

or devised for the purpose of obscuring the right of property in the premises, if the decrees should be reversed.

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“ I therefore submit that the appellant, by his vexatious conduct, has called upon your Lordships that some costs should be given against him, to mark your opinion of it. If the situation of the parties had been different, it would have been proper to go a greater length ; but, as it is, I must move that the decree be affirmed, and that the appellant do pay to the respondent the sum of £100 for his costs.”

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It was accordingly

Ordered and adjudged that the appeal be dismissed, and that the interlocutors be affirmed, with £100 costs.

For the Appellant, *Sir John Scott, W. Grant.*

For the Respondent, *Wm. Adam, Wm. Tait.*

(M. 5597.)

MAJOR ALEXANDER KYDE, in the East India Company's Service,	} <i>Appellant ;</i>
JOHN DAVIDSON, Trustee of Mrs. LINDSEY, Heiress at Law of Colonel Kyde, &c.,	
	} <i>Respondents.</i>

House of Lords, 16th May 1798.

WILL—HERITABLE BONDS—HERITABLE OR MOVEABLE.—An officer in India, and in the East India Company's service, remitted home to his attorneys in England, two sums of £2500 and £3000, with instructions to lay out the same in landed security. This was done accordingly, and the bonds taken in their name in trust for him. Sometime afterwards, he, being then still in India, made a will appointing trustees, and, after leaving several legacies, bequeathed the residue to the appellant. Mrs. Lindsey, as his heiress at law, having claimed the heritable bonds, which no will could carry. Held her entitled to these.

Colonel Kyde being in India, in the East India Co.'s service, remitted certain sums of money to his attorneys in Great Britain, with instructions to lay out the same *in land security*. In June 1780 £2500 of this money was, in terms of his instructions, invested in heritable security over estates in Forfar, Scotland, the rights being conceived in favour of the attorneys, *in trust for behoof of Colonel Kyde*. In 1786 the attorneys laid out £3000 more on an assignation to an heritable security and debt over the same estate.

In 1793 Colonel Kyde, still in India, made his *will*, ap-

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pointing several gentlemen in England his trustees, and after leaving several legacies, particularly £500 to the respondent, Mrs. Lindsey, his heiress at law, he bequeathed “ the remainder of his fortune, including his house and garden at Subpore, and all his monies and effects whatsoever “ in Europe and in India, to (the appellant) Major Alexander Kyde.”

Under this will the appellant, after the Colonel's death, claimed the two heritable bonds above mentioned. This being disputed by the heiress at law, mutual actions were raised to try the question. For the respondent, the heiress at law, it was maintained that heritable estate in Scotland could not be disposed of by will, to the prejudice of the heir at law; and the bonds being heritable, and not properly disposed of by the deceased, descended to her as the Colonel's heiress at law. For the appellant, it was maintained that the trustees appointed to hold the money, although they were instructed to invest it in heritable security, yet were only to hold it in trust for the behoof of Colonel Kyde, and to be paid to him when demanded. Accordingly, the money was invested in their names as trustees, in trust for his behoof.

Mar. 11, 1797. The Lord Ordinary preferred Major Kyde to the heritable bonds; but, on reclaiming petition, the Court altered, Dec. 20, — and found “ that the money in question being settled on “ heritable security in Scotland, with the approbation of “ Colonel Kyde, cannot pass by will, but falls to be taken up “ by the heir at law; and remit to the Lord Ordinary to “ proceed accordingly.” The Lord Ordinary afterwards de-
 Jan. 3, 1798. cerned in terms thereof.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—The reason given by the Court is, that the money in question being settled upon heritable securities in Scotland, with the approbation of Colonel Kyde, cannot pass by will, but falls to be taken by the heir at law. The appellant conceives that the very opposite conclusion ought to have been arrived at; for supposing it true that Colonel Kyde knew and approved of the money being lent on heritable security in *Scotland*, it must also be admitted that he also knew that these securities were not taken payable to himself. *He* had no heritable right in them. He could not have sued upon them. The bonds were taken in the name of other parties; and all the right

which he had was a right to call these parties attorneys, to account for and pay to him the sums therein. The heritable securities, therefore, being held by these parties in trust for Colonel Kyde, the claim of the heir at law, as such, was completely barred, leaving the sums therein to which he was entitled, to be carried by the Colonel's will as a part of his other funds.

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Pleaded for the Respondents.—The late Colonel Kyde was not ignorant of the consequences of his dying without making a regular disposition of the heritable securities in question. He was a native of Scotland; he had directed his money to be laid out in land security, which was done accordingly, under his own orders, and with his approval. The consequence of all these steps, and his ignorance of those consequences, are not to be presumed. Money secured upon land, as this was, is to all intents and purposes the same as land. It is real estate, and heritable in every sense. The appellant admits, that if the securities had been taken to Colonel Kyde himself, they would not have passed by the will, and must have gone to the heir at law. But in effect it makes no difference, as the right in the attorneys was merely nominal, the real and substantial right being in Colonel Kyde. But the true test to try this question is, to inquire to whom the trustees were bound to pay on the Colonel's death;—Whether to the heir at law, or to the executor of his will? And it is clear in this view, that the only party who could demand payment from the trustees, was the heir at law after service. It was not therefore a personal right in the Colonel merely to call the trustees to account. Had the trustees received the money in Colonel Kyde's lifetime, it would have been personal; but as the money remained heritable, it must be presumed that the deceased wished it to be so.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be, and the same are hereby affirmed.

For the Appellant, *W. Adam, Cha. Thomson, T. W. Baird.*

For the Respondents, *Sir J. Scott, T. Erskine, W. Grant,*
W. Tait.