

Nov. 17, 1830.

JOHN MARQUIS OF BUTE, Appellant.—
Lushington—James Campbell.

No. 40.

JOHN COOPER and Others, (Executors of the Reverend JAMES COOPER,) Respondents.—*Spankie—Robertson.*

Presumption.—Proving of the Tenor—Circumstances under which it was held (affirming the judgment of the Court of Session) that a Bond which had been destroyed, was to be presumed unconditional.

JAMES COOPER, son of Dr Cooper, Professor of Astronomy Nov. 17, 1830.
 in the University of Glasgow, was educated for the church of Scotland, and, previous to 1809, had been appointed keeper of the College Museum of Glasgow, at a salary of L.65. The late Marquis of Bute, grandfather of the appellant, was about this time residing at Mount Stuart, in the island of Bute, and being desirous to have a fit person to superintend, while there, the studies of his grandson Lord James Stuart, Mr James Cooper was recommended to him, and engaged in the month of January 1809. Mr Cooper remained at Mount Stuart for about four or five months, when he returned to Glasgow; and on the 23d of June, the Marquis wrote to him, stating that he had ordered fifty guineas to be paid to him, and returning him thanks for the attention which he had paid to his grandson. He farther stated, that, ‘situated as I happen to be, without entering into further reasoning, I must observe to you the impossibility of holding out other prospects of assistance than what is personal to myself. Should a vacancy take place, for example, in the kirk of Rothesay, and you competent to the presentation, I pledge my word to bestow it in your favour. In the interim, did it suit your views and convenience to live in my house, I shall gladly receive you, offering you, in such case, a salary of one hundred pounds (L.100,) and to add ten pounds (L.10) more to defray the cost of washing. Such arrangement to date from the moment of your joining me—say the beginning of November next, after your examination. Your journey to be paid for by me; likewise those you may be called upon to make for the same purpose. This salary of L.100 I propose continuing until you get the living of Rothesay, or that you are able to obtain a better provision.’ After making an effort to acquire the Gaelic language, which was essential to qualify him for the church of Rothesay, Mr Cooper wrote to the Marquis on the 24th of August, that he found it

2D DIVISION.
 Lord Cringletie.

Nov. 17, 1830. impracticable; that he was therefore obliged to abandon any prospect of a provision from that quarter; but stating that, ‘ as you formerly mentioned that you were to continue my appointment till I should get the living of Rothesay, or that I am able to get a better provision, you may now, if you judge proper, alter the terms in such a manner, that the appointment shall not continue longer than it probably would have done had I been able, by acquiring the Gaelic language, to have accepted of the church of Rothesay.’

His Lordship was, at this time, desirous to have a tutor to attend his son, Lord Dudley Stuart, and intended to go abroad. Some intermediate correspondence then took place, in which his Lordship mentioned, that although he had no hesitation in asking Mr Cooper to give up his situation as keeper of the Museum, on the supposition that he would be able to accept of the church of Rothesay, when it became vacant, and he could, in the interim, make good the value of his situation as keeper, yet, as matters stood, he could not ask him to do so: but if he thought fit to accept of his proposition, it was still open. This was declined; and on the 8th of November, the Marquis wrote from London to Mr Cooper’s father, in these terms:—‘ Having reflected upon the best means of securing to your son James a settled permanency, should he incline to attach himself to my house, I beg to state my readiness to execute a bond of annuity in his favour of L.100, payable out of my landed property. Should the arrangement meet your approbation, it might perhaps preclude the necessity of so immediately attending to the preparations for the church, which could be carried on in any leisure moment. You will be so good to favour me with your answer so soon as you can, directed to London.’ To this communication, Mr Cooper’s father, on the 11th, made this answer: ‘ The desire which you express that James should attach himself to your house, cannot but be both to him and me in a high degree flattering, and the arrangement you have the goodness to propose, so far as you have explained it, meets with my hearty approbation. As, however, it would be desirable for James, before it be finally fixed, to know some particulars respecting the nature, and probable duration of his services, I hope your Lordship will not disapprove of leaving the final adjustment open till he comes up, in consequence of your very kind invitation. He is now about ready to set out.’ &c. The Marquis, on the 14th, wrote that he intended to go abroad, and to take Mr Cooper with him, which would be highly advantageous to him, and which,

he trusted, would therefore meet with his father's concurrence. Nov. 17, 1830. To this Dr Cooper answered, that his son had set off, but that he was persuaded that he would accept of the proposal with gratitude.

Mr Cooper sailed from Leith on the 19th, and on his arrival in London on the 23d, the Marquis granted to him a bond of annuity for L.100, which was prepared by the late Mr Chalmers, solicitor; and immediately thereafter went abroad with his family, accompanied by Mr Cooper, who sent the bond to his father in Scotland. They returned about July 1810, and his Lordship then ordered his bankers to pay up the arrears of the annuity to Mr Cooper, and to give him credit for the annuity.

Mr Cooper soon thereafter took orders in the Church of England, and, in June 1811, was presented by the Marquis to the rectory of Landough, and in November thereafter to the vicarage of Roath, both in the county of Glamorgan, and producing about L.300 a-year. He continued to reside with the family as tutor to Lord Dudley till August 1812, performing his ecclesiastical duties by means of a curate. Lord Dudley having been sent to school, Mr Cooper entered himself in October of that year as a gentleman commoner of Bennet's College, Cambridge. The annuity was paid till the 26th of November, and it appeared, that in January or February 1813, he had written to his father for the bond, which was immediately sent to him, and delivered by him to the Marquis. His letter to his father was not preserved. On the 5th of February, the Marquis wrote to his bankers, requesting 'the annuity hitherto paid to the Reverend James Cooper, of L.100, may be discontinued, that matter being otherways settled.'

About this time, Mr Cooper showed symptoms of insanity; and having come to the house of the Marquis, his Lordship wrote to Mr Cooper's uncle, (Dr Thomson, who resided near Cambridge,) informing him of the circumstance. In consequence of this, Mr Cooper was removed to Glasgow, and, after a temporary recovery, he relapsed, and never recovered. In December, 1816, he was cognosed by a Jury, who found that he had been insane since December 1812, and his father was appointed his tutor.

The Marquis having died, and been succeeded by the appellant, an action was raised in October 1817 against him, by Dr Cooper, in name of his son, and of himself as his tutor, for payment of the annuity. In defence, the appellant maintained, 1. That the bond having been delivered up, must be held to have been discharged and extinguished, the more especially as

Nov. 17, 1830. it could not be found in the repositories of the late Marquis, by whom it must have been destroyed as a cancelled document; and, 2. That at all events, if it were to be held not to have been validly delivered as an extinguished document, it was incumbent on the pursuers to prove the terms of it—that it was clear, from the correspondence, that it must have been granted conditionally, or till the late Marquis should be able to make an equal, or a better provision, in favour of Mr Cooper; and that by presenting to him the two livings, he had performed that condition.

After some procedure before the Lord Ordinary, as to the necessity of a process of proving the tenor, the Court (of consent of the appellant) dispensed with a formal process of that nature, and allowed evidence to be adduced of the terms of the bond. About this time, (March 1822,) Mr James Cooper died, and his executors brought a supplementary action, concluding to have it found, that the bond had been delivered up when he was insane; that the obligation remained in subsistence till his death; and for L.900, as the bygone annuities. This action having been conjoined with the original one, two witnesses, Dr Meikleham, Professor of Natural Philosophy in the University of Glasgow, and Dr Thomson, Mr Cooper's uncle (of consent of the appellant), were examined, both of whom deponed that they had read the bond—that it was an annuity for life, and that so far as they recollected, it was not qualified by any condition. The Court, on the 22d of June, 1827, found, ' that the bond libelled ' must be held to have been unconditional, and to have been ' granted by the late Marquis of Bute to the late Reverend ' James Cooper, for payment of L.100 per annum, during Mr ' Cooper's life.* And thereafter, they remitted the following Issue to be tried by a Jury: ' It having been decided by the ' Court of Session, by interlocutor dated the 22d day of June, ' 1827, that an unconditional bond of annuity, dated on or ' about the 22d day of November, 1809, was granted by the ' late Marquis of Bute to the late Reverend James Cooper, for ' the payment of L.100 Sterling per annum, during Mr Cooper's ' life: And it being admitted that the said bond was, previous ' to the 10th day of February 1813, transmitted by the said ' James Cooper to the said Marquis of Bute,—Whether, at the ' time the said bond was so transmitted, the said James Cooper

* 5 Shaw and Dunlop, p. 831.

‘ was of unsound mind, and incapable of managing his own Nov. 17, 1830.
 ‘ affairs? or, Whether, at the time the said bond was so trans-
 ‘ mitted, the obligation therein contained had been extinguished?’
 The Jury returned a verdict, finding, ‘ on the first Issue, that
 ‘ at the time the bond was transmitted by the said James Cooper,
 ‘ he, the said James Cooper, was of unsound mind, and inca-
 ‘ pable of managing his own affairs: And on the second Issue,
 ‘ that at the time the said bond was so transmitted, the obli-
 ‘ gation therein contained had not been extinguished.’ In con-
 sequence of this verdict, the Court, on the 20th of December,
 1828, found ‘ the defender liable in payment to the pursuers
 ‘ of the sum of L.900 sterling, as nine years annuity due to the
 ‘ late Reverend James Cooper, from the 23d day of November
 ‘ 1812 years, to the 23d day of November 1821 years, with
 ‘ simple interest thereon, since the same fell termly due.’†

The Marquis of Bute appealed.

Appellant.—1. As the action is founded on a bond, it was incumbent on the respondents either to have produced it, or a decree of proving of the tenor. It is true that the appellant dispensed with a formal action of proving the tenor; but the respondents were nevertheless bound to adduce evidence equally conclusive, as to the terms of the bond, as if the proof had been taken in a regular proving of the tenor. In a process of that nature, the whole contents of the deed must be libelled, with all its limitations and provisions; and clear evidence of the contents must be adduced. But in the present case, neither the scroll, nor any written adminicle, (except the note by the late Marquis to his bankers,) was produced; and the only witnesses were two gentlemen, who were not professionally acquainted with the nature of such deeds, and who gave their testimony at the distance of more than 15 years from the time when they had read the deed. It was impossible, therefore, to hold that there had been satisfactory evidence of the tenor of the bond.

2. From the terms of the correspondence, it must be presumed that it was granted subject to the condition, that so soon as the late Marquis procured for Mr Cooper a better provision, it should come to an end; and as he had presented to him two livings worth L.300 a-year, and the bond had thereupon been delivered up, the condition must be held as having been implemented.

* 7 Shaw and Dunlop, p. 223.

Nov. 17, 1830. The *respondents'* counsel having begun to address the House;

Lord Wynford said, My Lords, I think it would be wasting your Lordships' time to allow the learned counsel for the respondents to argue this case. It appears to me to be perfectly clear, notwithstanding the very able arguments you have heard from Dr Lushington and Mr Campbell, that there is not the least pretence for disturbing this judgment. A great many observations have been made upon the evidence, as to the state of mind of this gentleman at the time of the delivery up of the bond, which is the only material point. Now, it appears to me, that we are precluded from considering the effect of that evidence—if we were not, I agree, there are many important observations which might be made as to the condition of this gentleman at that time; but the jury have found the fact of the insanity at that time, and it is not now open to your Lordships to consider the propriety of that finding.

The Earl of Radnor.—I beg pardon for interrupting the Noble and Learned Lord; but, I confess, it appears to me that the usual mode of proceeding is, when the appellant has gone through his case, that the respondent is to answer it, and the appellant replies. If there is any reason for going out of the usual course of proceeding in this case, we must discuss the reason for so doing in the absence of the learned counsel; and, I confess, it would be with great diffidence I should object to any course of proceeding proposed by the Noble Lord, but, at the same time, I should be glad to hear his arguments for a departure from the usual course of proceeding; and I should be glad to hear the Noble Lord's reason for deciding without hearing counsel on the other side. The Noble Lord will excuse me for interrupting him.

Lord Wynford.—Counsel will withdraw.—(Counsel retired from the bar.)—I consider they have withdrawn. We have never considered it necessary that they should actually withdraw, because it is better they should be present to hear the reasons upon which the judgment is given. If any Noble Lord entertains the least doubt, it is fit that the case should go to its end; but I thought it so clear, that it would be a waste of your Lordships' time to hear it any further argued. I have so much respect for the opinion of any one of your Lordships, that if any Noble Lord entertains the shadow of a doubt, I should think it fit that the case should be heard to the end. If your Lordships expressed a doubt, I should wish the case to be heard through.

Earl of Radnor.—I confess I should like to hear the case

go on. I hope for the indulgence of your Lordships for suggesting any thing in opposition to the opinion of the Noble and Learned Lord; but, I must confess, I should like to hear the case go on. I quite agree with the Noble and Learned Lord, that it is most desirable to support the opinion of the jury; but it does not appear to me, that the opinion of the jury is decisive of the case; and though, in point of fact, this gentleman may have been insane at the time the bond was given up, which the appellant does not contend against; and though the verdict may have been correct upon the other point, namely, as to the condition of the bond, and the obligation therein contained—

Lord Wynford.—There is no verdict upon that.

Earl of Radnor.—The issue is,—‘Whether, at the time the said bond was so transmitted, the obligation therein contained had been extinguished?’

Lord Wynford.—That does not touch the previous question; that was not submitted to the jury.

Earl of Radnor.—I confess, as the whole of the arguments have struck me, I think it is desirable to hear the counsel argue it.

Respondents.—1. The appellant having dispensed with a formal action of proving the tenor, the only question is, whether there be satisfactory evidence of its terms. The existence of the bond is admitted, and is proved by an entry in the books of the agent, Mr Chalmer. It is proved by the letter of the late Marquis, that in place of giving Mr Cooper a temporary allowance of L.100 a-year, which had been rejected, he had agreed to make a permanent provision in his favour, and it is established by his letter to his bankers, that he had granted a bond of annuity of L.100, and the two witnesses who read it recently after its execution, concur in saying, that it was granted for life, and that no condition was attached to it, except that it should be payable out of the landed estates in Scotland.

2. It is impossible to hold that the bond could have been qualified by the condition that it was to terminate when the Marquis should be able to present Mr Cooper to an ecclesiastical living, because this would have been a transaction of a simoniacal nature.

EARL OF RADNOR.—Perhaps your Lordships will excuse me—as I took upon me, in the course of the cause yesterday, to interrupt the proceedings, by suggesting to the Noble Lord at the table, a request that

Nov. 17, 1803. the cause might not be summarily decided, but that we might hear the respondents in this case—if I detain your Lordships for a few moments, while I express the grounds on which I have now come to the same decision at which the Noble and Learned Lord on the woosack had arrived, on hearing the counsel for the appellant. The Noble Lord, from his knowledge of the law, and his great habit of discussing these subjects, came to the conclusion much sooner than I was prepared to do ; but on further hearing of the case, and a consideration of all which has been urged, I feel myself bound to come to the same conclusion, but not without considerable pain and some difficulty. It appears to me, I confess, that the whole justice of the case lies on the other side ; that there is no ground whatever for imputing to the late Lord Bute, the present appellant's grandfather, the having entered into a simoniacal contract ; and that there is no ground for imputing any unfair dealing to the present appellant, the present Marquis of Bute ; but it appears to me that the present appellant is precluded from the remedy he might have obtained, and becomes a defeated party in this case, in consequence of his own benevolent feelings towards the family of the Coopers, inasmuch as he was willing to waive all legal objections, and unwilling to take advantage of forms ; and if satisfactory evidence was produced of the contents of the bond, he declared that he would not stand on forms of technicality. It appears to me, that, if it had been his wish to have stood on those forms of technicality, he might have defeated the claim upon this bond ; but he waived that right, as it appears, solely from kind and benevolent feelings to the family of the Coopers ; and in consequence of that, the jury have found that Mr Cooper was not of sane mind at the time he delivered up the bond ; and I cannot help coming to the belief, from the evidence, however imperfect that evidence may be, by Dr Meikleham and Dr Thomson, that the bond was a bond for an annuity for life. Under all the circumstances, I think that the appellant is precluded from any further proceeding, and that the interlocutors of the Court below must be affirmed ; and I have only further to apologize for having been the occasion of occupying the time of your Lordships' House by a continuance of the argument ; but it is satisfactory to my mind, that the House has allowed the case to go to its end, by which I have come to a decided opinion, at which I had not arrived on the hearing of the appellant's counsel, that the interlocutors of the Court of Session must be affirmed.

LORD WYNFORD.—I am glad that this case was heard through, because, as it is not a case entirely free from circumstances which ought to create doubt, it ought to be most maturely considered ; and, when we recollect that this is the last time at which it can be inquired into, it is undoubtedly fit that it should be sifted to the bottom. I beg to state to your Lordships, that I never did think there was the least pretence for imputing any thing like blame, either to the late Noble Marquis, or to the present appellant ; and I think the present appellant owed it to the memory of his grandfather to put the party claiming to proof of his case. The Noble Marquis, from the beginning to the end, has shown that it is not his disposition to defend himself by matters of form ; for he

has waived all objections of that nature, and has been most desirous that this case should be decided on the principles of justice. My Lords, I will not go into all the particulars of this case; there were originally four questions. The first question was,—Whether any bond existed, and what were the contents of that bond? The second question was,—Whether any interest was payable on the instalments due upon that bond? The third question was,—It being taken for granted, and the fact being undoubted, that the bond was given up and destroyed, Whether that was a delivery up, by the obligee, with an intention of putting an end to the obligation which Lord Bute was under of paying this annuity? or, Whether it was delivered up when he was not capable of knowing what he was doing? The fourth question is,—Whether the obligation was extinguished by any act done by Mr Cooper? or, Whether it was still a subsisting obligation?—a question properly raised, for the purpose of removing any unforeseen difficulty which might arise. The two last questions are put an end to by the verdict of the jury; for they have found that Mr Cooper was insane at the time of the delivery up of the bond, and that the obligation is still an existing obligation, it not having been affected by any act done by Mr Cooper. There, however, remain the two other questions, namely, the question of interest, which is hardly made a point here, or in the Court below. I think there cannot be a doubt, that, by the Scotch law, interest is due; and I wish that, with regard to interest on money lent, the English law were assimilated to the Scotch; for I think it is equitable that if a man retains the money of another, and deprives him of the means of making a beneficial use of it, he should pay for the use of it. I should, therefore, humbly submit to your Lordships, that there is no weight in this objection.

This brings me to the only other question of importance, namely,—Whether a bond existed, and what was the nature of it? That a bond existed there is no doubt. Then, what was the nature of that bond? Was it a conditional, or an absolute bond? If it was an absolute bond, it continued an absolute bond, securing an annuity for life, and the annuity continued payable up to the period of Mr Cooper's death; and, in that case, the sum found due by the Court below would be perfectly correct. It will be material, before I call your Lordships' attention to the evidence, in respect of this bond being an unconditional bond, to desire your Lordships to advert to the distinction between the terms in the letters of Lord Bute;—in respect of the first proposition made, and the subsequent proposition, it being quite clear, that, when the first proposition was made, no bond was ever intended to be given, but that it was intended to rest upon the personal obligation of the Marquis,—‘until you get the living of ‘Rothesay, I will give you L.100 a-year, and L.10 a-year for your washing;’ but no further consideration was then intended. Your Lordships know, that that went off in consequence of Mr Cooper not being able to make himself sufficiently acquainted with the Gaelic language, to qualify himself for taking that living; and, afterwards, Lord Bute appears to have been very anxious that Mr Cooper should have the care of his grandson, and then he writes him a letter, which I am now about to read,—and I

Nov. 17, 1830. think it most important, as your Lordships will perceive the difference between that letter and the former, to which I have before alluded, which referred to an engagement which was considered to be of a temporary nature. The letter is addressed to Dr Cooper, the father, and is in these terms:—‘ Sir, having reflected upon the best means of securing to your son ‘ James a settled permanency, should he incline to attach himself to my ‘ house, I beg to state my readiness to execute a bond of annuity in his ‘ favour of L.100, payable out of my landed property. Should the arrange- ‘ ment meet your approbation, it might perhaps preclude the necessity ‘ of so immediately attending to the preparations for the church, which ‘ could be carried on in any leisure moment. You will be so good to ‘ favour me with your answer as soon as you can, directed to London.’ So that your Lordships see now the church was no longer looked to ;—he had given up all idea of his getting into the church, and looked only to that which, in the language of this letter, is described as ‘ settled per- ‘ manency;’ and this letter states that which is material, that that settled permanency was to be payable out of his Lordship’s landed property, which is a circumstance affording strong confirmation to the evidence of the witnesses. This proposal is acceded to, certainly, with the salvo that the young man is to be consulted whether he will agree to it. If he agrees to it, it is to be considered as settled. I conceive it is to be taken for granted that he agreed to it; for the bond was afterwards executed. Now, it is a vast assistance in the administration of justice, when the frail memory of man can be assisted by written documents. Your Lordships perceive here, there is no expression in the letter implying that the same idea still continued, which existed in the mind of Lord Bute when he wrote the first letter; if it had, it is natural to suppose, that he would have said—I make you this, not as a permanent but a temporary settlement, to continue until you get something better. It is important, when we are obliged to trust so much to parole testimony, to have that confirmed by such a document as this, in which he says—the settlement is to be payable out of his landed property; and that is material to shew the permanent interest which Lord Bute was willing to secure to this young man. If Lord Bute was about to secure to him a payment for five or ten years, would it be natural that he should give a security on his landed property? Would not the personal bond of Lord Bute have been sufficient? Would it not have been an act of impertinence and ingratitude, if this gentleman had solicited his Lordship to give him more than his personal bond, and have suggested that it ought to be made a charge on his estate? An engagement of that duration probably would not have lasted beyond the life of Lord Bute; but we know, however well conducted the affairs of a family may be in one life, in another the state of things may be very different; and, considering the security to be one to continue during the life of this young man, it is but justice to the Noble Marquis to say, that he might feel that no other security than one affecting his land might perfectly effect the object which he stated himself to have in view, namely, the furnishing to this individual a permanent income. We come next to the parole evidence; and that certainly is imperfect. It is un-

doubtedly a very awkward thing to have the contents of a written instrument of this sort proved by parole testimony, but in numerous instances, where written instruments are lost or destroyed by the various accidents which occur, there is no other way in which the contents of those instruments can be proved. It is said in the present case, there is no scroll or copy of the bond,—its contents, therefore, can be proved only in one way, that is, by the testimony of witnesses. If the testimony of witnesses was not competent evidence of the existence of such an instrument, men would be subject to the hardships of losing their rights. Then, if it is the law that such an instrument may be proved by parole testimony, the law must adapt itself to the infirmity of our condition. Those who frame our laws know that human memory is subject to inaccuracy, and that the first perception is frequently erroneous,—that the perception may be imperfectly retained, and that different parts of an instrument will be retained by different persons ;—this is well known to all persons who attend to subjects of this kind ; and your Lordships will find in this case, on referring to the testimony of those two gentlemen, (one the Professor of Natural Philosophy in the University of Glasgow,) that there are between his testimony and that of the other witness, material discrepancies, but they are discrepancies only of such a nature as are considered by the best writers, instead of weakening, actually to confirm the testimony given. Both those persons, however, state this to be a charge on the land, taking the character of an heritable bond. It was, however, a bond of that nature, that Mr Cooper might, if he had suspected dishonour or injustice on the part of this family, which it was impossible he should, considering that he was bound to the family by every tie of gratitude, converted it substantially into an heritable bond. If the Court of Session had seen that it was the intention of the parties that it should be an heritable bond, that Court would have given the remedy. To this instrument those persons speak. The effect of their evidence must be taken to be, that it was the wish of both parties that this should be a bond affecting the land, and nothing short of it. And when we see how many instances occur in which there is great opulence in the parent, but which does not continue with the son, it is the sort of security which would naturally be given, where it was to continue for the life. The occurrence to which I have referred was not likely in the present instance ; but when we see how frequently the property of the father is dissipated by the son, nothing short of that security would have fully satisfied that intention, which, in justice to the late Marquis, I am bound to say it was his anxious desire should be made, namely, the giving a permanent income to this young man. Under these circumstances, my Lords, if this case had come before me as *res nova*, I should have decided as the Court of Session have done. I should have held that this was a security for life, affecting the landed property. But it does not come before your Lordships as *res nova*, but it comes before your Lordships, after having been unanimously decided by the Court of Session, which furnishes a presumption, not, however, incapable of being reversed, that the view taken by the Court of Session is correct. I therefore move your

Nov. 17, 1830. Lordships, that the interlocutors of the Court below be affirmed, with L.50 costs.

The House of Lords accordingly ordered and adjudged that the interlocutors complained of be affirmed, with L.50 costs.

Appellant's Authorities—20 Ersk. 1. 56.

Respondents' Authorities—Fletcher v. Lord Londes, April 9, 1827.—(1 Bligh, 144.)

J. CHALMER,—A. DOBIE,—Solicitors.

No. 41.

MRS ELIZABETH EWEN or GRAHAM, Appellant.—
Wetherell—Lushington.

MAGISTRATES OF MONTROSE, (Trustees of the late JOHN EWEN,) Respondents.—*Spankie—Robertson.*

Fraud.—Discharge.—Where a daughter had rights under her father and mother's contract of marriage, and the father, at a time when she and her husband had just attained majority, were in pecuniary distress, and the husband was about to sail to India, obtained a discharge from them without the assistance of an agent on their part; and the discharge narrated that it was granted in consideration of L.315, agreed to be given by the father out of his own free-will, and from regard to his daughter and husband, (whereas he entertained different sentiments,) and that one half had been instantly paid, (whereas he retained a large part in extinction of an alleged debt, and only gave a promissory-note at twelve months for the balance;) and the other half was to be payable at his death. Held (reversing the judgment of the Court of Session) that the discharge was not binding.

Testament—Writ.—Where a trust-deed of settlement for the foundation of an hospital for boys, was blank as to the sum to be provided, and the number of boys to be admitted—Held (reversing the judgment of the Court of Session) that it was inept.

Nov. 17, 1830.

1ST DIVISION.
Lord Newton.

JOHN EWEN married Janet Middleton in 1766; and on the 7th of December of that year, they executed a post-nuptial contract, by which it was, inter alia, declared, ' That
' the residue of his whole subjects, whether heritable or movable, shall belong to his children equally; declaring hereby,
' that in case the said child or children shall afterwards die
' in minority, without lawful issue of their bodies, and during
' the lifetime of the said Janet Middleton, their mother, then the
' general disposition before written, conceived in her favour, shall
' revive and return to its full force and effect, and she shall have
' the entire and free disposal of the whole effects and subjects,
' whether heritable or movable, hereby conveyed, alike as if