

SCOTT, APPELLANT.
 SANDEMAN, RESPONDENT.

1851.
 3rd, 4th, 8th April.
 1852.
 8th June.

IN this case, which is very fully reported upon the decision below (a), the *Lord Ordinary* (Lord Murray) pronounced an interlocutor which was recalled by the First Division, but which has been again, in effect, set up by the reversing judgment of the House of Lords.

The chief question was, whether certain payments ought to have been applied in reducing a principal debt, or in discharging the interest. Lord Murray held that, according to a true construction of the agreement between the parties, the payments were to be appropriated first to the reduction of principal; but the First Division held the contrary, and determined that the ordinary rule, which entitles a receiver to apply payments first in payment of interest, was not superseded by the agreement; their Lordships being of opinion that the circumstances would require to be very strong to alter the maxim founded on law and justice, that interest, which in itself carries no interest, ought in honest dealing to be paid before principal, to prevent loss to the creditor.

There were other points in the cause, which, however, may be collected from the following opinion delivered in moving for judgment, by

Lord TRURO:

My Lords, this appeal has been very elaborately argued; and the decision of the Court below objected to in every particular.

Circumstances under which it was HELD that payments should have been applied by the receiver in reducing *principal* and not in discharging *interest*.

Where a creditor, in the view of speedy payment, agreed to accept *four per cent.* interest,—HELD that mere delay in the payment did not entitle him to charge *five*; the evidence failing to show that the delay was attributable to misconduct on the part of the debtor.

Judgment of the First Division reversed, and interlocutor of the Lord Ordinary (Lord Murray) affirmed.

Costs of the reclaiming note (*i.e.* of the appeal from the Lord Ordinary to the First Division) given to the Appellant, although the Lord Ordinary had given him no costs, and although the suit was a creditor's suit with a fund in Court.

Lord Truro's opinion.

(a) Second Series, vol. *ii*. p. 405.

SCOTT
v.
SANDEMAN.
—
*Lord Truro's
opinion.*

On the part of the Appellant it is not denied that in ordinary transactions payments made *generally* may be applied by the receiver in satisfaction of an arrear of interest ; but the Appellant insists that the payments in this case were not made in the ordinary course of transactions, but under special circumstances, regard being had to the express terms of the deed executed by the parties.

It appears to me, my Lords, that none of the learned Judges below have adverted critically to the terms of that deed, but have expressed themselves generally to the effect that it contains nothing to interfere with the ordinary rule ; and they have held, therefore, that the Respondent might apply the payments according to that rule.

I am compelled to say I cannot concur in that conclusion.

The opinion I have formed upon the construction of the deed compels me to submit to your Lordships that the interlocutor of the *Lord Ordinary* upon this point is correct, and that the interlocutor of the Lords of the First Division is erroneous, and ought to be reversed ; the deed, in my judgment, binding the parties to apply the payments in reduction of the *principal*.

My Lords, the next question is, what rate of interest is the Respondent entitled to charge ? Upon this question three of the Judges in the Court below find that the Respondent is limited to four per cent. *for two years only* from the date of the deed ; but that he is entitled to charge five per cent. from that date to the time of payment ; and the ground of that opinion is, that the agreement was made upon an expectation, on the part of the creditor, that he would receive an early payment, in which, however, he has been disappointed. Some general terms are used imputing misconduct to the Appellant in protracting the

litigation; but the record discloses no facts to sustain the charge.

It seems to me that the deed bound the parties at the time, and that no sufficient ground is disclosed in the case to release them from its obligations.

The Judges have held that two years was a reasonable period within which the Respondent ought to be confined to the restricted interest of four per cent. No reason, however, is assigned for fixing that restriction; and no ground whatever is stated, and none can be found, to justify a departure from the terms of the deed upon an arrangement by mutual consent, and after mature consideration, that the rate of interest should be restricted to four per cent. till actual payment of the money. I think there is no ground for allowing the parties to say that at the end of two years, or any other arbitrary period, for the adoption of which no particular reason is assigned, they should be entitled to charge five per cent.

My Lords, the third question is, whether the Appellant, under the terms of the deed, is entitled to an allowance in return of one and a half per cent. upon the amount of interest which shall be paid to the Respondent.

It seems to me that the interlocutor of the *Lord Ordinary* is right in admitting this claim; and that the judgment of the Lords of the First Division, by which it was repelled, must be reversed.

The fourth question is, whether the Respondent is entitled to the expenses incurred by him in the proceedings relating to the establishment of his debt. The Court below have decided that question in his favour. The deed declares that two sums of 700*l.* and 2500*l.* shall be in full of all expenses of whatever kind or denomination, past or future. Does this clause preclude the Respondent? It seems to me that it

SCOTT
v.
SANDEMAN.

—
*Lord Truro's
opinion.*

SCOTT
v.
SANDEMAN.

Lord Truro's
opinion.

does, and that, in dealing with expenses, all that was intended to be charged was provided for. And I am of opinion that the demand is fully covered by the deed; and, upon the whole, it is my intention to submit to your Lordships that the interlocutor of the *Lord Ordinary* met the law and justice of the case, and that it ought to be adhered to; and that the judgment of the Lords of the First Division ought to be reversed, and the cause remitted.

Lord BROUGHAM :

Lord Brougham's
opinion.

My Lords, I did not attend the entire argument on this appeal, having been absent during a third part of the time; but so far as I entered into the case, judging from that portion of it at which I was present, I agree in the view which my noble and learned friend has submitted to your Lordships.

Mr. *Bethell* : Your Lordships will give the Appellant the expenses of the reclaiming note to the First Division; that is, your Lordships now reverse the interlocutor of the Lords of the First Division, and affirm the interlocutor of the *Lord Ordinary*; find the Respondent liable in the expenses of the reclaiming note; and remit the cause to the Court below to take such further proceedings therein as shall be just and consistent with this order.

The *Solicitor-General* (Sir *F. Kelly*) : I apprehend, my Lords, that this application is entirely unprecedented, and that there can be no ground whatever for saying that any costs are to be given. Though the proceeding has resulted in a reversal, I submit that the costs must be left as they are. This is a creditor's suit, and the costs are provided for out of the fund.

Lord BROUGHAM : What would the First Division

have done if they had come to the conclusion upon the merits which this House has now arrived at?

Lord TRURO: Ought not the House to place the parties in the situation in which they would have stood if an order had been made below in that form and manner in which the House now thinks it ought to have been pronounced?

The *Solicitor-General*: I apprehend that the Court below would not have given costs. The costs are taken out of the fund, where there is a fund in Court. In such a case it is not usual to give costs on either side; but, with great submission, I humbly think that this question should be remitted to the Court below.

Lord TRURO: It was said below, on the part of the Appellant, that by the deed a given sum "should cover all the expenses which the creditors had sustained, or should thereafter sustain." The Respondent says, "No: the deed provides for certain expenses; but does not touch those expenses which I am now asking for—they are not within the deed." This House says that they *are* within the deed. Then suppose the Court below had been of opinion that there was no ground for the reclaiming note?

Mr. *Bethell*: If they had affirmed the *Lord Ordinary's* interlocutor, it would have been a matter of course to give costs.

The *Solicitor-General*: On the contrary, I apprehend it would have been a matter of course the other way. The *Lord Ordinary's* interlocutor, which was favourable to the Appellant, gave no costs against the Respondent (*a*). And why? because it was a creditor's suit where there was a fund in Court.

Mr. *Bethell*: My Lords, I think I may venture to

(*a*) That no costs have been awarded by the Court below, is a circumstance always regarded in determining whether to award costs in the Court of Appeal. Per Lord Redesdale. 3 Bligh, 28.

SCOTT
v.
SANDEMAN.

say that I never remember an instance where a reclaiming note was repelled, and not repelled with costs.

The *Solicitor-General*: In the case of creditor's suits and executors' suits, there is a multiplicity of instances.

Mr. *Bethell*: Executors' suits may be governed differently.

Lord TRURO: The question as to those costs was never before the *Lord Ordinary*. They are consequential and subsequent to his interlocutor. The reclaiming note was not justified; and what expense may have been occasioned by it, this House is of opinion that the Appellant is entitled to.

IT IS ORDERED and adjudged, that the said interlocutor of the 24th of January (signed 9th February) 1849, complained of in the said appeal, be, and the same is hereby reversed; and that the interlocutor of the *Lord Ordinary*, of the 20th of July, 1847 (mentioned in the appeal), be, and the same is hereby affirmed: and it is further ordered, that the cause be, and the same is hereby remitted back to the Court of Session in Scotland, with directions to that Court to find the said John Sandeman liable to the said Ralph Erskine Scott in the expenses incurred by him in the said Court in respect of the reclaiming note of the said John Sandeman to the First Division of the said Court (mentioned in the appeal), and to decern accordingly, and also to do further in the said cause as shall be consistent with this judgment, and as shall be just.

RICHARDSON, LOCH, & McLAURIN—T. W. WEBSTER.