SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

GRAHAM—*Appellant.*

KEBLE and others—*Respondents.*

A PARTNER in a house of agency in India, where a deposit is made in trust for a particular purpose, is made one of the executors of him who made the deposit, and proves the will. Power of attorney sent from the executors in Europe to the house of agency for them to act under, but held that, as the partner named executor had proved the will, the house could only act under his authority, and he himself could not renounce the executorship and act in another character.

Nov. 10, 1813.

EXECUTOR.

PAGE Keble, father of the Respondent, having engaged in a project of cutting a canal in Bengal, called the *Banca Nullah*, which was considered as a work of great public utility, in 1786 obtained from the Indian Government a loan of 40,000 sicca rupees, for 10 years, at 2½ per cent. interest; for the repayment of which sum, he executed a bond to the Company, with Mr. John Petrie as his surety. To extinguish this debt when it became due, Mr. Keble deposited in the House of Graham, Cromeline, and Co. of Calcutta, of which the Appellant, a confidential friend of Mr. Keble, was the principal partner, securities for money to the amount of 46,428 current rupees, and gave positive instructions to the house that the money should be appropriated to the discharge of the bond granted

1786. Loan from the Government in India to Respondent's father.

Securities for money to repay it deposited with a house of agency, in which Appellant was a partner.

Nov. 10, 1813.

EXECUTOR.

to the Company when it became due, with certain directions as to the managment in the mean time. Mr. Keble, soon after making this deposit, set out for Europe, and left a duplicate of his will with the house, with directions that it should be opened in the event of his death.

Mr. Keble died on the passage from India, as was stated on the one side; or soon after his arrival in England, as was stated on the other; and his will being opened by the partners in the above house, it was found that the Appellant was named one of his executors, and Mr. Petrie and others his executors in Europe—Page Keble, the testator's son, being the residuary legatee. The executors in this country proved the will, and transmitted powers of attorney to the house of Graham, Cromeline, and Co. to act in the affairs of the estate. These powers of attorney were accompanied with a letter of instructions dated 20th March, 1787, stating that the executors in Europe had been informed that it would be more regular for the house to act under these powers of attorney, than that Mr. Graham should prove the will in India, and act as an executor, and then suggesting some alterations in the mode of managing the fund in their hands for the payment of the Company's bond. To this an answer was returned in these words:—

Appellant named one of the executors in will of Respondent's father.

"*Calcutta*, 10*th September*, 1787.

20th March, 1787. Power of attorney, for management of the deposit, sent

"The Minerva packet brought us your two letters of the 20th March, covering a power of attorney to our late friend, *which we shall not have occasion to use, as, on account of the demise of*

" *Mr. Keble, our Mr. T. Graham, on opening the* Nov. 10, 1813.
" *will left with us, and finding himself nominated*
" *an executor, took out probate, &c.*

EXECUTOR. from the executors in Europe to the house of agency, and answer returned that the house should have no occasion to use it, as Appellant had proved the will in India.

The expense of proving the will by Mr. Graham was also charged against the testator's estate. It also appeared that the Appellant himself had written a letter, dated 7th March, 1787, to the executors in this country, stating that he had proved the will, and the house would continue the management of Mr. Keble's affairs under his authority.

In 1787, Mr. Cromeline, one of the partners, quitted the house, and Mr. Graham, a brother of the Appellant, was assumed as a partner; when the firm, instead of " Graham, Cromeline, and Co." became " Grahams, Mowbray, and Co."

The Appellant was at this time a Member of the Board of Revenue. On the 4th March, 1789, an order appeared in the Calcutta Gazette, by the Government of India, forbidding any Member of the Board of Revenue to hold a share in a mercantile, or banking house after the 1st of May, then next. The Appellant, however, by the indulgence of the Government, was exempted from this order till the 31st October, 1790; when, having wound up his affairs, he ceased to be a partner in the house, and the firm then became, " Graham, Mowbray, " and Co."

Oct. 31, 1790. Appellant ceases to be a partner in the house of agency.

Almost the whole of the deposit by Mr. Keble had been invested in Company's bonds subsequent to the time of proving the will by Mr. Graham; but these bonds were not taken in his name as executor, nor with a declaration of their being held in

Nov. 10, 1813. EXECUTOR.

trust for Mr. Keble's estate; nor was there any writing across the face of them to that effect. These bonds were afterwards endorsed away, the house fell

Nov. 1791. House fails.

into difficulties, and, in November, 1791, failed. It appeared that the executors in this country had received accounts as to the management of the fund, from the last as well as the previous firm, up to 12th March, 1791,—the management having continued with the new firm after the retirement of Mr. Graham, without any objection stated. It also appeared that an attempt had been made in India, when the bond to the Company be-

Opinion of Advocate-General in India that Appellant was not liable to make good the whole of the deposit, and grounds of that opinion.

came due, to throw the responsibility on the Appellant, but the Advocate-General was of opinion that, under the circumstances, Mr. Graham was not liable, chiefly on the ground that Mr. Graham had not acted as executor, but merely under the powers of attorney sent from the executors in Europe, and that Mr. Petrie, the surety, had acquiesced in the management of the property by the new firm, after the Appellant had ceased to be a partner.

1803. Action in Court of Session by residuary legatee, &c.

In 1803, when the Respondent, Page Keble, the residuary legatee, became of age, he commenced an action in the Court of Session against the Appellant, who was subject to the jurisdiction, as having a considerable estate in Scotland. The summons, after stating the circumstances, concluded for payment by the Appellant of the amount of the bonds and balance due in money, making a sum of 4,768*l.* and a fraction, with interest upon the respective bonds, from their dates till cancelled or endorsed away, at the rate of 8 per cent.; and with interest

at the rate of 12 per cent. from that period, being the legal rate of interest in Bengal, which the Respondent would have drawn if the money had been paid. Nov. 10, 1813. EXECUTOR.

After various dilatory defences, (the Appellant being then in India,) the cause was, on the 14th November, 1806, heard on the merits before the Lord Ordinary, (*Cullen*,) who pronounced an interlocutor "repelling the defences, and decerning in "terms of the conclusions of the libel;" and, upon representation, he adhered to this interlocutor. This interlocutor was then reclaimed against, but adhered to by the whole Court, (5th February, and 11th March, 1808.) The Appellant then appealed to the House of Lords.

Nov. 14, 1806. Interlocutor of Lord Ordinary, decerning for Respondent in terms of libel.

Adhered to by whole Court, Feb. 5, 1808. Appeal.

Adam and Park (for Appellant) argued the case upon nearly the same grounds as had been taken in the Court below, which came substantially to two points:—1st, That the firm had acted under the powers of attorney sent from Europe, and not under the authority of Mr. Graham, as executor. 2d, That, as the executors here must have had notice from the Indian Gazette that Mr. Graham had withdrawn from the house, and yet corresponded with the new firm on the subject of the testator's property without intimating any objection to the transfer of the management, they must be held as having acquiesced in that transfer, and that the Appellant was therefore discharged from his liability. (*Lord Eldon* (Chancellor.) *When Mr. Graham was qualified as executor, could he act in any other character in regard to the pro-*

Nov. 10, 1813.

EXECUTOR.

perty?) The firm acted under the power of attorney. (Lord Eldon. *The answer stated to have been returned by you to the letter enclosing the power of attorney is, that you received it, but should have no occasion to use it.*) These bonds were not deposited with the firm by Mr. Graham in his executorial character, but by Keble himself; and Keble himself could not have taken them out without indemnifying the firm. It was true, the old firm must be liable, unless the creditor agrees to a transfer to the new firm: but specific notice was not always required. In banking partnerships here, the changes were not formally notified, but merely the name of the new firm intimated to the customers; and if no objection was made on the part of the customer, but he continued to act with the new firm, he was held to have adopted that security. In the present case, besides this kind of communication, the executors had notice by the government order that Graham had ceased to be a partner. They might have withdrawn the assets if they chose,—they might have intimated to the Appellant that they still considered him liable,—but they did nothing of all this. Then, as to the executorship, it would appear from the opinion given in India, that the mere circumstance of proving the will was not held sufficient there to render one liable as an executor, unless an inventory or account were exhibited. Even here, if an executor, under such circumstances, proved the will, was he liable to the utmost extent for the testator's property? It was submitted that he was not. It was usual to say in wills that each should be liable only for his own

acts, but that was not necessary. (*Lord Eldon* (Chancellor.) *It was a hard case for Mr. Graham, but the answer to the letter with the power of attorney was, "We have an executor here, under "whose authority we shall act." Could Mowbray, after that letter, say that they kept the deposit under the power of attorney? The fact was, that they all acted under Mr. Graham as executor.*) It was also submitted that the rate of interest claimed by the summons could not be supported.

Nov. 30, 1813.

EXECUTOR.

Romilly and *Horner* (for the Respondents.) This case depended entirely on principles of English law, and if it had arisen in the Court of Chancery here, there could be no doubt about it. It was not sufficient to make out a case against the co-executors, even if that could be done. This was an action by the residuary legatee, and even if the co-executors had given Mr. Graham a release, he would still have been liable to the residuary legatee. The moment he proved the will, he took the whole deposit as executor, and in such a case the Court here would compel the payment of the deposit into the hands of the Accountant-General. The opinion of the Advocate-General was quite erroneous, which was not surprising, considering, perhaps, the little experience in these matters which the business in India furnished. It had been said that it would have been hard to have taken this property from the partnership; but this was sacred property, which they could not in justice touch, and therefore the legal rate of Indian interest was properly charged. Even if the execu-

Nov. 10, 1813.

EXECUTOR.

torship had been out of the question, Mr. Graham would still have been liable, as no consent had been given to transfer the securities. (*Vide Henderson v. Graham*, 1800, 1801; affirmed on appeal. And Ersk. b. 3. t. 4. s. 22.)

Judicial observations.

Lord Eldon (Chancellor.) There appeared no ground of reflection whatever upon Mr. Graham's conduct morally considered. But the facts, as far as it was necessary for them to know them, were these:—He was a partner in a house of agency where a deposit was placed in special trust. He was made executor under the will of him who made the deposit. They had not then to discuss a case where the executor did not prove and yet interfered. He did prove, and charged the expense against the testator's estate; and was not then at liberty to renounce that character and act under another. He could do no act in regard to the estate for which he was not answerable as executor, and it was quite impossible to discharge him.

When Appellant proved the will, he could act in no other character than as executor.

Judgment. Judgment of the Court below affirmed.

Agent for Appellant, CAMPBELL.
Agent for Respondent, CHALMER.