Right Hon. LADY MARY MONTGOMERIE, &c., Appellants.— No. 15.
Tinney—Robertson.

RUNDELL, BRIDGE, and RUNDELL, &c., Respondents.—
Lushington—Kaye—et e contra.

Annual Rent.—Where a lady, as executrix qua relict, gratuitously undertook "the "gradual payment and extinction" of the debts of her deceased husband, "by "making payment and satisfaction" thereof out of her estate, chiefly by annual payments, contemplated to be effected in five years, and after a term of years paid off the greater part of these debts, and in the interim made successive partial payments and adjustments of interest with some of the creditors to a considerable extent, but never paid any interest, arising subsequent to her husband's death, to a certain class of English creditors under bonds or bills; and the House of Lords having found, in a question with the creditors, that the estate was liable for the debts till "paid and extinguished,"—Held (affirming the judgment of the Court of Session), that the estate was liable to the creditors for the interest accruing on her husband's debts while unpaid, although it had cost her a much greater sacrifice of property to pay off the principal than she had any reason to expect at the date of granting the gratuitous obligation.

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1ST DIVISION.
Inner House.

THE House of Lords having, in the leading question between these parties, (ante Vol. I. No. 14, where a full detail of the facts is given,) reversed, on the 15th April 1825, the judgment of the Court of Session, and found, "That under the commission "bearing date the 16th day of July 1814, and the deed of obli- "gation and assignation, bearing date the 10th day of October "1814, the said Commissioners are bound to apply the rents of "the estates mentioned therein, after making payment of the "sum therein mentioned to Lady Montgomerie, and of the "other sums and expenses therein provided for, in discharge of "the debts due from the late Lord Montgomerie, until thereby, "and with the other funds mentioned in the foregoing instru- "ments, the same debts shall be paid and extinguished. It is "therefore ordered and adjudged, that so much of the said in- "terlocutors complained of in the said appeal as is inconsistent "with the above finding be and the same is hereby reversed; "and it is further ordered, that the cause be remitted back to "the Court of Session in Scotland, to do therein as shall be "consistent with this judgment, and as shall be just."

Under a petition to apply the judgment, the creditors, besides payment of the principal, claimed interest on their debts, constituted or unconstituted, from the date of the arrangement. Lady Montgomerie, in order to obtain the unlimited administration of

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her estate, although only bound to a slow and gradual extinction of the debt, raised money and paid off the whole (with some minor exceptions), amounting to above £100,000; but the question of liability for interest remained in dispute.

Much discussion occurred in the Court of Session, whether the payment of interest had been contemplated by the creditors or by Lady Montgomerie. The evidence on this point was very loose and inconclusive. In a number of cases interest had been paid to Scotch creditors rather peculiarly situated, but the English creditors had not been paid interest; neither did a report by an accountant, whether the calculations, on which Lady Montgomerie brought forward her original offer to the creditors, included interest upon the debts subsequent to Lord Montgomerie's death, or only the principal, give much light, although the reporter, at the same time that he stated that he had been unable to arrive at any certain conclusion, was of opinion that interest had not been taken into calculation at all. The creditors also claimed their whole expenses, including those which had been incurred in the House of Lords. The Lord Ordinary found, "That the claimants are entitled to be ranked "upon the fund in medio for the interest due to them upon such "debts as were constituted by bonds or bills; but that the claim-"ants, who are all English creditors, are not entitled to interest "upon the debts due to them by open account, which, it is "admitted, do not bear interest by the law of England: Finds "it admitted that the claimants have received payment of the "principal sums due to them respectively in terms of the inte-"rim decree obtained by them on the 31st of May 1826; "therefore, in this multiplepoinding ranks and prefers the fol-"lowing claimants, viz. Rundell, Bridge, and Rundell, &c. all "of London, upon the fund in medio, for the interest upon the "principal sums which were due to them respectively, as speci-"fied in the first article of this condescendence, until the said "principal sums were either consigned by Lady Montgomerie "in the Bank of the British Linen Company, or paid directly "by her ladyship to the claimants themselves, under deduction "of property tax while the same continued, and also of any "sums paid to account of said interest, and decerns in the pre-"ference accordingly; reserving to the claimants who have been "found entitled to interest to be heard upon the claims which "they make for the difference between the interest allowed by

" the Bank upon the sums consigned, and the full legal interest " thereof from the date of consignation to the dates respectively " on which the principal sums were uplifted and paid to each, " and to all concerned their objections thereto, as accords; repels " the claim for interest made by the following claimants on the " sums due to them by open account, as specified in the second " article of this condescendence, Rundell, Bridge, and Rundell, " &c. all of London, and dismisses the claims for interest made " by these several claimants accordingly, and decerns; and in " respect to a motion made by the claimants for expenses, finds " it competent to award to them the expenses incurred by them " in this Court before as well as since the appeal to the House of " Lords; but finds that, in the circumstances of the case, the " claimants are not entitled to the expenses incurred by them in " the Court previous to the appeal; finds Lady Montgomerie " and her husband Sir Charles Lamb liable to the claimants in " the expenses incurred by them from and since the 13th of May " 1825, being the date of the interlocutor applying the judg- " ment of the House of Lords, appoints an account thereof to be " given in," &c.; but the Court recalled the findings as to the expenses, quoad ultra adhered, and found no expenses due to either party.* March 25, 1831.

Lady Montgomerie appealed on the merits; Rundell and Co. appealed as to expenses.

Lady Montgomerie.—It is not disputed that by the law of Scotland interest is due upon almost every debt, and the exceptions only confirm the general rule. Neither is it pretended that, as administrating qua relict, or in executing the agreement which she gratuitously volunteered, there has been any negligence or mora on the appellant's part. The question is merely, whether, by the deed of agreement, obligation, &c., with her husband's creditors, she came under any obligation to pay interest on the debts which she assumed. Separately, and in combination, these documents show that she did not. Demanding payment of the full debt, and not merely the amount that five years' accumulation could raise, (knowing, as the creditors did, that the payment of the full debt, whether the accumulations reached that amount or not, never was in the contemplation of

* 8 Shaw and Dunlop, No. 136.

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parties,) was a sufficient extension of the original terms; but the payment of interest never for a moment was expected. Such being the real evidence in the case, there is no room for presuming an obligation to pay interest, but the contrary; levatior obligatio semper presumitur, and particularly in regard to gratuitous obligations. Indeed, the whole res gestæ of the case, and the tenor and terms of the various documents that have given rise to this discussion, abundantly show that the present claim is an after thought of the creditors, suggested by their unexpected good fortune in the former appeal. There is nothing in the judgment of the House of Lords that implies obligation to pay interest. The judgment there merely found that the obligation to pay the principal was absolute, and not limited to five years; and, indeed, equality among the creditors being the basis of the appellant's agreement, how can payment of interest form an elementary part of it, seeing it is not disputed now that open account creditors have no claim to interest? Besides, the language of the judgment of the House — "in discharge of the debts due, &c.," "until the said debts be paid and extinguished," —is exclusive of the creditor's claim, for interest is not a debt. Under a commission of bankrupt no interest is proveable but what is interest arising by contract, otherwise it is only matter of damages. When the interest is part of the contract it is no doubt as much a debt as the principal, but where it is not part of the contract it is not a debt at all; it is mere damage which must be liquidated, and sought in an action. This is undoubtedly the law of England; and the present question, involving English debts, contracted in England, sued for by English creditors, must be treated as English debts, and the agreement, which is the foundation of the whole, be construed as an English agreement, and the support given to it such as it would have received in an English court of equity.

Lord Chancellor.—Yes. What you state as to interest has been long fixed by the case of ex parte Marlar, but it does not apply to the case of a bond; you do not there exclude the penalty.

Tinney.—Still the respondent is trammelled by the legal meaning of the word "debt." Here there are many creditors founding on bills and promissory notes; (we have nothing to do with the open accounts;—there is no pretence that interest is due on them;) now interest on bills and promissory notes is not a debt. If it were a debt it would be the ground of a petitioning creditor's debt in a commission of bankrupt, but it is incontestible

that it is not; and how can English creditors, on English contractions and English obligations, free themselves of the rules of English law? As to expenses, there were no grounds for giving to the creditors expenses since the remit, and it would have been incompetent to give any other.

Rundells, &c.—By the judgment of the House of Lords the appellant is bound to pay and extinguish the debts due by her husband to the respondents. The debts themselves are not disputed; they are constituted by bond or bill; but on debts so constituted interest accrues either ex contractu or ex lege, and in either view the appellant is liable. When soundly construed, the agreement and other writings which passed between the parties plainly imply that the debt, both principal and interest, was to be extinguished; but even had there been no such agreement there is nothing to take the case from the operation of the common law. Besides, the appellant has been utterly unsuccessful in explaining her conduct in paying some creditors interest, if the obligation had been merely to pay principal. No distinction was taken in the House of Lords between principal and interest, or rather, the terms of their Lordships' judgment necessarily imply that both constituted the debt, and per expressum the debt is ordained to be paid. That interest is not debt, and as the judgment of the House of Lords ordains the "debt," without saying any thing else, to be extinguished, therefore interest is not included, is a mere subtlety. It may be quite true that in a commission of bankrupt in England, in cases not excepted by statute or otherwise, interest on debt is not proveable; but it is a most illogical conclusion, that therefore a debt undertaken by a Scotch person and by Scotch instruments, and ordained to be extinguished by a judgment of the House of Lords, sitting as a Scotch Court and deciding in a Scotch suit, is not to be considered to include what in almost the universal case is in Scotland regarded as its natural concomitant. Besides, this argument is bottomed on an act of parliament, which, neither in principle nor detail, is known in Scotland. As to expenses, the Court ought, under the circumstances of the case, to have awarded the respondents the whole expenses, both before and after the remit from the Lords.

Lord Chancellor.—My Lords, in this case, which is one of considerable importance, I will state shortly the grounds on which

Macrh 25,1831. I deem it my duty to advise your Lordships to affirm the judgment appealed from on both points. The questions arise out of these facts:—Lady Montgomerie, on the death of her husband, came forward, and placed her estates under a course of management, restricting herself to a very moderate share, specially for the purpose of discharging a pious duty to the memory of her husband by the payment of his large debts. The first question is, Whether that deed shall be so construed as to impose upon her the obligation of paying the interest on certain debts allowed by the interlocutor, as well as the principal, which was disallowed by the first judgment of the Court of Session, and was afterwards imposed upon Lady Montgomerie? If the first case, which was decided some years ago in this House, reversing the former judgment of the Court below, still stood for the decision of your Lordships, I should have felt some of that doubt and difficulty with which the Court below appears to have been pressed on behalf of Lady Montgomerie. The decision of your Lordships called upon the Court below to adopt the view of the case taken here, but it does not appear to have materially altered the opinion of the learned judges whose decision it reversed. Lady Montgomerie's obligations were of a nature which, when taken altogether, were calculated to raise a fair doubt how far she had bound herself beyond the strict terms of the arrangement made. Nevertheless, I think, upon the whole, the balance of my opinion would have been in favour of the judgment which your Lordships were advised to pronounce by a late noble and learned friend of mine, the late Lord Gifford, whose loss to this House, as well as to Westminster Hall, there is every reason to lament; for the words of the deed are very strong, and certainly admit an unlimited construction of the obligation. The minute says, the remainder of the rents of her Ladyship's estates, beyond a certain sum, are "to be applied towards the extinction of the "balance of the debt. It is calculated that the debts may, in this "way, be all discharged in the course of five years, including the "expenses necessary for carrying the arrangement into execution." Then come a commission, deed of obligation, and assignation — all of which, being parts of the same transaction, are to be considered as parts of the same instrument for the purpose of effecting the object contemplated; and we find that the words are, after restricting herself to £5,000 a year, "to apply the prices and produce "of the foresaid whole subjects, heritable and moveable, together with "the rents and produce arising from any other lands and estate en-"tailed and unentailed" "towards the gradual payment and extinction "of the foresaid debts—all as mentioned and contained, so far as the "circumstances are at present known, in a statement and minute "subscribed by me, of this date." So that your Lordships see they

make a calculation only so far forth as they know the circumstances: so far forth as they can estimate the amount of the debts that is taken to be the amount; and to that amount the appellant by her obligation refers, without binding herself down to the very sum contained in the statement. The words are very material: "So "far as the circumstances are at present known, in a statement and "minute subscribed by me, of this date, and bearing reference "hereto; providing always, that the same commissioners shall be "bound to hold just count and reckoning to me for their respective "transactions and intromissions in virtue hereof; and, lastly, I "hereby declare that this commission shall endure and continue "until the foresaid powers are accomplished, so far as concerns "the payment and extinction of the foresaid debts." The word "foresaid," the reference to the balance, and the words, "so far "as the circumstances are at present known," are applied to the words, "towards the extinction of the foresaid debts—an account "and list of which is to be taken and made up by my said commissioners so soon as the same can be properly investigated," (so soon as the same—that is, certain expenses—can be investigated,) "until those debts are fully paid and discharged." Upon the whole, I lean to the opinion expressed in the year 1825 in this House; and that almost disposes of the present question; because, if interest is due upon these debts—upon the specialty debts—in England, and by the custom of merchants, upon promissory notes and bills of exchange, in Scotland as well as England, the question is only, Whether, the principal being disposed of in the former cause, the interest only remaining to be dealt with at the present time, that interest does not come within the scope and meaning of the obligation into which this lady, so honourably to herself, entered, and by which she engaged to pay? I am therefore of opinion that the Court below was right in giving the interest upon these particular kinds of debt. My Lords, I was greatly moved, certainly, by the argument pressed so ably upon the House by Mr. Tinney, and which was a view of the subject taken here for the first time; and I requested, upon that ground, that your Lordships would postpone the consideration till to-day, that the counsel might apply themselves to that view;—they have confined themselves strictly to it, and have, in my opinion, displaced Mr. Tinney's position, and shown that it ought not to induce your Lordships to reverse the decision. Throughout the whole of the instruments are to be found the word "debts," or some word equivalent. Then, says Mr. Tinney, the question is, Shall interest be given for those debts? This is strictly an English question; for it is by the creditors residing in England that the criterion is taken, and so laid down in Scotland. On all hands it is admitted, that the

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claim of interest on simple contract debts, which are not privileged, is to be rejected; because, though allowed in Scotland, no interest is due upon them in England. I wish it were otherwise in England; for, where there is a large sum,—£10,000 for instance,—the interest, amounting to £500 a-year, will bear the expense of a long litigation; and the parties, keeping their money in their own hands, will thus be enabled to support the cause; but such is the law. The question is, Whether, by the English law, this would be allowed? if so, it is allowed by the Scotch Court; and if not, it is disallowed by the Scotch Court. Now, Mr. Tinney says that the interest is not part of the debt, and cannot be proved under a commission of bankrupt; and for that he refers to the case of ex parte Marlar, in 1 Atkyns, 150, and Cameron v. Smith, in 2 Barnewall and Alderson, 305, which is not the first case of a Court of common law proceeding on the principle sanctioned by Lord Hardwicke in ex parte Marlar; for it had been referred to in the Court of Common Pleas. In those cases it is held only that you cannot add the interest to the principal, on a promissory note, to make up the hundred, or hundred and fifty, or two hundred pounds, necessary to constitute a petitioning creditor's debt, in suing out a commission of bankrupt, according as there may be one, two, or more creditors. Now, on what does this doctrine rest? It is, that interest is not a debt in the strict legal acceptation of the word, but only damages given for the detention of that debt; and as, at law, the debt must exist, and be a hundred pounds debt, or a hundred and fifty, or a two hundred, as the case may be, there must be a debt, and not damages for detention of that which is in strictness exclusively called debt. But the bankrupt law is the creation of statute; its whole arrangements arise out of the express provisions of acts of parliament; and so nice is the distinction taken in construing those acts, that the strongest equity a man can have against his debtor shall not enure to the extent of adding a farthing to make up the amount of the petitioning creditor's debt. So, a man may be bound in equity to pay me a thousand pounds, and yet I have no power of taking out a commission, unless I have a legal remedy. This is sufficient of itself to constitute a broad distinction between the case relied on by Mr. Tinney and that now at the bar; for it is perfectly clear that the Court of Session, being a Court of equity as well as a Court of law, is bound as such to put the construction which equity requires on the word "debt" in these instruments. I think your Lordships therefore are brought back to the fair construction of the word "debt;" for we find "the debt"—"the extinction of the debt"—"the "liquidation and extinction of the debt"—is the object of this arrangement, according to the various words used in these instruments; and if you find that there is nothing to exclude from the scope of these

expressions that which is undeniably due from Lord Montgomerie to his creditors—that which constituted the claim of his creditors against the estate of Lord Montgomerie—that which his creditors would have claimed against Lord Montgomerie's estate if that estate had been under the administration of the Court below, the question is, Whether Lady Montgomerie did by these instruments not put herself in the place of her deceased husband, under an arrangement to spread itself over a considerable period of time, a period uncertain as to its extent, but to last as long as those debts existed?—whether she did not mean to put herself into his shoes, (if I may so express myself,) as if bound by his obligation? Now, there cannot be a doubt that in these cases, both as to the specialties and as to the privileged instruments, of a mercantile nature, he would have been liable to interest as well as principal, though not recovered under the technical meaning of the word "debt;" but in an action on a debt due, it would have been recovered under a separate head; and, with that technical nicety which the law raises in this country, it would have come within the general description of his obligation, and would have been that which he was bound to pay,—the principal being strictly the debt, but the interest being equally within the scope of the obligation. It is an obligation upon her to pay that interest until the principal shall be satisfied. Mr. Tinney's argument, it is admitted, applies only to bills of exchange and promissory notes; and I find that this distinction, which I stated to him, was taken in Cameron *v.* Smith; for there the Court held that the argument did not apply to penalties in a bond.

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While I feel it my duty now to offer my humble advice to your Lordships to affirm the judgment, I shall not recommend that any thing should be said against the interlocutor refusing expenses. The conduct of this lady was above all praise. She has clearly made herself liable to payments which she was little aware of at the time. It is very likely she did not intend to bind herself to the extent to which this House, reversing the first judgment below, has held her liable; and it is quite clear that the amount goes very far beyond her calculations, so that she is placed in a situation of no little hardship. Upon these grounds, also, I should not advise your Lordships to allow any costs of this appeal.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellant's (*Lady Montgomerie*) *Authorities.*—Marlar, 1 Atkyns, 150; Cameron, 2 Barn. & Ald. 305.

ALEXANDER MUNDELL, MONCREIFF, WEBSTER, and THOMPSON—Solicitors.