[13th June, 1842.]

LIEUTENANT COLONEL JOHN GORDON, of CLUNY, *Appellant.*

JOHN CAMPBELL, W.S. *Respondent.*

Trust. — Found, that an heritable bond by trustees, which acknowledged receipt of money, and bound them *qua* trustees to repay it, and contained a clause for registration, in order to execution in common form, did not infer a personal liability against the trustees, beyond their possession of trust funds.

IN November, 1832, the testamentary and assumed trustees of Andrew Bell, deceased, of whom the respondent was one, borrowed of the appellant the sum of L.7000, and as security for its repayment, gave him an heritable bond over the trust estate, which, as to the parts material for the present purpose, was expressed in these terms: — " We, Andrew Bell Mabon, manager " of the Hull and Leith Shipping Company, Leith, and Charles " Bremner, Writer to the Signet, the surviving and acting " trustees nominated and appointed by the deceased Andrew " Bell, engraver in Edinburgh, conform to his several trust- " deeds, the first dated, &c. I, Andrew Bell, farmer at Glen- " corse, trustee assumed by the trustees above-named, in virtue " of the powers conferred on them by the said trust-deeds, con- " form to deed of assumption in my favour, dated and registered, " &c. I, John Campbell, Writer to the Signet, trustee also " assumed by the said other trustees. And we, Walter Paton, " ship-chandler in Leith, Thomas Paton, accountant in Edin- " burgh, and John Toper Gouthwaite of Roan, trustees also " assumed by the said other trustees, grant us hereby instantly " to have borrowed and received from Lieutenant-Colonel John

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" Gordon of Cluny, the sum of L.7000 sterling, whereof we do " hereby acknowledge the receipt, renouncing all exceptions to " the contrary; which sum of L.7000 sterling, we, as trustees " aforesaid, bind and oblige ourselves, and the survivors or sur- " vivor of us, and such other person or persons as may be " assumed by us in virtue of the powers committed to us by the " said trust-deeds, and by which trust-deeds it is declared that, " when the trustees shall amount to, or exceed three, a majority " shall in all cases be a quorum, to content and repay to the " said John Gordon, his heirs, assignees, or successors whomso- " ever, at the term of Whitsunday next, 1833, with the sum of " L.1400 sterling, of liquidate penalty in case of failure in the " punctual payment thereof, and the due and legal interest of " the said principal sum from the date hereof to the said term " of payment, and half-yearly, termly, and continually there- " after during the not-payment of the said principal sum, and " that in Edinburgh, at two terms in the year, Whitsunday and " Martinmas, by equal portions, beginning the first payment of " the said interest at the said term of Whitsunday next to come, " for the interest which shall be due at and preceding that term; " and the next term's payment thereof at Martinmas immediately " following, and so forth half-yearly, termly and continually " thereafter during the not-payment of the said principal sum, " with a fifth part more of liquidate penalty for each term's " failure in the punctual payment of the said interest at the " terms above mentioned. And for the said John Gordon and " his foresaids their farther security and more sure payment of " the said principal sum, interest, penalty and termly failures " above stipulated, and without hurt or prejudice to the fore- " going personal obligation, but in corroboration thereof, we, " the said Andrew Bell Mabon, Charles Bremner, Andrew Bell, " John Campbell, Walter Paton, Thomas Paton, and John " Toper Gouthwaite, as trustees foresaid, and as specially autho-

" rized by the titles in our favour, to sell, burden, or dispose of " the subjects after described and conveyed in security, do " hereby sell, alienate, and dispone from us, and the survivors " or survivor of us, and such other person or persons as may be " assumed by us, in virtue of the powers committed to us by the " said trust-deeds of the said deceased Andrew Bell, heritably " but redeemably always, and under reversion, in manner after " mentioned, All and Whole those parts and portions of the " lands of Blainslie, &c.: Together with all right, title, and " interest, claim of right, property and possession which we, as " trustees foresaid, our predecessors and authors, had, have, or " can any way claim or pretend to the said several lands, or to " any part or portion thereof, in time coming; and that in real " security, and for payment to the said John Gordon and his " foresaids, of the foresaid sums of money, principal, interest, " liquidate penalties and termly failures above specified, if in- " curred: In which several lands, teinds, and others above dis- " poned, but redeemable always, and under reversion in manner " after-mentioned, we, the said Andrew Bell Mabon, Charles " Bremner, Andrew Bell, John Campbell, Walter Paton, " Thomas Paton, and John Toper Gouthwaite, bind and oblige " ourselves, as trustees foresaid, and the survivors or survivor of " us, and such other person or persons as may be assumed by " us, in manner foresaid, upon our own proper charges and " expenses, duly and validly to infeft and seize the said John " Gordon and his foresaids, &c. and for that purpose, we, as " trustees foresaid, bind and oblige ourselves, and the survivors " or survivor of us and our foresaids, at any time when required, " at our expense, to grant all necessary deeds in favour of the " said John Gordon and his foresaids, with procuratories of re- " signation, &c. precepts of sasine, and all other clauses needful: " Which disposition under reversion in manner after mentioned, " the several lands, teinds, and others above disponed, infeft-

" ments to follow hereon, the sale or sales to be made in virtue " of the powers hereinafter granted for that purpose, if the same " shall take place, and all deeds to be granted in consequence " thereof, together with the ratifications to be granted by us as " trustees foresaid, or our foresaids, we bind and oblige ourselves " and them, but *qua* trustees only, to warrant at all hands, and " against all mortals. Moreover, we, as trustees foresaid, do " hereby make, constitute and appoint the said John Gordon " and his foresaids, our lawful cessioners and assignees, not " only in and to the rents, maills and duties of the said several " lands, teinds and others foresaid, &c. But also in and to " the whole writs and evidents, rights, titles, and securities, old " and new, of and concerning the several lands, teinds, and " others before disponed, and in and to the tacks thereof, set " or to be set, whole clauses therein contained, and all action " and execution competent thereupon; surrogating and substi- " tuting the said John Gordon and his foresaids in our full right " and place of the premises, with full power, &c. to them " to procure themselves infeft and seized in the same at our " expense, and generally to do every thing that we, as trustees " foresaid, might have done before granting this assignation; " which assignation, in so far as concerns the writs and evidents, " we bind and oblige ourselves and our foresaids, *qua* trustees, " to warrant at all hands, and in so far as regards the rents, " from our own facts and deeds only; and we consent to the " registration hereof in the books of Council and Session, or " others competent, therein to remain for preservation, and that " letters of horning on six days' charge, and all other legal exe- " cution, may pass on a decree to be interponed hereto, in com- " mon form; and for that purpose we constitute

our procurators, &c.

" Declaring always, as it is hereby expressly provided and de- " clared, that the said several lands, teinds and others, with the

" pertinents before disponed, are and shall be redeemable by us,
" the said Andrew Bell Mabon, Charles Bremner, Andrew Bell,
" John Campbell, Walter Paton, Thomas Paton, and John
" Toper Gouthwaite, and the survivors or survivor of us, as
" trustees foresaid, and such person or persons as may be assumed
" by us as co-trustees, in manner foresaid, at the said term of
" Whitsunday next, and that by payment to them of the said
" principal sum of L.7000 sterling, interest due thereupon,
" liquidate expenses and termly failures before specified, if in-
" curred; declaring always, that all expenses of infefting the said
" John Gordon or his foresaids in the premises, and expenses
" and charges incurred in the entry of their disponees, and in
" discharging or conveying this security, including the fees of
" preparing, revising and recording any deed or deeds connected
" therewith, conform to an account thereof to be rendered on
" their honest word, shall in every event be borne and paid by us
" as trustees aforesaid; declaring also, as it is hereby expressly
" provided and declared, that if we, the said trustees, or the sur-
" vivors or survivor of us, or those that may be assumed by us
" as co-trustees as aforesaid, shall fail to make payment of the
" sums that may be due under the personal obligation above
" written, within three months after a demand for payment shall
" be intimated to us, or quorum foresaid, personally, or at our
" dwelling-places, if within Scotland, or if furth thereof, at the
" market-cross of Edinburgh, in presence of a notary-public and
" witnesses, then and in that case it shall be lawful to and in the
" power of the said John Gordon or his foresaids, immediately
" after the expiration of the said three months, and without any
" other intimation or process of law for that effect, to sell and
" dispose of the whole or any part of the said several lands,
" teinds and others above disponed, by public roup, on previous
" advertisement once every week, for eight weeks, in the Edin-
" burgh Evening Courant and Edinburgh Observer newspapers,

" or in any two newspapers which may be published in Edin-
" burgh at the time, and for that end, with full power to them
" to enter into articles of roup, and to grant absolute and irre-
" deemable dispositions to the purchaser or purchasers, contain-
" ing procuratory of resignation, precepts of sasine, clauses bind-
" ing us as trustees foresaid in absolute warrandice of such dis-
" positions, and obliging us to corroborate and confirm the same,
" and all other clauses needful, and to grant all deeds necessary
" by the law of Scotland, for rendering the said sale or sales
" effectual, declaring that the purchaser or purchasers shall have
" no concern with the application of the price or prices, but shall
" be completely exonered thereof by the discharge of the said
" John Gordon or his foresaids, and the sale or sales shall be
" equally good to the purchaser or purchasers as if we ourselves
" had made them. — And farther, &c. In witness whereof these
" presents, consisting of this and the nine preceding pages of
" stamped paper, written by Daniel Forbes, clerk to Messrs
" Robertson and Bennett, Writers to the Signet, are sub-
" scribed by a majority and quorum of us, the said trustees."

This bond was signed by all of the trustees, with the exception of Bremner, and was duly recorded.

The interest upon the bond was duly paid up to Whitsunday, 1837, but not having been paid at Martinmas, 1837, the appellant extracted the bond, and on the first of December of that year, gave the trustees a charge of horning for payment of the full sum borrowed, with half a year's interest.

The letters of horning recited the personal obligation in the bond, and directed a charge to be given to the trustees " per-
" sonally, or at their respective dwelling places," and then proceeded thus: — " As also to make payment to the complainer of
" the legal interest of the said principal sum for the half year
" from the said term of Whitsunday 1836, to the term of Mar-
" tinmas last, with one-fifth part more of liquidate penalty in-

" curred through failure in punctual payment of the said half " year's interest at the said last mentioned term; and farther, to " make payment to the complainer of the said interest of the " said principal sum from and after the said term of Martinmas " last, half-yearly, termly, and continually as aforesaid, during " the not-payment of the said principal sum, with a fifth part " more for each term's failure in punctual payment of the said " interest, at the terms above mentioned, the terms of payment " being always first come and bygone, and that within, &c. " Attour that ye lawfully fence, arrest, appraise, compel, poind " and distrain all and sundry the said Andrew Bell Mabon, " Andrew Bell, or Andrew Paton Bell, Walter Paton, Thomas " Paton, John Toper Gouthwaite, and John Campbell's whole " readiest moveable goods, gear, debts, sums of money, and " other moveable goods of every denomination poindable or dis- " trainable pertaining or addebted to the said Andrew Bell " Mabon, Andrew Bell, or Andrew Paton Bell, Walter Paton, " Thomas Paton, John Toper Gouthwaite, and John Campbell, " wherever the same can be found, make penny thereof, to the " avail and quantity of the foresaid sums, and see the said Lieu- " tenant-Colonel John Gordon completely satisfied of the same, " after the form and tenor aforesaid, in all points."

The execution of charge returned by the messenger bore, that by virtue of the letters of horning, he had charged the parties, " trustees as therein mentioned," to make payment of the sum in the bond, with interest from Whitsunday preceding.

Upon receiving this charge, the respondent wrote Hunter, the agent of the appellant, on the 1st December, 1837, in these terms: — " I have a charge of horning, and as I have had no " intromission with, or management of, these funds, I beg to " know what you propose to do in regard to me personally, as I " do not wish to put the estate to any expense by seeking a legal " protection, if you satisfy me you have no hostile intention " against me personally. I am," &c.

On the same day Hunter answered: — " You, and the other " obligants in the bond, (of whose intromissions I know nothing,) " have got a charge of horning on your personal obligation, " because Colonel Gordon can neither get payment of his prin- " cipal sum which he called up, and has been looking for, since " Martinmas 1836, nor of the interest due at last term. If this " interest be now paid, and an assurance be given that the prin- " cipal sum will be paid at Candlemas, or even at Whitsunday " next, the diligence will not be pressed; but as you repeat the " threat of legal proceedings which you threw out on receiving " the charge of horning last winter, and as I told you that " Colonel Gordon was unconscious of any ground of objection " which you and the other obligants in the bond could state " against payment of the sum in your bond to him, I must now " insist that you and your co-trustees shall engage to pay your " bond without future objections, and without occasioning trouble " or delay by, at any time, resorting to a bill of suspension or " other legal process in reference to your bond, or that the " trustees (finding caution in common form) shall now enter " upon the discussion of the grounds of suspension (if there be " any) on which your threats of resorting to legal proceedings " are founded. Why has the estate of Blainslie been withdrawn " from the market? I am," &c.

On the 2d December, the respondent replied: — " I am not " aware that the trustees are liable, except as trustees, who have " given Colonel Gordon a legal right to the estate, and any " trust-funds besides which they may have. I have no funds; " on the contrary, am in advance, and all that I am anxious " about is, to avoid being involved in discussions with which I " have had no concern."

On the 16th December denunciation was executed, and on the 9th January, 1838, Hunter wrote the respondent: — " I " have received peremptory instructions to follow up the charge

" of horning at Colonel Gordon's instance, against Blainslie's " trustees, (which has been denounced and recorded,) with ulti- " mate diligence, unless immediate payment be made of a sum " equal to the interest due at Martinmas last, and an assurance " given as to payment of the principal in terms of my letter to " you of 1st December last. You will therefore please arrange " accordingly in the course of to-morrow, as otherwise I must " immediately thereafter follow out my instructions."

The respondent answered on the 10th January, 1838: — " I " have yours this morning, and beg to repeat, that I am a " creditor of Mr Bell's trust-estate, and have had no intromis- " sions with it for many years, and, of course, cannot be an " object of your ultimate diligence without subjecting your client " to damages. As your letter intimates that you mean to get a " caption against me to-morrow, I beg to have a note from you, " saying you do not now intend to adopt that procedure, other- " wise I must, of course, apply for protection. I am," &c.

On the same day Hunter wrote the respondent: — " You " surely don't seriously tell me that, whatever be the state of " your accounts with Bell's trust, you are not bound to imple- " ment your obligation to Colonel Gordon, to repay to him a " sum which you acknowledge to have borrowed and received, " and bind and oblige yourself to repay, and the idea of holding " out a threat to deter him from following out the diligence to " which you consent, for enforcing implement of your obligation " in case of failure, is a very extraordinary one."

Upon receiving this last letter the respondent presented a bill of suspension against the appellant, without offer of caution, wherein he set forth that he was threatened with caption, as would appear from Hunter's letter of the 9th of January, which was given at length. The bill then continued thus: — " The " complainer is not in possession of any funds belonging to the " trust-estate of the late Mr Andrew Bell, nor does he act in

" any way as factor thereon. He has had no intromissions with " any of the trust-funds for upwards of twelve years, his only " connection with the estate being as one of the trustees and " law-agent in some particular cases connected therewith, in " which latter character the estate is considerably addebted to " him. The complainer and his co-trustees are using every " exertion to have the trust wound up, and the estate extricated " from its present difficulties, and particularly from these engage- " ments to Colonel Gordon, but this cannot be accomplished " with such despatch as would seem to be expected by the " charger. The suspender, however, on receiving Mr Hunter's " letter, wrote to him as per letter, a copy of which is herewith " produced, mentioning the steps that were being taken, and the " prospect of a speedy and complete arrangement of these affairs. " To this communication the only answer given was, that the " suspender must apply for suspension, as the instructions were " to proceed with ultimate diligence. In these circumstances, " the complainer submits, that, acting as he does, merely *qua* " trustee, and possessed of none of the trust-funds, and having " no intromissions with the estate in any respect, he cannot " legally be subjected to the distress of ultimate diligence. " Therefore the said threatened letters of caption ought and " should be *simpliciter* suspended, without caution or consigna- " tion."

The appellant put in answers to this bill of suspension, in these terms: — " All the personal diligence on the obligation " down to the caption he admits to be right, and does not com- " plain of; but he complains that it is not fitting that a caption " should be issued against him in his character of a trustee, to " enforce implement of an obligation which he granted in that " character. The charger submits there is nothing incongruous " in this, if the suspender and his co-trustees bound themselves " as trustees, and if letters of horning have been duly issued

" against them as trustees, upon which they have been duly " charged as trustees, and the charge having expired, they have " been orderly denounced rebels as trustees, and the denounced " horning has been regularly entered in the register of hornings, " as registered against them in their character of trustees; all of " which has been done, and was required to be done, in order to " the accumulation of interest with the principal, and the sus- " pender admits this as reasonable and proper. Upon what " principle, then, can the suspender call upon your Lordships to " interpose to prevent the diligence being farther followed out? " Is there any thing to prevent a caption being issued against " parties, whatever may be their character, after being in that " character orderly denounced rebels? A caption can be " issued against trustees, upon a registered horning against them, " with as much fitness as a horning can be issued on a registered " bond by them. They can be incarcerated as trustees, and in " the prison books they can be duly booked as trustees. In the " same way that the members of a company can be incarcerated " and booked for a company debt, and the company thereby be " rendered bankrupt, though the partners, as individuals, may " remain solvent. It may be as necessary to render trustees " bankrupt to prevent preferences, as to render a company " bankrupt; and unless the diligence of the law necessary for " this purpose be followed out, how is this to be accomplished?"

Upon advising the bill and answers, Lord Cunninghame (Ordinary,) on the 18th January, 1838, refused the bill by the following interlocutor, and added the subjoined note: — " The " Lord Ordinary having considered this bill, answers, and pro- " ductions, in respect that no precise and relevant statement is " given in the bill, nor any account exhibited by the complainer " to shew that the trust-funds are deficient, from circumstances " or causes which can affect the accounting of the complainer " and his co-trustees with the charger; and in respect that the

" bill is presented without caution, refuses the bill: Finds the " respondent entitled to expenses, and remits the account " thereof, when lodged, to the auditor to tax and report."

" *Note.* — Had this bill been presented on satisfactory caution, the " Lord Ordinary would have been disposed to pass it, notwithstanding " the very meagre statement of facts in the bill to account for the " alleged deficiency of funds on the estate for which the trustees " borrowed so large a sum from the charger in 1832.

" At the same time, the Lord Ordinary thinks it a question of very " considerable doubt, whether the trustees have not bound themselves " personally by this bond. They, no doubt, only bind themselves " 'as trustees, and the survivors and survivor' (not heirs and " executors,) 'and such other person as may be assumed by us in " 'virtue of the powers committed by the said trust-deed,' &c. &c. " Still, when trustees borrowed a sum, they may be understood as " guaranteeing the estate at least to be equal to the sum borrowed. " And Mr Thomson, in his Treatise on Bills, quotes an English case " where Chief-Justice Dallas ruled, that trustees granting bills must " be held to admit the trust-estate to be of that amount, unless they " specially limit their obligation 'to the extent of the trust-estate.' " See also a very strong case to the same effect in the First Division " of this Court in 1829. — Thomson, Shaw, vol. 7, p. 787.

" Still, as this is the case of a bond, and not a bill, a distinction " may be raised which it might be proper to try deliberately on ex- " pede letters of suspension, if caution had been offered. It is not " thought that in any view the diligence should be suspended without " caution. For, even after making every allowance for trustees, they " ought not to be allowed to stop diligence on such a bond, without " giving full security to a creditor who lent his money to them, that " the trust-funds have not been improperly expended or exhausted in " claims which such a creditor on the trust-estate as the charger " would not be bound to sustain. But nothing of that kind is shewn, " or even set forth with any distinctness in this bill, while, on the " contrary, the charger's statement, and the documents produced by " him, raise a strong inference that if there be any deficiency of the

" trust-estate here, it is from circumstances which the suspender " cannot found on in a question with the charger. Thus, if the " trustees granted the bond charged on in the face of an inhibition, it " is hardly possible to conceive that they can be allowed to charge the " inhibiting creditor's debt against the property disponed to the " charger. In like manner, their having allowed the interest on the " first security to run into arrear for years, is a very questionable " sort of administration to affect the charger.

" All these circumstances induce the Lord Ordinary to think that " this is a case in which it is not proper to dispense with caution."

The respondent reclaimed to the Court, and offered caution. The Court passed the Bill, and thereafter the letters were expede. Before any farther judicial procedure, a correspondence took place between the parties, with a view to extrajudicial arrangement. This, however, went off, and another half year's interest having become due, the appellant, on the 23d April, 1839, gave the respondent a second charge upon the same letters of horning for payment of this interest. The respondent presented a note of suspension of this charge, and upon advising the note, with answers, Lord Jeffrey, (Ordinary,) on 26th July, 1839, " passed the note without caution or consignation," and added this note :—

" *Note.* — The registered bond and horning (which are the neces- " sary warrants of the present charge,) being under suspension in a " previous depending process, seems to make the charge incompetent " in point of form, and the grounds of suspension in the previous " process being identical with those now maintained and brought " into question, the legality of any proceeding against the complainer " upon these documents, make it still more clearly incompetent in " substance and common justice. The case does not appear to the " Lord Ordinary to be attended with any difficulty."

The two suspensions were subsequently conjoined, and came to depend before Lord Moncrieff, as Ordinary, and a record was

made up upon reasons of suspension and answers, and a counter statement by the appellant, and answers by the respondent. In these papers the respondent alleged, that only L.4000 of the loan upon the bond had been actually advanced by the appellant. That the remaining L.3000 had, by the desire of Bennett, his then agent, been deposited in a bank in Bennett's name, until the creditor in a prior encumbrance, which this sum was intended to discharge, should be ready to take his money. That the respondent's co-trustees had, without his knowledge, arranged with Bennett, that the L.3000 should be lent to Messrs Sandeman, with whom Bennett was concerned in business. That Sandemans had repaid part of the L.3000 to Bennett, but had become bankrupt while the balance was in their hands. Letters, under Bennett's hand, were produced, which proved the truth of these averments.

On the other hand, the appellant denied that this transaction was done with his authority or knowledge, and repudiated any liability in respect of it; and he farther averred, that by the terms of the correspondence which had taken place between him and the respondent since the charge was given, the latter had promised to pay the debt, with interest, so as to preclude him from farther insisting in the suspension. These respective averments were followed by pleas in law founded upon them; but as the argument of the appellant, at the hearing of the appeal, was confined entirely to the degree of liability, appearing *ex facie* of the bond, the only plea maintained by the respondent, in the Court below, which it is necessary to notice, was this: — "I. The charger has no right, under the "bond and disposition in security, to do personal diligence "against the suspender for the principal sum and interest "therein contained; and the only competent mode by which "he can recover payment of his debt is, by adopting proceed-"ings against the trust property."

The appellant, on the other hand, pleaded: — "I. The "charge complained of was fully warranted by the document of "debt charged on.

"II. The suspender having borrowed the sum charged for, "under the promise and engagement, and in the circumstances "condescended on, and having granted the bond for its repay- "ment, which is now charged on, and having neither proved "nor averred matter relevant to discharge him of his liability to "repay the sum borrowed, the letters ought to be found orderly "proceeded."

Before the case was advised upon the record, the respondent lodged a minute stating, "That, without acknowledging any per- "sonal liability for the sums charged for, but solely in order to "save great loss and expense to the trust estate, under the "management of the suspender and his co-trustees, he, the sus- "pender, was willing to advance from his own private funds, a "sum sufficient to pay the whole principal sums and interest "contained in the bond and disposition in security held by the "charger, and also to consign in bank a sum sufficient to cover "the whole expenses claimed by the charger, as falling under "the penalty in the bond, or incurred in the two processes of "suspension, depending between the parties, till the question as "to these expenses should be determined, either by the Court, "or under a reference to Mr Guthrie Wright, or any other arbi- "ter to be mutually agreed upon. — That this offer had been "made in a letter dated the 17th September 1839, addressed by "the suspender to Mr Hunter, the agent for the appellant, and "under form of protest.—That, without acknowledging any lia- "bility for the sums charged for, the suspender now judicially "repeats the offer formerly made by him in his letter and pro- "test."

"That, in these circumstances, the Lord Ordinary would per- "ceive that the only point necessary to be determined in this

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" process, relates to the question of expenses; and the Lord " Ordinary was accordingly moved to make avizandum, with the " view of closing the record, and afterwards appoint the parties " to debate upon that question."

The appellant answered this minute by referring to the correspondence between the parties, shewing that the difference between them was in regard to the liability for the expenses, which had been incurred, and concluded thus: — " The charger " is still willing to refer to the auditor of Court to tax his agent's " whole accounts, and to determine what sum is payable under " the stipulation in the bond as to liquidate penalty, over and " besides principal and interest; and on receiving payment of " the principal, interest and liquidate penalty, as ascertained, he " is ready to discharge or convey the bond and disposition in " security, and infeftment in question. In short, he is ready to " discharge or convey all claim of every kind under the bond in " question, including all claims for expenses at his instance, in " and regarding the several processes, as these shall be taxed and " ascertained by the award of the auditor, as referee. But he " declines, for the reasons appearing in the correspondence, and " others unnecessary to be stated, to make any claim for ex- " penses at the suspender's instance the subject of reference."

On the 21st December, 1839, Lord Moncrieff (Ordinary) pronounced the following interlocutor, and added the subjoined note: — " The Lord Ordinary, having considered the closed " record in these conjoined processes of suspension, and hav- " ing heard parties' procurators fully thereon, and made " avizandum; finds that there was no legal warrant in the " heritable bond and disposition on which the letters of horn- " ing were issued for charging the suspender as on personal " diligence, for payment of the debt in question, as due by " him personally and individually: Finds, *separatim*, that " after the first bill of suspension had been passed, it was

" not competent to give a second charge on the same bond and " letters of horning, which were already under suspension by the " first depending process: Therefore, and to the effect above " expressed, sustains the reasons of suspension in both processes, " suspends the letters, and decerns; but without prejudice to all " other questions between the parties: Finds expenses due, and " allows an account to be given in, and remits the same, when " lodged, to the auditor to be taxed; but reserves for future " consideration, after the account shall be audited, how far there " may be ground for some modification thereof.

" *Note.* — The minute and answers reduced this cause to a question " of expenses. The charger was offered full payment of the principal " and interest of his debt, and of all expenses incurred by him, to be " ascertained according to a reference proposed. The charger " agreed to this, except that he would not refer the question as to " the suspender's claim of expenses in the processes of suspension. " He wished to have it assumed that he only could have any claim of " expenses. In consequence, it became necessary to discuss the " merits of these suspensions, after all the subject-matter of them " was at an end.

" Now that they have been fully heard, the Lord Ordinary is of " opinion that the charges cannot be sustained. Looking to the first " charge, it is a charge on letters of horning taken on an heritable " bond granted by the defender and certain other gentlemen, ex- " pressly as the trustees of the deceased Andrew Bell, and the " warrandice clause bears in direct words, that they bind themselves, " 'but *qua* trustees only.' On a bond so conceived, the charger " takes letters of horning, of course according to the terms of the " warrant for registration, and charges the suspender, one of the " trustees, with the avowed purpose of personal diligence against " him, as being personally and individually liable for the whole " amount of L.7000, expressed in the bond, with interest. The Lord " Ordinary thinks this incompetent. The charger justifies it by " detailed statements of proceedings, by which he thinks Mr Camp-

" bell rendered himself personally liable for the debt. This may be " very possible, though the Lord Ordinary thinks that the charger " was far from succeeding in shewing it in the debate. But it is " nothing to the point. The charger might have had a very good " ground of action for his debt and all damages against Mr Campbell. " This has nothing to do with the question as to the competency of " these charges of horning against the individual respondent.

" The bond is a common heritable bond granted by certain trustees " on the estate of Andrew Bell, of whom Mr Campbell was one. There " was nothing in it but the common obligation by the granters, as " trustees, followed by the conveyance of the heritable subjects in " security. If, on such a bond, any one trustee may be charged and " laid under caption, which was stated to be the fact here, for the " whole sum in the bond, the system of trusts, of such vast impor- " tance to the country, would speedily come to an end. It is beyond " all doubt, that there is no such personal obligation imposed by the " bond, on which any letters of horning could issue, sufficient to warrant " such a charge. The charger seems to be aware of this, and tries " to make out a personal responsibility in Mr Campbell individually, " and in the other trustees, on their acts and deeds, extraneous to " the bond. He may be right or wrong in this. He may have had " grounds for an action against them to make good his debt, if he " had failed in making it good by his bond, and for any damages he " thought he could claim. But this is not the point. Could he com- " petently charge Mr Campbell personally, and take personal caption " against him, for this as a personal debt of his? The proposition " appears to the Lord Ordinary to be absolutely untenable. The " charger had no warrant for letters of horning but the bond itself, " in which Mr Campbell is not personally bound at all. Although, " therefore, his grounds of claim against Mr Campbell personally, to " make good the debt — to guarantee the lands to be free of encum- " brances — to see the prior debt paid, &c. &c., were as clear as he " represents it, though of a very doubtful character, it would afford " no aid to his plea, for supporting the charge of horning. Such " claims require constitution by action. They require proof of the " facts averred, judgment on their relevancy, decree on the whole

" matter. Till there is such a decree, there can be no warrant for " any charge of horning which is to be supported on such grounds. " The bond and the decree of registration on it, have no such thing " in them. They rest on the simple obligation of the trustees, *qua* " such only. They make no personal liability in a single trustee. " And most especially, it is impossible to maintain, that when such " trustees grant an heritable bond as trustees only, the obligation " expressed in it imports a personal undertaking by each trustee, on " which the creditor may, on any loose and unproved allegations of " personal acts, be at once charged with horning for the whole debt, " however large, and put in prison till he pays it.

" Being thus of opinion, that the charge of horning was *funditus* " incompetent, the Lord Ordinary does not feel himself to be under " the necessity of considering particularly the charger's statements, " directed to the object of proving that the suspender had made him- " self personally liable for the debt. It might have been so found " in a proper action; though the Lord Ordinary doubts the soundness " of the whole views on which it is maintained. The charger does " not observe the importance of the fact, that his own accredited " agent was the chief actor in the whole affair, and far more deeply " engaged in it than he even alleges Mr Campbell to have been. " That he may have deceived the charger, his employer, is a possible " supposition. But all that took place, confessedly without Mr " Campbell's concurrence, had, at the least, Mr Bennett's sanction, " if it did not in fact entirely originate with him. The L.3000 was " put in his hands, or at his command, as the charger's agent. If he " let it be otherwise disposed of than it ought to have been, it is " rather hard that the charger, who had put his confidence in him to " negotiate the loan, should cast on Mr Campbell, who refused to " sanction Bennett's proceedings, the blame of what he did or " approved of. And besides this, the whole money was repaid to Mr " Bennett, and afterwards re-lent, without any authority by the " trustees.

" But these views are of no materiality to the point. The parties " are not in an action for making Mr Campbell liable for special " acts or undertakings. The Court have nothing to deal with but

" the charges and the suspensions; and these must and can only
" depend on the bond.

" This state of the case entirely excludes any application of the
" case of Thomson referred to, 24th June, 1829. No one can attach
" more importance to the authority of that case than the Lord Ordi-
" nary does. But, besides that it is essentially different in the special
" facts and grounds of judgment, from any state of the case which
" can be here assumed, its application is at once excluded by the
" fact, that the question was tried in an ordinary action of constitu-
" tion, and not in a suspension of a charge of horning on the bill.
" It would have been a far more plausible proceeding in that case.
" But it was not attempted. The process was an action, which ad-
" mitted of proof of all manner of grounds of personal liability. That
" has no resemblance to the present question, in the objection of
" total incompetency.

" The charger says, that in a certain correspondence, the suspen-
" der had abandoned the first suspension. The Lord Ordinary has
" read the whole correspondence, and he is of opinion, that there is
" nothing in it which can have the effect of rendering it incompetent
" for Mr Campbell to proceed with the first suspension, under the
" circumstances which occurred in April 1839. He sees, indeed, that
" the whole matter had been on the eve of a complete settlement,
" and probably would have been settled long before, but for certain
" very trifling difficulties chiefly raised by the charger. It appears,
" however, to have been fully known to the charger and his agent,
" that the arrangement was of this nature, that Mr Campbell should
" advance three-fourths of the sum required, and that Mr Spence
" should advance the other fourth. This appears distinctly from the
" terms of the deed of assignation, which had been actually signed by
" the charger, and which is in favour of Mr Spence to the extent of
" his interest; and it is farther proved by Mr Hunter's letter of the
" 18th April 1839. Although, therefore, it is true, that, in the ex-
" pectation of the settlement taking place, Mr Campbell had declared
" his intention not to proceed with the suspension, it surely will not
" follow, that, when upon the bankruptcy of Spence the charger re-
" fused to settle it, unless Mr Campbell should take the whole debt

" upon himself personally, and forthwith executed a second incom-
" petent charge of horning, he should be obliged to submit to the
" first charge, while he was advised that his suspension was perfectly
" well founded. But after all, the discussion of this case has only
" been rendered necessary by the charger's having declined the
" apparently reasonable offer made by the suspender in the month of
" August.

" If the first charge was incompetent, the second must have been
" so. But separately, the second charge was, in the Lord Ordinary's
" opinion, manifestly incompetent, for the reasons briefly but clearly
" stated in the note of Lord Jeffrey, in passing the bill without
" caution. The first suspension did not proceed merely on the
" groundlessness or incompetency of the particular charge. It im-
" peached the bond as a ground of any charge against the suspender
" personally, and the horning as incompetent to sustain such a charge.
" That first charge included a demand of the whole principal debt.
" The second related to another year's interest. But the very basis
" of the diligence was under suspension by the first process; and,
" consequently, there could be no other similar process in virtue of
" it, while it so stood. It should have been altogether abandoned
" when the bill was passed.

" In this state of the cause, the Lord Ordinary can do nothing but
" decide it on its merits. He regrets that it should have been
" forced to this point. But there is no help for it, since the charger,
" exercising his undoubted right, insisted on its being so treated.
" But still there is no interest at all involved but the question of
" expenses. And the Lord Ordinary earnestly trusts, that, what-
" ever the charger may be advised to do in regard to that question,
" he will now accede to the offer of payment of the principal and
" interest of the debt, and consignation of whatever may be necessary
" to cover all claims of expenses in any result; and, without more
" hesitation, discharge the encumbrance to the purchaser; or other-
" wise, that he will consent to an arrangement with the purchaser for
" whatever consignation may be necessary."

The appellant reclaimed to the Inner House, (the Second

Division,) and on the 21st February, 1840, his reclaiming note was refused by an interlocutor, in these terms: — "The Lords "having considered the reclaiming note for Colonel Gordon, "with the proceedings, and heard counsel thereon, vary the in- "terlocutor complained of, in so far as it finds the second charge "incompetent, in respect of the previous suspension, but, *quoad* "*ultra*, adhere to that interlocutor, and refuse the desire of the "note: Find the suspender entitled to additional expenses, and "remit to the Lord Ordinary to proceed accordingly."

The opinions delivered by the Judges at pronouncing this interlocutor were as follow: —

Lord Justice-Clerk. — "The opinion I have formed in this "case is, that, looking to the principal finding of the Lord "Ordinary, as compared with the argument of the parties, I am "not prepared to alter that finding; but as at present advised, "I cannot concur with his Lordship that it was incompetent to "give a new charge for the accruing interest. But this is merely "a subsidiary point; the other finding is the main question; and "as to it I say, that if it was intended to proceed against these "individuals merely as trustees, and not, as the Lord Ordinary "says, 'against them personally and individually,' there should "have been no disguise about the matter, and there would have "been an end of this multifarious litigation; no doubt this was "the view now professed, and so it was stated in the answer to "the first bill of suspension, that it was *qua* trustees only that it "was intended to proceed against them; but after the bill was "passed the ground should have been clearly taken. For what- "ever correspondence may have passed, and though Mr Camp- "bell may have so conducted himself, or rather as it would be, "misconducted himself, as to become personally liable for the "amount of this loan, that may very well be found in an action, "but I can arrive at no such conclusion as that it can be done

" under a charge on this bond. The words of the Lord Ordi-
" nary are extremely guarded in the leading proposition of this
" interlocutor, and I have no doubt that it is a correct finding in
" point of law. Now that the money has been paid, the only
" question is as to expenses; but to get at that we are asked to
" find that this interlocutor is contrary to law. But even sup-
" posing, which I give no opinion upon, that there was a clear
" ground for making Mr Campbell personally liable for the
" money, that could not be got under this charge, and as this
" litigation has been encouraged by the other party not speaking
" out, he must just pay the penalty."

Lord Meadowbank. — " I entirely concur in the result at which
" your Lordship has arrived as to the first finding. I have,
" however, a little doubt as to the point on which your Lord-
" ship has differed from the Lord Ordinary. The first charge
" was for payment of the bond, it might be right or wrong, but
" the charge was suspended. It, therefore, appeared to me to
" be *res judicata* between these parties, and to stop any charge
" for future interest. It is different from a running charge for
" minister's stipend that only accrues from year to year, but here
" the bond, which was the very ground of the charge, had been
" previously suspended. As to the other point, your Lordship
" has said that this party had not spoken plainly enough as to the
" object of the charge; but I rather think that he shewed plainly
" enough that his object was to lay hold of these gentlemen
" personally."

Lord Medwyn. — " I cannot entirely concur with your Lord-
" ships. When a bond has been granted by trustees, and horning
" raised on the bond, and the parties charged as trustees, they
" may suspend on the ground that they have no trust-funds;
" and the very first statement in a suspension in such a case
" should be to that effect. The charger is not bound to call on
" them to make any statement as to the trust-funds; it is their

" clear duty to put it forward themselves. But I cannot take " the averment made by Mr Campbell in the bill, that he had " no funds in his hands as sufficient for this purpose ; for although " he individually was not the factor for the trust, and had no " funds in his own hands, yet being a trustee, the funds in the " factor's hands were funds in Mr Campbell's hands, and he is " responsible for them. Then I can discover no statement by " him in the record that there are no trust-funds. His objec- " tion to the charge is on the ground of its imposing on him " a personal liability, and that Colonel Gordon may proceed " against the trust-funds. But when a charge is given to trustees " for payment of trust money, especially for repayment of money " borrowed by themselves for the trust, the only defence against " it is, that there are no trust-funds, and if this is not shewn, " then it is to be presumed that there are funds, and they must " pay. I perfectly concur with the Lord Ordinary, that if Mr " Campbell, or any other trustee, had, by any separate proceed- " ing, made himself personally liable for a trust-debt, and the " creditor wished to go against him personally, rather than " against the trust-estate, the claim must be constituted by a " separate action. But there is no attempt to make such a claim " here till the parties are otherwise in Court. Mr Campbell is " charged as trustee: he does not plead that he has no trust- " funds, but, on the contrary, makes an arrangement for paying " up the debt. I cannot, therefore, suppose how it can be held " that a party acting as the suspender has done, is entitled to " any part of the expenses of this litigation from the creditor.

" As to the other point, I concur with your Lordship that the " second charge was competent; I do not mean to say that the " party could go on, and that it was not to abide the fate of the " first charge. Here a suspension was presented, and the bill " passed, which was right. But still it was not incompetent to " give the charge and denounce, so as thereby to secure the

" benefit of accumulation of interest. The bond was not sus-
" pended *in toto* by the previous suspension."

The expenses of the respondent were subsequently modified and decerned for by the Lord Ordinary. The appellant reclaimed against his Lordship's interlocutor, but it was adhered to by the Court.

The appeal was taken against the interlocutors of Lord Moncrieff and the Court.

Mr Pemberton and Mr Jas. Anderson for the appellant. — The question in this case arises upon an heritable bond, and in the view which we take of the case, it will not be necessary to trouble the House except in regard to the degree of liability incurred by the parties to the bond *ex facie* of that deed. Other questions were agitated in the Court below, which are noticed in the interlocutor of the Lord Ordinary, and the opinions of the Judges, but the question to which we intend to confine ourselves, will, we apprehend, sufficiently dispose of the case.

[*Mr S. S. Bell for the respondent.* — Mr Pemberton will excuse me interrupting him to put the House in possession of the fact, that the principal debt and interest out of which this appeal has arisen, have both been paid, and that the appellant, whatever may be the judgment of your Lordships, cannot have any relief under this appeal, except as regards the matter of costs.

Lord Brougham. — Do you mean to contend, Mr Pemberton, that the costs are not entirely in the discretion of the Court, even supposing it to have miscarried on the merits?]

Certainly not, but your Lordships will observe, that the question raised by the appeal, involves the right of the appellant to the use of the particular execution. That, as your Lordships will perceive, involves a very important question; and behind it remains the question of the right of the respondent to damages,

if that execution has been improperly used, and as to this, he has already threatened the appellant with an action.

In the outset of the bond, the parties acknowledge receipt of the L.7000, without any qualification or reservation, and bind themselves to repay it. Accordingly, they consent in ordinary form, to registration of the deed, that execution may pass upon it. No doubt the words "as trustees" are used, but this was to describe the character of the parties — not to limit their liability. The only purpose of the clause of registration is to authorize diligence; the registration is equivalent to a decree with the consent of the party. If, then, execution be competent at all, it is difficult to discover how these words "as trustees" can make any difference as to the execution to which the trustees are liable. The writs may *ex figura verborum*, be directed against them as trustees, but it can only be against them in their proper individual capacities that they can operate, and whether a man be imprisoned as a trustee, or in his own capacity as an individual, it cannot matter to him. Here the writs were directed against the suspender as a trustee, and no objection was, or could be raised to them on that ground — they were in strict conformity with their warrant. Yet the interlocutor of the Lord Ordinary, adhered to by the Court, finds that there was no warrant in the bond for the issuing of the letters of horning. The respondent himself did not object to the charge of horning. His objection was, to farther execution founded upon the charge of horning, but if the parties had trust-funds in their pockets, how were these funds to be made available without personal diligence against the trustees to compel them to pay over? Unless this could competently be done, of what possible use could the personal obligation in the bond, and the clause for registration be?

[*Lord Brougham.* — The object may be to the end and intent to enforce payment out of the trust-fund.]

Just so, and the appellant was entitled to enforce the payment

in the mode pointed out by the bond, by diligence raised upon it, and he could not do it in any other manner.

[*Lord Campbell.* — If there were alleged not to be any trust-funds, might there not be an action of constitution ?]

Whether the appellant might have that, or any other mode of relief, we are not aware, but it would not be the remedy given by the bond. The parties had consented to execution being obtained upon the bond, without the necessity of action.

[*Lord Campbell.* — Suppose all the trustees who executed the bond had died; it does not bind the heirs and representatives of those who execute it ?

Lord Brougham. — I suppose the other party admits that this bond would bind the successors of these trustees, " such other " person or persons as might be assumed by them."

Mr Bell. — To the effect of binding the trust-estate in their hands.

Lord Campbell. — That is to say that there should be a due administration ?

Mr Bell. — Exactly.]

If any liability at all be admitted, whether the trustees are personally liable must depend upon the circumstances when you come to try against what the execution is issued. Unless the respondent can make out that there was no personal obligation of any kind, he must admit the liability of the trustees to personal execution, leaving it to them to discharge themselves of that liability by shewing that there were no trust-funds. That such a personal obligation was given, and intended for some effect, is shewn by those clauses of the bond which apply to the security given over the real estate, and to the power of sale for the purpose of making that security effectual.

But the notion of a distinction between individual liability to execution, and liability to execution *qua* trustees, is without foundation in the law either of England or Scotland; in the

Courts of England an attempt has frequently been made to raise such a distinction, but has always failed. Trustees are not under necessity to enter into obligations of this nature, and if they nevertheless do it, they must stand to the consequences. In Burrell *v.* Jones, 3 *Bar.* and *Ald.* 47, which was an action upon an undertaking in these terms, — "We, as solicitors to the "assignees, undertake to pay," the parties were held to be personlly liable, Justice Best observing, "the term, as solicitors, is "merely descriptive of the character they fill, and which has "induced them to undertake." In Appleton *v.* Binks, 5 *East*, 148, the party covenanted "for himself, his heirs, executors, &c. "on the part and behalf of the said Lord Viscount Rokeby;" and though he argued that he covenanted as agent for ord Rokeby only, yet the Court held that there was nothing against law if a party would bind himself for his principal. In Ball *v.* Storie, 1 *Si.* and *Stu.* 210, the plaintiff was relieved against a personal obligation for payment of money, solely upon the ground, that, by the defendant's own admission, it was through entire mistake that the obligation had been framed so as to impose any liability upon the party, the true intention having been, that he should execute the deed as an agent merely, and in such terms as to bind his principal only.

[*Lord Campbell.* — We have no such instrument as this bond in English conveyancing.]

But the principle for which we are contending has been also recognized in Scotland in the case of Thomson *v.* M'Lachlan, 7 *S.* 787, where parties who had granted bills as trustees of the late Colin M'Lachlan were found to be personally liable for their payment. So also in Thomas *v.* Walker's Trustees, 11 *S.* and *D.* 162, trustees who had sold a house through the medium of a factor, by whom the price had been received and misapplied, were found personally liable either to grant a disposition, or return the price. And again, in Gibson *v.* Pearson, 11 *S.* and *D.* 656, a

trustee was found personally liable for the expenses of a litigation carried on by him *qua* trustee.

The Solicitor-General and Mr Bell appeared for the respondent, but were not called upon.

LORD BROUGHAM. — I think we need not trouble you, their Lordships do not see any ground for altering the interlocutors complained of.

My Lords, The principal question here is with respect to the nature of the liability incurred under a bond given by the trustees of Andrew Bell; and I think, upon a careful view of the whole instrument taken together, and particularly the early part of it, the warrant of it must be taken to be confined to them in their character of trustees, and only to impose upon them a liability to the extent to which they were concerned in the trust fund.

Lord Cottenham. — I quite agree with the opinion which has been already expressed upon this case. The appellant having issued this process against the respondent, the respondent applies to him to know whether he intends to use it against him personally; the appellant's agent replies, and writes a letter, dated the 10th of January, in which he uses these expressions: — "You surely don't seriously tell me, that whatever be the state "of your accounts with Bell's trust, you are not bound to imple- "ment your obligation to Colonel Gordon, to repay to him a "sum which you acknowledge to have borrowed and received, "and bind and oblige yourself to repay; and the idea of holding "out a threat to deter him from following out the diligence to "which you consent, for enforcing implement of your obligation "in case of failure, is a very extraordinary one." There is a distinct statement. First, there is diligence issued, and upon application to know what use was intended to be made of it,

they at once say, We mean to make you personally pay out of your own funds, the money borrowed from Colonel Gordon. If the party had made use only of a threat, is that any ground for refusing a bill of suspension? The party sought to be charged was quite right in applying to the Court for a suspension from an improper use of the diligence, and accordingly, relief by a bill of suspension was applied for and obtained. Being of opinion that the bond did not warrant the party to proceed personally against the trustee, to compel him to pay out of his own funds that which is a charge upon the trust fund only, it appears to me clearly, that the party was endeavouring to make a use of the process beyond that intended, and that the party was quite regular in applying to the Court by bill of suspension. The Court were of opinion, and I think they were right in so holding, that an improper use was intended to be made of the diligence; and the mere question is, Whether the party is to pay the expenses of a proceeding to which he put his adversary, and which was rendered necessary, in order to prevent him making an improper use of the process of the Court. I think there is no ground for the appeal, and I think the Court was right in directing the bill of suspension to issue, and ordering the expenses to be paid by the appellant.

Lord Campbell. — I am of the same opinion. Unless the suspender was absolutely and personally liable to pay the L.7000, and interest, he was entitled to suspension. It is admitted he might lie by till the proper time for making the application, or that he had a right to come *quia timet.* Then is he absolutely liable? I am of opinion that the cases quoted do not apply where there is a limited liability. They are cases where the parties had contracted with the agent, the principal being liable. It is likewise different from the cases of bills and promissory notes. The truth is, that this instrument is quite unlike what we have in England; it is clear there was only a limited

liability, and not an absolute liability, *in solido*, for the whole of the advance. He takes care to state that he contracts in his character of trustee, in words which I need not repeat, treating the trustees as a body, like a corporation, avoiding personal liability; and therefore I think that he was not liable, and was entitled to the suspension. I am therefore clearly of opinion that the interlocutors ought not to be disturbed, and I move your Lordships that they be affirmed.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutors, so far as therein complained of, be affirmed with costs.

BRUNDRETT, RANDALL, SIMMONS, & BROWN — RICHARDSON & CONNELL, Agents.