March 10. 1830.

Ordinary, Eldin, found, that the 'said books ought not to be 'received as evidence in the accounting, and remitted to the ac-'countant to amend his report accordingly;' and the Court adhered, with expenses.*

Jane Smith appealed.

Appellant.—No suspicion whatever attaches to the books in question; and there is every probability that their contents were quite well known to Maxwell. The company entries relative to payments made to him by Smith, are corroborated by various circumstances, and confirmed by the fact, that the representatives of Maxwell for years remained contented with the report of an accountant, framed on the principle that these books were legal and sufficient evidence. To strike out these payments, would lead to the untenable conclusion that Maxwell had not drawn money out of the copartnery at all, as there are no traces of any other payments to him.

The respondent's Counsel was stopped.

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

Respondent's Authority.—Phillip's Law of Evidence, vol. i. p. 266.

RICHARDSON and CONNELL—D. CALDWELL,—Solicitors.

No. 10.

JOHN KIRKPATRICK, Esq. Appellant.—*Spankie—Brown.*

ISOBEL INNES AND JOHN GAVIN, Respondents.—*Lushington.*

Trust—Title to Pursue.—A person having conveyed a right in a depending action to trustees and their assignees; and the trustees having died without assigning; and the next of kin (who was interested in the subject of the trust) having confirmed as executor to the truster; and a creditor of the next of kin having adjudged the right;—Held, (affirming the judgment of the Court of Session), that the creditor had a good title to pursue the action.

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* 5. Shaw and Dunlop, No. 21. p. 32.

March 17. 1830.

2d Division.
Lord Cringletie.

In 1789 Miss Margaret Sime raised an action against John Kirkpatrick, residuary disponee of her brother, who was the disponee and representative of her father, for payment of the amount of her legitim. Pending the proceedings she executed, in 1798 and 1803, two trust-deeds, by which she conveyed to James Clephane and others nominatim, 'or to the acceptors or survivors, 'or acceptor or survivor of them, and to the assignees of them or 'him, her whole estate and effects, real and personal, and all and 'singular debts and sums of money, with the grounds, vouchers, 'and instructions thereof, which have been or shall hereafter be 'found and adjudged to pertain and belong to me as legitim, or on 'any other account, or for any cause or consideration, by virtue and 'in consequence of an action and process now pending at my in-'stance,' &c. in trust, inter alia, to pay over the free proceeds of her estate and effects, personal and real, to the persons, and in the shares following; viz. 'two-third parts of the free residue and 'proceeds to and in favour of the said James Clephane and Isobel '(Innes) his wife, in conjunct fee and liferent, and to their child or 'children in fee equally among them, or subject to such limitations 'and distribution among their children, as they or the survivor of 'them should appoint by any writing under his or her hand; 'whom failing, to their nearest lawful heirs or assignees whom-'soever; and the other one-third part of the said free residue or 'remainder to Charles Hay, shipmaster in Leith, and to the child 'or children of his body, either equally among them, or subject 'to such conditions and distribution as he should appoint; whom 'failing, to his own nearest lawful heirs or assignees.'

Miss Sime died in 1815, at which time James Clephane was the sole surviving and accepting trustee. In that capacity he entered on the management of the trust, in which he continued till 1824, when he died, without having assigned the trust to any person, and while the action at Miss Sime's instance against Kirkpatrick was still pending.* Isobel Innes, Clephane's wife, being nearest of

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March 15. 1830.—The Lord Chancellor informed the House, that his Majesty had appointed Lord Tenterden to be Speaker in the absence of the Lord Chancellor, and Lord Wynford to be Speaker in the absence of the Lord Chancellor and the Lord Tenterden.

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* Several very difficult and involved questions arose out of this action, and were carried to the House of Lords on appeal.—Vide Sime *v.* Balfour and others, March 1. 1804, (App. to Morrison's Dictionary, N. 3. Her. & Mov.); affirmed 20th July 1811, (7. F. C. 684.)

March 17. 1830. kin to Miss Sime, obtained decree-dative, and was confirmed executor. Thereafter she and her only child Isabella Clephane, (wife of Dr Minto), granted a bond for L.3000 to John Gavin, who thereon raised an action of adjudication and declarator against them, subsuming, that in consequence of Miss Sime's trust not having been given to the trustees' heirs and executors, the trust had come to an end, and that the 'property, heritable and moveable, rights of action, and others thereby conveyed, returned 'in bonis and in hæreditate jacente of the said Miss Margaret 'Sime;' and concluding, that he was entitled 'to follow forth and 'pursue the said action assigned by the said Miss Margaret Sime, 'deceased, to the said James Clephane, &c. and at the time of the 'said James Clephane's death depending against the said John 'Kirkpatrick, Esq. as sole defender, or any other action or actions 'which may be necessary to enable him, the said John Gavin, pur- 'suer, to recover the legitim due to the said Miss Margaret Sime, 'deceased, in consequence of the death of the said John Sime, 'senior, her father, to the extent of the said Mrs Isobel Innes or 'Clephane, and the said Mrs Isabella Clephane or Minto's share 'and interest therein, in order that the said John Gavin, pursuer, 'may recover payment of the said sum of L. 3000,' &c. The Court adjudged and declared in terms of these conclusions.

Isobel Innes and John Gavin having claimed to be sisted as pursuers in Miss Sime's action, Kirkpatrick objected to their title; but the Lord Ordinary repelled the objection, sisted them as pursuers, and the Court (30th May 1826) adhered, with expenses.*

Kirkpatrick appealed.

Appellant.—The titles founded on by the respondents do not confer on them a valid right to insist in the action; because, as the trust conveyed the legal right to the trustees, there remained no right in Miss Sime which could be taken up by the decree and confirmation; and consequently the adjudication in favour of Gavin, which proceeded on the footing that the right had been vested in Isobel Innes, was inept. The only mode in which a proper title could have been obtained was to have raised a process of declarator, calling all the other parties concerned, to have it found, that in consequence of the failure of the trustees, the legal

* 4. Shaw and Dunlop, 629.

title to the property should be vested in the pursuers, for the benefit of all concerned; and, in order to accomplish the purposes of the trust, adjudging and transferring the legal title accordingly. The question here is, not whether there be a remedy, but whether the proper remedy has been adopted? And it is clear that it has not.

Lord Chancellor.—If Mr Clephane had not been expressly appointed a trustee, but was a trustee only in the character of executor, and he had died, on that event would not Miss Sime's representatives have had the right? How can you distinguish between the cases?

Spankie.—If Miss Sime had appointed Clephane her executor-nominate, and Clephane had died, the right certainly would have vested in the next of kin. But here the trustee is not a mere executor: he is clothed with particular powers; and the trust-deed clearly shews, that the truster meant to withdraw this right from the next of kin.

Lord Chancellor.—What necessity is there for an application by declarator to the Court of Session, in reference to an estate which terminates with life? The testatrix carved out an estate; all the rest remained with her. Why should the Court be called on to interfere where that estate has ceased? Does not the personal representative step in?

Spankie.—That is not the view in which the case was argued in the Court below. The law of England might remove the difficulty, by holding that what was not given away remained. But by the law of Scotland there was an absolute transference of the legal estate, though for particular purposes. If the subject had been real, then it is clear that a declaratory action would have been necessary; but the respondents take an unfounded distinction between the cases of real and personal subjects: In the former, they say, that there is no reverting into the estate of the truster; and that in the latter there is. It seems plain, that although the appellant may be a debtor in relation to Sime's estate, he is not to the respondents, in the characters they bear—certainly not to the next of kin; and if not to her, not to John Gavin, who cannot be in a better situation than his author. The appellant has never denied, that there is a proper method by which to call him to account; but the question is, whether the proper method has been adopted? The right is not in bonis defunctæ; it is not in the heir or assignee of the trustee; and there is no clause in this trust-deed, declaring, that if

March 17. 1830. the trustee did not assign, the right should revert to the truster. The question must remain on legal principles; and there are none which give sanction to the respondents' argument. If the appellant admitted this title to pursue, he might be involved in endless litigation. What security would success against the present respondents procure to him? Hay, the disponee to the one-third of Miss Sime's estate, is interested in the execution of this trust; and the question should be treated as if there were twenty other individuals similarly situated. The appellant ought to be made sure that all parties interested are called, and that the decision will not affect the interest of parties not brought before the Court to state their objection to that decision.

Lord Chancellor.—If we once settle who has the legal title, the appellant is secure.

Spankie.—That is the difficulty. But we conceive the point is ruled by the case of Drummond *v.* M'Kenzie. The principle which pervades that decision, applies to the case under discussion, and supersedes argument. The passage, taking a distinction between real and personal rights, is unauthorized in principle; and is plainly merely the private and inaccurate opinion of the reporter. But there is also the case of Campbell *v.* Campbell, in which the Court plainly acknowledges the necessity of appointing an administrator, where the trustees fail; and that, where the right had been in them; for, speaking of ' denuding the trus- ' tees,' plainly implies that there was something in the trustees to be denuded of. As to any equitable title, it is quite clear, that, without the necessary course of procedure, an equitable title is nothing, independently of the legal title, where the question is, if the party can insist as a pursuer under the circumstances detailed?

Respondents.—The trust, not having been granted to the heirs of the trustees, lapsed on the death of the trustees; and the subject of the trust being personal, reverted to Miss Sime, fell in bonis defunctæ, and has been taken up by the next of kin's confirmation. The next of kin acts as trustee for all having interest in the executry, and can be called to account by the parties interested. There is no distinction between a personal trust, not taken to heirs of the trustee, and the office of executor. In both, on failure of the trustee, there is room for the appointment of another to act for the parties concerned. It is a mistake to say that Miss Sime was completely denuded of the legal title in this action. It was no doubt for a time out of her by the trust;

but whenever the trust expired it reverted, and was taken up by her next of kin, Isobel Innes. Had the right been real, there might have been, on feudal principles, a necessity for a declarator and adjudication; but here the right was personal, which Isobel Innes, who was the most materially interested in the subjects conveyed, was entitled, as the party for whose benefit the trust was principally created, to take up, and pursue all personal actions connected with or arising from the trust-deed in her own name, to the extent of her interest. All parties concerned in the trust subjects are protected, for they have a right to call on Miss Sime's personal representative duly and faithfully to administer the trust. As to the case of Campbell, the trustees there refused to act; but they were in existence; and the Court held, that if they all refused to act, an action would lie at the instance of the party interested to compel them to denude in favour of other trustees who would accept. It was necessary to denude them; for, until they were denuded, no other person could act in the trust. But the trustee here is dead, and the person who takes up the right is willing to act. It is quite plain that Gavin's title is good, if that of Isobel Innes be so.

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

Lord Wynford.—My Lords, Although it is not my intention to address your Lordships at any length, I must ask your Lordships' indulgence to let me speak from the place where I now sit.

Dr Lushington has told your Lordships that you are about to decide on a technical objection; but he admits, that if that objection be founded in law, it ought to be attended to by your Lordships. It has been one of the habits of my life, to look at technical objections with the greatest jealousy, and to get rid of them wherever I could. I was during a considerable part of the argument, particularly during the time that Mr Brown addressed your Lordships, very much afraid that this technical objection would prevail against the justice of this case; but I have satisfied myself that we can get over it, and bring this cause, which has continued as a cause for a period of time that is disgraceful to the judicature of this country, to a speedy, and, I hope, an equitable determination.

My Lords, a Miss Sime, so long ago as the year 1798, executed this deed or will, (it is perfectly immaterial by what name it is called, its construction will be the same), by which she gave all her property to three different persons, namely, James Clephane, William Gavin, and John Young, 'or to the acceptors or survivors of them, and to

March 17. 1830. 'the assignees of them.' My Lords, two of those persons did not accept; Clephane only accepted. By the terms of the instrument, two-third parts of the free residue and proceeds were given to and in favour of Clephane, now deceased, and Isobel Innes, his wife, now also deceased, 'in conjunct fee and liferent, and to their child or children 'in fee, equally among them, or subject to such limitations and 'distribution among their children, as they or the survivor of them 'should appoint, by any writing under his or her hand; whom failing, 'to their nearest lawful heirs or assignees whomsoever.' The remaining third was made over to Charles Hay, ship-builder in Leith, and his issue. After Miss Sime's death, and Clephane's death, Isobel Innes and her daughter, and her daughter's husband, granted a bond for L.3000 to Gavin, for the purpose of being the ground for an adjudication, to enable parties to make effectual their claims under the will.

Now, my Lords, it is admitted in this case, that neither Clephane, the only person who took, and who has since died, nor his wife, made any appointment to affect the present question; and it is for your Lordships to say, whether the Judges of the Court below have decided right with respect of what became of this interest upon the death of Clephane. The Judges in the Court below have decided, that upon the death of Clephane the trust that was in him reverted, as I should say, as bona omissa, to Miss Sime, and through her to her next of kin, and was to be administered by her next of kin. That is the effect of their decision.

My Lords, it is insisted, on the part of the appellant, that this decision is erroneous; because, the trust being at an end, it was necessary for the parties to apply to the equitable jurisdiction of the Court of Session to have a new trustee appointed; for if that had been done, all the parties interested would have been called in, to make their objections as to the disposition of the property. I was, for a considerable time, strongly impressed with the idea, that there was a good deal in that argument, and that that practice not having been resorted to, a decision might be given affecting the interest of parties not brought before the Court to state their objections to that decision; but I submit to your Lordships, that this argument has been satisfactorily answered by Dr Lushington. Dr Lushington says, 'I insist, that this trust expiring with the death of Clephane, the right reverted back to Miss Sime, and passed through her to Miss Sime's personal representative. I admit that Miss Sime's personal representative does not take it in consequence of any beneficial interest she has in it, but that she takes it clothed with a trust; and any party interested would have a right to call upon Miss Sime's personal representative duly and faithfully to administer that trust. Whoever therefore has an interest, has the means of having that interest protected, without calling on the Court of Session to appoint a new trustee.' This an-

swers the claim made for Mr Gavin. The bond was given to him, not by the trustee, but by those who had the beneficial interest. His right must be of the same nature as that of those persons from whom it was derived. The representative of Miss Sime was the trustee of their interests, and must also be the trustee of his: whether the interest belongs to him or them, the trustee is the only person who can support a claim to it in a Court of law. The bond, therefore, that had been given to Gavin, cannot affect the decision. The ground upon which I humbly submit to your Lordships you should affirm the judgment in this case is, that when the right went back to Miss Sime, it passed to her personal representative, and that Mrs Clephane was that personal representative, and as such liable to be called upon, by those who had a beneficial interest, to administer it according to the terms under which she took it. This view of the case appears to me to protect all the parties against any abuse of this trust; and your Lordships may with justice confirm the decision.

But, my Lords, it is for those who insist that the judgment of the Court below was wrong, upon such an objection as they have taken, to shew that the party who sues is not the proper party;—it is for them to satisfy your Lordships, by the authority of decided cases, that the Court below were bound to have decided differently from what they have done, and that your Lordships, in administering Scotch law, are bound to say, that the judgment so given was a judgment inconsistent with the established course of decision in that country. So far, my Lords, from that being the case, only one authority has been referred to that bears upon the point. The case to which I allude is that of Sir Robert Munro of Foulis, in the year 1758; for the Judges in that case took a distinction between real and personal property, and said that in real property the heir must make up his title, and that the heir can make no claim till he has done that: that is stated in distinct terms. If this be correct, a personal representative may proceed at law without making up his title. It is answered, that is but the opinion of the reporter;—but if he be a fair reporter, it is the opinion of the Court. That is a decision as far as it goes against the appellant in the present case. Then it has been insisted that this is a mere obiter dictum. It was not necessary certainly to decide the point; but a case of this kind, unless met by an authority on the other side, is entitled to great consideration, and it is met by no authority.

Mr Serjeant Spankie has referred your Lordships to a case which he considers as overturning this decision, and shewing that it was necessary, that, before the parties could interfere, a confirmation of the character of administrator should be obtained. That is the case of Archibald Campbell, minister at Weem, who had made a deed of mortification, conveying property as it would be termed in this country in mortmain, which he settled on five trustees and their succes-

March 17. 1830.

sors, &c. (His Lordship here stated the case.) Dr Lushington has clearly distinguished that case from the present. The parties did not come and say, in that case, Confirm us as trustees, and we will act in execution of the trust; but they said, that as a quorum of the trustees will not act, the intention of the creator of the trust is therefore destroyed: Give it back to the representative of the family. The Court made this answer, (and it was the only answer they could make), they said—No; suppose all had refused to act, there is not an end of the trust, but we should have denuded them in favour of other trustees. A very ingenious observation has been made upon that expression, 'we should have denuded them in favour 'of other trustees;' namely, that it must have been in them, or it could not have been considered necessary to take it out of them. But observe the distinction—the trustees in that case refusing to act, were in existence. Till they were denuded of their trust, nobody could act upon it. Here the trustee is dead, and there is a person who comes into his shoes, who does not refuse to act, but is willing to act. The Court interfered to denude, because the party would not act; but here, although the trust is gone from the original truster, the person who comes in his room is desirous to act in the character of trustee.

I submit, therefore, to your Lordships, that that authority is not opposed to the decision of the Court below. It is this—There is no doubt that Mrs Clephane and her daughter are beneficially entitled to the property; and the defendant can only say, you shall not recover in this cause, because you have not clothed yourself formally with a character in which you are entitled to sue. We think you have that character. This is consistent with justice. This defendant ought to have handed over the money long ago, and I trust he soon will be compelled to do it. There being therefore nothing to fetter your Lordships' authority, no established rule to prevent that being done which every body would be disposed to see done, and that as soon as possible,—I submit to your Lordships, that the judgment of the Court below should be affirmed, and with costs.

Appellant's Authorities.—Drummond, June 30. 1758, (16,206.); Campbell, December 11. 1752, (16,203).

Respondents' Authorities.—3. Ersk. Inst. 9. 30. 38.; 3. Stair, Inst. 8. 61. Drummond, June 30. 1758, (16,206).

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