

[19th July 1833.]

No.35. FRANCIS GRAHAM, Appellant and Respondent.—  
*Dr. Lushington—Robertson.*

JOHN ALISON, Appellant and Respondent; and JOHN BROWN and the representatives of COLIN ALISON, Respondents.—*Sir C. Wetherell—Murray.*

*Agent and Client—Adjudication—Reparation—Entail.* — A law agent was employed by a creditor to lead an adjudication against the entailed estate of his debtor; and the agent raised a summons concluding for decree of adjudication of the debtor's life-rent interest in the lands, which he obtained, and employed another agent to complete a feudal title on the decree by charter and sasine, which was done accordingly; but it was afterwards found that they were inept as a feudal title, in respect the fee and not the life-rent ought to have been adjudged: Held (affirming the judgment of the Court of Session), that the original agent was liable in repetition to the creditor of the expense of the charter and sasine, but not in damages; and that the other agent was not liable in repetition or damages.

2D DIVISION.  
Ld. Corehouse

THE respondent, John Alison, a writer to the signet, was instructed by Mr. Graham, the appellant, to recover payment of a debt due from Mr. Gray, who was heir of entail in possession of the estate of Carse, by adjudging his interest in the estate. In the summons he concluded for an adjudication “ of the life-rent of the said Charles

“ Gray, or whatever more extensive or valuable right  
 “ stands vested in his person, or in the person of any  
 “ trustee for his use or behoof, so far as not inconsistent  
 “ with the conditions of the entail of the said estate.” It  
 was executed under the direction of Colin Alison, a writer  
 in the country, and transmitted by him to John Alison,  
 to be proceeded with in common form; and decret was  
 pronounced conform to the conclusions. John Alison,  
 having soon after retired from business, committed the  
 charge of the future proceedings to the other respon-  
 dent, John Brown, who accordingly prepared the re-  
 quisite deeds for completing a feudal title on the decret  
 of adjudication,—the dispositive clause of the charter of  
 adjudication being in terms conformable to the summons  
 and decret.

Founding on this title, the appellant raised an action  
 of reduction of certain securities in favour of other par-  
 ties over the estate of Carse. He was met by an objection  
 to his title to insist, that his decret of adjudication was  
 insufficient to attach the estate, seeing that it did not  
 adjudge the fee of the lands, but merely Mr. Gray’s life-  
 rent right in them, Mr. Gray not being a life-renter, but  
 a limited fiar, and that his charter of adjudication and  
 infestment were consequently inept as a title to challenge  
 real securities. The Lord Ordinary (Newton), on 29th  
 January 1828, pronounced this interlocutor:—“ The  
 “ Lord Ordinary, having considered the summons and  
 “ preliminary defences, with the productions made by  
 “ the pursuer, and heard parties procurators thereon,  
 “ finds that the dispositive clause of the pursuer’s  
 “ charter of adjudication (which is precisely conform  
 “ to the decret of adjudication on which it proceeds),  
 “ in so far as it respects the entailed estate of Carse,

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“ does not convey the lands themselves, but ‘ usum  
 “ ‘ vitalis redditus dicti Caroli Gray et quodcumque  
 “ ‘ aliud jus vel interesse magis extensum vel pre-  
 “ ‘ tiosum vestitum stans in ejus persona vel in persona  
 “ ‘ alicujus amici fiduciarium ut fidei commissarii in  
 “ ‘ fiducia pro ejus usu et beneficio quantum non  
 “ ‘ repugnat conditionibus talliæ,’ &c.: Finds that the  
 “ conveyance of Mr. Gray’s life-rent was inept, he  
 “ being no life-renter, but fiar of the lands, though a  
 “ limited fiar; and that the addition of the indefinite,  
 “ more extensive, and valuable rights which he might  
 “ happen to be vested with, either in his own person  
 “ or in that of a trustee for his behoof, is not such as  
 “ could constitute a proper feudal estate in the pur-  
 “ suer, or to warrant his infeftment in the lands: Finds,  
 “ that the precept which authorizes in general terms,  
 “ ‘ Sasinam totarum et integrarum pefat. terrarum.  
 “ ‘ decimarum et secundam formam et tenorem antedict  
 “ ‘ cartæ nostræ,’ although a sufficient warrant for in-  
 “ feftment in the other lands and subjects directly con-  
 “ veyed, was not such in regard to the entailed estate,  
 “ as to which all that is granted is a right of life-rent  
 “ which did not exist, or some more extensive right,  
 “ the nature of which is left altogether undefined:  
 “ Therefore, sustains the objections to the pursuer’s  
 “ title, that he has no valid infeftment or feudal estate  
 “ in the tailzied lands; assoilzies the defenders; and  
 “ decerns; but finds no expenses due.”

The Court having, on the 14th November 1828, ad-  
 hered to this interlocutor, Mr. Graham brought an  
 action of damages against the respondents, as having,  
 by the inept manner in which they prepared his titles,  
 occasioned his postponement to the heritable creditors

of Mr. Gray, and involved him in ineffectual litigation upon the faith of these titles. The respondents stated various grounds of defence; and in particular that the question as to whether the right of an heir of entail was that of a life-renter or a fiar was one of difficulty, and hitherto unsettled, and if the respondents had committed an error in law they ought not to be found liable in damages. The Lord Ordinary (Corehouse) pronounced this interlocutor (11th June 1830):—"The Lord Ordinary, having considered the closed record, and heard counsel for the parties, finds the defenders liable to the pursuer in repetition of the expense of expeding the charter and sasine on the decret of adjudication mentioned in the pleadings, in so far as it had been paid to them, or to Mr. Colin Alison for behoof of them or any of them; assoilzies them from all the other conclusions of the action; finds no expenses due; and decerns."

His Lordship at the same time issued this note:—"If the law laid down in Lord Newton's interlocutor of the 29th of January 1828 had been perfectly settled previous to that interlocutor, there might perhaps have been some ground for the claim of damages raised by the pursuer. But that is not the case, as appears from the judgment of the First Division, where his Lordship's interlocutor was reviewed, and still more from the deliberations of the Court on that occasion. It seems to have been held, then, that the adjudication itself, independently of the charter and infestment which followed upon it, was a sufficient title to insist in the reduction brought by the pursuer, in which view the charter and infestment, at the worst, were only superfluous. But farther, till

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“ that time the law with regard to a feudal title of the  
 “ nature in question was by no means clear. It is  
 “ certain that a life-rent, meaning thereby a usufruct—  
 “ for example, the courtesy, terce, or a life-rent granted  
 “ in life-rent use allenary, cannot pass to the effect of  
 “ being feudalized in the person of the disponee or  
 “ adjudger. In law language, inhæret ossibus of the  
 “ life-renter. But it is equally certain, that the right  
 “ of an heir in possession under a strict entail (which,  
 “ though often termed a life-rent, is not a usufruct,)  
 “ may be adjudged to that effect; and the question is,  
 “ what is the proper mode of doing so? Previous to  
 “ the decision in Sir William Nairne’s case in 1810,  
 “ the practice generally, if not universally followed,  
 “ was to adjudge, not the lands themselves, but the  
 “ interest of the heir in the lands, exactly as the  
 “ defenders did in the present case. This appears from  
 “ the form prescribed in the Juridical Styles, and the  
 “ fact is well known to every person who practised at  
 “ that period. Lawyers seem to have been apprehensive,  
 “ that if an adjudication of the lands themselves were made real, though limited in endurance  
 “ and extent, in the same manner as the heir’s fee, it  
 “ would infer an irritancy, and consequently defeat the  
 “ whole proceedings. In Sir William Nairne’s case  
 “ the point raised was not whether the disposition  
 “ granted by the heir of entail, and followed by infestment,  
 “ was an irritancy, but whether, under the limitations introduced,  
 “ it was or was not a real right in competition with personal creditors. Since that  
 “ case, indeed, there has been an understanding that  
 “ the fee of an entailed estate may be disposed or  
 “ adjudged, and the right of the disponee or adjudger

“ feudalized without risk, the restrictions of the entail  
 “ being inserted in his investiture. But it is thought  
 “ that this has not yet been the subject of express de-  
 “ cision ; nor, until the judgment of the Court in 1828,  
 “ has it been found that the heir’s right, which is not  
 “ of the nature of the usufruct, might not be adjudged,  
 “ and a feudal title so completed, according to the old  
 “ practice, without including the lands themselves in  
 “ the adjudication. For, according to feudal principles,  
 “ there is no right connected with land, except a usu-  
 “ fruct, that may not be made real by infeftment, and  
 “ in that form conveyed to a third party. Taking into  
 “ view, therefore, the circumstances of this case, namely,  
 “ the danger of an irritancy on the one hand, and the  
 “ admitted practice on the other, it can hardly be main-  
 “ tained that Mr. John Alison was to blame in following  
 “ the course he did, in a matter in apicibus juris ; but  
 “ if he was, there was no such culpa lata, or gross pro-  
 “ fessional ignorance, as ought to subject them in  
 “ damages to the pursuer.”

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All parties reclaimed ; and the Court, on 4th Decem-  
 ber 1830, assoilzied Brown and the representatives of  
 Colin Alison, but found “ that the defender, John  
 “ Alison, is liable in repetition of the expense of the  
 “ charter and sasine, mentioned in the pleadings.” \*

Against these interlocutors Graham appealed, and  
 John Alison cross appealed.

*Appellant.*—The decree of adjudication, and charter  
 of sasine following thereon, were blundered by the re-

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\* 9 S. & D. p. 160.

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spondents. The error in the decree of adjudication is of such a description as to render the professional persons employed responsible for the consequences. An error having been committed, on account of which the appellant is entitled to demand reparation from those employed by him, there is sufficient evidence to attach that responsibility to all the respondents.

*Respondents.*—The decree of adjudication, with the charter and sasine which followed thereon, were prepared and expedite according to the usual and established forms, and, whether these forms shall be held correct or not, the respondents cannot be made liable in damages, merely for adhering to them. The claims now made by the appellant are inconsistent with the conclusions of his own summons, and there is neither legal ground, nor equitable principle, for holding Mr. John Alison responsible for any expenses connected with the charter or infestment in question.

LORD CHANCELLOR.—My Lords, the case of Graham v. Alison stood over for the purpose of further consideration. It respects the costs of certain legal proceedings referred to in the original appeal. Since the discussion, I have availed myself of the opportunity of further considering that case, and I would advise your Lordships to affirm the judgment. I had some doubt whether the Lord Ordinary was right in assoilzieing all the defenders except John Alison, for I questioned whether John Alison ought not to have been assoilzied too; and I moved your Lordships, in consequence, that the case should stand for further consideration. I have since further considered it; I have had some

correspondence with the Learned Judges upon the subject; and the grounds of my doubt having been removed, the result is, that I have now come to a conclusion, that the Court below was right in making the exception of John Alison. I do not feel it to be necessary to say more upon this case, but will move your Lordships to affirm the judgment of the Court below, with costs to the respondents, as regards the original appeal.

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The House of Lords ordered and adjudged, That the said original and cross appeals be and are hereby dismissed this House, and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed: And it is further ordered, That the appellant in the said original appeal do pay or cause to be paid to the respondents in the said appeal the sum of 193*l.* 7*s.* 10*d.* for their costs in respect of the said appeal.

JOHN A. POWELL—JOHN BUTT and WILLIAMS—  
 BROOKS, POWELL, and BRODERIP, Solicitors.