believe, that any of the heritors have been really prejudiced, I do not feel it possible to support the judgment below.

Lord Advocate.—My Lords, with regard to the form of judgment, I presume, that your Lordships will reverse the interlocutor, and remit the cause to the Court of Session, with instructions to receive the minute tendered on behalf of the appellants.

LORD CHANCELLOR.—If the interlocutor be reversed, all the rest will follow.

Lord Advocate.—Not necessarily.

LORD CHANCELLOR.—The case will be remitted to the Court of Session for consequential proceedings.

Lord Advocate.—That is enough. There is a decerniture for costs. I believe the ordinary form now is, that the costs, if paid, should be repaid to the appellants.

LORD CHANCELLOR.—Just so.

Interlocutors reversed, and cause remitted, with directions.

Appellants' Agents, R. B. Maconochie, W.S.; Loch and Maclaurin, Westminster.—*Respondents' Agents*, Jollie, Strong, and Henry, W.S.; W. and H. P. Sharp, London.

APRIL 26, 1866.

THOMAS ALEXANDER LORD LOVAT and Others, *Appellants*, *v.* ARCHIBALD THOMAS FREDERICK FRASER, Esq. of Abertarf, *Respondent; et è contra.*

Entail—Estate subject to just debts—Costs of defending estate—Heir and Executor—*A, by deed of entail, disponed lands to F and certain heirs of entail "under burden of all my just and lawful debts, due and addebted at my death, which said debts shall noways diminish my executry or other funds, property, or effects." Various parties after A's death made demands and raised actions against F, as executor, which were decided by the Court to be unfounded, and F, in resisting such demands, incurred expenses amounting to £2791.*

HELD (by LORDS CRANWORTH L.C. and CHELMSFORD—*dissentiente* LORD KINGSDOWN, partly reversing judgment), *That F was not entitled to recover such expenses against the estate which had been burdened with A's debts, because such expenses were costs incurred in the administration of the personal estate, and were not debts due by A at his death.*

HELD FURTHER, *That it made no difference whether those expenses were properly incurred or not, nor whether for the benefit of the estate or not.*

Appeal—Competency—Interlocutor of Lord Ordinary not reclaimed—*Where an interlocutor of the Lord Ordinary is acquiesced in or not reclaimed against, to the Inner House, no appeal lies to the House of Lords against it.*[1]

The pursuer succeeded to the estate of Abertarff in Inverness-shire, under deeds of entail executed by his grandfather the Hon. Archibald Fraser of Lovat, who was fee simple proprietor of these estates. The pursuer was also his grandfather's residuary legatee and general disponee.

After the Hon. Archibald Fraser's death, certain claims were made by his creditors against the present pursuer as representing him. Some of these claims were admitted, and others were resisted, by the pursuer, who, after litigation, succeeded in considerably reducing them. The sums for which he was found liable, and those which he did not resist, amounted in all to £6186 0*s.* 7½*d.*, which he paid, taking assignations from the creditors.

The present action was raised by Mr. Fraser of Abertarff, as executor of his grandfather Archibald Fraser, and directed against himself as heir of entail in possession of the entailed estate of Abertarff, and against Lord Lovat and others as the heirs substitute of entail, for the purpose of having it declared, that the sums thus paid by the pursuer were the proper debts of the Hon. Archibald Fraser; and that, under the provisions of his settlement, they, and the expenses incurred in the litigations in reference to them, formed burdens on the entailed estate of Abertarff. An interlocutor was pronounced by Lord Handyside on 20th November 1855, finding, that the debts in question formed burdens on the entailed estate, but that the entailed estate was not liable in payment of the expenses of the litigations in which these debts had been constituted. This interlocutor, in so far as it dealt with the debts, was adhered to in the Inner

[1] See previous report 16 D. 645; 21 D. 1154; 31 Sc. Jur. 656. S. C. L. R. 1 Sc. Ap. 24; 4 Macph. H. L. 32: 38 Sc. Jur. 372.

House; but in so far as it dealt with the expenses of the litigations it was recalled, and the cause was remitted to the Lord Ordinary to allow parties to add to and conclude their proof.

The only question remaining was, Whether the expenses of the litigations were also burdens on the entailed estate of Abertarff, or whether they fell to be paid out of the executry of the Hon. Archibald Fraser, to which the pursuer had succeeded as his residuary legatee?

The cause being remitted back to the Lord Ordinary, the parties lodged prints of documents containing excerpts from the process in question; and, by a minute, they renounced probation.

The entail of Abertarff conveyed the lands "under burden of all my just and lawful debts due and addebted, or which may be due and addebted by me at my death, which said debts shall noways diminish my executry or other funds, property, or effects, unless such executry shall be given and conveyed by me to the said Thomas Alexander Fraser of Strichen [the defender Lord Lovat] and the other substitutes above mentioned."

The processes which were litigated by the pursuer were five in number; the total sums claimed in these processes amounted to £7888 8*s.* 2*d.* The sums which were ultimately found due amounted only to £4986 9*s.* 2*d.*; and in this way the pursuer, by these litigations, reduced the claims on the estate by £2901 19*s.* In four of the litigations, however, he was found liable in expenses, and in the remaining litigation neither party was found entitled to expenses. The whole sum which the pursuer paid as expenses in these litigations, and which he now sought to make a burden on the entailed estates, was £2782 0*s.* 10½*d.*, only £119 18*s.* 1½*d.* less than the reduction which he had succeeded by these litigations in effecting on the claims themselves.

Three of these processes were actions for melioration by tenants on the entailed estates of Lovat, which estates, however, did not descend to the pursuer. The actions were directed against him as general representative of Archibald Fraser; and in all of them he unsuccessfully maintained the plea, that not he, but the then heir of entail in possession of the estates of Lovat, was the party liable for meliorations.

In the first of these cases the claim was for £1236 4*s.* 8*d.* sterling, and after issues had been prepared a compromise was effected, by which the present pursuer agreed to pay, and the pursuer of that action to accept in full of his claims, £750, the present pursuer agreeing to pay the expenses. The total expenses in that process paid by the present pursuer amounted to £989 12*s.* 2*d.*

The second action for meliorations, in which the sum claimed was £591 9*s.* 6*d.*, consisting of two separate sums of £236 10*s.* and £354 19*s.* 6*d.*, was sent to a jury on separate issues. The present pursuer was found liable only in £236 10*s.*, and in that part of the expenses of process which had been incurred in the discussion. The total expenses paid in that case by the present pursuer amounted to £507 8*s.* 5½*d.*

The third action for meliorations claimed £600, and the sum found due was only £44; but the present pursuer was again found liable in expenses, subject to modification, and in that case the total amount of expenses paid by him was £824 4*s.* 3*d.*

Another of the processes was a claim for £1260 14*s.*, as clothing furnished to the Honourable Archibald Fraser, as commandant of the Inverness-shire Militia. In that process the present pursuer was found liable in the sum of £901 9*s.* 2*d.*, and in the expenses of process of the pursuer of that action, amounting, along with his own expenses, to £129 12*s.* In the last process certain arrears of a sinking fund established under Act of Parliament, for the purpose of paying the debts on the Lovat estates, were claimed by the judicial factor appointed to administer that fund. The sum claimed in this process was £4200. The present pursuer denied liability *in toto*, but he was found liable to the extent of £3054 10*s.*, but no expenses were found due to either party. The expenses, however, incurred by the present pursuer amounted to £331 4*s.*

The Court of Session held, that the executor was entitled to relief as to those expenses where neither party was allowed costs by the Court, but not as to the costs where the Court had condemned him in costs, and that the first mentioned costs were a burden on the entailed estate.

Lord Lovat appealed against that part of the interlocutor which found, that the respondent, A. T. F. Fraser, Esq. of Abertarff, was entitled to reimbursement out of the entailed estate, of such expenses as he had properly incurred as executor in defending the estate from unfounded claims.

The appellant, Lord Lovat, in his *printed case* submitted, that there ought to be a reversal for the following reasons:—1. Because, according to the true construction of the deeds of 1808 and 1812, the respondent became institute of entail, and came precisely into the place of the appellant Lord Lovat, the original institute, both as regards the succession to the lands and estate and the payment of the entailer's debts out of the executry, in the event which happened of such executry being bequeathed to him; and these debts accordingly fall to be paid by the respondent out of the executry. 2. Because the liability of the respondent for these debts is entirely unaffected by the terms of the deed of entail of 1851, executed by him in obedience to the judgments pronounced in the previous action of declarator, which deed was not intended to effect and did not effect any change in regard to the liability of the respondent for the said debts, or the terms or import of the said deeds of 1808 and 1812 taken together as regards burdens, but

left the legal effect of these deeds as regards such burdens to stand as before. 3. Because the respondent having improperly made up fee simple titles to the said estate, and created burdens over the same while he held the estate under such titles, is not entitled to have burdens or charges thrown upon such estate until these previous burdens are discharged and the estate is disencumbered thereof. 4. Because the respondent having also during the period when he possessed the estate on the fee simple titles made up by him thereto, contracted debts which still subsist, and for which such estate may be attached and sold, he is bound, before being allowed to charge the estate with debts or burdens, to pay off and discharge all such debts contracted by him; or to give security, that such debts shall not in time to come affect the entailed estate, and that the estate shall not be attached and sold therefor. 5. Because the entailer having conveyed the estate to the heirs of entail under burden of his own debts only, and not having provided, that the expenses of litigation said to have been incurred by the respondent, amounting to £323 11s. 1*d.*, or any expenses incurred by him, should be made burdens upon the entailed estate, it is incompetent and *ultra vires* to impose these expenses as a burden on the estate. 6. Because said expenses were incurred by the respondent in a litigation directed against him as an individual and for his own behoof, and not in any degree as representing the entailed estate or the heirs of entail, because they were not incurred by him *in bonâ fide*, but improperly, and because the respondent, having entered into a voluntary arrangement whereby he undertook to pay these expenses, he is bound to abide by such arrangement, and is not entitled to relief of such expenses out of the entailed estate. 7. Because even assuming such expenses to have been incurred *in bonâ fide* and beneficially for the estate and the heirs of entail, and that the respondent is in a position to claim relief thereof, neither the estate nor the heirs of entail can be made liable therefor, and the same cannot be made a burden upon that estate.

The respondent, A. T. F. Fraser, in his *printed case* contended in answer to the original appeal —1. That by the deed of entail of Abertarff, executed in 1851 at sight of the Court, the entailed estates were liable in payment of the debts of the entailer, to the total relief of his executry, and that the entailed lands were to bear the whole burden of such debts.

As to the cross appeal he contended—1. That the Court below was wrong in disposing of the question whether the litigations were properly or improperly conducted on a mere presumption founded upon the result of these litigations, and without consideration of the nature of the claims resisted, and of the defences pleaded. 2. That the litigations in which the expenses were incurred were necessary for the examination and constitution of the debts, and were conducted *bonâ fide*, and on the whole properly by the appellant, A. T. F. Fraser. 3. That the appellant, A. T. F. Fraser, was entitled to relief of the expenses of the litigations under the clause in the entail which provides, that the debts should nowise affect or diminish the executry.

Lord Advocate (*Moncreiff*), and *Rolt* Q.C., for the appellant Lord Lovat.

The Attorney General (*Palmer*), *Sir H. Cairns* Q.C., and *M'Lennan*, for the respondent.

Cur. adv. vult.

LORD CHANCELLOR CRANWORTH.—My Lords, this was an appeal against several interlocutors of the Court of Session pronounced in a cause in which the respondent was pursuer, and the appellants were defenders.

The dispute arose out of two deeds of entail and settlement executed by Archibald Fraser of Lovat the grandfather of the respondent. The first of these deeds was executed on the 15th August 1808, and thereby the said Archibald Fraser gave and disponed his lands of Abertarff to and in favour of the appellant, Thomas Alexander Fraser, now Lord Lovat, whom failing, to various heirs substitute named in the deed; nevertheless, with and under the burden of payment of all his just debts which might be due from him at his decease, which said debts he declared "shall in nowise affect or diminish my executry, or other lands or effects, unless such executry shall be given and conveyed by me to the said Thomas Alexander Fraser and the other substitutes above mentioned;" and in the deed was reserved to the said Archibald Fraser an absolute power of revoking or altering the same at any time during his life.

By another deed bearing date the 2nd July 1812, the said settler, reciting the deed of 1808, and his power to revoke or alter the same, expressed his intention to exercise that power to the extent of appointing his grandson Archibald Thomas Frederick Fraser, the new respondent, and the heirs of his body, to succeed to the said property immediately after himself, and failure of his heirs of his body, whom failing, to the persons named in the said former deed, to succeed as heirs substitute in the order therein mentioned.

The said Archibald Fraser died in the month of December 1815, and he did not give his executry to the said Thomas Alexander Fraser, so that the debts due from him at his decease became a charge on the entailed estates.

The present respondent, the institute named in the deed of 1812, was a minor at the death of his grandfather, the settler, and his curators or trustees disputed his obligation to execute a deed of entail pursuant to the deeds to which I have referred, contending, for reasons to which I need not advert, that he was entitled to the Lands in question in fee simple. The present appellant,

Lord Lovat, and other persons interested after him under the deeds of 1808 and 1812, thereupon raised an action of declarator of entail against the respondent, insisting on their right to have a proper deed of entail executed for the purpose of carrying into effect the provisions of those deeds.

This led to a very protracted litigation, which ended in establishing the liability of the respondent to execute a deed of entail in conformity with the deeds of 1808 and 1812. And such a deed was accordingly prepared, under the sanction of the Court, bearing date the 8th of February 1851, and was executed by all necessary parties. This deed contained a declaration, that the settlement thereby made was under the burden of payment of all the just and lawful debts of the said deceased Archibald Fraser, due and indebted by him at his death. The respondent thus became seised of the lands burdened as aforesaid to him and the heirs male of his body, whom failing, to the appellant Lord Lovat and the heirs male of his body, whom failing, to the other substitutes named in the deed of 1808.

This deed having been thus executed in February 1851, the respondent, in the following month of December, raised the present action against Lord Lovat and his sons, who are the appellants in the first appeal, and against the other heirs substitute named in the deed of entail, concluding that it ought to be declared, that the several sums therein mentioned, making together the sum of £6186, were just and lawful debts of Archibald Fraser, the settler, due by him at his decease, and had been paid by the pursuer as his general disponee and representative *in mobilibus;* and further, that it ought to be declared, that the lands included in the deed of entail executed on the 8th February 1851, were held under burden of the payment of all the debts of the said Archibald Fraser due at his decease, including these debts, and of relieving the executry of the said Archibald Fraser from the payment thereof, and that the said lands might be sold therefor, and further, that it might be declared that the pursuer was entitled to be relieved out of the entailed lands of the sum of £2791 1*s.* 9*d.*, as the expenses of litigation incurred by him *bonâ fide*, and beneficially for the heirs of entail as set forth in the condescendence, and that the said lands are liable in payment thereof, and to be attached and sold therefor.

The pursuer, the now respondent, stated in his condescendence, that several of the sums, making up the said sum of £6186, had been due to the creditors of the deceased, who claimed, and raised actions against him to recover sums greatly exceeding the amount which they ultimately succeeded in establishing as due to them, and that he resisted these demands, and so litigated not only *bonâ fide*, but also beneficially for the estate ultimately liable for the debts in question; but he alleged, that the expenses of the litigation amounted to £2782, or, as stated in the summons, £2791, and which sum, therefore, he insisted, was a charge on the entailed lands in addition to the £6186.

The appellants and the other defenders contended, on grounds to which it is unnecessary now to advert, that the entailed lands, in the circumstances which had occurred, were not liable to bear the burden of the debts of the deceased, and so they disputed the right of the respondent to the relief he sought both as regarded the £6186 and the £2791.

The record having been closed, the Lord Ordinary pronounced his interlocutor of the 17th June 1853. He found, "that by the express terms of the clause in the deed of entail, dated 8th February 1851, the payment of all the just and lawful debts due by the late Archibald Fraser of Lovat at his death is declared to be a burden on the entailed lands, and in nowise to affect or diminish his executry, except only in the event of the executry being given and conveyed to the defender and the other substitutes, which contingency never emerged: Finds, that this deed of entail was prepared under the directions of, and has been approved by, the Court of Session, and, that the insertion of the aforesaid clause was objected to by the defender, but, that his objections were repelled in this Court and in the House of Lords: Finds, that there is nothing in the provisions contained in the deeds of 15th August 1808 and 2nd July 1812, which, either according to their true meaning or legal effect, are inconsistent with the sound construction of the aforesaid clause in the deed of entail of 1851: Therefore finds and declares, that the lands included in the deed of entail of 1851 are held under the burden of payment of the debts due by the deceased Honourable Archibald Fraser of Lovat, and of relieving his executry of the same; and appoints the case to be enrolled for the purpose of hearing parties as to the future mode of procedure, and in the mean time reserves all questions of expenses."

The defenders, being dissatisfied with the decision of the Lord Ordinary, lodged a reclaiming note to the First Division of the Court of Session, but that Court concurred with the Lord Ordinary, and adhered to his interlocutor.

By a further interlocutor dated the 20th of November 1855, the Lord Ordinary found and declared, that the various sums specified in the first conclusion of the summons, amounting to £6186, were just and lawful debts of the deceased, and had been paid by the respondent as general disponee and representative *in mobilibus*, but he declined to make declarator, that the entailed lands were liable to the payment of these debts until the pursuer should have produced certain discharges specified in the interlocutor; and as to the last conclusion of the summons the Lord Ordinary found, that the pursuer was not entitled to relief out of the entailed lands as to the said sum of £2791, and assoilzied the defenders from that conclusion of the summons.

The appellants reclaimed against this interlocutor to the First Division of the Court as to so much of the interlocutor as relates to the last conclusion of the summons, *i.e.* to the £2791, the sum claimed for expenses of litigation. The Lords recalled the interlocutor, but *quoad ultra* they adhered to it, and refused the reclaiming note, and they remitted to the Lord Ordinary to allow an opportunity of substantiating their respective averments as regarded the said sum of £2791.

By an interlocutor of the 8th June 1858 the Lord Ordinary found, that the pursuer was entitled to relief in respect of the sum claimed as aforesaid for expenses of litigation, with certain specified exceptions, and subject to taxation, and by another interlocutor of the 17th of the same month of June, he found, that the discharges required by the interlocutor of the 20th of November 1855 had been produced, and he therefore found and declared, that the lands included in the deed of entail of the 8th February 1851 were liable to the sum of £6186 mentioned in the summons, and might be attached and sold, in so far as might be necessary for payment thereof.

Against these two last interlocutors, the pursuer lodged a reclaiming note, and by an interlocutor of the First Division made on the 7th of July 1859, the Lords found, that the reclaiming note, so far as related to the interlocutor of the 17th June 1858, was not insisted in, and therefore they refused to recall the same; but as to the interlocutor of the 8th June 1858, they recalled the same, and found, that the pursuer was entitled to relief out of the entailed lands to a sum of £331, part of the sum of £2791, claimed for expenses of litigation, subject, however, to taxation, but was not entitled to any further part of that sum. The result of such further proceedings was, that this sum of £331 was reduced by taxation to £323.

Both parties were dissatisfied with this result. Lord Lovat, and those entitled after him to the entailed lands, disputed the liability of the lands to make good the £323. On the other hand the pursuer contended, that the Court ought to have declared the whole of the £2791 (subject if necessary to taxation) to be a charge on the entailed lands.

Cross appeals were presented by each party, and were heard at your Lordships' bar before the Easter recess. The first appeal was, that of Lord Lovat and his sons, and as presented to your Lordships' House, it complained not only of the charge of £323 for expenses, but also of the charge of £6186 for the debts. But your Lordships intimated, in the course of the argument, that as to that latter sum they could not entertain any appeal, for as the reclaiming note lodged against the Lord Ordinary's interlocutor of the 17th June 1858, which had declared the entailed lands liable to the payment of that sum, was not insisted in, the parties must be taken to have acquiesced in its propriety. The question, therefore, before this House on that appeal, was confined to the charge of the sum of £323, which, by the interlocutor of the 7th July 1857 and the subsequent taxation, had been found to be the amount of a certain portion of the expenses of litigation. The appeal by the original pursuer was directed to the object of establishing a title to all the sums incurred in the expenses of litigation, and which the Court, except as to the £323, had disallowed. The question in both appeals was substantially the same, *i.e.* as to the proper interpretation of the clause in the deed of 8th February 1851, declaring, that the entailed lands were to be held, "with and under the burden of payment of all the just and lawful debts of the said deceased Archibald Fraser due or addebted by him at his death, which said debts shall in nowise affect or diminish his executry or other funds, property, and effects."

On the part of Lord Lovat and the heirs substitute of entail, it was contended, that nothing is charged on the lands which was not a debt, which the deceased was liable to pay in his lifetime; that the costs of litigation now sought to be added to the amount of such debts not only were not debts of the deceased, but were occasioned by unjust demands set up after his death by persons claiming against his executor sums as due from him which were not due. On the part of the original pursuer, the argument was, that the charge of just and lawful debts due from the deceased at his death must be taken to include a charge of all costs fairly incurred in ascertaining what these debts are, and more especially, as in this case, the costs of resisting excessive demands unjustly made against the executry. It is now for your Lordships to decide between these conflicting arguments.

My advice to your Lordships is in favour of Lord Lovat and the parties entitled after him as heirs substitute in the entail. I do not think, that any part of the sum constituting the expenses of litigation can be treated as having been charged by the settler on the entailed lands. The question is, in strictness, whether these expenses are so charged by the deed of the 8th February 1851? But as that deed recites the previous deeds of the 15th August 1808, and the 2nd July 1812, and appears on the face of it to have been framed in order to carry into execution the purposes of these deeds, I should have been very unwilling to act on the deed of 1851 independently of the prior deeds, if there had been, which I do not think there is, any conflict between them, and I am willing to consider the subject as depending on the true effect of the deeds of 1808 and 1812, the purpose of those deeds being, as I think, effectually embodied in the deed of 1851.

The question therefore may be thus stated. When a testator charges his real estate with the payment of his debts in exoneration of his personalty, and, after his death, a creditor sues the

executor and puts him to costs in resisting so much of the demand as was unfounded, can the executor recover those costs from the real estate? He may certainly recover the amount of the debt which has been established by the creditor, and which I assume the executor to have paid. But I cannot discover any principle for fixing the real estate with the costs of litigation to which the executor has been wrongfully put by a person setting up against the testator's estate an unfounded claim of debt. If such costs have been properly incurred by the executor, he may retain them out of any fund coming to his hands as executor. But that is because they have been costs necessarily incurred in the due administration of his testator's estate, and the rule in England, and, as I conceive in Scotland also, is, that the costs of administration are paid out of the general personal estate. Lord Curriehill treats it as clear, that in Scotland an executor properly incurring costs for the benefit of third parties claiming under the testator, is entitled to be indemnified out of the executry estate itself, and not out of the estate for the benefit of which they were incurred. This is, I conceive, in exact conformity with the law of England.

There was a great deal of discussion among the Judges who decided this case in Scotland, as to how far all or any part of this sum claimed for expenses ought or ought not to be considered as properly incurred. But to all such inquiries I think that Lord Lovat and the other heirs of entail are entitled to say, that in such a question they have no concern. If improperly incurred, they must fall personally on those who incurred them. If properly incurred, they will constitute a valid claim against the executry or personal estate of the testator. But in no view of the case can they be treated as a debt due and owing by the deceased at his death. Costs incurred by an executor in resisting an excessive demand against the estate of the deceased, whereby the demand established is reduced in amount, cannot be put higher than costs incurred in resisting a demand which wholly fails. But surely if, when a claim is set up against an executor, the party claiming fails in establishing any demand whatever, it would be strange to say, that the costs of resisting such an unfounded demand was a debt due from the testator at his decease. They may be costs against which the executor is entitled to be protected, but this would be, not because they could be called a debt due from the testator, but because they formed part of the general costs of administration.

It was argued, that when there is a charge on an estate, and the amount of that charge has to be raised by sale or mortgage, the sum to be raised will include the costs of raising it. That is undoubtedly so. The persons entitled to an estate burdened with debts, take it subject to a definite charge, *i.e.* when the amount of the debts has been ascertained, but they who call themselves owners are not in fact owners till they have first satisfied the charge. They are bound to have by some means the full amount of the charge forthcoming, and it is obvious, therefore, that they must at their own costs get at the necessary amount. But this bears no resemblance to the costs incurred in ascertaining what the amount of the charge is.

I am therefore of opinion that your Lordships ought to affirm the interlocutors appealed from, up to and including that of the 20th November 1855, and also the interlocutor of the 10th December 1857, except so far as it recalls the interlocutor of the Lord Ordinary of the 20th November 1855, and as to that recall, that you should reverse the interlocutor and all the subsequent interlocutors appealed from, as to the third conclusion of the summons. The appeal of Lord Lovat should be allowed, and the cross appeal dismissed. But, under all the circumstances, I think there ought not to be any costs of appeal.

LORD CHELMSFORD.—My Lords, my opinion has fluctuated a good deal during the course of the argument upon the question, whether the costs of opposing the demands of the creditors of Archibald Fraser are to be borne by his executry, or to be a burden upon the entail; but I have at last arrived at the same conclusion with my noble and learned friend on the woolsack. I agree with him in his general views with respect to the primary liability of the personal estate to bear the costs of litigating debts which are made a charge upon the real estate; and I consider the true question in this case to be, whether any intention is expressed or necessarily implied in the deed of entail of 1851, that this burden should be supplied from the executry and laid upon the entail?

By the deed of 1851, the estate is entailed with and under the burden of payment of all the just and lawful debts of the said deceased Archibald Fraser, due or addebted by him at his death, which said debts (it is added) shall in nowise affect or diminish his executry, or other funds, property, and effects. Under these words the question arises, whether costs incurred by the executor in litigating the claims of the creditors of Archibald Fraser can be construed to be just and lawful debts, or necessary incidents to such debts, within the meaning of the deed.

This being, upon my view, merely a question of construction, it is immaterial to inquire, whether the litigation was for the benefit of the entail or not, or whether Abertarff acted prudently, or otherwise, in defending the action. It may be admitted that, as executor, he was not bound to pay debts without previous investigation, that when the actions were brought against him, he had no alternative but submission or defence, and that his submission would have burdened the entail more than his resistance. All this may be conceded without in any degree affecting the question of the true meaning and construction of the deed.

The just and lawful debts of Alexander Fraser due at his death are alone to be a burden upon the entail. Under this description, everything incidental to or inseparable from the debts would be included. For instance, suppose the debts bore interest, and interest accrued upon them after the death of Alexander Fraser, it would, as a matter of course, follow the principal, and contribute to increase the burden upon the entail. But the costs and expenses of an action brought to enforce the payment of a debt are not necessarily incident to it, and when a person is providing for the payment of his just and lawful debts, probably the last thing he thinks of is the idea of their becoming the occasion of litigation.

Is there anything in the language of the deed to shew, that the entailer has in his view anything beyond the debts themselves as a burden upon the entail? I think rather too much stress was laid, in the argument, on the words employed to express the entailer's meaning. It was said, that the expression "shall in nowise affect or diminish his executry," manifested the intention of the entailer, that the executry should be discharged from every liability which in any manner might be incurred by reason of the debts due from Archibald Fraser; but the word "nowise" seems to have been used merely to intimate more emphatically that the debts themselves were not in any event to be paid out of the executry.

The entailer never having anticipated that any costs could be incurred with respect to the only debts in his contemplation, viz. the just and lawful debts of Archibald Fraser due at his death, made no provision for such an event. In the absence of any specific direction upon the subject, there is nothing to exonerate the executor from his original liability to satisfy such costs out of the general personal estate. If in this case the executor and the heir of entail had been different persons, the executor, upon actions being brought against him by the creditors of Archibald Fraser, might have given notice to the heir and taken his directions as to defending them, and have refused to make any defence unless the heir would guarantee him against the costs. But the same person being both executor and heir of entail, he could not by any act of his own shift the burden of the costs from the executry to the entail.

The narrow view, as it may be considered, which I have taken of this question renders it wholly unnecessary to advert to the distinction, acted upon in the Court below, between the litigation being profitable or unprofitable to the entail, or the defences being proper or improper, as indicated by the award of costs in the several actions. The costs, whether properly or improperly incurred, could not be converted into debts retrospectively due from Archibald Fraser at his death, and must all of them in my opinion be paid out of the personal estate.

I agree with my noble and learned friend on the woolsack as to the mode in which we should deal with the question of costs.

LORD KINGSDOWN.—My Lords, this case has occasioned much difference of opinion in the Court below, and I am very sorry to say that such difference extends to your Lordships' House, for I confess that I find myself unable to concur in the views of my noble and learned friends who have already addressed you.

Lord Handyside was of opinion that none of the costs could be thrown on the estate, holding, that the case was the same as if, without any special charge, the heir of entail in possession had resisted any action brought against him in that character, in which case the expenses would have fallen upon him personally.

But when the interlocutor of Lord Handyside was brought before the Inner House it was recalled, and it was remitted to the Lord Ordinary to allow parties, before answer, an opportunity of substantiating their respective averments as regards the claim for the amount of these costs.

The question then came before Lord Kinloch as Lord Ordinary, who was of opinion that, under the terms of the entail, burdening the lands of Abertarff and others with the debts of the granter, and declaring, that "these debts shall noways diminish my executry or other funds, property, or effects," the expense *bonâ fide* incurred in having the debts so charged fairly expiscated and their amount adjusted, is in sound construction a consequence of the debts, and equally chargeable on the entailed lands with the debts themselves. He accordingly pronounced an interlocutor on the 8th June 1858, in which he found the pursuer entitled to relief out of the lands and estate of Abertarff of the expenses, whether incurred by himself or his agent, or found due by him to his antagonists, disbursed or incurred by him, of having the debts chargeable against the said lands and estate, and the amount thereof fairly settled and adjusted, but of no other expense; and with regard to the five litigations the costs of which are in dispute, he found the pursuer entitled to them (with the exception of the costs incurred in a particular question) subject, as regards his own costs, to taxation, and he remitted it to the auditor of the Court to examine the accounts of expenses, of which the pursuer claimed relief, and to separate and tax the same consistently with the following findings, and report.

The intention of this interlocutor, as I understand it, was to decide, that the pursuer was entitled to the costs of the five actions so far as the proceedings taken by him in each action were properly taken with the view previously expressed, viz. that of having the debts chargeable against the estates and the amount thereof fairly settled and adjusted, and to direct the disallowance of all expenses not falling within that category, and to refer it to the auditor to inquire and determine what expenses under that declaration were properly chargeable on the estate.

I do not think, that when the case came before the Inner House any of the Judges, except Lord Curriehill, dissented from the principles of Lord Kinloch's judgment. Lord Ivory discusses the question in a most able and elaborate judgment, in which he supports the view of Lord Kinloch's main argument, which it seems to me is extremely difficult to answer. Lord Deas agrees with Lord Ivory as to the general principle, and the Lord President, though in some degree objecting to the form of the summons, I think, intimates, that he does not disagree with the general views of the Lord Ordinary.

The ground, upon which the decision of the majority of the Judges disallowing the costs in four of the actions proceeds, is, that, inasmuch as in those actions the defendant was ordered to pay costs to the pursuer, the defence of them must necessarily, in the opinion of the Courts who decided them, have been improper.

I cannot concur in that conclusion. A defendant in a suit is often ordered to pay costs, not on the ground that there was anything in his conduct deserving of censure, either in the fact of resisting a plaintiff's claim, or in the mode in which the resistance was conducted, but on the principle, that a plaintiff who succeeds in establishing a demand is *primâ facie* entitled to receive the costs to which he has been put in making it out. But an executor or a trustee who is ordered to pay costs to the claimant is entitled, unless he has forfeited his right by some *laches* or misconduct, to recover from the estate which he has defended, not only the costs which he has incurred to the adversary, but also the costs which he has paid to his own solicitor. The real question is, therefore—In what position did Abertarff stand when these actions were defended by him on his behalf?

The disponee could not, as against his creditor, relieve his personal estate from the payment of his debts, or his executor from the liability of being sued for them. But the executor was entitled to be repaid, out of the real estate, whatever he might be compelled to pay out of the personalty. He stood, therefore, really in the situation of a person who, in admitting or resisting claims, was acting on behalf of others, that is, of those who were entitled to the real estate. In other words, he was trustee for them. He could not take their directions as to the payment of the sums demanded, or the resistance to the claims, for he was himself the first institute under the entail, and his issue male were the first substitutes, and though as it seems he has no issue male, Lord Lovat's succession has now become highly probable. That time it was very remote when some of these demands were made. Abertarff was a minor, and the rest were brought forward very soon after he came of age. He could have no knowledge of the circumstances or amount of them. He could have no sinister interest in resisting them; indeed, whether they fell on the real or the personal estate, he supposed that he alone was interested in the matter. In all cases the resistance occasioned a substantial reduction of the original demand, though in some the costs exceeded the amount of the reduction. It may turn out upon inquiry, that some part of these costs may have been improperly incurred, and if so, they will be disallowed, but I agree in Lord Kinloch's judgment, that such expenses as were properly incurred ought to be allowed. I should be inclined to introduce the word "properly" before the words "disbursed or incurred," and the words "properly incurred" before the words "in the said litigations," and with these variations, which were merely intended to express more clearly the meaning of Lord Kinloch, to affirm the interlocutor of the 8th June 1858, and reverse the interlocutor of the 7th July 1858 so far as it recalls the interlocutor of the 8th June 1858.

When an estate is devised to trustees in trust to raise and pay the amount of a testator's debts, the trustee is entitled to be reimbursed out of the estate whatever expenses he has properly incurred in ascertaining the amount, or in raising the sums necessary for paying it.

When the estate is charged with debts, but no express trust is created for paying them, the heir or devisee becomes, I apprehend, a trustee for the purpose. If he be the absolute owner subject to the charges, of course no question arises; but if he have no interest, or only a limited interest, then he stands, I think, in the same position with any other trustee.

The peculiar situation in which Abertarff stood of representing the executry, to which the creditors had a right to resort, seems to me to strengthen his claim to be considered a trustee.

Assuming that he has acted prudently and properly in requiring the debts to be made out, he ought not to be subjected personally to the costs which have been incurred in protecting the estate which he represents. But the testator has declared that the debts, and impliedly, therefore, in my opinion, the costs of ascertaining them, shall not diminish his executry.

The necessary consequence seems to me to be, that they must fall upon the real estate. But as a majority of your Lordships think differently, of course the judgment will be as proposed by the Lord Chancellor.

Interlocutors in part affirmed, and in part reversed.

Appellants' Agents, Gibson Craig, Dalziel, and Brodies; Grahames and Wardlaw, Westminster.—*Respondent's Agents*, Æneas Macbean, W.S.; Loch and Maclaurin, Westminster.