House of Lords.

Tuesday, February 23. 1875.

(Before Lord Chancellor Cairns, **Lords Hatherley** and **Selborne**).

Archibald T. F. Fraser of Abertarff

v.

Lord Lovat et e contra.

(Ante, vol. x. p. 353.)

Subject_**Entailed Estate — Relief — Executry — Vouching of Accounts.**

Facts:

Circumstances in which *held* (aff. judgment of Court of Session) that an executor was entitled to relief against an entailed estate for various accounts paid by him as executor.

Headnote:

These were appeals and cross-appeals arising in conjoined actions in the First Division of the Court of Session. Actions of declarator were raised by the appellant against himself as heir of entail in possession of Abertarff, and also against Lord Lovat and others, the substitute heirs of entail. The first action was raised in 1855, for the purpose of declaring that certain sums, amounting to £29,741, were just debts of the deceased Hon. Archibald Fraser of Lovat, due by him at his death in 1815, and that the lands were held under the burden of payment and of relieving the executry of such debts. A supplementary action was raised in 1859, so as to bring in other claims of the same kind, amounting to £9481, and of a sum of £7293 as expenses of litigations in reference to the affairs of the late Archibald Fraser, and of the sum of £30,000 as the excess of the interest on the debts and on the relative claims, expenses, and outlays from the date of the death of Archibald Fraser, over and above the free rents of the entailed lands; also of the sum of £5000 as the alleged amount of the diminution of the said Archibald Fraser's executry by the pursuers having to borrow money, and to insure his life for the purpose of raising money to pay such debts, claims, and expenses. Defences were lodged, and then a remit was made to Mr Adam Gillies Smith, accountant, to inquire and report as to these debts. The accountant made his report, and in January 1872 Lord Jerviswoode pronounced an interlocutor, finding that certain sums, established as debts due by the deceased at his death, and paid by or on behalf of the pursuer, must be allowed, and finding that certain other sums must be disallowed. The total sums included in the remit were £39,223, and of this about £19,916 was allowed as a burden on the entailed estate, and a sum of £19,306 was disallowed. The appellant reclaimed against this interlocutor, and the First Division altered it, and allowed £17,750 as debts of the deceased Lovat with interest, and found that other claims were not sufficiently established, and must be disallowed. The sum disallowed was £21,472. Appeals and cross-appeals were now made against these interlocutors so far as they prejudiced each of the parties. One of the main questions turned on the construction of the deed of entail executed in 1808 by the

Hon. A. Fraser of Lovat, to whom the estate had come by purchase. That deed disponed the estate to the respondent Thomas Alexander Fraser of Strichen (now Lord Lovat), and his heirs male, and to other substitutes, but under burden of payment "of all my just and lawful debts due and addebted, or which may be due or addebted by me at my death, which said debts shall in no ways affect or 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, and to their substitutes above-mentioned," and also under the burden of a variety of annuities and legacies. By a later deed, dated 1812, Lovat, in exercise of a power to alter the deed of 1808, appointed the appellant and the heirs-male of his body to succeed to the estate immediately after himself and the heirs of his own body. The appellant, after Lovat's death, claimed to possess the estate in fee simple, but after a long litigation the Court of Session found that he was bound to take up the estate under the fetters of a strict entail, and such an entail was executed in 1851. This deed was in favour of the appellant and his heirs-male,

whom failing, other substitutes, and it was made under the burdens specified in the deeds of 1808 and 1812, and, in particular, under the burden of payment of the just debts of the late Lovat. The other main question involved in the case related to the vouchers of the various debts and claims made by the pursuer, and the propriety of allowing or disallowing them.

Argued for the appellant—The Court below had erroneously construed the deed of 1808. That deed did not limit or qualify the nature of the debts chargeable against the estate, nor confine the relief to such debts only as would affect or diminish the executry. On the contrary, there was an express provision that the debts should not only not affect the executry, but should not affect his other funds, property, and effects. This meant that the appellant was to have the whole estate, heritable and moveable, of the testator, free and disburdened of all debts due by him at his death, and that the entailed lands were to be burdened with all debts, whether proper executry debts or not. The evident intention of the testator was to relieve the appellant of all debts for which he became liable either as disponee or executor. The respondent was in the position of a beneficiary under the deeds, and as such only had any right or interest in the estate. The right thus given was entirely gratuitous, and he had no other right or privilege than any ordinary beneficiary. If so, then the

respondent was bound equally with the appellant by the actings of the late Lord Lovat's trustees, and had no more right to challenge or impugn them than a beneficiary under an ordinary settlement. Nor could the respondent object to the appellant's actings in regard to the ascertaining and settling of the truster's debts. The debts objected to were paid in the belief that they were justly due, and to admit such objection would practically exclude all discretion in the trustees. Looking also to the time which had elapsed (about half a century) since the exact nature of the evidence and proof of the trustees' intromissions, it would be inequitable now to permit a party who had a merely gratuitous interest in the trust to challenge the management; and the same was true as to the reports made subsequently. There were also particular claims which the Court below had disallowed which ought to have been allowed when the various circumstances were fully examined. The decision of the Court below should, therefore, be reversed.

Respondents counsel were directed to confine their argument to two of the points only in the appellant's argument—namely, as to the executor being bound to plead the triennial prescription, and as to the forehand rents.

In delivering Judgment—

Judgment:

The **Lord Chancellor**—My Lords, this case has occupied a considerable portion of your Lordships' time, and some of the items upon which much of that time has been spent are so minute that I have no doubt many of your Lordships regret the length of time which the discussion of them has occupied. I am, however, in a position to submit to your Lordships the only changes which, as it appears to me, will be found to be necessary in the leading interlocutor in the Court below. But before explaining the changes which I would suggest should be made in detail, I will refer to the only question of principle and of importance, so far as regards the amount concerned, which has been raised between the parties. I refer to the question of interest upon the change which is created by this interlocutor.

Your Lordships will bear in mind that Abertarff, as I shall term him, the present proprietor of the entailed estate, seeks to establish against that entailed estate—which means in reality against the present Lord Lovat—a charge for all the debts which he can show to have been paid out of the executry of the settler, the former Lord Lovat, and to have been properly paid, because they were debts due from that executry, for it was for the amount of those debts so existing and so properly paid that the charge

against the entailed estate was to take effect. The Court of Session have found and constituted the amount of the debts which have been paid, and in the interlocutor of the 14th of March 1874 they have in effect declared that for that sum so found there is to be a charge against the entailed estate, with interest from the various dates at which the items forming that aggregate sum were paid by the executor. From that interlocutor the appellant, as I shall term Abertarff, appeals to your Lordships, and he contends that the charge for interest should not merely date from the time when the sums were paid, but that he should have a charge for interest from the death of the settler, or from some earlier period, and that, so far as the free rent of the Abertarff estate should be found not to be sufficient to keep down that interest, he should charge the surplus against the inheritance. On the other hand, Lord Lovat contends before your Lordships that there should be no charge for interest at all, at all events beyond the date of the interlocutor constituting the charge.

Your Lordships will bear in mind that the charge which was created by the settler in this case was one of a very peculiar character. It was one as to the existence or *quantum* of which it was quite impossible for Lord Lovat, the payer, the substitute heir of entail, to know anything of the details. It was for the executor of the settler to come forward and to instruct what debts of the settler existed, what debts were paid by him, and at what time and under what circumstances they were paid, and until that was done there was absolutely no knowledge on the part of Lord Lovat, the substitute heir of entail, as to the charge that was to devolve upon the inheritance as against him. When your Lordships are asked now to hold that there should be an accounting for the interest upon this charge, and an inquiry as to whether the free rents of the Abertarff estate were sufficient to keep down that interest, your Lordships are in fact asked to go back to the commencement of the century, at all events to the year 1816 or the year 1816, and to enter upon an investigation as to what has been the amount of the free rents of the Abertarff estate during 50 or 60 years, how the rents have been received and by whom, how they have been expended, and what portion can be held to be free rents applicable to keeping down the interest.

Now my Lords, I do not mean to lay down, and I do not ask your Lordships to lay down, any general rule upon the subject of the obligations of persons in possession of a Scotch entailed estate to keep down the interest on encumbrances. I ask your Lordships to proceed upon the peculiarity of the present case during the greater portion of those 50 or 60 years to which I have referred. The *bona fide*

belief of Abertarff was not that he was in the position of what we should term a “limited” heritor of this property under obligations to his successors, and possessing rights against his successors, but that he was the absolute owner of the Abertarff

estate, without the fetters of any entail at all, and it was not until the question was determined against him in comparatively modern times by this House that that opinion was removed from his mind. On the other hand, as your Lordships have been told at the bar, the opinion of Lord Lovat was not that he was a person interested in ascertaining what the amount of this charge was, and how the interest upon it was kept down, but that by reason of the dealings in the settlement of this Abertarff estate and the charges made in the course of that settlement, the payment of the debts to which I have referred was not under any circumstances to constitute a charge as against him. It was in that state of things that neither did Abertarff come forward to instruct this charge against the inheritance, nor did Lord Lovat require the charge to be examined and investigated with a view to have it either instructed or set aside.

I think, my Lords, that under these circumstances there is no conclusion at which your Lordships can arrive but this, that during the whole of this time Abertarff was well content to place in abeyance his right, whatever his strict right might be, with reference to this charge, that he was well content not to make any claim in respect of it, and when he comes forward at a much later period, although his right to establish his charge is not taken away, yet I apprehend your Lordships will hold that that right can only be given to him in connection and fettered with this qualification, that he must not make any claim during those years that he, as it were, slumbered upon his right in respect of what might have been the amount of interest payable upon his charge during those years, and whether that interest would or would not exceed the free rents of the estate.

My Lords, I cannot but observe that in the former litigation which came to this House, and which has been so often referred to in the argument, when Abertarff succeeded in establishing for the first time one portion of his charge against Lord Lovat, in that proceeding which awarded him a charge for a sum of £6000 odd, nothing was said in the interlocutors of the Court of Session, or in the order of your Lordships' House, dealing with the interest upon that £6000 odd, and I cannot but think that it did not occur to any person at that time that anything ought to be said respecting the interest upon the sum.

I think, therefore, and I submit to your Lordships, that the Court of Session would have acted more rightly in holding that the charge for the further sum which is now to be instructed in favour of Abertarff was a charge which ought to be accompanied with an award of interest from the date of the interlocutor establishing it, and not from any earlier period.

When I come to lay before your Lordships the alterations in the interlocutor which I have to propose, I will upon that point submit to you an alteration in the interlocutor of the Court of Session.

My Lords, I now come to those things which appear to be more matters of detail, and of minor detail than that to which I have now referred, and I take, first, the question which has been argued with regard to the report which is called Thomson's report, and I may couple with that the report which is called Girvan's report. Both sides object to the degree of weight which is given or refused to those reports by the Court of Session. I cannot think that your Lordships will entertain any doubt upon the subject. It appears to me, with regard to Thomson's report, that everything in that report is *res inter alios acta*, and that the report cannot be received, as the appellant would have your Lordships receive it, as proof of the debts which are mentioned in that report as having been paid by the executor of the settler. That was a report made between Abertarff on the one hand, and Mrs Fraser, the executrix of Lovat, the settler, on the other hand, for the purpose of taking an account as against her of her intromissions as representing the estate, and it was not an account which in any way bound the present Lord Lovat, or ought to be received now as evidence against him, without some further support.

On the other hand, I cannot advise your Lordships to accept the view of the respondent, that the report ought to be altogether disregarded. It is clearly sufficient evidence, especially having regard to the rules of evidence in Scotland, of the *resgestæ* which occurred at that time between the executrix, representing the estate of the settler, and those who were calling her to account, and it may be—and indeed in the consideration of the items which your Lordships have gone through, it has been found to be—a document which gave considerable information, and very proper information, as to some of the details of the payments.

My Lords, the next question which was raised and argued before your Lordships was on the subject of prescription—how far should it be held that the triennial prescription prevailing in Scotland should be applied to the debts which were paid by the executor out of the estate of the settler? How far was the executor or those who acted on behalf of the executor bound to insist upon the triennial prescription as against the various creditors of the estate? My Lords, I think that that question should perhaps be stated in a somewhat different way. It is not, as your Lordships will observe here, a question of how far the executor is justified in spending the funds under his control as against those who are entitled to those funds, but it is a question of how far acts done by the executor, (payments made by the executor) can be termed, as against those who are to be subject to a charge upon another property, a payment of the just and lawful debts of the settler, for it is in respect of those things which may be predicated to be just and lawful debts, and of those things alone, that a charge is to be imposed upon the heritable property.

Viewing it in this way, I cannot but think that the reasonable conclusion at which we ought to arrive is this, that where there were debts of the settler which at the time of

his death were barred by this triennial prescription, and could not be recovered by the creditor against him unless he could produce either the writ or the oath of his debtor (and that of course he no longer could do if the debtor was dead), there the executor I do not say ought not to have been paid the debt, but ought not to have a right if the debt is paid to charge it as a necessary payment against the inheritance of a third person whose inheritance is to bear that charge.

If any special case could be shown under these

circumstances by the executor—if he could show that although the debt was barred by this triennial prescription, yet there were circumstances connected with it which would have made it unjust or unrighteous in him not to have made the payment—it appears to me that the executor perhaps might have put forward that special excuse for having made the payment. But unless some special evidence of that kind is brought forward exempting the case from the general rule I have mentioned, it appears to me that the general rule ought to apply, and that it not being a debt recoverable it ought not to be called a just and lawful debt of the settler within the meaning of the words creating the charge.

My Lords, I pass next in order to the question of forehand rents. It appears that there were certain rents, amounting altogether to the sum of £944, 14s. 10d., which were received by the settler under these circumstances. Being in possession of the entailed estate he had contracts with his tenants, by which his tenants paid him rents for a certain portion (I think what they call the cow lands) of the estate before the time that they were properly exigible by law. These rents were in the hands therefore of the settler with this condition, that if he lived up to the time when payment was due he would be able to spend those rents and to treat them as his own money, but if he did not live up to the time when payment was due they would be rents in his hands properly belonging to the next successor to the property. There is no dispute as to the facts of the case, or as to the amount, but the Court of Session have held that these sums were in the hands of the settler in the nature of trust funds, and that they were, as the Court of Session appears to have thought, in some way ear-marked, and not in the condition of any other debt due from the settler. My Lords, in my opinion they were simply in the hands of the settler as money had, and reserved to the use of his successor in the event of himself not living to the time when he could enjoy them and possess them as his own. They were what probably we should call in this country an equitable debt, but still they were a debt, and nothing but a debt from the settler. They were not ear-marked or set aside in any way from his general money, but they were mixed with all the other money that he had, and they were simply like any other debt

due from him. It appears to me that these sums having been paid by the executor there clearly was a right to charge them.

The next question raised by the appellant—for I am dealing with the objections by the appellant first—was in respect of what was called the Markinch rents upon a tack which belonged to the settler, running over a period of 293 years. As I understood the argument, the appellant seemed to think that because there was an obligation on the part of the settler to pay this rent, the amount of it was to be considered a debt due from his estate for the whole currency of the tack, and to be paid accordingly. My Lords, the tack came into the possession of another person after his death. The person taking it was bound to pay the rent, and except for the debt due or current at the time of the death of the settler no other claim ought to be allowed.

My Lords, I pass rapidly over several other small items. Your Lordships are satisfied, I think, that the small sum of £3, 9s. 2d. to Samuel Fraser, the flesher, ought to be allowed. Your Lordships, are, I believe, satisfied that the £25 paid as rent of a store-house for the local Militia was properly disallowed by the Court of Session. Your Lordships are satisfied that the sum of £25, 2s. 6d., the stipend of the Reverend Dr Bayne, was really paid and must be taken as having been paid in the lifetime of Lovat, the settler, and ought not to be allowed. If your Lordships agree with the view which I submit to you upon the question of prescription, the consequence will be that sums amounting to £90, 19s. 5d. (that is to say, Dallas' assignees £55, John M'Tavish, £1, 10s. 4d., Duncan Fraser, of Fort George, £34, 9s. 1d.) ought to be allowed, because as regards these none of them were prescribed at the death of the settler. On the other hand there were certain small items prescribed at the death of the settler which ought to have been disallowed by the Court of Session—items of £1, 9s. 8d., £22, 4s., £1, 18s. Your Lordships are, I think, also satisfied that vouchers are now proved to exist for two items which were disallowed in the Court of Session upon the ground that they were not vouched, namely, Colin Kemp £26, 14s. 2d., Catherine Drummond £4, 10s. 11d.

Then, my Lords, with regard to two larger items, the debt due to the Caledonian Coach Company, £827, 10s. 11d., and the debt due to Anderson in respect of grain, £61, 11s. 3d., your Lordships will find that these two items stand in this position—Anderson was factor of the settler; he had large sums in his hands from time to time, consisting of rents and other moneys received on behalf of the settler. From indisposition to transact business, or some other reason, there appears to have been little or no settlement of account at any time between him and the settler The result was that at the death of the settler there was no account taken and settled between him and Anderson, and it was not taken and settled until some years after his death. But I think your Lordships will be clearly of opinion that this Caledonian Coach Company's account, if not due to Anderson himself, although it seems highly probable that it was

due to him, and that he was the only partner in the company, was at all events an account passing through his hands. Whether he had contracted for the items in it on behalf of the settler does not appear, but certainly he was the person expected to obtain payment, and to carry that payment to the Caledonion Coach Company from the settler. So also with regard to the account for grain, I think your Lordships cannot have any doubt that if there had been any general settlement of account between him and the settler immediately before the death of the settler, these items would have come into that account, and inasmuch as it now appears that Anderson had up to the death of the settler in his hands more money than was enough to liquidate both of these claims, your Lordships, I think, will be satisfied that in point of fact the state of things at the death of the settler was that he had a claim against Anderson for the balance of his account, and that by balancing his account these two items would have been wiped out, and the sum coming to the settler would have been the balance due from Anderson. Under these circumstances, it appears to me, my Lords, that these two items of the Caledonian Coach Company's claim and the grain claim cannot be treated as debts which were due by the settler at the time of his death. They were in substance paid, for Anderson, who was to make payment of them, had money sufficient in his hands to pay them.

My Lords, with regard to the meliorations in respect of Markinch, amounting to £80, 9s. 0d., the only objection taken in the Court of Session was that this allowance was made in the year 1827, and not at the first break of the lease in 1813. The contract was that the claim for meliorations might be made at the end of the lease, and it appears that the melioratious were assumed to have been made upon 5 acres under the lease which had come to Lovat. Under these circumstances, I think your Lordships would not be disposed to disturb the conclusion of the Court of Session upon that head.

My Lords, with regard to the sinking fund, and the claim made by the appellant in respect of it, I think your Lordships will be of opinion that the whole of that question was settled, and finally settled, by the interlocutor of Lord Corehouse on the 6th of March 1835, when the sum of £3054, 10s. was allowed upon this score and that the present claim is merely one to add something to that which was settled and adjusted, and which had become *res judicata* by those former proceedings.

My Lords, as to the property tax, I think it is now admitted, after full and very candid argument on both sides at the bar, that in respect of the property tax for the year 1815–16, one half-yearly payment, amounting to £575, Os. 3d. was due in the September, that is on the term day, before the death of the settler, and that must be treated as being properly a debt of the settler, for which there is a charge. Your Lordships are satisfied, I think, that the conclusion of the Court of Session with regard

to the parochial assessments due at the death of Lovat is a correct conclusion, and was not arrived at *per ircuriam*, as was suggested during the opening of the case. The stipends charged against Lovat appear to me to have been properly dealt with by the Court of Session, and not to require any review. So also as to the schoolmaster's salary. The forehand rents I have already mentioned to your Lordships.

That, my Lords, exhausts all the complaints on the part of the appellant, and I have now only to turn to those on the part of the respondent.

I have already mentioned the view which I take, and which I submit to your Lordships, as regards interest, so far as that is complained of by the respondent. What I have said as to triennial prescription also embraces one of the objections of the respondent, and so far is favourable to that objection.

The next objection of the respondent was with respect to the funeral charges and the charges for mourning. I think that objection is entirely well founded. It appears to me that it is impossible to treat the charges for the funeral and for mourning, though they may be properly charges payable out of the executry, as debts due from the settler at his death within the meaning of the charge in this case. The sums which have been allowed, perhaps on evidence not altogether so complete as otherwise would have been the case, on the ground that the documents upon which the evidence could have been completed were entrusted to the respondent and were not forthcoming, appear to me under these circumstances to have been properly allowed.

I think the only other items of the respondent are those with regard to the Duffs' debt of £2000, a debt of £2106, and Clark's valuation. As to all these, I think your Lordships are satisfied that they were items which were properly allowed by the Court of Session, and that there ought to be no change in that respect.

The result of the whole, as I submit to your Lordships, is that the only interlocutor which requires any alteration is that of the 14th of March 1873, and what I should propose to your Lordships, and move your Lordships, is this, to declare that the following sums, in addition to the sums mentioned under the heads 1 to 9 in the interlocutor of the 14th of March 1873, ought to have been treated as sums instructed to be debts of the deceased the Honourable Archibald Fraser of Lovat, due by him at his death, and paid by or on behalf of the pursuer as his executor, namely,—I will now enumerate the sums, and if I am in error as to any of the figures I shall be glad to be set right:—£3, 9s. 2d. due to Fraser the flesher; £90, 19s. 5d., which consists of these three sums—Dallas' assignees £55, 0s. 0d., Mactavish £1, 10s. 4d., and Duncan Fraser, of Fort George, £34, 9s. 1d.,—which ought to be allowed, having regard to the observations which I submitted to your Lordships upon the question of prescription. Then £31, 5s. 1d., the amount of the two sums for which vouchers are now shown;

£80, 9s. 0d. for meliorations, £575, 0s. 3d. the property tax for the half-year, £944, 14s. 10d. the amount of the forehand rents.—And declare that on the other hand the following sums claimed by the pursuer, and allowed under the interlocutor, ought to have been disallowed, namely, £275, 3s. 11d., and the £3 (for the piper) for the funeral and mourning (in articles 2 and 5 of state) and the items of £1, 9s. 8d., £22, 4s., and £1, 18s. (in article 5 of state), items which were prescribed at the death of the settler. Then, my Lords, I propose to declare that the sum of £17,750, 14s. 6d, mentioned in the said interlocutor, ought to be increased by the sum of £1479, 5s. 6d., that is the amount of the sums which I first mentioned, deducting the funeral and other expenses, which ought to be disallowed. And that interest on the sums so increased ought to be charged against the entailed estate from the date of the said interlocutor only, subject to the obligation of the pursuer to keep down such interest thereafter out of the free rents of the entailed estate. With this variation of the interlocutor of the 14th of March 1873, affirm all the interlocutors under appeal, and remit the case to the Court of Session.

My Lords, I do not propose to ask your Lordships to say anything upon the subject of costs.

Lord Hatherley—My Lords, this case is one depending in so many particulars upon its own peculiar circumstances that I do not think it necessary to say much upon it. Principle is very little in question, but, as I have said, very much depends upon the detail of the circumstances of the accounts and the dealings between the parties. To one or two heads that were argued before us, in which principle was involved, it may be worth while for a moment or two to advert—especially to the question of interest. That, although termed a matter of principle, and involving in the result a coniderable amount of payment, is really one of the points which I have more properly described as depending very much upon the extremely peculiar circumstances of this case.

The appellant in the original appeal was in possession of an estate which he at the time thought to be his own estate, with which he could deal as he pleased, and which he could burden as he pleased

with regard to any person making a claim after his decease to that property. It turned out that he was afterwards advised, and rightly advised (for it was so determined), that he was in truth only tenant in tail of that estate; and he was then thrown upon the necessity of availing himself of a clause in a deed of settlement made in the year 1808, by which the then owner of the estate had declared that this property so entailed should be burdened with the payment in aid of his executry of all debts justly and lawfully owing by him at his decease. I think the expression he used was—“addebted

by him." The consequence of that provision was that the appellant became entitled, upon payment of any of those debts, to have, as against those in remainder, a charge of the amount which he might so pay, he being himself the donee or the disponee of the executry as well as of this entailed estate, and therefore it being of course his interest to swell the executry by means of charging the reversion (as we should term it), that is to say, of charging the estate when it should come into the possession of those who were entitled after him under the entail, with the amount of debt that he should have paid out of the executry.

Under those circumstances many of these debts were allowed to remain for a considerable time unpaid. Proceedings, however, took place from time to time with regard to their payment, and at one time a portion of these payments out of the executry was brought before the consideration of your Lordships' House, and by the decision of your Lordships' House a debt was constituted to the extent of £6000 in favour of the present appellant and in aid of the executry, out of which that amount had been paid. Now, after a great lapse of years, further proceedings have been had. The law of Scotland allows that course to be taken; it apparently permits the proceeding of winding up accounts to be gone through piecemeal. Further proceedings having been taken, a further charge has now been constituted in the Court in Scotland, and is brought up to your Lordships' House, both parties being dissatisfied with the amount of that further charge.

The first claim which was argued before us, and which was said to involve a question of principle, was a claim with regard to interest. Now, this gentleman's position in the matter was this,—he was the owner of the executry subject to the debts. Whatever he paid of the debts he might charge upon those who came after him in the entailed estate. But he was also in possession of the entailed estate, and it was his duty to keep down, during his lifetime, to the extent of the rents received, and so far as they would allow him so to do, the interest upon those debts. Then observe what his position was. If delay took place in the payment of those debts he would be enjoying the whole of the rents, he would be enjoying all the interest of the executry until it was applied in payment of the debts, and it would not be until the debts were paid that any quest ion about interest could arise. Accordingly we find (and when I say that the case depends on its own peculiar circumstances, these are amongst the very singular circumstances upon which the case rests) that he does not seem to have thought it right either in the Court in Scotland or before your Lordships' House, when he claimed and established his right upon the claim to the £6000, to have demanded any interest.

Just observe, my Lords, what a demand of interest would have involved. He would have stood very much in the position in which a mortgagee in possession stands in this country. He held the estate, and if he had made any demand for interest he would have had to charge that the interest payable in respect of the debts exceeded the rents

of the estate of which he was in possession, because otherwise the rents would be applicable to the keeping down of that interest. And if he were now, at the end of some 60 years, which have elapsed since the settler's death, to enter into the question of interest, unravelling all that has been done since that time, and especially acting in a manner totally inconsistent with the decree pronounced by your Lordships' House as to the £6000—I say if he were now to open the whole of that question, there would be other questions opened also as to the amount of rent which had been received by him during the time, because he would be bound to show in the first place that he had applied all the rent he had received to keeping down the interest, and then questions would arise as to whether or not there had been wilful default on his part as to the amount of rent received; in other words, whether he ought not to be chargeable with further rents which he might have received and had not received; and again a further question would arise as to what he ought to be charged for occupation rent in respect of the portions of the property which he possessed that were in his occupation and not in the possession of tenants.

Now, my Lords, I think the parties have had enough of litigation in the 60 years which have elapsed without entering upon that wide field of inquiry. I think it would be very wrong, if I may say so,—I mean very wrong in point of law,—and certainly very unfortunate for the parties, if your Lordships should come to any other conclusion than this, that the decision and rule adopted with regard to the £6000 was the proper decision and rule to be now adopted with regard to the remaining claim of this gentleman. Of course when the interlocutors, so far as they shall not be reversed by this House, have declared that a debt is constituted, then from the date of that declaration (as the Lord Chancellor has proposed) the debt will bear interest, and the person who ought to keep down the interest will do so,—namely, the present appellant during his life, or so long as he shall be owner of the estate in question. That appears to me, my Lords, to be a clear mode of solving the present question without reference to more general principles, and resting entirely upon the very peculiar circumstances of this case.

With regard to the question with respect to Thomson's report, I think your Lordships were all of opinion that that report could not possibly be received in evidence to the extent to which the appellant desired that it should be received, to which contention of his the Court in Scotland has not given way. I believe your Lordships were all of opinion that it could not possibly be received as substantially establishing and proving debts as against this entailed estate, the other owners who were entitled subject to the present ownership of the appellant as the person in possession not being parties to the litigation which had taken place, and therefore the whole matter being, as my noble and learned friend the Lord Chancellor has expressed it, *res inter alios acta*. But, on the other hand, the Court did rightly in judging that it might be admitted as adminicular evidence in

order to give an amount of information which might easily be required in the course of such a long and protracted litigation as the present, aud which it was really calculated to afford. That was confirmed in this instance, as a receipt was produced for a sum of money, which sum was not immediately identified. In such a case it was allowable to see from Thomson's report, looking at the debts and looking at the other circumstances contained in the report, to what particular matter that receipt would be properly applicable. I merely give that as an instance—there may be several other instances of the same kind—in which the *adminicular* use of that report would be allowed and desirable.

Now, my Lords, with regard to prescription, your Lordships thought that, with reference to debts as to which the prescription had not run at the date of the death of the settler, those debts clearly fell to be paid by the express terms of the deed in aid of the executry, for they were debts due and owing in every possible sense by the settler at the time of his decease. The circumstance of their not being paid is a circumstance which would properly fall within the cognizance of those who were administering the estate, and who, finding the debt an existing debt at the time of the settler's death, would know of their own knowledge that it had not been paid. With regard to debts upon which the prescription had run at the time of the death of the settler, I confess that I cannot altogether agree with the view taken in the Court of Session, namely, so far as distinction is made with respect to the debts which have been paid by the widow, on the ground that the widow must be supposed to have known the exact state of the settler's transactions, having been by him appointed as one of those who were to carry the trusts of the deed into effect. I do not entirely follow the distinction taken in that respect by the Court of Session. The law of Scotland seems to require that if a creditor wishes to be paid his debt he must manage to be paid within three years, or if he is not paid within that time he cannot afterwards recover his debt in any other manner than by writ or oath—by the oath of the person sought to be charged, or by something in writing which shall evidence and attest the continuance of the debt. I think, under these circumstances, those who wished to charge the estate of a third person through the medium of a debt were put in this position, that they were bound to show to your Lordships that it was necessary for them to pay that debt, either because there was writ to support it, or because when put upon their oath they were so cognizant of the debt that they would have been compelled to make an immediate admission of it. Of course the question as to what might have been done if that state of things had presented itself would open up quite a different consideration from that now before us. Until, at least, such evidence as that was given, it would not be right to charge, as against a third person to whom no means of informing himself had had been afforded, the amount of a debt under a charge created by an instrument such as that to which I have referred, namely, the deed of 1808.

Now, after disposing of these questions with respect to the interest, and with respect to Thomson's report, and with respect to prescription, we really then fall into a series of very small suits or actions upon which each particular debt has to be tried, involving no fresh or new principle of law whatever, and having, I think, no interest attaching to them which would present a difficulty worthy of solution by your Lordships' House. And when the several cases come to be analysed, as they have now been analysed in a complete and perfect manner by the Lord Chancellor, they seem to me to admit of no doubt or difficulty whatever. I do not therefore pursue these details, because I think there is nothing of general interest in them as regards the principles of law which requires me to say anything further upon the subject.

My Lords, I entirely agree with the declaration which is proposed to be made, and with the alterations in the interlocutor proposed by my noble and learned friend the Lord Chancellor.

Lord Selborne—My Lords, I am of the same opinion.

The only point upon I have entertained any doubt in this case has been whether or no our order might not on the point of prescription havebeen more favourable to the appellant Abertarff than that proposed by my noble and learned friend on the Woolsack, but after full consideration I agree that it is right to exclude from the charge on the entailed estate those debts on which the triennial prescription had already run at the time of the settler's death, and in support of which no evidence at all is offered beyond the mere fact that either the widow, or Mr Anderson, or Abertarff himself, thought it right to pay, and did in fact voluntarily pay them afterwards.

The principle on which, in the English cases of Martin v. Whichele and Briggs v. Wilson, an admission by or even a judgment against an executor for a debt barred by the English statute of limitations at the time of the testator's death was held not to be evidence sufficient to establish a charge for the same debt against the testator's real estate, seems to me to be sound, and it is in fact the same principle as that upon which your Lordships and the Court of Session have in the present case held the reports of Thomson and Girvan to be inadmissible as primary evidence of the existence of debts chargeable under the trust in this case upon the Abertarff estate.

Counsel for the respondent having called their Lordships attention to a mistake amounting to between £50 and £60 in the sum mentioned, suggested that their Lordships should give the parties an opportunity of correcting the details afterwards.

Lord Chancellor—My Lords, I apprehend that there will be no objection to what is now suggested. The principles being admitted as we have laid them down, if there is

any objection to the figures I have read out those figures can be corrected by the parties subsequently.

Interlocutors appealed against affirmed, with a declaration varying the interlocutor of the 14th of March 1873; and the cause remitted.

Counsel:

Counsel for Appellant— Cotton, Q.C., and Kinnear.

Counsel for Respondent— Southgate, Q.C., and Pearson, Q.C.

1875
