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### FIRST DIVISION.

[Lord Rutherford Clark, Ordinary.

FRANC NICHOLS STEUART *v.* SIR ARCHIBALD DOUGLAS STEWART.

*Entail—General Disponee—Statute 1 Geo. IV. c. 47, sec. 47; 4 Geo. IV. c. 49, sec. 25—Real and Personal.*

An heir of entail borrowed money for the making and maintenance of certain roads, and granted bonds for the money under the Acts 1 Geo. IV. c. 47, and 4 Geo. IV. c. 49, binding "his heirs, not only of line and provision, but also of tailzie, and his executors and successors." On his death the bonds were paid by his testamentary trustees out of his moveable funds.—*Held* that the bonds were *sua natura* moveable, and had been rightly so paid, and were thereby extinguished, and that therefore they could not be reared up by a subsequent heir of entail to affect the entailed estates and relieve his executors.

This was an action of relief brought by the pursuer, as executor and general disponee of Sir William Drummond Steuart of Grandtully, Strathbraan, &c., against Sir Archibald Douglas Stewart, who succeeded Sir William as heir of entail in his entailed estates, for payment of the sums contained in two bonds for £1100 each, granted by Sir William to Miss Barbara Hay and Miss Jane Hay. In these bonds, which were granted in 1840, Sir William bound his heirs, executors, and successors, but expressly declaring that his heirs of entail are to relieve all others, his heirs, executors, and successors. It was alleged that these bonds were granted by Sir William for sums which were actually advanced, in the first instance, by him for making a road called the Strathbraan turnpike road, that runs through part of his entailed estates, under the powers conferred on heirs of entail by a local Road Act of 1820 and the General Turnpike Act of 1823 (the Acts relied on by the pursuers in the case of *Breadalbane's Trustees v. Breadalbane*, July 7, 1846, 8 Dunlop 1062) to charge heirs of entail with the sums borrowed for making and maintaining the roads constructed under those Acts. It appeared, however, that the sums expended on the making of the road were borrowed by Sir John Steuart, the heir of entail who preceded Sir William in the estates, along with various other proprietors of adjoining estates. For these sums he and the other subscribers granted bonds to various creditors, and amongst others to the Misses Hay, binding the whole parties jointly and severally, their general representatives and their heirs of entail, but giving no indication of an intention that their heirs of entail should be primarily liable. They also executed a bond of relief apportioning the amount of liability amongst the various parties. Sir John died in 1838, leav-

ing a trust-disposition and settlement, in which he made no special provision for the payment of his share of these bonds. His trustees, on a requisition from the trustees of the Marquis of Breadalbane, who had been one of the co-obligants in the bonds, that the bonds should be paid up in order that the Marquis's estate might be wound up, paid his share, including the bond to the Misses Hay, out of his moveable funds. Sir William having succeeded his brother in the entailed estates, granted these bonds anew, as narrated above; and in this action his executor sought to enforce the relief which Sir William had provided for his general representatives against the heirs of entail.

The pursuer pleaded—" (3) The amount of £4273, 2s. 11d., or at all events the amount in the bond libelled, was chargeable and charged by Sir John Archibald Stewart against the entailed estates and heirs of entail, and there was nothing in the arrangements by which that amount was separated from the sums undertaken by other proprietors which had the effect of relieving said entailed estates or heirs of entail. (5) The deceased Sir William Drummond Steuart having advanced funds to the amount of the bond in question, for making and maintaining said road, was entitled to borrow the like sum and to bind the estate and heirs of entail for the same."

The defender pleaded—" (1) The said Sir William Drummond Steuart not having been a subscriber for the formation of the said Strathbraan turnpike road, which was made before his succession to the entailed estate, the pursuer has no claim as his executor under the Acts of Parliament recited in the summons for relief of the sums contained in the bond and assignation libelled against the defender as heir of tailzie. (2) The subscription of the said Sir John Archibald Drummond Stewart for the formation of the said Strathbraan turnpike road having been paid, and the bonds granted by him to the persons who advanced the money to meet said subscription, including the Misses Hay, having been paid off by his trustees and executor as liable therefor both at common law and under the directions contained in his trust-disposition of 4th September 1837, no claim lies against the defender or any of the heirs of tailzie in respect of any of the said bonds. (3) Sir John Archibald Drummond Stewart never having imposed the liability of relieving his executors estate from the amount of the said subscription upon heirs of tailzie, no claim can in any event be now made against them in respect of any part thereof."

The Lord Ordinary assolviced the defender, and added the following note:—

"*Note.*—By bond, dated 15th December 1840, the late William Steuart bound himself and his heirs of entail to pay £2200 to the Misses Hay. The bond proceeds on the recital of the Acts after mentioned, that Sir William had contributed £4723, 2s. 11d. towards the making of the Strathbraan Road; that he was desirous of keeping up the debt against the entailed estate; and that in order to assist him in paying this sum the Misses Hay had agreed to advance, and had advanced, £2200.

"The pursuer, as Sir William's executor, had paid to the Misses Hay the debt due to them, and has brought the present action of relief against

the defender. He pleads that the defender, as heir of entail, is the proper debtor in the bond.

"The defender maintains that the road debt was incurred by Sir John Steuart, Sir William's predecessor; that it was paid from Sir John's personal estate, and that Sir William could not charge it either on the entailed estates or on the heirs of entail.

"The case, as it was presented to the Lord Ordinary, may be thus stated:—

"By the local Act of 1820, and the General Turnpike Act of 1823, heirs of entail are authorised to charge against their successors such sums of money as may be expended in making or repairing certain roads. Under the authority of these Acts, a road, called the Strathbraan Road, was made. It was completed, or at least the liability for the cost of it was incurred during the lifetime of Sir John Steuart.

"The funds necessary for making this road were raised partly by subscription and partly on the joint obligation of certain gentlemen of the district, of whom Sir John was one. These gentlemen granted an obligation and bond of relief for the purpose of fixing the extent of their several obligations *inter se*. It seems to the Lord Ordinary to be unnecessary to give in detail the terms of these instruments.

"Under the arrangements which were thus made, £2200 was borrowed from the Misses Hay, and a bond was granted to them for that sum, dated 9th March 1833. The granters, including Sir John Steuart, bound themselves, not only as trustees, but individually and conjunctly and severally, and their heirs not only of line and provision, but also of tailzie, and their executors and successors, to pay the sum contained in the bond. The tolls were also assigned in security of the loan. Similar bonds were granted in favour of other lenders.

"On 30th April 1836 Sir John Steuart granted a trust-deed for behoof of his creditors, as at 19th September 1831. It appears that a former trust-deed of that date had been executed for this or a similar purpose, and that the latter deed was intended to explain or confirm the earlier.

"By *mortis causa* trust-disposition and settlement, dated 4th September 1837, Sir John disposed to the trustees acting under the trust of 1836 his whole moveable estates, *inter alia*, for payment of debts, and with the ultimate direction that the surplus should be applied in the payment of debts affecting the estate of Logiealmond.

"The proportion of the road-debt incurred by Sir John Steuart, as ascertained after his death, included the moneys lent by the Misses Hay. The sum due to these ladies was paid by his testamentary trustees, and they granted a discharge in favour of the Road Trustees and the other obligants under the bond of March 1833. This took place, so far as the Lord Ordinary can discover, without the knowledge of Sir W. D. Steuart.

"After this payment was made, it seems to have occurred to Sir William and his advisers that the heirs of entail were the proper debtors in the sum due to the Misses Hay. Accordingly, certain deeds were granted in order to put the matter on what they considered to be its proper footing. *Inter alia*, the Road Trustees granted an acknowledgment that the money had been received from Sir William, and on a recital of the statutes and that he had advanced the money, Sir

William, as already explained, granted to the Misses Hay the bond of 15th December 1840, receiving from them the amount therein contained. His interest was this—He contends that he was in effect the residuary legatee of Sir John Steuart, inasmuch as the entail of Logiealmond was not invalid. Whether that discovery was made at the time of these transactions is not ascertained. But it is certain that the entail of Logiealmond was found to be bad, and that the estate was sold by Sir William.

"It was assumed on both sides of the bar that Sir John Steuart's heirs of entail, as well as his heirs *in mobilibus*, were debtors to the Misses Hay for the debt contained in the bond granted by Sir John. The question is—On which class of heirs did the debt ultimately fall?

"This point has been so far elucidated in the case of *Breadalbane's Trustees*, 8 D. 1062. The first Marquis of Breadalbane had incurred liabilities of the same kind as Sir John Steuart, and had granted to the lenders a bond or bonds in the same terms. It was held that his general representatives had no claim of relief against his heir of entail. The Court were of opinion that no burden was created either on the entailed estates or on the heirs of entail, and that the debt was primarily payable by the general representatives of the debtor. It is true that the general estate of the Marquis comprised heritable as well as moveable property, and therefore it is not decided whether the debt was to be discharged by the heir in heritage or by the heir *in mobilibus*. For, assuming that the heir in heritage was the primary debtor, the decision would have been the same, inasmuch as the heir of line could have no relief from an heir of provision.

"But, in the opinion of the Lord Ordinary, the debt due to the Misses Hay was nothing else than a moveable debt payable from the executry estate. If the question arose between the three classes of heirs, viz., heirs of entail, heirs of line, and heirs *in mobilibus*, the Lord Ordinary thinks that the last must be held to be the primary debtors. If the debt was not made a burden on the entailed estate, it was not made a burden on the fee-simple estate, and therefore, in the opinion of the Lord Ordinary, it was properly paid out of Sir John's executry. If so, the proceedings adopted by Sir William to raise it up again as a debt against the heirs of entail were beyond his powers.

"It was urged that Sir John Steuart intended that the debt should be paid by the heirs of entail. The Lord Ordinary has seen no evidence of that intention, except in so far as it may be derived from the circumstance that the money may be supposed to have been expended for their benefit. The same argument was urged in the case of *Breadalbane*, but it was not sustained."

The pursuer reclaimed, and argued—(1) If Sir William advanced the money for making the roads, there can be no question that the deed he executed was one he was entitled to execute, and one that made the debt a burden on his heirs of entail. (2) If he did not advance the money, but Sir John did, this case can be distinguished from the *Breadalbane* case. The debt in this case was paid up on the urgent request of the trustees of another subscriber, to extinguish the joint and several liability the subscribers had originally incurred, not to extinguish it as a road-debt coming

under the statute. In *Breadalbane's* case the road-debts were paid by the general representatives of the Marquis, and rightly paid by them, because the object of the trust there was to add to the entailed estates by purchasing more land to be entailed, and therefore it would have been absurd to burden the existing entailed estate to effect that object. The intention of the Marquis was what the Court there chiefly dealt with. The trustees of Sir John might have made this debt a burden on his entailed estates after his death, and, in the circumstances, the fact of their having paid it cannot be held to have extinguished it in a question between the heir of entail and the general representatives. Besides, this debt was not in its nature moveable. The statute authorises the money to be considered a charge on the estate, and this security, in spite of the fact that executors are bound, will make the debt heritable.

The defender argued—(1) Sir John, and not Sir William, advanced this money, and bound himself in the same terms as were in *Breadalbane's* case found ineffectual against heirs of entail. The statute extended the liability for such debts to heirs of entail, but did not in any way alter the legal order of liability. The debt was in its origin personal, and therefore was properly paid by the executors. (2) If Sir William advanced the money, are his heirs of entail liable? We submit they are not, for where one of several debtors all liable makes payment of a debt without taking an assignation to it, he must be held to have made a present of it to his creditors.

Authorities—*Breadalbane's Trustees*, 8 D. 1062; *Douglas' Trustees v. Douglas*, January 7, 1868, 6 Macph. 223; *Erskine*, ii. 2, 14, with *Irving's* note; *Sandford on Entails*, p. 410; *Wauchope v. Duke of Roxburgh*, March 9, 1825, 1 *Wilson and Shaw*, p. 41; *Bell's Conveyancing*, p. 725.

At advising—

LOED PRESIDENT—The claim that is made in this action by the executor of the late Sir William Drummond Stewart is to be relieved of the debt contained in two bonds of £1100 each, and he calls upon the defender, who is the heir of entail in possession of the entailed estates of Grantully, Strathbraan, and others, to pay the sum contained in these bonds, or to pay the money to him in order that he may operate his own relief.

The ground of action is that the last heir of entail, Sir William Drummond Stewart, advanced money for making what is called the Strathbraan turnpike road, and borrowed these sums of £1100 and certain other sums for the construction and maintenance of the said road. Further, the claim is made on the ground that Sir William having advanced part of the money for the construction of this road, and being in the position contemplated by the Act of Parliament which is referred to, proceeded to grant bonds to creditors which had the effect of binding the grantor and his heirs, executors, and successors, but expressly declaring that the heirs of tailzie are to free and relieve all others, his heirs, executors, and successors. Such is the ground of action explicitly stated in the 4th and 5th articles of the condescendence. Particularly in the 4th, it is stated—"In or prior to December 1840, and by virtue of the powers contained in the foressaid Acts of Parliament, the late Sir William Drummond Stewart, proprietor of the entailed estates

of Grandtully, Strathbraan, and others, in the county of Perth, and other proprietors of estates in the said county, or their predecessors in their entailed estates, made, or advanced sums of money for making and maintaining, a line of road called the Strathbraan turnpike road;" and then follows a description of the course of this road. It is said, no doubt, "that the said line of road was made, or partly made, during the lifetime of the deceased Sir John Archibald Stewart, formerly of Grandtully, who died in the year 1838, heir of entail in possession of the said estates of Grandtully, Strathbraan, and others, and was succeeded therein by the said deceased Sir William Drummond Stewart." The allegation in the 5th article is perhaps of even greater importance to attend to. He says there—"The said bond and assignation was granted by Sir William Drummond Stewart as heir of entail advancing the said amount for making and maintaining said road, and in pursuance of and as part of the arrangements made by the said deceased Sir John Archibald Stewart for raising his share of the expense of constructing the said road, and for allocating the amount of such expense among the proprietors of the entailed estates through which the road passed, in proportion to the subscriptions undertaken by them in respect of their said estates. The sums contained in the bonds originally granted by the subscribing proprietors as aforesaid were not actually paid by them, and, in particular, the heir of entail who truly advanced and paid the foressaid sum of £4273, 2s. 11d.," of which these two sums of £1100 formed part, "was Sir William Drummond Stewart. Thus, although discharges of the two bonds of £1100 each in favour of Miss Barbara Hay and Miss Jane Hay were executed on or about 12th November 1839 in favour of the subscribing proprietors surviving, and of their heirs, executors, and successors, and of the heirs and representatives whomsoever of those who had deceased, this was effected by Mr Condie (who acted as agent for all parties interested) in such a manner that the debt was not truly extinguished, but was undertaken by Sir William, a new bond being granted by Sir William in favour of the creditors in the original bonds. There was no discharge of the obligation imposed by the deceased Sir John Archibald Stewart in the original bonds upon his heirs of tailzie, or of the right of the heir advancing the money to borrow the like sum upon bonds affecting the estate and heirs of entail. The said bond and assignation for £2200 was granted by the said Sir William Drummond Stewart as heir of tailzie to the said Sir John Archibald Stewart, and thus under obligation to the said Misses Barbara and Jane Hay, by whom the same was received in replacement of the original bonds."

Now, I must say it appears to me that if the allegations made there are correct, the pursuer is entitled to prevail, because it is there stated that Sir William advanced the money to the trustees for the making and maintenance of these roads, and if he did so he was entitled under the Act of Parliament to grant the bonds he actually did grant, binding the heirs of entail, and in addition to them his other legal representatives; but it was also competent to provide that the general representatives should be liable only *subsidiarie* to the heirs of entail. The whole question, how-

ever, depends on whether these averments are true, and I am very clearly of opinion that they are disproved by the documents in process, and therefore I am for adhering to the Lord Ordinary's interlocutor.

Now, it is perhaps a little difficult to trace the true history of the transactions in this matter, but I think it is quite possible to see what really took place.

The first arrangement was made in 1831, by which a certain sum of money was borrowed from the Perth Banking Company under a cash-credit. That appears from a letter of guarantee addressed to Henry Lindsay, the cashier of the Banking Company, dated 5th December 1831, and subscribed by the trustees and subscribers to the said road. This was, of course, merely a provisional arrangement. Then there follow certain bonds in favour of creditors who had advanced the money for the making of the road, and in those bonds the subscribers bound themselves conjunctly and severally to repay the sums therein contained; but they also bound their heirs of line and provision and of tailzie, and their executors and successors, to the extent to which they had subscribed. This obligation to Miss Hay was one in which these obligations are laid on heirs and representatives without in the least degree providing whether the burden was ultimately to fall on the heir of entail or on the general representatives of the debtors in the bond. We then have a bond of relief, in which the various subscribers bind themselves for various specific amounts, but the balance is taken as a burden on Sir John Steuart; and he says—"I, the said Sir John Archibald Steuart, shall be liable in the total sum beyond the particular sums above enumerated which may be requisite for completing the said road, building the requisite bridges, and making the requisite toll-houses and toll-bars, erecting the necessary enclosures, and defraying all claims of damages, management, and incidental charges which may be incurred in finishing and completing in every respect the said turnpike road, and the necessary works therewith connected;" and by this deed they agree that each shall furnish his own subscription and no more, and that they shall mutually relieve one another so as to operate that result.

This sum having been borrowed, the road is forthwith constructed. That is the state of matters when Sir John Steuart died. He was bound to different creditors for sums thus advanced to an aggregate amount of upwards of £4000, and for repayment he had bound his heirs of line and of provision, his heirs of entail, and his executors and successors, but he had not in any way during his lifetime indicated that the liability was ultimately to fall on his heirs of entail, or on one class of heirs more than another. His intention is not to be gathered from any of these bonds, or from any of the documents before us.

The question then comes to be, Were these bonds *sua natura* moveable or heritable? To that there can be but one answer. They are beyond all doubt moveable, and must be paid by the executor. They have none of the characteristics of heritable bonds. We have therefore next to turn to Sir John's testamentary provisions to see if there are any instructions by what class of heirs or out of what funds these bonds are to be paid. But, again, we are left without any light on the

subject. The trust-disposition before us, dated 4th September 1837, makes various provisions that are of no consequence in this question, but it directs his trustees in the ordinary terms to pay his just and lawful debts. That, I need not say, has no effect in determining the nature of these debts. It is merely a matter of style common to all such deeds. Then, after making certain provisions for his widow, he proceeds to provide—"In the third place, in case my executry, independent of the furniture and effects in the house at Murthly, shall be sufficient to meet the payment of all debts due by me, and obligations that may lie against my said trustees, I hereby appoint my said trustees to deliver over to the heir who shall succeed me in the entailed lands and estate of Murthly and others, the whole household furniture, books, plate, wines, and plenishing of every description that now are or may be at the time of my death in my establishment at Murthly Park, but should my moveable effects be insufficient to meet these obligations, then I appoint my said trustees to offer the whole of my said effects in the establishment at Murthly Park to the heir entitled to succeed to the entailed estates at the valuation of neutral persons to be mutually chosen by him and my said trustees:" "And then, in the fourth and last place, I appoint my said trustees, in the event of there being any surplus of the estate and effects hereby conveyed to them after satisfying the debts and bequests above set forth, to pay over such surplus towards extinguishing the debts affecting the estate of Logiealmond, also belonging to me." As far as one can see, it is not intended that the heir of entail of Murthly and Strathbraan should have any interest in the trust-settlement except that, if the executry could afford it, he should receive the furniture and plenishing of Murthly Park; and if the executry had a surplus it was to be applied to pay off the debt on the Logiealmond estate. There was no gift to the heir of Murthly as an individual. It was to the estate of Logiealmond and to the class of heirs entitled to succeed thereto that there was in a certain event to be a gift.

Now, did Sir John's executors pay this debt and extinguish it? And, in the second place, did they in so doing do rightly? I am of opinion, in the first place, that they were bound to pay this debt and to relieve the heir of entail, and, in the second place, I think that they did pay the debt, and that it was extinguished by a formal instrument which makes it clear that before the operations on which this action is founded were commenced there was no such debt in existence.

The debts due under the bonds were paid and the discharges were granted in November 1839 in order to satisfy the trustees of the Marquis of Breadalbane, who were anxious to have this debt paid up. The agent of Sir John Steuart's trustees granted an obligation, "at the term of Whitsunday next, to pay up the sums due by the late Sir John Archibald Drummond Steuart for forming and maintaining the following turnpike-roads"—then follows a specification of the different roads—"and thereby to free and relieve the trustees of the late Marquis of Breadalbane, and all others, of all liability for said sums due by Sir John Archibald Drummond Steuart." Further, we find in a minute of a meeting of trustees, dated 8th May 1839, an entry, under the

head of debts falling to be paid at Whitsunday, a sum of £7264, 12s. 10d. in road obligations, which admittedly comprises the sum of £4000 in question; and finally, we have the meeting authorising "Mr Condie to pay up the contents of the different obligations come under by Sir John to the Crieff and Taybridge, the Bishoprick, and Strathbraan turnpikes, obtaining the proper discharges therefor and assignation to the toll revenues, or any other securities that may appear necessary and proper in security of the sums to be so paid."

Now, I need not say that the debt due to the Misses Hay might be extinguished as between debtor and creditor, but that Sir John's Trustees might be entitled to be relieved of it by taking an assignation to the toll duties; that is quite in accordance with statute. But here there is no instruction to Mr Condie to take any steps to effect such an arrangement, and he is afterwards expressly ordered to take the assignations in favour of Sir William Stewart. That, it seems to me, imports an extinction of the two bonds granted to the Misses Hay, and an extinction of the other bonds also; and these debts being discharged, what was the position of Sir John's estate? It was this—The trustees were to consider if they could afford to make over the plenishing of Murthly Park to the heir of entail—that they did,—and then if any surplus remained they should have applied it in extinguishing the debts on the Logiealmond estates. That they did not do; but that does not affect the question before us. It is said that the entail of Logiealmond was defective, and therefore that Sir John's object had been defeated, but I confess I cannot see that. The entail was not found invalid for two years after this time; but that is immaterial. An estate may be freed from debt although it is not entailed. It is admitted—confessed is perhaps a more appropriate word—that they, by what looks very like a breach of trust, paid over the surplus to Sir William for his own behoof, and here commenced a fictitious set of proceedings for renewing the obligation to the Misses Hay. It is somewhat troublesome to follow the inventor of this plan through all the sinuosities of his scheme; but they are apparent enough. The gentleman who happened to be the agent for Sir John's Trustees, for Sir William, for the Misses Hay, and for the Strathbraan Road Trustees, by entries in his books made it appear as if the debt had never been extinguished. But all that I throw aside; it is mere fiction; the debts were extinguished in 1839, and could not be revived; they were extinguished by payment out of moveable funds made by Sir John's executors, who were bound to do so, and therefore I am for adhering to the Lord Ordinary's interlocutor.

LORD DEAS—I concur in the conclusion at which your Lordship has arrived, as I do in the detailed exposition of the transactions given by your Lordship. I think this bond was for a moveable debt, and although it bears to bind the heirs, not only of line and provision but also of tailzie, as well as his executors and successors, it was properly an executory debt. No steps were taken to make it a debt affecting the entailed estate, which the statute authorised to be done. This point was settled by the case of *Breadalbane's*

*Trustees*, and if it were still open I think that case was well decided. The debt was extinguished, and all the efforts made to rear it up, with the view of laying it on the heirs of entail, were altogether futile, and only serve to illustrate the fact that parties felt they were not in a position to go against the heir of entail under the statute. The reasons for this conclusion are well stated in the Lord Ordinary's note, to which I think we ought to adhere.

LORD MURE—I concur. The evidence of the bonds having been paid up with money of Sir John Stewart's executors, in respect of instruction given by his trustees, is distinctly proved; that debt once paid up, it was beyond the power of Sir William Stewart to rear it up again. The theory of the pursuer is that Sir William Stewart advanced the money in 1840, but it is distinctly shown by the documents that the transaction took place in 1831.

LORD SHAND—I concur with your Lordships. The ground of action is simply this, that Sir William Stewart advanced a sum of £4000, of which the sum sued for is part, in 1840, and was entitled to charge this against the entailed estates. But the documents clearly demonstrate that no such advance was made. The true history of the matter is that in 1831 it was arranged that this road should be made and funds for that purpose provided by certain gentlemen through whose lands it was to run. Sir John Stewart was then heir of entail in possession of the lands of Murthly and Strathbraan, and the documents show that he made the advances. The money was at first advanced by a bank, as your Lordship has noticed, but in order to put these obligations on a more permanent footing, the subscribers executed bonds to private persons and a bond of relief to regulate relief among themselves. The advances were thus really made by these gentlemen themselves, who got the money from third parties, and made it over to the Road Trustees. After Sir John's death, the creditors who held the bonds were repaid by his executors, and the bonds were discharged. That being so, it was impossible for Sir William Stewart to charge the legal incidence of these debts, particularly by deeds which, like those here, do not represent any real transactions. The question remains, whether in 1838 Sir William was entitled to have these sums charged on the rents of Murthly? I waive that question, and I am of opinion that, taking the case on the footing on which Sir John left the estate, the pursuer is not entitled to succeed. It is settled that an obligation of this kind, while it gives creditors a right against heirs of line and of entail, is primarily of a moveable character. That was settled in *Breadalbane's* case, and if it had not been, I am of opinion that there is the correct principle of law to apply. In short, the executors fulfilled their legal obligation, and Sir William could not rear it up against the heirs of entail.

The Court adhered.

Counsel for Pursuer—Lord Advocate (Watson)—Lee—Graham Murray. Agents—Tods, Murray & Jamieson, W.S.

Counsel for Defender—Balfour—Mackay. Agents—Dundas & Wilson, C.S.