

to the question, whether he believed that the precise individual debt sued for was due. Having therefore declined to depone that he believes the debt claimed for to be due, the respondents were entitled, according to the law of Scotland, to be assoilzied, and consequently the judgment complained of ought to be affirmed. May 25. 1825.

The House of Lords 'ordered and adjudged, that the appeal 'be dismissed, and the interlocutor complained of affirmed, with 'L. 100 costs.'

Appellant's Authorities.—4. Stair, 44. 17. ; 4. Ersk. 2. 20.

Respondents' Authorities.—4. Stair, 44. 15. 21. ; 4. Ersk. 2. 16. ; Act of Sed., Jan. 13. 1692.

MEGGINSONS and POOLE—SPOTTISWOODE and ROBERTSON,—
Solicitors.

Lieutenant-General GEORGE MONCREIFF, Appellant.

No. 27.

WILLIAM TOD and PATRICK GEORGE SKENE, Esq. Respondents.

Entail—Heir and Executor.—An heiress of entail in possession having bound herself and the proprietor, at the end of a lease, to pay certain sums to the tenant for meliorations, but not having constituted them against the estate in terms of the 10. Geo. III. c. 51. ;—Held, (affirming the judgment of the Court of Session, with certain variations as to illiquid claims), That the executor of the heiress, and not the succeeding heir of entail, was liable.

ON the 10th of August 1787 Major-General Philip Skene executed an entail of his estates of Hallyards and Pitlour, containing inter alia a prohibition against contracting debt or burdening them with sums of money, under irritant and resolute clauses. At the same time he made a disposition, by which he conveyed to a certain series of heirs all his other estates, real and moveable, which included that of Falkland. In virtue of these deeds his sister, Mrs Helen Skene, widow of Colonel Moncreiff of Reddie, succeeded, in 1803, to the estates, on which occasion she took the name of Skene. The respondent, Patrick George Skene, Esq. was her grandson by her eldest son, and the appellant, Lieutenant-General Moncreiff, was her second son. Part of the entailed estate, called West-Gosperty, was let to the other respondent William Tod, and when his lease was about to expire a new one was granted to him in 1811 by Mrs Skene, who at this time was about 87 years of age. By that lease she 'set, and in tack May 27. 1825.
1ST DIVISION.
Lord Gillies.

May 27. 1825. ‘ and assedation let to the said William Tod and his heirs, expressly secluding assignees, legal, voluntary, or conventional, as also sub-tenants and heirs-portioners, all and whole the farm of Wester-Gosperty, the mill and mill-lands of Burngrange, with the pendicle of Hedderwick, with the multures and sequels, and privilege to the Lomond Hills, conform to use and wont, all as possessed by the said William Tod, and that for all the days, years, and space of nineteen years, from and after the term of Martinmas 1807; which tack the said Mrs Helen Skene binds and obliges herself, her heirs and successors, to warrant to the said William Tod and his foresaids, at all hands, and against all deadly.’ This tack also contained the following clause:—‘ Whereas Mr Robert Balfour, architect, St Andrews, General Moncreiff, and Robert Meldrum, factor for the said Mrs Helen Skene, at the desire of the proprietrix, inspected the steading of Wester-Gosperty, they found the tenant was entitled to a new steading, viz. a dwelling-house, barn, and byre, and some repairs to the old steading; that the said Robert Balfour then made out a plan and estimate of said houses; and the same being now executed, and the accounts examined by the said Robert Balfour and Robert Meldrum, they found the same to amount to L.620 sterling. And whereas it was agreed upon betwixt the said Mrs Helen Skene and William Tod, to prevent any dispute anent the obligations on the proprietor for building a new steading, that the said William Tod should advance the foresaid sum of L.620 sterling, upon being repaid the same at the end of his lease, and getting deduction out of his rent of the sum of L.21 sterling for crop 1813, and the like sum yearly for the remaining years of the lease, after said crop; and, in terms of said agreement, the said Mrs Helen Skene binds and obliges herself, or the then proprietors of the lands, at the end of this lease, to pay to the said William Tod, his heirs or assignees, the foresaid sum of L.620 sterling, and that at the expiration of this tack, with interest after the said term of payment till paid, and a fifth part more of penalty in case of failure; as also, the said Mrs Helen Skene binds and obliges herself, and the proprietor for the time being, to allow the said William Tod and his foresaids, out of the rent of crop 1813, the foresaid sum of L.21, and the like sum of L.21 yearly during the remaining years of the tack after crop 1813; and in consequence of said agreement the said William Tod binds and obliges himself, and his foresaids, to uphold the new dwelling-house, barn, and byre, in a good tenantable condition, and the old steading to be upheld by the

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‘tenant only for his own accommodation; and whereas the
‘tenant has erected a thrashing-mill and shed, the proprietor
‘hereby becomes bound to take the same on a valuation at the
‘end of the tack; and in case the tenant shall enclose any part of
‘the foresaid lands, he shall be allowed the value thereof at the
‘end of the lease, as shall be ascertained by two neutral men,
‘one to be chosen by each party.’ No measures were taken by
Mrs Skene to constitute any of these contemplated improve-
ments burdens on the estate in terms of the 10. Geo. III., and
she died in 1816. She was then succeeded in the entailed pro-
perty by the respondent Mr Skene, while, in virtue of a deed
executed by her, the appellant acquired all the other property,
including the estate of Falkland, subject to various burdens, and
was nominated and confirmed her executor. Tod having claim-
ed from Mr Skene, the heir of entail, deduction of the L. 21 out
of the rent, that gentleman refused it, and intimated that he did
not consider himself liable to pay either the L. 620 or the value
of the thrashing-mill, enclosures, &c. A claim was then made
by Tod against General Moncreiff, as the representative of his
mother, the granter of the lease, and this having been resisted,
Tod raised an action against him before the Court of Session,
concluding that he ‘ought and should be decerned and ordained
‘to free and relieve the pursuer of all claim which the said
‘Patrick George Skene has, or pretends to have, to payment of
‘the said sum of L. 21 per annum, allowed by the said tack to
‘be abated or deducted from the rent payable by the pursuer,
‘and of any sequestration, diligence, or action, which the said
‘Patrick George Skene has brought or may bring against the
‘pursuer, for enforcing payment of that annual sum already due,
‘or to become due, in terms of the said tack, and of all the ex-
‘penses attending the same, and other consequences thereof;
‘and further, to make payment to the pursuer, at the expiration
‘of the said tack, of the said principal sum of L. 620 sterling,
‘with a fifth part more of penalty in case of failure, and of the
‘sum or sums he has paid out, or may pay out, in erecting the
‘foresaid thrashing-mill and shed, and in enclosing the foresaid
‘lands, or any part thereof, as the same shall be ascertained,
‘as pointed out in the said tack, at the expiration thereof;
‘and also of the additional value of the lying and going
‘gear of the mill, beyond the inventory and valuation before
‘mentioned, with the legal interest of these principal sums
‘ascertained, and to be ascertained, from the term of Martin-
‘mas 1826, and thereafter in time coming till payment.’ In
defence, General Moncreiff pleaded, that the claim lay only

May 27. 1825. against Mr Skene, the heir of entail in possession, who was deriving the benefit of the lease; and he at the same time brought an action of relief against Mr Skene. Lord Gillies, on the 31st of May 1821, pronounced this interlocutor:—‘ Having heard
 ‘ parties, conjoins a process of relief at General Moncreiff’s
 ‘ instance against P. G. Skene, Esq. with this process: in this
 ‘ process, repels the defences, and decerns against General
 ‘ Moncreiff, the defender therein, conform to the conclusions of
 ‘ the libel at Mr Tod’s instance; sustains the defences for P. G.
 ‘ Skene, Esq. in the process of relief at the instance of General
 ‘ Moncreiff against him; assoilzies Mr Skene from the conclu-
 ‘ sions of the libel of relief, and decerns.’ To this judgment the Court (holding that the general point was fixed by the decisions) adhered on the 6th of July 1822; and thereafter, on the 14th January 1823, refused a petition, on advising it with answers.*

General Moncreiff appealed.

Appellant.—1. An obligation cannot be extended beyond the meaning and intention of the parties. If a party in express terms excludes the liability of one class of heirs, the person who contracts with him cannot insist for payment or performance from these heirs. But an implied exemption from liability, provided it be fairly deducible from the terms of the obligation, is just as good as an express exemption. Now, in this case Mrs Skene did not bind her heirs, executors and successors, to perform the stipulations in question; she merely bound ‘ the then
 ‘ proprietor of the lands at the end of the lease;’ an obligation the tenant accepted of, and consequently he could never rely on her executor, who, he must have known perfectly, could not succeed to the entailed estate. ‘ It is not incumbent on the appellant to shew who is the tenant’s proper debtor. It is sufficient if he can establish that no liability attaches to himself. But the heir in possession is clearly liable, both in justice and equity. He alone will derive all the benefit arising from the improvements, and consequently ought to pay for them, so far as thereby benefited. The Act of 10. Geo. III. has merely the effect to render the heirs liable whether they are lucrati or not; but at common law, where an heir is lucratus, a liability is affixed to him.

2. Supposing, however, the judgments to be right on the general principle, they are plainly premature, except as to the

* Sec 2. Shaw and Dunlop, No. 110.

deduction of rent. The L.620 are not payable till the end of the lease, and it is not till that period that any demand can be made for meliorations. But no such claims may exist at that period, and therefore to this extent the appellant ought to have been assoilzied. May 27. 1825.

Respondents.—1. The obligation undertaken by Mrs Skene was one which could have been enforced against her personally, and consequently can be equally so against her representative. The entail contains a prohibition against contracting debt, or binding the lands with sums of money, and therefore Mrs Skene had no power to do so; and as she did not avail herself of the statute, no claim can be made against the respondent Mr Skene, who does not represent her. Besides, the general question has been settled by a series of decisions, in which the pleas urged by the appellant, both in law and equity, were repelled.

2. The respondent Tod is entitled to have decree in terms of the libel, although the day of payment is not arrived, execution being of course postponed till the arrival of that period.

The House of Lords ‘ordered and adjudged, that the interlocutor of 31st May 1821 complained of be varied, by leaving out the words, “conform to the conclusions of the libel at Mr Tod’s instance,” and inserting in lieu thereof these words, “conform to those conclusions of the libel at Mr Tod’s instance, by which he claims to be relieved from the payment of the sum of L.21 per annum, and also by which he claims payment from the appellant, at the expiration of the tack, of the sum of L.620 sterling;” and by inserting after the words, “at the instance of General Moncreiff against him,” these words, “as to the claims last aforesaid;” and by inserting after the words, “libel of relief,” these words, “as to those claims:” And it is further ordered and adjudged, that, with these variations of the said interlocutor of 31st May 1821, that interlocutor, and the other interlocutors complained of, be affirmed; and it is further ordered, that this judgment is to be without prejudice to any claim of the said Mr Tod, at the end of the said tack, in respect of the matters stated in the other conclusions of the libel at his instance, either against the appellant or any other person; and also without prejudice to any claim of relief by the said appellant, in respect of the same matters, against the said Patrick George Skene, or any other person or persons.’*

* The judgment now stands thus:—In the process at Tod’s instance against

May 27. 1825.

LORD GIFFORD.—There was a case before your Lordships, to which I shortly called your attention on a former occasion. It was a case, in which Lieutenant-General George Moncreiff, and others, were the appellants, and William Tod, and Patrick George Skene, were respondents.

This was a case, my Lords, in which it appeared that a person of the name of Skene was in possession of estates in Scotland under an entail, in which entail there is the following condition:—‘ That it
 ‘ shall not be lawful to, nor in the power of any of the foresaid heirs,
 ‘ to sell, alienate, impignorate, or dispone the foresaid lands and others,
 ‘ or any part thereof, either irredeemably or under reversion, or to
 ‘ burden the same, in whole or in part, with debts or sums of money.’
 It appears that this lady, being thus in possession, granted several leases, and, among others, a lease of lands to a person of the name of Tod; and that lease contains this clause:—‘ Whereas Mr Robert Balfour, architect, St Andrews, General Moncreiff, and Robert Meldrum, factor for the said Mrs Helen Skene, at the desire of the proprietor, inspected the steading of Wester-Gosperty,—they found the tenant was entitled to a new steading, viz. a dwelling-house, barn and byre, and some repairs to the old steading; that the said Robert Balfour then made out a plan and estimate of said houses, and the same being now executed, and the accounts examined by the said Robert Balfour and Robert Meldrum, they found the same to amount to L. 620 sterling:’ it then goes on to state, that it had been ‘ agreed upon betwixt the said Mrs Helen Skene and William Tod, to prevent any dispute anent the obligations on the proprietor for building a new steading, that the said William Tod should advance the foresaid sum of L. 620 sterling, upon being repaid the same at the end of his lease, and getting deduction out of his rent of the sum of L. 21 sterling for crop 1813, and the like sum yearly for the remaining years of the lease after said crop; and in terms of said agreement the said Mrs Helen Skene binds and obliges herself, or the then proprietor of the lands at the end of the lease, to pay to the said William Tod, his heirs or assig-

General Moncreiff, repel the defences, and decern against General Moncreiff, the defender therein, conform to those conclusions of the libel at Mr Tod’s instance, by which he claims to be relieved from the payment of the sum of L. 21 per annum, and also by which he claims payment from the appellant, at the expiration of the tack, of the sum of L. 620 sterling: sustain the defences for P. G. Skene, Esq. in the process of relief at the instance of General Moncreiff against him. As to the claims last aforesaid, assoilzie Mr Skene from the conclusions of the libel of relief as to those claims, and decern; but this judgment is to be without prejudice to any claim of the said Mr Tod at the end of the said tack, in respect of the matters stated in the other conclusions of the libel at his instance, either against the appellant (General Moncreiff) or any other person; and also without prejudice to any claim of relief by the said appellant (General Moncreiff), in respect of the same matters, against the said Patrick George Skene, or any other person or persons.

‘ nees, the foresaid sum of L. 620 sterling, and that at the expiration of May 27, 1825.
 ‘ this tack, with interest after the said term of payment till paid, and
 ‘ a fifth part more of penalty in case of failure; as also the said Mrs
 ‘ H. Skene binds and obliges herself, and the proprietor for the time
 ‘ being, to allow the said William Tod and his foresaids, out of the
 ‘ rent of crop 1813, the foresaid sum of L. 21 yearly, during the re-
 ‘ maining years of the tack after crop 1813; and, in consequence of
 ‘ said agreement, the said William Tod binds and obliges himself and his
 ‘ foresaids to uphold the new dwelling-house, barn and byre, in a good
 ‘ tenantable condition, and the old steading to be upheld by the ten-
 ‘ ant only for his own accommodation.’ It then recites, ‘ And whereas
 ‘ the tenant has erected a thrashing-mill and shed, the proprietor hereby
 ‘ becomes bound to take the same at a valuation at the end of the tack;
 ‘ and in case the tenant shall enclose any part of the foresaid lands, he
 ‘ shall be allowed the value thereof at the end of the lease, as shall be
 ‘ ascertained by two neutral men, one to be chosen by each party.’

I ought to have stated to your Lordships, that this was a lease, dated the 5th of November 1811, to this Mr Tod, who appeared to have been in possession of the farm for some years, and it was a term of 19 years, to be calculated from Martinmas 1807. You will see that four years of the term have elapsed; and the situation of the lease in respect of the deduction of L. 21 a-year, in consequence of the tenant having expended the L. 620, was not to commence till after the crop of 1813, being two years after the date of the lease, and six years after the commencement of the term.

My Lords,—Mrs Skene was a very old lady at that time, and she died some years ago; and at her death a gentleman of the name of Patrick George Skene came into the possession of the estate, as succeeding heir of entail. Against this gentleman, as succeeding heir of entail in possession, Mr Tod claimed this deduction of L. 21 per annum, and the performance of the other stipulations contained in this lease. The succeeding heir of entail, not conceiving he was bound to fulfil these stipulations, the respondent, Mr Tod, brought an action against the present appellant, Lieutenant-General Moncreiff, who it appears was the executor of this lady; and in this action he sought that the ‘ de-
 ‘ fender ought and should be decerned and ordained to free and relieve
 ‘ the pursuer of all claim which the said Patrick George Skene has, or
 ‘ pretends to have, to payment of the said sum of L. 21 per annum,
 ‘ allowed by the said tack to be abated or deducted from the rent
 ‘ payable by the pursuer, and of any sequestration, diligence or action,
 ‘ which the said Patrick George Skene has brought or may bring
 ‘ against the pursuer for enforcing payment of that annual sum already
 ‘ due, or to become due in terms of the said tack, and of all the expen-
 ‘ ses attending the same, and other consequences thereof; and further,
 ‘ to make payment to the pursuer, at the expiration of the said tack,
 ‘ of the said principal sum of L. 620 sterling, with a fifth part more of
 ‘ penalty in case of failure, and of the sum or sums he has paid out, or

May 27. 1825. ' may pay out in erecting the foresaid thrashing-mill and shed, and in
 ' enclosing the foresaid land, or any part thereof, as the same shall be
 ' ascertained as pointed out in the said tack at the expiration thereof ;
 ' and also of the additional value of the lying and going gear of the
 ' mill beyond the inventory and valuation before mentioned ; with the
 ' legal interest of these principal sums ascertained and to be ascer-
 ' tained from the term of Martinmas 1826, and hereafter in time coming
 ' till payment.' Upon this action being brought against the appellant,
 General Moncreiff brought an action against the respondent Patrick
 George Skene, the heir of entail in possession of the land ; and by that
 action he claimed to be indemnified against these claims of the tenant.
 The action came on before my Lord Gillies as Lord Ordinary, who
 pronounced the following interlocutor :—' Having heard parties, con-
 ' joins a process of relief at General Moncreiff's instance against P. G.
 ' Skene, Esq. with this process : in this process, repels the defences,
 ' and decerns against General Moncreiff, the defender therein, conform
 ' to the conclusions of the libel at Mr Tod's instance ; sustains the
 ' defences for P. G. Skene, Esq. in the process of relief at the instance
 ' of General Moncreiff against him ; assoilzies Mr Skene from the con-
 ' clusions of the libel of relief, and decerns.'

My Lords,—That interlocutor was brought under the review of the
 Court of Session, and they affirmed that interlocutor ; so that they have
 affirmed the decision to which the Lord Ordinary came in that action
 of relief brought against the respondent Skene by General Moncreiff.

My Lords,—This interlocutor of the Lord Ordinary, confirmed by
 the Court of Session, has been brought before your Lordships on
 appeal. My Lords, it is hardly necessary for me to state, that in a
 case of this nature it is certainly not competent for the heir of entail
 in possession to erect farm-houses and other buildings upon the farm,
 and to throw the whole expense of those buildings upon the succeed-
 ing tenant of entail, in order to enable the heir of entail in possession,
 who enjoys this limited interest, to throw any of the expense so
 incurred upon the succeeding heir of entail. A statute was passed in
 the tenth year of his late Majesty in aid of heirs of entail in posses-
 sion, who, by taking certain proceedings pointed out in that Act, may
 burden the estate of the succeeding heirs of entail with a portion of
 the expense necessarily incurred, but it can only be such a proportion
 as is pointed out by that statute. In this instance, Mrs Skene, it
 appears, had not recourse to that statute, and it is endeavoured to
 throw upon the executor of Mrs Skene the whole expense of the
 farm-house. It appears, that the agreement which she made with the
 tenant was, that a certain rent should be paid, the rent being commensurate to the increased benefit which the tenant derived by the money laid out upon the farm-house ; but then she made a stipulation, that she should not pay it herself, but said, You, the tenant, shall pay the L.620, and you shall be repaid that sum at the end of your lease. You shall be paid that sum at the end of the lease by the proprietor ;

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and to compensate you for the outlay, you shall have out of the rent crop 1813 the sum of L. 21, and the like sum yearly during the remaining years of the tack after crop 1813 ; in other words, there shall be an annual deduction of rent, or rather of payments, to be made to the proprietor of the land, of L. 21, and which you must consider as the interest of L. 620 from the year 1813 to the expiration of the lease ; so that the consequence of that was to throw the whole burden of the expense of the house on the succeeding tenant of entail, and, in the mean time, to throw upon the heir of entail, so long as her possession continued, the interest of L. 620.

In consequence of this, as I have stated to your Lordships, upon Mr Skene refusing to comply with the obligations which Mrs Skene had come under, an action was brought by the tenant against the executor of Mrs Skene, it being contended that that was a debt which Mrs Skene had no power to throw upon the estate, and therefore he, the tenant, had a right to be relieved against the claim by the executor ; and he claimed to have it declared by the Court, not only that the executor of Mrs Skene was liable to pay the L. 620, and the L. 21 a-year, but he sought also to have it declared provisionally, that, at the expiration of the lease, the executor of Mrs Skene would be also liable to make good to him the sum or sums he had paid out, or might pay out, in erecting the thrashing-mill and shed, and also the expense of enclosing lands, if any enclosure should be made before the expiration of the lease, as the same should be ascertained. The Court of Session, without distinguishing, as it appears, or without perhaps directing their attention to the particular terms of the action, decerned generally by confirming the interlocutor of the Lord Ordinary. They ‘ repel the ‘ defences, and decern against General Moncreiff, the defender therein, ‘ conform to the conclusion of the libel at Mr Tod’s instance ; sustain ‘ the defences for P. G. Skene, Esq. in the process of relief at the ‘ instance of General Moncreiff against him ; assoilzie Mr Skene from ‘ the conclusion of the libel of relief, and decern.’

The decisions, my Lords, on the general point, appear to be conclusive. I have looked at the cases cited, and at other cases, which, as well as the statute, shew the way in which an heir of entail is enabled to throw an expense of this description on the succeeding heir of entail ; for without the aid of that statute it might be very prejudicial to all the succeeding heirs of entail, if the heir of entail in possession should not be liable to build farm-houses, if necessary ; which he would be hardly inclined to do if the whole expense fell upon him as tenant for life, without throwing part of that burden upon the succeeding heir of entail. That statute of 10. Geo. III. has pointed out the mode in which it is to be done ; but this lady has not resorted to the statute, but endeavoured to throw the whole burden upon the succeeding heir of entail.

My Lords,—With respect to that conclusion of the libel which seeks to have it declared that the representative of Mrs Skene shall be

May 27. 1825. liable for L.620, which is a certain sum, and therefore determined to be debitum in præsentī solvendum in futuro, it appears to me, with respect to that sum, as well as the L.21, the Court of Session have determined rightly in determining in favour of the respondent, and that he is entitled to relief by the executor of Mrs Skene; but with respect to the sum relating to the thrashing-mill, and with respect to the expense that may be incurred relative to the enclosure of the land, it does appear to me quite premature to determine those questions. You do not know, my Lords, in point of fact, whether any enclosure of the lands has been made, and if made, it may become an important question whether made in the lifetime of the late heir of entail, or whether made during the possession of the present heir of entail, who may have looked on and taken advantage of it in his time. With respect to the valuation of the mill, it is a question whether it comes to a certain value. Therefore, my Lords, with respect to this part of the conclusion of the libel, I must confess at present I think a decision would be premature, and therefore that it is quite unnecessary for the Court of Session to determine those questions. An important question may arise upon these points at the end of the lease, between the heir of entail and the executor; but at present it would be premature in me to offer any opinion upon them. It was argued at the Bar, that if the heir of entail in possession suffer tenants to make improvements in his time, of which he will have the benefit, and the exclusive benefit, whether or not, he adopting and suffering them to be made, and taking advantage of them, he may not have to repay those expenses to the tenant: but at present it appears to me quite premature to determine that question, because non constat it may ever arise; for there is no proof before your Lordships that any enclosures have been made. And with respect to the other part, I should recommend to your Lordships to affirm the judgment which decerns against the defender conformably to the conclusions of the libel, relating to the L.620 and L.21 per annum; and with respect to the other conclusions of the libel, to suggest to your Lordships the propriety of intimating an opinion, that that question had better be left quite open, supposing the question should ever arise; for it does not follow as matter of course that it will arise. I shall therefore propose to your Lordships a judgment of that nature. It will require some little nicety in penning it; and I should wish to consider it a little before I hand it in to your Lordships, which I will endeavour to do in the course of a few days; but I thought it right to state my view of the case this morning, that the parties interested might be aware of the judgment which I shall ask your Lordships to approve.

Appellant's Authorities.—3. Stair, 8. 1.; Lord Eldon in *Queensberry Cases*, July 10. 1819.

Respondents' Authorities.—Leslie, March 2. 1779, (15,530.); Dillon, Jan. 14. 1780, (15,432.); Webster, Dec. 1791, (15,439. and Bell's Cases, No. 7. Entail); Taylor, 1792, (No. 8. Entail, Bell's Cases); 10. Geo. III. c. 51.