

himself had an interest ; and secondly, because, as far as related to the deed, it was a deed mortis causa. On these grounds I am disposed to recommend your Lordships to affirm the opinion of the Court below. I further think that, as far as relates to the will, it was intended by the party to be an execution of the power contained in the first deed. It is impossible to consider the nature of the transaction itself, as mentioned in the first deed, and the description of the property, and not to come to the conclusion that the party intended to execute that. The question that remains then is, Whether the mode of execution was sufficient? If the mode of execution was sufficient, then there is an end of the question. I can hardly distinguish this case from the case of Willoch. It was considered at that time a question of very little doubt. Under such circumstances, I move your Lordships that this judgment be affirmed, but without costs. Feb. 25, 1831.

The House of Lords ordered and adjudged, That the interlocutor complained of be affirmed.

Appellant's Authorities.—3 Ersk. 2, 43; Crawford, Feb. 3, 1801 (No. 3, Appendix, Deathbed); Batley, Feb. 2, 1815 (F. C.); Mudie, March 1, 1824 (2 Shaw's App. Ca. 9); Scott, March 2, 1820 (F. C.); Roxburghe, Dec. 13, 1816 (F. C. App. May 25, 1820); Bell on Testing Deeds, 110; 3 Ersk. 2, 22; Logan, Feb. 27, 1823 (2 Shaw and Dunlop, 253); Colville, Dec. 16, 1664 (15,927); Brand, Dec. 4, 1735 (15,941); Davidson, Dec. 20, 1797; (5,597, No. 1, App. Her. and Mov.)

Respondents' Authorities.—Willoch, Dec. 14, 1769 (5,539); 3 Ersk. 2, 44; Lang, Nov. 16, 1809; Bellenden Kerr, Feb. 24, 1829; (7 Shaw and Dun. 454.)

SPOTTISWOODE and ROBERTSON—RICHARDSON and CONNELL,—
Solicitors.

ARCHIBALD THOMAS FREDERICK FRASER, Appellant.

No. 9.

THOMAS ALEXANDER FRASER, Respondent.

Entail.—Held (affirming the judgment of the Court of Session), that an heir under a strict entail is not liable to implement an obligation granted by a preceding heir in a lease, to pay for the value of meliorations at its expiration.

LORD LOVAT was attainted of treason, 1746, and his estates annexed to the Crown. They were restored in 1774 to his eldest son, Lieutenant-General Simon Fraser, who, on the 16th Feb. 25, 1831.
1st Division.
Lord Newton.

Feb. 25, 1831. of May of that year, executed a settlement and deed of entail of the lands in favour of himself and the heirs of his body, whom failing, to a series of families of the name of Fraser. At the same time, and as a burden upon this entail, he executed a disposition in favour of trustees for payment of debts. He subsequently executed, in 1776, under reserved powers, another trust-disposition in place of the former, which he also declared a burden on the deed of entail. Full power was thereby conferred on the trustees, upon his death, to enter to the possession and management of his estates, to grant tacks of the endurance allowed by the entail, to borrow money for executing the purposes of the trust, and to grant bonds binding upon the heirs succeeding to his estate; and he declared, that the trust should continue until his whole obligations were discharged. The entail contained all the usual prohibitions, and was effectually fenced by irritant and resolute clauses.

On the 17th of March 1779 he addressed this letter to the trustees:—“ As you seem to think written authority necessary, “ I hereby empower you, in my name, to promise to the tenants “ over all my estates meliorations for houses and buildings that “ may be made and erected by them, not exceeding three years’ “ rent of the respective farms, to be paid at their removal by the “ incoming tenant; and I oblige me, and my heirs and suc- “ cessors, to implement such promise.”

He died in 1782; and the trustees thereupon entered into possession, and assumed the management of the estate. In October 1785 they let the lands of Dalcraig to Alexander Fraser for nineteen years; and, after reciting the above letter, the lease contained the following clause: “ It is therefore “ hereby specially conditioned and agreed, that the said “ Alexander Fraser and his foresaids shall, at the termina- “ tion of this tack, and upon their removal from the said “ lands, be entitled to receive, from the heritor or incoming “ tenant, the value of such houses and buildings, including “ stone-dykes, as shall then be upon the foresaid lands, to the “ extent of £49 16s. sterling money, being three years’ rent or “ tack-duty of the said lands, provided the value of the said me- “ liorations shall amount to so much, over and above the sum of “ £2 19s. 9d. sterling, being the heritors’ ground comprising, “ by the appreciation of one or two judicious persons, to be “ named by each party, for ascertaining the same, at the term of.

“ the tacksman’s removal ; but declaring, that whatever may be Feb. 25, 1831.
 “ the value or amount of the said buildings, or other improve-
 “ ments on the said lands, that the tacksman shall only be en-
 “ titled to receive for the same to the amount of the said three
 “ years’ rent or tack-duty, or so much less as shall be ascertained,
 “ in manner foresaid, to be the worth and value of his houses
 “ and buildings ; upon payment whereof he shall be bound and
 “ obliged to surrender the whole to the heritor or succeeding
 “ tenant, without being permitted to carry any part of them off
 “ the ground.”

Under the authority of an Act of Parliament, the trustees sold part of the estate, cleared off the debts, and in 1802 renounced the trust, and surrendered the possession to Archibald Fraser, the entail’s brother, and next heir of entail. Archibald Fraser then entered into an arrangement with the tenant, by which the latter surrendered his lease, and Fraser thereupon granted a new one to him for nineteen years from and after Whitsunday 1802. This lease contained the following clause:— “ And
 “ whereas, by the foresaid renunciation, the said lease granted
 “ by the said trustees is considered as having expired at the term
 “ of Whitsunday last, whereby the said Alexander Fraser, as
 “ outgoing tenant, is entitled to meliorations, in terms of the
 “ said lease: Therefore, it is hereby agreed upon between the
 “ parties, that at or as soon after the execution of this lease as
 “ possible, the whole houses, biggings, dykes, and inclosures
 “ upon the foresaid possession shall be comprised by one judi-
 “ cious man named by each of the parties contractors, agreeably
 “ to the terms of the said original lease ; and that one or more
 “ schedules thereof shall be made up, to be signed by the appre-
 “ ciators, and by the said Honourable Archibald Fraser of Lovat,
 “ and the said Alexander Fraser, and reference made therein to
 “ these presents, whereof they shall be considered as part ; and
 “ the said Alexander Fraser agrees to defer all demands on the
 “ said Honourable Archibald Fraser and his foresaids, on ac-
 “ count of the said meliorations, until the expiry of this present
 “ lease ; and further binds and obliges himself and his foresaids
 “ to keep, maintain, and uphold the said houses, biggings, dykes,
 “ and inclosures, contained in the said states or schedules, in
 “ equally good repair and condition, as shall be therein ex-
 “ pressed, during the whole currency of this present lease, and
 “ to leave the whole in the like good condition at the expiry

Feb 25, 1831. “ thereof; it being hereby declared, that the said Alexander
“ Fraser and his foresaids shall then, and not otherwise, be
“ entitled to receive from the said Honourable Archibald Fraser
“ of Lovat and his foresaids, or the succeeding tenant, the sum
“ mentioned in the said schedules or estimates, as the value of
“ the said meliorations, provided the same shall not exceed the
“ sum allowed for the said meliorations by the said lease, granted
“ by the said trustees on the estate of Lovat: Provided always,
“ that the said houses, biggings, dykes, and inclosures shall be
“ found, in the manner above expressed, to be worth that sum;
“ and also, provided they shall be found, at the expiry of this
“ present lease, to be in equally good condition and repair, and
“ worth as much as they shall be found and stated to be in the
“ said schedules and estimates made at the commencement
“ thereof; it being, however, understood, that the said Alexander
“ Fraser is not to be charged for the natural decay of timber,
“ or mason, or stone-work, from mere lapse of time, provided
“ the said Alexander Fraser has, by due attention to keeping
“ the said houses and buildings wind and water tight, and re-
“ pairing and upholding the said dykes and inclosures, and other
“ usual and necessary modes of repair, done all in his power to
“ prevent any deterioration of the aforesaid subjects; providing,
“ in case the said Alexander Fraser shall fail to repair the said
“ houses, buildings, dykes, and inclosures, after three months’
“ notice to that effect by the proprietor or his factor, the factor,
“ or such person as the proprietor shall appoint, shall cause the
“ same to be done by other persons whom he shall employ for that
“ purpose; and the said Alexander Fraser, so failing, shall be
“ obliged to repay the expense thereof to the said Honourable
“ Archibald Fraser of Lovat and his foresaids, as the same shall
“ be ascertained by the Baron Bailie, and diligence for payment
“ of such expense shall pass in the same manner as for the rent:
“ And whereas it may be expedient to meliorate the subjects hereby
“ let, by other biggings and inclosures, to the extent of three
“ years of the present rent, including the amount of the melio-
“ rations allowed by the last lease, and comprised in the schedules
“ above mentioned, it is hereby agreed, that the said Alexander
“ Fraser and his foresaids shall be allowed to lay out upon and
“ meliorate the said subjects, to the extent of three years of the
“ rent presently reserved, provided he shall give previous notice
“ to the said Honourable Archibald Fraser or his foresaids of

Feb. 25, 1831.

“ the biggings or meliorations intended to be made, and shall
 “ obtain his approbation of the same in writing ; and provided
 “ also, that the sum due by the said Honourable Archibald
 “ Fraser of Lovat and his foresaids for meliorations under the
 “ former lease, granted by the said trustees, shall be taken to be
 “ part and portion of the three years’ rent reserved under the
 “ present lease, to which the whole claim for meliorations, as
 “ above specified, shall be confined ; declaring, that whatever
 “ may be the value or amount of the said buildings and other
 “ improvements on the premises, that the tacksman shall only
 “ be entitled to receive for the same to the amount of the said
 “ three years’ rent, or tack-duty presently reserved, or so much
 “ less as the same shall be ascertained, in manner foresaid, to
 “ be the worth and value of the houses, buildings, dykes, and
 “ inclosures ; upon payment whereof he shall be bound and
 “ obliged to render the whole to the said Honourable Archibald
 “ Fraser, or his foresaids or succeeding tenants, without being
 “ permitted to carry any part of them off the ground ; and, in
 “ order to encourage the planting and preserving of trees on the
 “ said farm, the said Alexander Fraser shall be allowed to claim,
 “ as part of the foresaid melioration, the value of all trees planted
 “ and preserved by him, as the same shall be ascertained by
 “ two persons mutually chosen, in manner above mentioned,
 “ provided always, that every fourth tree, so planted as aforesaid,
 “ shall be a lime tree.”

Archibald Fraser died in 1815 ; and, while Thomas Alexander Fraser succeeded as heir of entail to the estates of Lovat, Archibald Thomas Frederick Fraser, as the legal representative of Archibald Fraser, acquired right to his unentailed property.

On the termination of the lease in 1821 the tenant claimed the value of the meliorations from Thomas Alexander Fraser, and brought an action against him, in which Lord Alloway pronounced this interlocutor :—“ In respect that the late Archibald
 “ Fraser of Lovat was in possession of the entailed estate of
 “ Lovat at the expiry of the leases granted by General Fraser the
 “ entailer: Finds, that the meliorations exigible under those leases
 “ were due by him as representative of the entailer, and likewise
 “ as being the heir of entail in possession : Finds, that these meliorations were payable by the heir of entail in possession ;
 “ and that Archibald Fraser, as heir of entail, had it not in his
 “ power to postpone and transfer this obligation, which was

Feb. 25, 1831. “ exigible from himself, upon any future heir of entail: Finds,
 “ that although these clauses as to meliorations, to the extent of
 “ three years’ rents, were effectual against the heir in possession,
 “ seeing they were obligations imposed by the entailer in the
 “ leases granted by him, yet this did not authorize the heir pos-
 “ sessing the estate to introduce similar clauses, so as to affect
 “ heirs of entail, who did not represent the granter of the leases ;
 “ and that such heir had no way of burdening the next heir of
 “ entail with meliorations in buildings, to the extent of three
 “ years’ rent, except by following out the terms of the Statute
 “ of the tenth year of king George the third with regard to the
 “ improvements upon entailed estates: Therefore assoilzies the
 “ defender, reserving, however, to the pursuer his recourse
 “ against Mr. Fraser of Abertarff, and the other representatives
 “ of Archibald Fraser of Lovat, who granted the leases con-
 “ taining the obligations in question, and decerns.” His
 Lordship also issued the subjoined note of his opinion.*

* “ 1. The amount of the original meliorations contracted under the first leases,
 “ having been warranted by General Fraser the entailer, or by his trustees, was an
 “ unquestionable debt due by his heirs to his representatives.

“ 2. Upon expiry of these leases, the pursuer had an unquestionable claim upon
 “ the heir of entail then in possession, who could not take the estate without being
 “ liable for the whole of the entailer’s debts and obligations, and, of course, payment
 “ of these meliorations.

“ 3. The question then is, Whether the heir in possession could not only postpone
 “ and transfer this debt, then become due and exigible by the tenant, at the end of
 “ his lease, upon an heir who had not then succeeded, but could then also create new
 “ obligations to affect that heir to the amount of three years’ rent of the farms upon
 “ which these meliorations should take place, without having power under the entail
 “ to burden either the estate or the next heir with a debt to that amount, or without
 “ his having availed himself of the means which the statute 10 Geo. III. had afforded
 “ him of rendering three-fourths of these improvements a burden upon the entailed
 “ estate ?

“ 4. The Lord Ordinary conceives, upon the principle of the cases *Dillon v.*
 “ *Campbell of Blythswood*, and *Webster against Farquhar*, and other cases of the
 “ same nature, that the heir of entail in possession had no power to subject the suc-
 “ ceeding heir to the payment of these buildings.

“ 5. With regard to the original meliorations under the first lease, although all
 “ the representatives of the entailer are liable for the meliorations, yet the heir of en-
 “ tail who was in possession when that obligation became due and exigible, and his
 “ representatives, are liable, in the first instance, and could not transfer and postpone
 “ this obligation upon the defender, the succeeding heir of entail. It is not disputed
 “ that the heir of entail then in possession, and his representatives, left sufficient
 “ funds for the payment of all those meliorations ; and the Lord Ordinary therefore
 “ doubts how far that heir, by a connivance with the tenant having the right to those

To this judgment the Court adhered on the 7th of June 1825.* Feb. 25, 1891.

The tenant thereupon brought an action against Archibald Frederick Fraser as the representative of Archibald Fraser, in which the Court, on the 29th of May 1827, altering an interlocutor of Lord Eldin, “ found the defender liable to the pursuer “ in meliorations, so far as due under the lease betwixt the “ pursuer and the deceased Archibald Fraser of Lovat, and “ remitted to the Lord Ordinary to proceed accordingly. †

Archibald Thomas Frederick Fraser then raised the present action against Thomas Alexander Fraser, concluding to have it found and declared that he was the party liable, and that he should be ordained to relieve the pursuer. The Lord Ordinary, in respect of the above decision, assoilzied the defender; and to this judgment the Court adhered on the 29th of January 1830.‡

Archibald Thomas Frederick Fraser appealed.

Appellant.—In virtue of the powers conferred upon the trustees, and especially under the letter of the 17th March 1779, they were entitled to stipulate that the tenants, upon the expiry of their leases, should have allowance for meliorations, and be made effectual against the heir of entail or incoming tenant. They accordingly did so, and thus created a proper debt against the entailed estate. This was kept up by being transferred to the new leases, and consequently the claim is exigible from the respondent as the heir, taking the benefit of these leases. The late Archibald Fraser had also power to constitute such an obligation against the estate, for it was a proper act of management, and was agreeable to the invariable practice on the estate, which had been recognized by the entailer. If the value of the melio-

“ meliorations, could postpone the payment thereof until the expiry of the next “ nineteen years’ lease.

“ 6. As to the homologation, it is not alleged that any of those buildings for “ which the meliorations are claimed were erected since the defender’s succession to “ the entailed estates; and therefore there is not such a homologation, arising from “ his drawing the rents for some of the last years of the lease, as could transmit this “ obligation upon him.”

* 4 Shaw and Dunlop, No. 61.

† 5 Ibid. No. 336.

‡ 8 Ibid. No. 184.

Feb. 25, 1831. rations was not obtained from the incoming tenant, it was the fault of the respondent; and as he derives the whole advantages from these meliorations, he is justly liable for the value of them, and not the appellant, who obtains no benefit from them.

Respondent.—The general rule is settled by the cases of Dillon, Webster, Campbell, and Tod, that an heir of entail is not liable for the value of meliorations stipulated in a lease by a preceding heir of entail, who is prohibited from contracting debt. None of the meliorations in question were authorized by the entailer. The letter of 17th March 1779 had reference to the leases about to be granted by the trustees, and conferred no power on heirs of entail to impose such an obligation on their successors. By the transaction in 1802 Archibald Fraser took the burden on himself of paying for the meliorations; and this cannot be transferred to an heir of entail, but must fall on the proper representative of Archibald Fraser.

LORD LYNDBURST.—My Lords, I am of opinion that in this case the original engagement was to pay for the ameliorations at the expiration of the nineteen years originally contracted for. If in 1802, while the original leases were still pending, the heir substitute in possession, instead of paying, put the payment forward by executing fresh leases, in order to have the chance of its falling on his successor,—that is a transaction which cannot be allowed to operate to the prejudice of the person to succeed to him in the estate. This is the short point. I think the Court of Session have done perfectly right; and I now move your Lordships that the judgments complained of be affirmed, with costs.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Respondent's Authorities.—10 Geo. III. c. 51; 3 Stair, 5, 18; 3 Ersk. 8, 51 3 Bank. 5, 66; Dillon, Jan. 14, 1780 (15,432); Webster, March 3, 1792 (Bell, p. 207); Campbell, Feb. 15, 1812; (F. C.) Tod, Jan. 14, 1823, (2 Shaw and Dunlop, 113; and May 27, 1825, ante Vol. I. 217); Sandford on Entail, 217.

PALMER and A. M'RAE, Solicitors.