steading is that upon which the house may be built, and the other is that upon which the grass is growing, and which, in other cases, would be called the watersidings or waterside stony ground, or whatever else would better describe it; but as grass grew there, "waterside grass" is used as descriptive. Upon these grounds I am of opinion, without any hesitation, that I ought to advise your Lordships to pronounce a judgment affirming the interlocutor complained of, and dismissing the appeal. April 2, 1831.

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

Appellants' Authorities.—2 Ersk. 9, 14, & 36.

CALDWELL—EVANS, STEVENS, and FLOWER,—Solicitors.

ALEXANDER FRASER, Appellant.—*Lushington—Wilson—Stuart—Robertson.* No. 20.

Lieutenant-Colonel PATRICK VANS AGNEW, Respondent.—*Lord Advocate (Jeffrey)—Solicitor General (Horne).*

Entail.—Held (affirming the judgment of the Court of Session), that an heir under a strict entail was not liable in payment of an account due to a law agent employed by a preceding heir, although by his agency a large part of the estate was restored to the heir of entail.

PART of the entailed estate of Sheuchan having been judicially sold by Robert Vans Agnew, the heir of entail in possession, an action of reduction was raised by his son and next heir substitute, John Vans Agnew, who succeeded to the estate in 1809. To this process he called as defenders, his brother Colonel Patrick Vans Agnew, and the other representatives of his father, as well as the purchasers of the estate. April 2, 1831.

1ST DIVISION. Lord Corehouse.

After various proceedings, the House of Lords on the 31st of July 1822, and 12th of March 1823*, reversing the judgments of the Court of Session, found that the estate was not attachable for the debts for which it had been sold, that the proceedings were irregular, and therefore that the sales were null and void, and remitted to the Court of Session to proceed accordingly. These judgments were applied on the 17th of May 1823, and a

* 1 Shaw's App. Ca. 320, 333, & 413.

April 2, 1831.

question having afterwards arisen with the purchasers as to their right to retain in security of meliorations, the lands were sequestrated, and a judicial factor appointed. The purchasers were however removed at Martinmas 1824, and John Vans Agnew thereupon entered into possession. He died in October 1825, having nominated an executrix, who, as such, had right to his personal funds. Colonel Vans Agnew (who was at this time in India), the next heir substitute, immediately came to this country. John Vans Agnew had, previous to his death, ordered an extract of the decree of reduction, which had been made and partially paid for, but not delivered. The balance of the dues were paid by Colonel Vans Agnew, and he obtained the extract, and was served heir of entail to his father in relation to those lands which had been restored, and in which John Vans Agnew had not been infeft.

In the month of January 1829, Mr. Fraser, solicitor in the Court of Chancery, alleging that he had been employed by John Vans Agnew to act as solicitor in the cause while depending in the House of Lords; that he had done so; had been successful in getting the judgments of the Court of Session reversed, and restitution of the lands decreed; that an account had been incurred to him commencing in March 1820 and terminating in July 1823, amounting to 1,800*l.*, and now, with interest, to 2,400*l.*, of which no part was paid, nor could be recovered from John Vans Agnew's personal funds; raised an action against Colonel Vans Agnew on the ground that he had taken benefit from the decree, and was in the possession and enjoyment of the lands, and therefore that he ought to be ordained to make payment of the debt.

Colonel Vans Agnew, besides stating that he had not employed Mr. Fraser, who on the contrary was employed against him; that whatever might be the advantages derived by future heirs from the restored lands, he did not, and could not gain any during his life; that other parties had claims, founded on equal or even stronger grounds of equity with that of Mr. Fraser, which he could not satisfy without involving himself in ruin, pleaded *inter alia*, That as he was an heir of entail, and did not represent John Vans Agnew, he was not liable for any personal contract into which he had entered, nor was it relevant to allege that thereby the entailed estate had been meliorated.

The Lord Ordinary pronounced this interlocutor:—"Finds, "that the sum pursued for is said to be due for law business "performed by the pursuer on the employment of the late John "Vans Agnew, the defender's brother: Finds, that the defender "does not represent his brother in any respect, except as heir in "the estates of Sheuchan and Barnbarroch, held under the fetters "of a strict entail: Finds, that it is not a relevant ground for "subjecting an heir of entail in a personal debt of his prede- "cessor, that the entailed estate was meliorated by the operations, "for payment of which that debt was contracted; therefore "assoilzies the defender, and decerns: Finds him entitled to "expences." April 2, 1831.

To this interlocutor his Lordship at the same time issued the subjoined note of his opinion:—"This point has been often before "the Court, and was fully considered in the late case of (Todd) "Moncrieff *v.* Skene, 14th January 1823, shortly reported by "Shaw, 2. 113. In the case of Innes *v.* the Duke of Gordon, "on which the pursuer chiefly relies, the claim of Innes for "meliorations was rested on a different ground, namely, that he "acted on the faith of a lease which he had reason to believe "was effectual under the entail, and therefore, as the *bonâ fide* "possessor of an heritable subject, he was entitled to reimburse- "ment. A majority of the Court held, that the lease was a con- "travention, and that he knew, or must be presumed to know, "that it was so."

Fraser having reclaimed, the Court *, on the 23d of February 1830, adhered.†

Fraser appealed.

Appellant.—The Court below have misapprehended the ground on which the present claim was made against the respondent.

† 8 Shaw & Dunlop, 585.

* *Lord President* observed, Is it meant to be maintained that if Mr. John Vans Agnew had paid this debt to Mr. Fraser, he (Mr. Agnew) would have had a claim of relief for the amount against the next heirs of entail? If he could not have had such a claim, how can his agent have any better?

Lord Balgray.—It is a very hard case, I must say.

Lord Cragie.—The only view that occurred to me possible to take, in support of Mr. Fraser's claim, is founded in justice.

Lord President.—The purchasers who have had their estates taken from them, might come forward on the same ground.

April 2, 1831.

They appear to have thought that it was rested on the personal contract of John Vans Agnew, and directed against the respondent as his representative; whereas the claim is made against the respondent, not in that character, but in respect that he is the

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Lord Gillies.—They have a much better claim in equity than Mr. Fraser has here.

Lord Cragie.—My Lords, what I was going to state is, that it has been held by the Court in some cases, that the heir in possession has the character of trustee for the other heirs of entail; and it has been decided, that the heir in possession, by combining with the next substitute, may bar the rights of the remaining heirs. This has been found in cases of prescription, where the remoter substitutes were found not entitled to deduct their minorities. And if it could appear that the heir in possession was to be considered as acting as trustee, then he might have a claim of relief in a case like this. For my part, however, I confess that I never agreed in that doctrine, and never could see any ground for implying a trust of this kind in entails. All the heirs of entail have separate interests and rights, and each of them must act for himself. I regret in this case, that Mr. Fraser cannot get redress. He might have had title-deeds in his possession, by retaining which, he might obtain indemnification; but he appears not to have been possessed of this means of securing payment.

Lord President.—I have no doubt at all. The original contract between Mr. John Vans Agnew and Mr. Fraser, was nothing more than a personal contract. In taking the employment, Mr. Fraser had nothing but the personal obligation of Mr. Agnew to trust to, and he took his risk of this being fulfilled by Mr. Agnew himself. And when he looked to the purpose and object of the action, Mr. Fraser must have seen this. It was not an action to obtain this estate for Mr. Agnew himself, or in which he had the sole interest. His interest was of a qualified nature, so that the moment Mr. Agnew died, the whole interest, as to him or his representatives, was at an end. When you come to the true question here, it is just this: that if the heir, by recovering this estate, would have been entitled to make the expences a debt against the estate, then Mr. Fraser is entitled to the benefit, and may claim against the heirs; but if it be merely a personal obligation, as I apprehend it to be, which could not be made a debt, and which Mr. Agnew, if he had paid it, could not have made effectual against the estate, we cannot find the defender liable here. Therefore, however much I regret it, yet I cannot find principles on which to bottom a judgment for Mr. Fraser.

Lord Gillies.—I am of the same opinion with your Lordship, and on the same principles. This point was extremely well considered in the case of Innes, and that case was really a stronger one than the present; for there the claim was for meliorations made on the property, by which the entailed estate was benefited and increased, and there might be ground for saying that that should form a debt against the estate and the heirs. But here the entailed estate is not improved at all, and the claim is not made on that ground..

Lord President.—In the cases of (Todd) Skene and Dundas, and Hamilton of Pencaitland, the entailed estate was benefited, whether the law-suit was lost or won.

On the point of expences,

Lord Balgray.—I really think, especially in a case like this, that there is no ground for expences.

Lord President.—I would have thought so too, if this had been the first case of the kind: but the point has been repeatedly settled in former cases.

Lord Gillies.—I hold the point to have been clearly settled by former decisions.

proper debtor, directly and immediately liable as having been lucratus far beyond the amount sued for, by the exertions, professional skill, and pecuniary advances of the appellant. The claim is founded on the principles of recompense which, according to the authority of Stair, Bankton, and Erskine, creates a direct personal liability against a party who has been made locupletior by the acts and deeds of another. In such a case the rule is, that the party is responsible, independent of contract altogether, in quantum locupletior est. But the restored lands of which the respondent is in the enjoyment yield a rental of at least 3,000*l.* per annum, while the debt sued for does not exceed 2,400*l.* Against such a claim the plea of being an heir of entail affords no answer, and accordingly, in the case of Innes the majority of the Court were of opinion, that if the claim had not been excluded by mala fides, the heir of entail would have been responsible. But in the present case the appellant acted in optima fide, and there is no allegation to the reverse.

Lord Chancellor.—How can you support this appeal? It is not very creditable that there should be any refusal to pay Mr. Fraser's bill; but we must go by the law. The heir of entail is a stranger to Mr. Fraser, or any contract that may have been made with him. There is no privity between them. The case of Fraser *v.* Fraser, decided this session, settled this very point.

Dr. Lushington.—Of course, it is not our wish or intention to argue against any decided cases. But in this one there is great hardship.

Lord Chancellor.—There ought to be an end of arguments upon a point decided over and over again; and with respect to the hardship, what can be harder than the cases of leases? Suppose the case of a tenant, who enters upon an estate upon a lease for ninety-nine years; he lays out 40,000*l.* upon the improvement of the property, and the lease is afterwards found void; the next substitute heir of entail gets into possession by setting aside the lease, obtains the benefit of every farthing that has been expended, and the lessee has not a claim for a sixpence. Mr. Fraser's case is a very hard one, peculiarly hard. Indeed this is like a case of salvage. The subject matter has been saved. I know very well what a man of honour ought to feel upon the subject, whatever the feelings of a lawyer may be; and I hope that will be considered. Mr. Fraser has the strongest claim of an equitable nature, which means in Scotland, not what equitable means in this country, but of an honourable

April 2, 1831. nature. If Mr. Vans Agnew stands upon his rights, he ought to consider to whom he owes the estate.

Mr. Solicitor General.—If this claim were admitted, there are others of the same nature to a greater extent than the property itself.

Lord Chancellor.—But a claim of salvage stands in a very preferable situation. Mr. Fraser is the person to whom Mr. Agnew owes the estate. Recollect how much depended upon the discussion at the Bar of the House; and the reversal of the judgment below is not to this moment acquiesced in by the law authorities of Scotland. If it had been left to them, Mr. Vans Agnew would not have had a farthing; but Mr. Fraser takes the matter up, and rescues the estate from the fangs of the decision in the Court below—for that is really the case—and gets it back again. It is saved in consequence of what was done here at the expence of Mr. Fraser. If I were Mr. Vans Agnew I would pay Mr. Fraser, if I did not pay any body else.

The Lord Advocate.—It is impossible to deny that this debt is due, but it ought not to fall entirely upon the present possessor.

Lord Chancellor.—If it could be done it ought to be distributed over the heirs *ad infinitum* in succession, because whoever may succeed Mr. Vans Agnew is just as much benefited as he is himself by Mr. Fraser's expenditure; still if the estate is 3,000*l.* a-year, as I understand it to be, Mr. Vans Agnew ought not to grudge it, though he pays the expence for the future heirs. Every owner lays out money for the benefit of future heirs by any improvement he may carry into effect. Upon the principles of justice this is as near an entailer's debt as it can be. It is so strong a case for burdening the estate that it is a wonder an estate bill has not been applied for, if there is much debt of the same kind. The money out of pocket ought at all events to be repaid. Their Lordships who with me heard the cause both observed that they never knew a stronger case of a debt of honour. I hope that will be considered—it is impossible to intimate a stronger opinion—I hope that will be considered by this gentleman, an officer in the army; but on the law the point is fixed, and we cannot help it. We must dismiss the appeal, and confirm the interlocutor, but without costs.

On a subsequent day the Lord Chancellor observed,—It has been communicated to me, that, for a purpose which neither my noble friends nor myself could have intended, a very improper use has been made of some observations made by the noble Lords present and myself, in disposing of the case of Fraser *v.* Vans Agnew,—that they have been turned into the means of applying a kind of pressure which it is certainly not the business of this House to employ.

April 2, 1831.

There was no stigma cast upon the conduct of the respondent for not having done that which, having done, might have operated his entire ruin. If he, the heir substitute, and against whom no demand lies personally, once yields to a claim of *right* in one, two, three, or four cases, he may yield to all the others, till the whole property is exhausted; and that certainly could not have been the intention of the noble Lords or myself. What we said was, that the respondent, having a right in law, is quite entitled to resist the claim. But there is a peculiarity in Mr. Fraser's situation; and that we wish to submit to Colonel Vans Agnew's consideration; and he, being a man of honour and a gentleman, is likely to feel—for that is the way in which it was put—the strong and eminent claim of Mr. Fraser, and which applies to Mr. Fraser alone—that Mr. Fraser had a sort of salvage claim—that is the very expression I used: he saved the estate by the money which he expended out of his own pocket, which estate would otherwise have been lost in consequence of what this House determined to be a wrong decision below. The others are common debts, which he is no more liable to than a remainder-man in England would be liable to the repayment of money expended for the benefit of the estate; he is just in the same situation — there is no privity between him and his immediate predecessor — so, in the case of Colonel Vans Agnew, no human being has a *right* to come against him; and if he gives any thing, it is out of his own sense of fairness towards the appellant: paying Mr. Fraser does not entitle any one human being to come against the respondent.

I am sorry what passed was made the ground of very improper constructions against Colonel Vans Agnew's conduct,—constructions which were by no means consistent with the intention of my noble friends or of myself. Still we cannot be surprised that Mr. Fraser and those who are acting for Mr. Fraser feel very strongly upon the subject; it is a very hard case upon him.

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

Appellant's Authorities. — 1 Stair, 8, 1 to 8; 1 Bankton, 9, 1 to 4; 3 Ersk. 1, 11; Innes, Dec. 21, 1827; (6 S. & D. 279, and Nov. 10, 1830, ante Vol. IV. 305); 1 Stair, 9, 9; 1 Bankton, 9, 45; Paterson, June 4, 1824; (3 S. & D. 103.)

Respondent's Authorities. — Dillon, Jan. 14, 1780, (15,432); Webster, Dec. 7, 1791, (15,439, and Bell's Cases, No. 7, Entail); Tod, Jan. 14, 1823, (2 S. & D. 113, affirmed May 27, 1825, ante 1, 217); Fraser, May 29, 1827, (5 S. & D. 722; affirmed Feb. 25, 1831, ante 5.)

HORE—RICHARDSON and CONNELL,—Solicitors.