Kinloch's interlocutor of 17th June 1858, and therefore refused the desire of the reclaiming note, in so far as it prayed for the recall of that interlocutor; recalled the interlocutor of the 8th of June 1858, and in place thereof found the pursuer entitled to expenses of litigation to the extent of £331, 4s. Lord Lovat appeals against the whole of this judgment, while Mr Fraser of Abertarff in a cross appeal complains of so much of it as limits his right to recover the expenses of litigation, to the sum of £331, 4s. As to the sum of £6186, os. 7½., your Lordships intimated that the appeal could not be insisted in, and in that opinion Lord Lovat acquiesced. The question is therefore confined to the sum of £331, 4s., costs of litigation, to which the Court below has found the pursuer entitled. In both cases the question turns upon the construction to be placed on the clause in the deed of August 1808, "under burden of all my just and lawful debts due and addebted to me at the time of my death." Under that description of liability I think costs incurred subsequent to the settler's death in resisting unjust demands cannot be included. My advice to your Lordships is that Archibald Fraser did not constitute the costs of litigation a burden on the entailed lands. When a testator charges his executry with the payment of debts, his executor, suing or having sued, is entitled to indemnify himself out of the funds in his possession, but there is no principle by which he can saddle the real estate. This is the opinion of Lord Curriehill, and with it I entirely concur. According to my view of the case, it thus becomes immaterial to inquire whether the respondent litigated *bona fide* or not. I think, however, there should be no costs on either side.

Lord CHELMSFORD concurred, observing that there was nothing in the deed of entail to exonerate the executry from primary liability.

Lord KINGSDOWN said he regretted that the difference of opinion which had existed in the Court below upon this matter extended also to their Lordships' House. All the Judges in the Court below, with exception of Lord Curriehill, had held the respondent entitled to burden the lands with the costs of certain of the litigations, and the reason they had not empowered him to do so in every case was that in the former he had been successful, and in the latter unsuccessful. In that ground for distinction he could not concur. In cases where an executor was entitled to idemnify no such test was applied. Abertarff was in the position of a trustee for others, and incurred these costs from no sinister motives, and was entitled to be reimbursed.

Certain interlocutors affirmed; one interlocutor in part affirmed and in part reversed; other interlocutors reversed.

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*March* 12–15, *and April* 26.

FARQUHARSON *v.* BYRES.

*Servitude—Road—Decree-Arbitral.* A proprietor of a farm having been found by an arbiter, in 1763, entitled to the use of a road, and his successor having thereafter become proprietor of an adjoining farm—*Held* (aff. C. of S., diss. Lord Chelmsford) that the latter was, under the decree-arbitral, entitled to use the road for the purposes of both farms.

Counsel for Appellant—Sir Hugh Cairns, Q.C., and Mr Forbes. Agents—Mr John Robertson, S.S.C., and Messrs Clark, Woodcock, & Ryland, London.

Counsel for Respondent — The Attorney-General (Palmer), Mr Anderson, Q.C., and Mr J. Badenach Nicolson. Agents—Mr Walter Duthie, W.S., and Messrs Martin & Leslie, London.

This is an appeal from an interlocutor of the First Division of the Court of Session.

In 1763 the lands of Whitehouse, now belonging to the appellant, were in possession of John Durno, the elder, and John Durno, younger of Catie, and were then called Meikle Catie, while at the same period the estate of Tonley, belonging to the respondent, and then called Kincraigie, was in the possession of Alexander Achyndachy. In September of that year the Durnos and Achyndachy entered into a submission to John Gordon of Craig, advocate in Aberdeen, whereby they agreed to refer, and did refer, to him, all claims, questions, controversies, and disputes betwixt them, and, *inter alia*, the right, whether of property or servitude, which each of the said Alexander Achyndachy or John Durnos, elder and younger, or either of the said parties, have or pretended to have to the disputable ground betwixt the towns of Holes, Upper and Nether Edindurno, belonging to the said Alexander Achyndachy, and the town of Meikle Catie, the property of the said John Durnos, elder and younger, with full power to the arbiter to ascertain and determine the marches, &c. Mr Gordon accepted the office, and pronounced a decreet-arbitral by which he found, *inter alia*, that Alexander Achyndachy and his tenants of Upper Edindurno had right and title to a road or cawloan upon the north side of the burn of Catie, from the town of Upper Edindurno westward to the low ground on King's highway; and he ordained the said road or cawloan to be lined out as near to the burn as conveniently might be to the extent of 20 feet wide down the side of the said burn, reserving liberty to the proprietors and tenants of Meikle Catie to water their cattle at the burn of Catie, notwithstanding the road which was declared to be common to both. The road was accordingly formed, and the respondent and his predecessors, as proprietors of the lands of Upper Edindurno, and his tenants on their lands, have ever since enjoyed its use. The appellant has also used it, and it is available to him principally as a private road leading to his mansion-house, and a small part of the arable lands of Whitehouse. It is wholly upon his lands, and is kept in repair solely at his expense. In 1836 the predecessor of the respondent joined to the farm of Upper Edindurno the farm of Holes, and let both to one tenant, and the road referred to has been since used for the purposes of both these farms. The appellant having on one occasion complained to the predecessor of the respondent, the latter disclaimed all right to use the road in question except for the purposes of the farm of Upper Edindurno, and stated that if his tenant used the road he did so without permission from him. The respondent's tenants, however, having still continued to use the road, the appellant at last raised the action, in which the interlocutor was pronounced now the subject of this appeal. The summons concluded that it should be found and declared that the respondent and his tenants had no right of commonty, pasturage, or other servitude over any part of the appellant's property, with exception only of the said road in respect of the respondent's ownership of Upper Edindurno; and had no right to use the said road except in respect of the latter farm. The respondent pleaded that under the decreet-arbitral he had a right of common property in the road, and might use it for any purpose he pleased; that the said road had been used, not only in respect of Upper Edindurno, but also in respect of Holes for upwards of forty years, and that the appellant and his authors had acquiesced in such use. A proof was taken, and on the 16th of June 1864 the Lords of the First Division found that the first declaratory conclusion of the summons had not been insisted in, and assoilzied the respondent from the other conclusions.

Sir HUGH CAIRNS, Q.C., on the part of the appellant, submitted—first, that upon a proper construction of the decreet-arbitral the road in question was wholly within the boundaries of the appellant's lands, and that the respondent's right to use the road was merely a servitude constituted in his favour, not as proprietor of Holes, but solely as proprietor of Upper Edindurno, to the purposes of which farm it was limited. It had been decided n Scott *v.* Bogie (6th July 1809, Fac. Coll. 397) that

a party having a *servitus itineris* to one farm was not entitled to use the road for the purposes of another farm lying beyond, and to which a road lay from the servient road through the dominant tenement. Secondly, the respondent and his predecessors had not acquired by prescription any right to use the road in question. The respondent was bound to prove his right by the most continuous and constant usage for forty years. The learned counsel then referred to the proof, and contended that it did not in the very slightest degree make out the case which the defender wished to establish. Thirdly and lastly, there had been no acquiescence by the appellant in the use of the road made by the respondent for the purposes of the farm of Holes. General Byres, the respondent's predecessor, had expressly admitted, in answer to a complaint made to him by the appellant, that he did not claim the use of the road for the farm of Holes, and that his tenant acted without his authority or permission in using it. He submitted that the interlocutor of the Court below was wrong, and ought to be reversed.

Mr FORBES then followed upon the same side; and Lord CHELMSFORD was pleased to thank him for his argument.

The ATTORNEY-GENERAL, on the part of the respondent, said it was quite competent for the arbiter to declare the road in question common property, and to restrict its use by each party to that of a road only. Lord St Leonards, in his "Vendors and Purchasers" criticised and disapproved of the decision in Keful *v.* Davie, in which Lord Brougham laid it down that an estate in fee-simple could not be limited in its use. Besides, that case had been overruled by Lord Cottenham in the Leicester Square case (2 Philips, 774).

The LORD CHANCELLOR—There was a case before Vice-Chancellor Shadwell, in which, though there was a covenant to keep Cockspur Street open, he yet refused to prohibit the erection of the statue there, on the ground that its erection could not be regarded as a breach of the covenant.

The ATTORNEY-GENERAL—Next, as regarded the construction of the decreet-arbitral, the fair construction was that the arbiter gave to the respondent's predecessors the sole property in the land upon their side of the burn, while he gave the land upon the other side to the appellant's predecessors, subject to what would be requisite to form a road. Or, taking the alternative construction—namely, that a servitude only was granted to the respondent's predecessors, the addition of "and his tenants in Upper Edindurno" would not be held as derogating from the unconditional right granted to him. It was not a mere personal right, but one which he could transfer. Next, as to prescription, the unquestionable effect of the evidence was that, as far as their Lordships knew, the road had been in use for the purposes of Holes farm from the date of the award down to 1817. From that year down to 1824 the respondent certainly made use of a part of this road without any permission, and the use of a part was use of the whole. So, down to 1831, there must have been a constant traffic, and from that time down to the present time. There had therefore been a user of this road for upwards of forty years. Lastly, the appellant and his predecessors knew and acquiesced in the use made of this road. There was first an objection made only to its use as a carriage road. Then in a letter to the respondent from the appellant, the latter referred to its having been used hitherto as a cart road. So, other parts of the correspondence showed acquiescence in the respondent's making use of this road in one way or another.

Mr ANDERSON, Q.C., then followed on the same side.

Sir HUGH CAIRNS having replied,

The LORD CHANCELLOR intimated that the House would reserve its judgment.

## *Thursday, April 26.*

Judgment was delivered to-day.

The LORD CHANCELLOR said he was grieved to find two gentlemen, the proprietors of adjoining estates, appealing to their Lordships' House upon so trifling a matter. While the respondent's predecessor was proprietor of Edindurno he had been declared entitled to the use of this road. He had afterwards become proprietor of the adjoining farm of Holes, for the purposes of which he claimed also to use the road. His right depended entirely upon the construction to be placed upon the decreet-arbitral. The question was one of great difficulty; but he had come to the conclusion that the respondent's claim was just, more especially as the road in question was the only communication between Holes and the turnpike road. He therefore advised their Lordships to affirm the interlocutor appealed against.

Lord CHELMSFORD said he had the misfortune to differ from both his noble and learned friends. He thought the respondent had not a right of common property with the appellant in the road, but only a right of servitude. The farm of Holes not having been in the possession of either of the parties to the award, he could not see that in settling these differences the arbiter would take its interests into consideration. He approved of the case of Scott *v* Bogle, in which it had been held that a party having a *servitus itineris* to one farm was not entitled to use the road for the purposes of another farm lying beyond, and to which a road lay from the servient road through the dominant tenement. He thought the appellant entitled to the declarator he asked, unless the respondent could prove prescription or acquiescence; that had not been done, and he therefore thought the interlocutor appealed from ought to be reversed.

Lord KINGSDOWN had great doubts upon the subject, and was therefore not disposed to reverse the unanimous decision of the Court below. He therefore agreed that the interlocutor should be affirmed.

Interlocutor affirmed.