LORD JUSTICE-CLERK—If answering the questions in this case, as I propose to your Lordships to do, would have the effect of casting any doubt upon the proposition that after a man's death his estate is liable for his debts, I would not be a party to any decision which could have that result. But the claim in question here is not in the position of an ordinary debt. It is not easy to define exactly what it is, but it is not a debt in the proper sense of that word. It could not be put in competition with the debts of ordinary creditors. It may at once be admitted that there was an obligation upon the deceased during his life, and upon his estate after his death, to provide for this lunatic son. By his will he did provide for him. What he did was to declare that after his wife's death her children, whom he named, should be liable—as a condition of receiving the provisions made in their favour—for their brother's comfortable maintenance and support in an asylum or elsewhere. That seems to me to put the obligation of maintaining the lunatic upon the children if there is free estate of the testator which they receive. They are the persons who are to be liable. It is to be observed that the testator here did not contemplate a trust which might continue for fifty or sixty years. We are familiar with such trusts, but there is nothing of that kind here. The estate is not directed to be kept up, and the obligation of providing for the lunatic is not directed to be discharged, by anyone else than the children. The obligation imposed upon them can be easily expressed in the receipts granted by them for their legacies, and they will be under legal obligation to carry it out. I am therefore of opinion that the questions should be answered as Mr M'Lennan proposes.

LORD KYLLACHY—I agree. If this had been an ordinary debt due by the deceased, I do not doubt—indeed, it was not disputed—that the trustees, before payment to the beneficiaries, must have retained enough in their hands to meet the claim. If they had done otherwise it would have been at their own peril, for they would have been personally liable. That is clear. Nor would they be absolved from that liability by anything which the deceased might say or direct in his will. That also is, I think, sufficiently clear. But then this claim for aliment was not an ordinary debt due by the deceased at his death. In a sense, no doubt, it was a debt, and a debt due by him. For he was undoubtedly bound, while he lived, and so long as he was not himself indigent, to provide for his lunatic son. At least he was so bound while no conflict arose with the claims of his ordinary creditors. The claim was also, in a sense, a debt which affected the deceased's estate after his death. It did so, inasmuch as it transmitted to and affected persons taking gratuitous benefits in his succession—such persons becoming liable to continue the aliment to the extent of the benefit taken by them, except perhaps in the case where they were themselves indigent. But the liability did certainly not constitute an ordinary debt—a debt due unconditionally, and for which the trustees of the deceased were (at least directly) liable to action and diligence. It was, strictly speaking, a debt, as I have already said of the beneficiaries; and that the trustees should be bound to retain, as against the beneficiaries, the amount necessary to provide for its payment, and to do so irrespective of the truster's directions and of the beneficiaries' readiness to undertake the burden themselves, is a proposition for which I can only say that I know no authority.

LORD STORMONTH DARLING—I agree. The claim here made on behalf of the lunatic is of a peculiar nature. I say so in full view of the admission that the lunatic in this case is forty-seven years of age, that there is no prospect of his recovery, and that therefore the claim will in all probability subsist for a considerable period. But still the debt is contingent and depends on his survivance. I do not doubt that anyone who is in possession of the father's estate may be liable so far as he is *lucratus* as and when the claim emerges. But the question is whether the trustees are bound *as such* to provide for this particular debt by holding up the estate. Now, the answer to that, I think, is the answer which your Lordship has made, that they are not bound to do more than the testator has directed them to do, which is to hand over the estate under the obligation which the beneficiaries are willing to give.

LORD LOW—I agree with the result at which your Lordships have arrived, and with the reasons given by your Lordships, and I do not think it necessary to add anything to what has been said.

The Court answered the first three questions in the negative and the fourth in the affirmative.

Counsel for the First Parties—Cullen, K.C.—A. R. Brown. Agent—W. B. Rainnie, S.S.C.

Counsel for the Second Parties—M'Lennan, K.C.—C. D. Murray. Agents—Hossack & Hamilton, W.S.

Thursday, November 1.

FIRST DIVISION.

[Lord Ardwall, Ordinary.

AIRD AND OTHERS *v.* TARBERT SCHOOL BOARD AND OTHERS.

Expenses—Process—Reclaiming Note on Question of Expenses—Point Raised in Inner House not Taken before the Lord Ordinary—Competency.

The Court will not entertain a reclaiming note dealing with a question of expenses on a point which was not argued before the Lord Ordinary.

Expenses — Public Authorities Protection Act 1893 (56 *and* 57 *Vict. cap.* 61), *sec.* 1 (*b*) — *Application of Statute to Decree Obtained of Consent.*

Per Lord Pearson—"I doubt whether section 1 (*b*) of the Public Authorities Protection Act has any application except in a case where the action has been pressed to a judgment on the merits, which is a different thing from a decree of absolvitor obtained of consent."

The Public Authorities Protection Act 1893 (56 and 57 Vict. cap. 61), sec. 1, provides:—"Where, after the commencement of this Act, any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance or execution or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect . . . (*b*) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

On February 20, 1905, Robert Aird, headmaster of Tarbert Public School, residing at Bank Buildings, Tarbert, Lochfyne, and others, raised an action against the School Board of the Parish or District of Tarbert, and its members as individuals, to have it declared that the election of one of them, viz., John Campbell, joiner, Tarbert, was null and void, and for interdict against his acting as a member of the said School Board, and, further, the pursuers sought to have a certain minute of the School Board dated 28th January 1905, dismissing and suspending the said Robert Aird, reduced.

On September 29, 1905, the pursuer Robert Aird died, and on January 23, 1906, the Lord Ordinary (ARDWALL) pronounced an interlocutor sisting his executors-dative *qua* next-of-kin, Mrs Margaret Aird and John Aird, as pursuers in the cause, as executors and as individuals. They subsequently lodged a minute of abandonment in the following terms:—"Jameson for the pursuers stated that this action had been originally raised by the pursuers in the interests, as they conceived them, of education in Tarbert, and for the purpose of reinstating the late Robert Aird in his position as headmaster of the public school, but that in view of the altered situation caused by Mr Aird's death on 29th September last the pursuers did not think it desirable that the action should proceed to proof solely with the view of determining the question of the expenses of process, and they accordingly, for the reasons stated, consented and hereby consent to the defenders being assoilzied from the conclusions of the summons and respectfully moved the Court to dispose of the question of expenses as shall be just."

On 6th February 1906 the Lord Ordinary (ARDWALL) pronounced this interlocutor:—"The Lord Ordinary having considered the minute for the pursuers, in respect thereof assoilzies the defenders from the conclusions of the summons, and having heard counsel for the parties and taken into consideration the question of expenses, finds no expenses due to or by either party, and decerns."

Opinion.—"I am not without judicial knowledge of the merits of this case, having dealt with the inception of the proceedings against the late Mr Aird by the defenders in a suspension and interdict in the Bill Chamber on 27th January 1905. Subsequently to the disposal of that note of suspension and interdict the defenders passed another minute on 28th January 1905, which purported to record the adoption of the motions and minutes which had been held to be inept in the first suspension and interdict. There was further an action of damages for slander at the instance of the defenders in this action against a newspaper regarding the proceedings in which the deceased Mr Aird was interested. The result of it was adverse to the present defenders. Throughout the whole proceedings there were two parties in the School Board. Though the defenders represent the majority I am far from being satisfied that they were in the right. Mr Aird, the principal pursuer, died on 29th September 1905. How far his death was accelerated by the proceedings taken against him by the votes of the defenders I have no means of knowing, but now that he is dead I think that his executors and the remaining pursuers have very wisely consented to absolvitor, as no judgment in this case can do any good to the deceased, and to proceed with the action would involve expense to his estate, which I presume is ill able to bear it. Having regard to the whole circumstances of this case as appearing in the proceedings before this Court, and in the exercise of the discretion which the Court always has in dealing with the question of expenses, I consider it proper in the present case to find no expenses due to or by either party, and I confess I was a little surprised at the persistency with which the public board insisted for these against the representatives of a deceased teacher, who, whatever may have been his faults, had apparently done some good work for the school, as it appears to have been under his headmastership that it had advanced from the position of a merely elementary school to that of a secondary school."

The defenders reclaimed on the question of expenses, and argued — The Public Authorities Protection Act, section (1) (*b*), entitled the defenders to expenses as successful defenders—*Christie* v. *Glasgow Corporation*, May 31, 1899, 36 S.L.R. 694, *per* Lord President (Robertson) at p. 698. Further, the minute lodged by the pursuers was a minute of abandonment, and payment of expenses was a condition of the right to abandon—Judicature Act 1825 (6 Geo. IV, cap. 120), section 10. Moreover, the defenders had been in part successful so far as the case had gone.

Argued for the pursuers and respondents —The application of the Public Authorities Protection Act had not been argued before the Lord Ordinary, and the point could not

be taken now. That Act, further, merely prescribed a scale and did not deprive the Court of its discretion. The intention was to protect public bodies against extra-judicial expenses. Had the statute aimed at taking away the Court's discretion it would have been more explicit.

LORD M'LAREN—If in this case there had been no question under the Public Authorities Act, and if we had had to deal with this as an ordinary reclaiming note, I should have said, in the first place, that I had great difficulty in seeing any good reason for withholding expenses from the defenders. But at the same time, the amount at stake not being large, and the case not involving any question of principle, I should have said that it was not a suitable case for reviewing the award of the Lord Ordinary as to expenses. Of course the Lord Ordinary's judgment as to expenses may be reviewed by us, and there are instances in which that has been done. But it has always been the custom of the Court to discourage reclaiming notes on questions of expenses, and I must say that this is not a case where I should have been disposed to interfere with the discretion of the Lord Ordinary.

But the ground on which we are asked to alter the judgment of the Lord Ordinary is in respect of a question arising under the Public Authorities Act. It is a question of principle, and when such a question is involved we are always prepared to reconsider the Lord Ordinary's finding as to expenses. The question, however, was not raised in the Outer House, and that seems to me an insuperable objection to our dealing with it in this Court, for I know of no precedent for altering the judgment of the Lord Ordinary regarding expenses on a point which has not been taken before him. The counsel in charge of the case in the Outer House not having raised the point, the inference is that it was waived, and that they considered this was not a case for pressing the provision in question.

As to the construction of section 1 (*b*) of the Public Authorities Act 1893, I desire to reserve my opinion.

LORD KINNEAR—I am of the same opinion and for the same reasons. The main ground for discouraging reclaiming notes on mere questions of expenses is that the cost of reclaiming in such cases is generally out of all proportion to the amount involved, and also that the Judge who tried the cause is much better able to dispose of the question of expenses than the Court of Review, which cannot have the same knowledge of the whole course of procedure. In the present case I have no doubt whatever that the Lord Ordinary, who knows all the circumstances, is in a much better position than we can be to determine the question of expenses. Further, I agree with your Lordship that we should not entertain a reclaiming note dealing with such a question on a point which was not argued before the Lord Ordinary.

I should only add that I express no opinion as to the proper construction of the statute quoted to us beyond saying this, that while the Court has already said that the enactment is peremptory, that only means that it peremptorily enacts that the thing which it directs to be done shall be done. What it is that the statute so peremptorily requires is a different matter, and therefore the question which has been suggested as to the construction of the statute is not foreclosed by the decision or by anything that we now decide.

LORD PEARSON—I am of the same opinion on both points; and I have only to add that I doubt whether section 1 (*b*) of the Public Authorities Protection Act has any application except in a case where the action has been pressed to a judgment on the merits, which is a different thing from a decree of absolvitor obtained of consent.

The Court adhered.

Counsel for the Defenders and Reclaimers —Guthrie, K.C.—Wm. Thomson. Agents —J. Douglas Gardiner & Mill, S.S.C.

Counsel for the Pursuers and Respondents —Jameson. Agents — Kirk Mackie & Elliot, S.S.C.

Saturday, November 3.

FIRST DIVISION.

[Sheriff Court at Glasgow.

MECHAN *v.* WATSON.

Reparation—Landlord and Tenant—Negligence—Common Stair—Alleged Original Defect in Railing of Staircase—Tenant's Child Falling through Space between Upright of Railing and Wall of Landing—Averments—Specification—Relevancy.

A tenant's pupil child fell through a space between the wall of the landing and the nearest upright of the railing of the common stair leading to his father's house and was injured. At the time of the accident the staircase and railing were in their original condition.

In an action at the instance of the child's father against the landlord for damages in respect of the injuries to his child, *held* that the action was irrelevant (1) inasmuch as the pursuer must be taken to have satisfied himself as to the sufficiency of the staircase when he took the house, and consequently no fault on the part of the landlord was averred—*Greer* v. *Stirlingshire Road Trustees*, July 7, 1882, 9 R. 1069, 19 S.L.R. 887, *distinguished* and *commented on*; *M'Martin* v. *Hannay*, January 24, 1872, 10 Macph. 411, 9 S.L.R. 239, and *Indermaur* v. *Dames*, L.R., 1 C.P. 274, *distinguished*; and (2) inasmuch as the pursuer's averments were wanting in specification in respect that he omitted to state the age of the child, the width of the space in question, the period during which he had been tenant of the house, or that he was not well