arrear. The Sheriff says—"The pursuer says that he did not make any special demand for payment of feu-duties from year to year. If he had made the demand the Sheriff is of opinion that he was bound to declare whether he was to take capons or money, or shear dargs or money." I think it is proved that the superior did declare his option of taking payment in kind.

All that the Act requires to make the action good is, that the value of the subjects shall not be less than £25, and that the feu-duty should not have been paid for two years. The clause of the Act provides that the vassal may purge the irritancy incurred by payment of the arrears pursued for. This phrase is not perhaps well chosen, because the Court must have the power of adjusting the sum to be paid. The clause indicates that the amount in arrear ought to be set out in the summons; and I think that it is sufficiently stated that £12, 8s. 9½d., or at least feu-duty for two years, was in arrear. I think that we should find that the feu has been irritated, reserving any question as to the nature and amount of the feu-duty which the vassal is bound to pay, and should remit the case back to the Sheriff in order that he may allow the defender an opportunity of paying his feu-duty before decree is pronounced.

In regard to the four shear dargs, they cannot be demanded after the year has passed. I do not think that any money value can be asked for them, as the superior ought to have given his vassal notice if he was to require his services.

Agents for Pursuer—Hope & Mackay, W.S.
Agents for Defender—D. Crawford & J. Y. Guthrie, S.S.C.

Saturday, January 20.

WILLIAMS AND JAMES *v.* MACLAINE AND OTHERS.

Entail—Trust for Payment of Debts.

A proprietor entailed his estate upon a certain series of heirs, and at the same time conveyed the estate to trustees for the purpose of payment of debts. This deed contained a declaration that whenever its purposes were fully answered it should be void and extinct. A subsequent heir of entail raised an action of sale against these trustees, and in this action the superiority of part of the estate was sold. This superiority was acquired in order to constitute a right to a vote, and a title was made up by charter to the lands, and was afterwards conveyed to the heir in possession of the estate. The whole estate continued in the possession of the heirs of entail. *Held* that the trust-deed did not divest the grantee, being merely a security for payment of debt. When its purposes were fulfilled, the heir in possession became reinvested; consequently, the heir had right to the *dominium utile* of the lands of which the superiority had been conveyed.

The question at issue in this case was the effect of the settlement of the late Donald Maclaine of Lochbuy, who died in 1863, leaving a trust-settlement, directing his lands in the island of Mull at the date of the settlement to be entailed on a certain series of heirs.

All the testator's lands in Mull at the date of his settlement were parts of the estate of Lochbuy, which had been in his family for many generations. But it was contended, on behalf of a creditor of his eldest son and heir-at-law, Murdoch Gillian Maclaine, and indirectly on behalf of M. G. Maclaine himself, that the testator had never been feudally vested in a part of the estate called Scallastle, and therefore that the son was entitled to serve himself heir to his grandfather in these lands, passing over his father, and so withdrawing them from his father's settlement. An action of adjudication and declarator was brought by the creditor, to which the testamentary trustees and the second son of the testator, A. V. Maclaine, the first substitute under the new entail directed to be made, lodged substantially the same defences.

The contention of the pursuers was maintained upon the following state of facts:—In 1776 Archibald Maclaine, then proprietor of the estate of Lochbuy and barony of Moy (which are interchangeable terms) infeft under the Crown, settled his property by two deeds. He made an entail of the estate upon a certain series of heirs. But at the same time he conveyed it in trust to Lord Bannatyne, and Allan Macdougall, W.S., for payment of certain family provisions and debts, enumerated in a list, amounting to £10,000, with powers of sale to that extent. The deed contained both procuratory and precept, but the trustees were to enter with the Crown only in case of lands which were sold. This deed contained the declaration "that, whenever the purposes of this trust shall be fully answered, this conveyance, with the infeftment to follow hereon, shall become void and extinct, in the same manner as if such deed had never been granted nor infeftment taken," "or in that case, and in the event that I or my heirs and successors shall make payment of the whole debts, &c., my said trustees, by their accepting hereof, become bound and obliged, upon the charges and expenses of me, my heirs and successors, to grant and execute all deeds necessary for extinguishing the trust, and vesting my lands and estate hereby conveyed in the person of me or my foresaids."

The trustees were infeft upon the precept of this deed.

No part of the estate was sold, strictly speaking, under the powers of this trust. But the first substitute in the entail, Murdoch Maclaine, who was infeft under the Crown in 1785, finding entailer's debt to amount of £30,000, and being himself a large creditor, raised an action of sale of the estate, under which he sold in 1801 certain portions at sight of the Court, and with concurrence of the entailer's trustees. One lot sold was an estate of six farms called Ardmeanach, "together with the superiority of the lands of Scallastle, which, in addition to the superiority of the lands contained in this lot, extend to upwards of £4 Scots of valued rent, affording a freehold qualification."—(Articles of roup).

It is at this point that the title to Scallastle was said to break off from that of the rest of the Lochbuy estate.

The superiority of Scallastle then sold passed in 1819 to Lord Colonsay, who acquired it for a vote, and made up his title in the more regular manner of a charter to the lands, feu-rights excepted. In 1859 he conveyed his right in the same terms to the testator, Donald Maclaine, who was infeft upon it.

Murdoch Maclaine II succeeded Murdoch I in 1804. He completed his title to the barony and estate as heir of entail of his father under the Crown in 1814, dropping Scallastle from the enumeration of the component parts of the estate.

The trustees of 1776 had no intromission with the estate, at all events after 1804, and the debts for which their infeftment was a security had all been paid by the proceeds of the sales, and by subsequent payments by Murdoch II himself, at latest before 1820. In 1832 Lord Bannatyne, the surviving trustee, executed a formal reconveyance in favour of Murdoch II, of the whole estates, excepting the lands of which the *dominium utile* was sold, and the superiority of Scallastle. This deed contained clauses of obligation to infeft with *a me vel de me* holding, procuratory of resignation and precept of sasine.

Murdoch II made up a title under it by sasine, and charter of confirmation, confirming the trust-deed 1776 and sasine, and reconveyance 1832 and sasine, in which charter he describes himself as superior of the lands undermentioned, *except Scallastle.*

Murdoch II died in 1844. He was succeeded by Murdoch III, who died in 1850, without making up a title. He was succeeded by his brother the testator, Donald Maclaine.

After the death of Murdoch II his estate was sequestrated in 1847, and transferred to Archibald Borthwick as trustee. By this time it had been ascertained that the entail of 1776 was defective and insufficient to protect the estate against creditors, and a large portion of the estate was purchased by Donald Maclaine from Borthwick in 1855.

Thereafter, in 1862, Donald served to his father as heir of entail to the barony, but omitting from the enumeration both Scallastle and the portion he had himself purchased.

In 1863 Borthwick, having paid all the debts of Murdoch II, reconveyed the barony of Moy to Donald Maclaine, as heir of entail, the deed enumerating only those lands enumerated in Donald's title of 1862. Donald Maclaine never made up any title specially connecting himself with the reconveyance from Bannatyne to Murdoch II in 1832.

The possession of the whole estate was never divided. It always remained with the successive heirs of entail.

In this condition of the title it was not contested that Donald Maclaine was entitled to deal with all the rest of the estate as proprietor in fee-simple. But the pursuers maintained that from the time the superiority of Scallastle was sold (which could only be the superiority left in the entailer's person after the base infeftment of his trustees in 1776) the heirs of entail had no feudal title to which they could ascribe their possession of Scallastle, except the infeftment of the trustees, which title came into the person of Murdoch II by the reconveyance and infeftment of 1832, and had never been taken out of his *hereditas jacens.*

The defenders, on the other hand, contended that the trust-deed of 1776 for payment of debt had no effect on the feudal title of the entailer, except as a mere burden, and was incapable of forming the leading title to any part of the estate. (2) That Scallastle had been possessed upon the entail title to the barony; that, although the name was dropped from the title from 1814, the title necessarily comprehended Scallastle, and the possession was wholly under that title for more than forty years. (3) That if it should be held, owing to the omission of Scallastle from the barony title and Lord Colonsay's infeftment in it subject to feu-rights, that Scallastle had not been possessed under the barony title, then the feudal title to it was in Lord Colonsay, and had been transferred by him to the testator in 1859. His title was in form a title to the *lands*, subject to feu-rights; but there were no feu-rights, because the trust-infeftment of 1776 did not split the fee; and, if not, the words, "together with the superiority of Scallastle," in the articles of roup, were obviously inept to divide a then undivided fee.

In the Outer-House the preliminary question of the intention of the testator's trust-deed was alone argued before Lord Jerviswoode, who decided it in favour of the pursuers.

In the Inner-House the Second Division, being with the defenders on that point, ordered minutes of debate on the question of title. They sustained the defences.

WATSON, CRAWFORD, and MONCREIFF for the defenders.

The Solicitor-General (CLARK) and M'LAREN for the pursuers.

At advising—

LORD JUSTICE-CLERK—(*After explaining the nature of the action*)—There are two questions raised for our decision—(1) Whether the *dominium utile* of the lands of Scallastle and Garmony remained *in hereditate jacente* of Murdoch II? (2) Whether, if they were vested in Donald Maclaine, he intended to convey them by his settlement?

I shall state fully my opinion on the first of these points, and shall preface my observations by a summary of the feudal transmissions on which it depends. I have found it a very complicated and troublesome question.

There are three different series of titles to be considered—(1) The entail title, comprehending the lands conveyed by the entail; (2) the trust-title, also comprehending the whole lands conveyed by the entail; and (3) the superiority title, affecting only the lands of Scallastle and Garmony.

1. The entail title commences with a disposition and deed of entail of the barony of Moy, and others, executed in 1776 by Archibald Maclaine, and recorded in 1785 by the institute Murdoch I, who in that year completed his title under it by obtaining a Crown charter, on which he was infeft. Murdoch I died in 1804, and was succeeded by his son Murdoch II, who, in 1814, made up his title, by service to Murdoch I, in the barony and lands holding of the Crown, as heir of entail and provision. The lands of Scallastle were not enumerated in the retour, for a reason which I shall explain. Murdoch II died in 1844, and was succeeded by his son Murdoch III, who died in 1856, without having completed any title. He was succeeded by his brother Donald, who, in 1862, completed his title to the barony and lands holding of the Crown, by service to Murdoch II. These lands of Scallastle were not enumerated in this service. From 1776 down to 1862 the entailed lands generally, including those of Scallastle, were possessed by Archibald Maclaine, and his heirs of entail.

2. The trust-title.—Before executing his entail, and as a preliminary to doing so, Archibald Maclaine, in 1776, executed a conveyance of all the lands he afterwards entailed to certain trustees, for payment of family provisions, and in security, and in payment of certain debts specified in a list.

The deed contained, in regard, at least, to part of the lands, including those of Scallastle, a double manner of holding, but it was provided that the trustees should not complete their title with the Crown unless they exercised the power of sale given them, and then only to the extent of the lands sold. The trust-deed declares these debts to be a real burden, and the trust to be irrevocable until its purposes were completed, but that then it should *ipso facto* come to an end. It also contained an obligation on the trustees to reconvey to the granter, and his heirs and successors, should they pay off the debts. The trustees were infeft in 1776, and the deed of entail expressly confirms their powers. They never had possession. They never sold, and, except giving their concurrence to a sale by the institute in 1801, they never acted at all. All the debts, to a much larger amount than those contained in the list, were cleared off by 1822, but the trustees never used the rights conferred on them.

In 1832, for some reason not explained, Murdoch II took a reconveyance from the surviving trustees. In regard to the other entailed lands, he first took infeftment on the disposition by the trustees, and then, as if, as heir of entail, he had held nothing but a right of superiority, confirmed that infeftment, and then resigned in his own hands *ad remanentiam*, as if to consolidate the *dominium directum* and the *dominium utile*. As regards the lands of Scallastle, the *dominium directum* was excepted in the conveyance from the trustees, on which Murdoch II was simply infeft. This is the title on which the pursuers found.

3. The superiority, or what is called in the titles the *dominium directum* of Scallastle.—In 1787 Murdoch I, in pursuance of a power reserved in the entail, brought a process of sale before the Court of Session to sell part of the entailed estate, in order to pay debts of the entailer, in terms of a power reserved in the deed of entail. Under this process Murdoch I sold in 1801, in pursuance of a decree of the Court, the *plenum dominium* of certain of the lands, and the *dominium directum* of Scallastle and Garmony. The trustees of 1776 consented to the sale. The lands were bought by Murdoch I, who made up no title, but left them to his testamentary trustees, who completed their title in 1808 by adjudging from his heir-apparent Murdoch II, and from the trustees obtaining a charter of adjudication from the Crown, of, *inter alia*, the *dominium directum* of Scallastle. In 1819 the trustees conveyed these lands to Murdoch II, the heir in possession of the entailed estate, who thereupon resigned into the hands of the Crown, and obtained a charter of "the lands of Scallastle." Thereafter Murdoch II conveyed the "lands of Scallastle" to Lord Colonsay, excepting the feu-rights from the warrandice; and, at the same time, assigned to Lord Colonsay the unexecuted precept in the Crown charter. Lord Colonsay took infeftment in the disposition, and in the Crown precept, and in 1859 he conveyed these "lands of Scallastle" to Donald Maclaine, the heir of entail in possession.

Such are the titles. It is maintained by the pursuer that the superiority and property of Scallastle were effectually separated by the infeftment of the trustees, and that while Donald Maclaine held the *dominium directum*, the *dominium utile* was not taken up by him, but remained, in the reconveyance by the trustees, in *hereditate jacente* of Murdoch II.

This is a purely technical point in feudal conveyancing. The way to its solution will be found in the answer to the question whether the deed of 1776 did or did not divest the granter of his feudal title to the *plenum dominium* of these lands of Scallastle, and the rest of the barony lands, which were afterwards entailed. If the infeftment on the trust-deed did divest the granter, I should be of opinion that the *dominium utile* of Scallastle, and of all the other entailed lands, was vested in the trustees from the date of their infeftment, and that it was validly conveyed to Murdoch II by the reconveyance in 1832. In that case it would no doubt follow that the service of Donald Maclaine, being limited to the lands held of the Crown, did not carry the *dominium utile* of Scallastle, and that nothing passed under the entail excepting a base superiority, until the reconveyance. On the other hand, if the trust-deed did not divest the granter, but left his feudal title vested in him, then I think it equally clear that the *plenum dominium* of all the entailed lands was conveyed by the deed of entail, and that the *dominium utile* was never vested in the trustees, and never existed as a separate feudal estate.

It is apparent, from the narrative I have given, that the title of the trustees was not within the tailzied investiture at all. The *jus crediti* or right to demand a reconveyance is vested by the trust-deed in the granter and his heirs and successors, and the infeftment of the trustees was in no respect under the fetters of the entail.

I cannot hesitate as to the solution of this question. The granter, Archibald Maclaine, was not divested of his feudal title by the execution of the trust-conveyance; and the infeftment of the trustees, as long as the power of sale was unexecuted, was a security only, and a mere burden or incumbrance on the right of the granter, which affected neither his judicial investiture or his beneficial enjoyment of the lands, and which required for its extinction nothing but the extinction of the debt for which the security was created. It had no more effect in divesting the granter than if he had granted a bond or disposition in security to an individual creditor.

This principle is now firmly fixed. It was first applied in the noted case of *Ederline's Creditors;* but the leading case is that of *Macmillan* in 1851, decided both in this Court and in the House of Lords. The facts were entirely analogous to those of the present case. Campbell had granted to Ferrier a trust-conveyance for payment of creditors, with procuratory and precept. Ferrier took infeftment, and afterwards reconveyed to Campbell, who thereupon resigned in his own hands, and afterwards executed an entail of the lands. After his death a creditor of the institute in the entail challenged the title made up under the reconveyance, which was admitted to be defective; and the question came to be, whether Campbell had a title to entail the lands without having obtained a reconveyance. It was pleaded there, as it is suggested here, that there is a distinction between such a trust and an ordinary bond and disposition in security. But the Court found "that David Campbell, not having been divested by the trust-deed, had power to execute the procuratory of resignation containing the entail, and that the titles made up under it were validly and feudally made up." Lord Moncreiff, in his note, states the law with great precision, to the effect that "such a trust-deed does not divest the granter of his

feudal title, and is only to be considered as a burden on that title;" and his views were affirmed by the Court and the House of Lords.

In this case, and the former case of *Ederline*, the law has long been considered as conclusively settled; and our best writers on conveyancing treat it as admitting of no dispute. Mr Menzies in his Lectures, says—"It is to be carefully observed, however, that a trust-disposition for payment of creditors does not divest the granter of his radical right of property. Upon its face it is shown not to confer on the trustee an absolute right. It is a security, and may be extinguished by renunciation." Mr Montgomerie Bell says—"The trust merely created a burden on his right, and on fulfilment of the purposes the burden is extinguished and the lands at his free disposal, just as if he had granted a bond and disposition in security, and had paid or obtained a discharge of the debt."

I have no doubt, therefore, that the trust-conveyance of 1776 did not divest the granter of, and did not invest the trustees in, the feudal title to the lands which were afterwards entailed. I am not sure if this is disputed by the pursuers; but they have endeavoured, with considerable ability, to avail themselves of an analogy which was unsuccessfully pleaded in the case of *Macmillan*. They say that a trust-deed of this description has precisely the same effect as an absolute disposition to be held of the granter, qualified by a latent trust for the granter's behoof, such as was in use formerly for the purpose of creating freehold qualifications. But there is not the slighest analogy between the two rights, one being *ex facie* a security, and the other being *ex facie* a divestiture of the granter. In the case of *Macmillan* the same plea was attempted, on the authority of the case of *Fairlie* v. *Ferguson*, which well illustrates the principle. In that case Sir Adam Ferguson, having granted a feu-right to his brother Lord Hermand, *ex facie* absolute, although really in trust for himself, with a view to split the superiority of property, executed an entail of the lands before obtaining a reconveyance. The entail being challenged by a creditor of the first institute, it was found that Sir Adam Ferguson was divested, and had no power to make the entail. Lord Moncreiff pointed out in the case of *Macmillan* that the conveyance in *Fairlie's* case was absolute; and in the House of Lords Lord Wynford, in moving the affirmance of the judgment, referred to this case, and said—"But your Lordships will see the distinction between that case and this. In that case there was no object expressed, such as payment of debts. In the present case there is the expression of that object, and the object ceases for which it was made; so that every one would see that it was not conveyed to him absolutely, but for certain purposes." It is wholly immaterial that, even when the conveyance is absolute, the latent trust may preserve to some extent the radical right in the granter. When the conveyance is one in security, it is not the radical right merely, but the original feudal title which remains with the granter, whether the security be granted to a trustee or direct to a creditor.

If I am right in this view, the trust-infeftment never did or could enter the progress as a substantive or independent title. It was a mere burden from the first. It required no feudal form to extinguish it; and as all the debts had been paid prior to 1832, it was extinguished at that date. Even a reconveyance could only operate to terminate the security, and free the dominant title from the burden, and therefore I am of opinion that the deed of 1832 was entirely ineffectual as a substantive title to the *dominium utile*.

If the deed of entail therefore effectually conveyed to the institute and heirs-substitute of entail the *plenum dominium* of the barony and lands of Moy, although these had been previously conveyed in security to the trustees, the question I am now considering seems to be concluded, as regards the lands of Scallastle, as well as the rest of the entailed estate. The truster's title to them was precisely the same. The sale of the *dominium directum* of Scallastle in 1801 by Murdoch I, whatever complication it may have introduced into the progress, could not enlarge or alter the nature of the right conveyed by the trust-deed. If it was a right in security only before the sale, it was and could be nothing more after the sale. It is said, and truly said, that the conveyance of the Crown title to Scallastle left Murdoch I with no separate feudal title to the *dominium utile* of Scallastle. But that only proves what seems quite clear, that there never was any effectual separation of the superiority and property of any of the entailed lands; a separation which could only be effected by an absolute feudal investiture in the *dominium utile* as a separate estate. A Crown vassal vested, as Murdoch I certainly was, with the *plenum dominium*, cannot create a separate estate in the *dominium utile* by conveying the *dominium directum*. This is well established, and the reason is, that the superiority is the nobler and dominant right to the lands, and carries the whole feudal title, subject to the existing sub-infeudations. The conveyance therefore of the *dominium directum* of Scallastle carried to the purchaser the whole right of the lands, under burden of the truster's infeftment in security.

When a creditor is infeft base on a bond and disposition in security, a *quasi* feudal relation is constituted between the granter and the disponee, but no separation is thereby effected of the granter's original title, which is only burdened, but in no part transferred; and the mid-superiority so created of course consists of the granter's original title of property, under burden of the security. This was the real effect of the sale in 1801; and although at the time nothing was warranted to the purchaser but a base superiority, a little consideration of the actual position of parties at the time of the sale will explain how that was.

In the case of *Campbell* v. *Spiers*, decided in the House of Lords, it was fixed that a trust-conveyance like the present, under which the trustees had power to complete their title with the Crown, still remained nothing but a security until sale or eviction, and did not divest the granter of his Crown holding. The trustees under the deed of 1776, while they only took infeftment on the precept, had a personal disposition to the *plenum dominium* of the whole entailed lands, and, for the purposes of a sale, might have confirmed their infeftment, and carried off superiority and property together. It is plain, therefore, that in 1801 the institute Murdoch I. could not have sold an acre without their consent, because while the power of sale in their conveyance remained, no purchaser was safe, and the proprietor could give no warrandice. As regards the lands which were sold out and out by Murdoch I. in 1801, the consent of the trustees was an absolute discharge of their security;

and thus the seller was able to give the purchaser a better title than he himself had, as it was disburdened of the security. But in regard to these lands of Scallastle, the trustees did not discharge their security—that is to say, they still reserved their right to sell them for the purposes of the trust—but they did discharge their right to complete their title with the Crown, and, in effect, became bound to use in a sale their base infeftment only, to give to the purchaser only a right to be held base. The result of this is, that what was sold was the *plenum dominium*, subject to the security, just as the seller himself held it. He could warrant the Crown title in virtue of the trustees' consent, but while they retained the power of sale he could warrant nothing more. There is no difficulty as to the rest of the process. The charter of 1819, nearly twenty years afterwards, granted the lands to Lord Colonsay, who held at the same time a disposition, in the warrandice of which the feu-rights were excepted. Had the superiority and property ever been separated, this title would have applied to superiority only, but, as it was, it gave him the whole lands, subject to the trust-infeftment, which, by the payment of all the debts in 1822, became absolutely extinct.

It is of no moment, although quite certain, that Lord Colonsay meant to purchase, and Murdoch II to sell, only a superiority, for intention will not cure blunders in conveyancing. In 1801 the right sold was not worth more than a bare superiority, if, as is probable, a sale on the trustees' title was in contemplation. In 1819 the facts were forgotten, and the conveyancers may have assumed that there had been a separation of superiority and property, which there never was. Donald Maclaine in 1859 acquired Lord Colonsay's rights, and so absorbed the only feudal title which existed to the property.

That this is the accurate result, on technical principles of conveyancing, I cannot doubt, provided the sale of 1801 was valid. There are serious grounds on which it might have been impugned by the next heir of entail. It is also certain that Lord Colonsay, notwithstanding his title, never could have asserted a right to the beneficial enjoyment of the lands which he never possessed, and was not intended to have. But all these rights of challenge, personal to the heir in possession, centred in Donald Maclaine, and I need not pursue them farther.

On the second question, I only think it necessary to say that, in my opinion, the terms of Donald Maclaine's settlement were sufficiently wide to comprehend these lands; and that I see no reason to infer that he did not intend to convey them.

Lord Cowan—The pursuers have instituted this action as creditors of M. Gillian Maclaine, the present heir in possession of the entailed estate of Lochbuy, concluding primarily for decree against him for the sum mentioned in the libel, and decree of constitution has been pronounced in absence; and, farther, concluding for adjudication of the lands specially mentioned, viz. the penny land of Garmon, the penny land of Scullastlemore, and the penny land of Scullastlebeg—alleged to pertain heritably or otherwise to the said defender, or which pertained heritably or otherwise to the deceased Donald Maclaine, the defender's father, and to which the defender "might establish a right in his person were he served heir of entail and provision to the said deceased Donald Maclaine," with all right, title, and interest which the said defender might have "were he lawfully served infeft and seised as heir of entail and provision in special to the said deceased Donald Maclaine in such of the foresaid lands and others as he died infeft in, or lawfully served heir in general" to the said Donald "in such of the foresaid lands and others as he was not infeft in, but to which he had a personal right."

The substantial question thus put in issue regards the liability of the lands mentioned, which formed part of the entailed estate, to be attached for debt due to the pursuer under the decree against Murdoch Gillian Maclaine; and this again depends upon the state of the title under which the lands were possessed by Donald Maclaine, his father.

That the original entail of Lochbuy, and the investiture which followed on it, were not apt and sufficient to protect the estate against adjudication for the onerous debts of the successive heirs in possession, cannot be made matter of dispute. No doubt it is contended that the prohibition against alteration in the order of succession, found to be effectual by this Court in 1807 *inter hæredes*, is conclusive also in a question with onerous creditors. This is disputed by the pursuers, on the ground that by a subsequent judgment of the House of Lords a prohibition expressed in precisely the same terms was held to be ineffectual. But it is not necessary to enter on this argument, for in completing the investiture under the entail in 1785 a fatal error was committed, inasmuch as the word "*debitum*" was omitted in stating the prohibition against the contraction of debt. The result was that the estate was held attachable for debt by this Court in 1846 in an action at the instance of Sir John Cathcart; and, thereafter, in September 1846, the whole estates of Murdoch II, including the entailed estate, were sequestrated for his debts; he had died in 1844, and the sequestration was directed against him as a deceased debtor, and under it the estates were transferred to Mr Borthwick as trustee, by whom so much of the estates as was required to pay the debts were sold and subsequently transferred to Donald Maclaine in 1855. The error in the investiture, which thus laid open the entailed estate to be attached for debt, has been continued in the subsisting entail title; and, so far as I can judge, the lands of Scallastle and others were liable to be attached for the debts of Donald Maclaine, assuming him to have completed titles to the estate in terms of the original investiture.

Founding upon this state of matters, the pursuers maintain—(1) that assuming the titles made up by Donald, as heir of entail, to have included the lands of Scallastle, they were not conveyed to the defenders, the trustees under his disposition and settlement, but descended to his son Gillian in terms of the entailed destination; (2) that holding the intention of Donald to have been to include the entailed estate in his trust settlement, the lands of Scallastle, at least, were not so vested in him as to permit of their being carried by that deed, and (3) that consequently, on either ground, these lands are liable to be adjudged for the debt of their debtor under the charge to enter heir to his father Donald, implied in the summons—the usual proceedings for that purpose being duly followed.

The state of the title to the lands sought to be adjudged is much involved, and notwithstanding the very able pleadings before the Court, I have

had no inconsiderable difficulty in arriving at a satisfactory conclusion; but, in the view I take of the principles established by authoritative precedents, I think it must be held—(1) that a radical right to the *dominium utile* of the lands of Scallastle has all along belonged to the successive heirs taking the entailed estate and barony; (2) that the extinction of the trust created in 1776 by the fulfilment of its purposes, not less than by the reconveyance in 1832, effeired to that right, and conferred on Murdoch II a complete title to the *dominium utile*, in respect of this his radical right to the entailed estates and lands; (3) that Donald Maclaine effectually took *ex hæreditate* of Murdoch II the very right that was in him at the time of his death, either directly or through the trustee on his sequestrated estate, Mr Borthwick, and whether that right be regarded as personal or feudal, and (4) that such right was carried to the trustees by Donald's trust-disposition and settlement.

Archibald Maclaine of Lochbuy executed two deeds in 1776, regulating the succession to the lands and barony of Moy (otherwise known as Lochbuy), and generally his whole lands and estates—the one deed being an entail of these lands; and the other deed a trust-conveyance of the same lands, intended to take immediate effect, and specially referred to in the deed of entail as a burden on the right of the heirs of entail. The sole object of the trust-deed, which was declared irrevocable until its purposes should be fulfilled, was to provide for payment of the truster's debts, amounting to upwards of £10,000, as set forth specifically, and declared to form a real burden on the lands, and for this purpose with full power to his trustees to sell lands to the extent necessary to pay off these debts, and so to disburden the estate. And it is specially provided "that whenever the purposes of this trust shall be fully answered, this conveyance, with the infeftment to follow hereon, shall become void and extinct in the same manner as if such deed had never been granted nor infeftment taken." Infeftment was taken on this deed in favour of the trustees in May 1776.

The deed of entail conveys the lands, barony, and estate (subject to the granter's liferent) to and in favour of the heirs-male of the granter's body, and failing them to the other heirs-substitute described in the deed. It farther reserves power to the granter to pay off all outstanding debts now affecting the estate according to the tenor of the trust-disposition foresaid; and also declares it to be not disallowable for the heirs of entail to alienate so much of the lands as should be necessary to satisfy the debts owing by the granter at the time of his decease, to the extent specified in the trust-deed. This entail was not feudalised or recorded in the lifetime of the entailer: but, on his death in 1785, Murdoch Maclaine I, the next heir in succession, completed titles by expeding crown charter of resignation in favour of himself and the other heirs of entail, on which he was infeft.

With the view of providing for payment of the debts affecting the estate, Murdoch I, with concurrence of the trustees, raised an action of sale in 1787, and disposed of so much of the lands, from time to time, under judicial authority, as was necessary for that purpose; and *it is an admitted fact that thereby the object of the trust-conveyance was fully accomplished.* To use the words of the trust-deed, its purposes were "fully answered," and that deed and infeftment following thereon became "void and extinct in the same manner as if the deed had never been granted nor infeftment taken." There was no necessity for any declarator of extinction or other judicial proceeding. Nor was there any necessity,—and this is the great peculiarity of the present case,—for any reconveyance by the trustees to the heir of entail then in possession and his successors. The deed of entail, and the completed title following thereon, was the foundation of their right to the estate, and required no subsidiary conveyance to confer on them the *plenum dominium* of the whole entailed barony. The contemporaneous trust created by the entailer, so long as the debts were not paid, was no doubt a burden upon the entail title; but it was no more such than any heritable bond or security over the estate granted by the entailer would have been. Its purposes being fulfilled, the trust-conveyance became altogether effete, just as an heritable bond would be on payment of the debt; and the lands and estate under the original tailzie-conveyance were thenceforth vested in and taken by the successive heirs of entail in *pleno dominio*, altogether free of the trust-deed and infeftment, and of the debts to secure payment of which alone the trust had been created.

The peculiarity now noticed distinguishes this case essentially from all the cases to which reference was made in course of the discussion. Even that of *Melville* v. *Preston*—in which there occur the valuable remarks quoted by the defenders from the opinion of Lord Corehouse—was essentially different. Cases do occur where a proprietor desirous of entailing his estate, and of freeing the succession thereto of debt, conveys his estates to trustees for the purpose of paying his debts, and thereafter entailing the lands upon a series of heirs; but in such cases the entail is the creation of the trustees. Other cases there are where a proprietor conveys his lands in trust with a view to payment of debts, leaving his property, subject to that burden, to revert to himself and his successors, in such terms as to make this reversionary right truly subordinate to the trust-infeftment; and this was the peculiarity in the case of *Melville*. Questions in such cases may arise as to the necessity of reconveyance by the trustees, in order to vest the parties entitled to succeed with a valid title. But in the more usual case, Mr Sandford (196-7) says justly, that the truster is alone considered as proprietor in every question with the truster, his kin, or creditors. And in the present case that rule falls short of the legal position of the institute and substitute heirs, whose essential title to the estate was the original deed of entail. The contemporaneous trust-right, created by the entailer for payment of specific debts, was a mere excrescence on the entail title, which by its very terms became extinct when the debts were paid. The true and only title of the successive heirs to the entailed estate was thus altogether apart from and exclusive of the trust-conveyance.

This was the state of matters even prior to the death of Murdoch I in 1804; and at all events in the person of his successor Murdoch II, who possessed the estate until 1844, the entailed lands were vested and possessed—whether by feudal or by personal title will be afterwards considered—exclusively under the deed of entail. And when the surviving trustee, under the trust-deed of 1776, reconveyed the lands and estate to Murdoch II in

1832, he did not by that deed confer on the heir in possession, for the first time, a title to the estate and lands. The only effect of it, except in the light I shall immediately explain, was to afford conclusive evidence that the trust-burden had been long previously extinguished.

No doubt infeftment was, as I think, unnecessarily taken on that reconveyance, but assuming it entitled to effect, this may be viewed as having had the effect of converting the radical right to the *dominium utile* of the lands that was in Murdoch II, as heir apparent, into a feudal right; but it could have no other effect. For it was no *new* title, but simply auxiliary to and supplementary of the radical right to the lands already in Murdoch II, under the deed of entail, to the *dominium utile* of the whole entailed estate, including the lands of Scallastle. But with these lands he could not deal as he did with the other entailed lands of which he was himself superior under the crown; for these special lands were held under a subject superior, as has now to be explained.

One of the parcels of the lands sold under the action of sale in 1801 included the *superiority* of Scallastle and others, the purchaser being Murdoch Maclaine I himself, and he conveyed this along with his other general estates to trustees for certain purposes of his own. These trustees obtained in implement of the said purchase decree of adjudication, and expede Crown charter including therein the said superiority; and thereafter, having disponed in favour of Murdoch II, he obtained Crown charter and subsequently disponed the same to Duncan M'Neill, Esq. (Lord Colonsay), by whom infeftment was taken in 1819 as crown vassal.

That a good title to the *dominium directum* may be held to have been thus constituted, for the purpose of conferring a vote on the disponee, does not require to be disputed. It is the effect of this title to the superiority on the right to the *dominium utile* vested in the heir of entail in manner just explained which is alone matter of controversy.

That Murdoch II, on his succession in 1804, had right to the *dominium utile* of the lands, and was entitled to complete a feudal title thereto, notwithstanding the sale of the superiority, cannot admit of doubt,—assuming that the trust-conveyance of 1776 had become inoperative, and was extinct and void. As the heir of investiture, he had right to the *dominium utile* of Scallastle and others, as part of the entailed estate; and if he did not vest himself feudally, he had, at all events, a personal right as heir apparent, which he might make feudal whensoever he thought fit. As the lands in question, however, were no longer held under the Crown, the special service of Murdoch II in 1814, with a view to the completion of his title as heir of tailzie, did not, and could not include the lands of Scallastle. The superiority of them was at that time (1814) the subject of the proceedings by adjudication in implement and subsequent resignation under the Crown, which have been referred to, and which ultimately issued in the completion of Mr M'Neill's Crown titles in 1819. He then became intermediate superior; and no infeftment was consequently expede by Murdoch II in the *dominium utile* at that time. But I consider that the infeftment subsequently taken by Murdoch II under the deed of reconveyance of the whole estate in 1832 may be held to have effeired to his radical right, as heir-substitute of tailzie. His title, in that view, became thereby feudalised, its basis, however, being the deed of entail under which he had all along possessed the lands, and his superior being from 1819 downwards Mr M'Neill (Lord Colonsay). The conveyance by the surviving trustee was a mere form, adopted to validate and perfect his inherent and radical right to the lands as such heir—to demonstrate on the face of the records that all right under the trust of 1776 was extinct.

The pursuers contend that when the *dominium utile* of lands is conveyed to trustees, with a view to the creation of a freehold franchise, and a conveyance of the *dominium directum* made to a purchaser, to be held of the Crown, the effect of that conveyance is to change the legal character of the radical right in the granter of the trust—not that the right is destroyed, but that its legal character is changed into that of a personal claim, or *jus crediti*. It is said "it will remain with the truster himself, the true proprietor; only, as the truster no longer possesses any feudal estate to which his radical right can attach, that right is necessarily reduced to the position of a personal claim against the trustee, and can be made effectual only by means of a reconveyance from him;" and it is urged that the only distinction between the freehold franchise cases and the cases of trust for creditors is, "that in the one case the estate remaining in the truster is conveyed to a third party, who obtains a new investiture, while in the other it remains with the truster himself on his old investiture." Now, *first*, had it been maintained, which it is not, that by the transference of the superiority title the truster had entirely divested himself in favour of the disponee of his whole right to the property, this reasoning might have been more plausible; but it is conceded that the superiority disponee took nothing, and could claim nothing, but what effeired to that estate, and that the truster still continued the true owner, as regards the *dominium utile*. On what ground, then, can it be said that the radical right that was in the truster to that estate before divesting himself of the superiority title, can be affected by that divestiture? The character of the right in him remains the same. He is still the true proprietor, as regards the *dominium utile*, burdened only with the trust-conveyance. The reality of the case is that his radical right has legal relation only to the *dominium utile;* and, as much after as before his conveyance of the superiority to another, the extinction of the trust had the effect of disburdening his radical right to the *dominium utile* under the old investiture. But *second*, this reasoning is quite fallacious, as applicable to the present case. The trust-conveyance of 1776 was exclusively to provide for payment of debts. It did not divest the granter of the radical right of property in any sense. Far less can it be said to have affected the right of the institute and heir's substitute called to the succession by the entailing deed of 1776. This trust-deed was a mere burden on the title, otherwise complete under the entail, becoming extinct and void *eo ipso* of the trust purposes being fulfilled. There was no change in the character of Murdoch's right, or of his title as regards the *dominium utile*, effected by means of the conveyance of the superiority. The investiture of 1785 was from the first, and continued to be throughout, the title under which the successive heirs of entail possessed the property, or *dominium utile* of the lands. Nor, *third*, can it be said that in this state of the title, the transference of the superiority, ultimately conveyed to Mr M'Neill, could at all affect the right

of the disponer as regards his position of true proprietor. Advantage may have been taken from the supposed split effected by the trust-conveyance of 1776, but which, as a mere trust for payment of debt, could not legally so operate; and the freehold franchise only may have been thereby conferred in 1819 on Mr M'Neill, as vested with the superiority,—although his title was legally sufficient in terms to carry the *plenum dominium*, had there been possession. But the possession from 1804 downwards has all along been in the successive heirs apparent, in virtue of their rights of succession under the charter of 1785.

This being the state of matters affecting the title under which Murdoch II possessed the lands, the title made up by Donald, and the rights in him, have now to be considered. He succeeded to the entailed estates in 1850. (1) Having purchased a large portion of the lands and barony of Moy or Lochbuy, he obtained a disposition in his favour in 1855 from the trustee on the sequestrated estate of Murdoch II. (2) Thereafter he obtained from Mr M'Neill, then Lord Colonsay, *inter alia*, a disposition of the lands in question, on which he was duly infeft in 1857, confirmed by the Crown in 1859. (3) In 1862 he obtained decree of special service as heir of entail and provision to his father Murdoch II, in the lands and barony of Moy, upon which he obtained Crown writ of *clare constat*, recorded in Register of Sasines 26th November 1862, and in virtue of the general service therefrom to be inferred, vesting in himself every personal right to the estate which was in his ancestor. And (4) finally, in 1863 he obtained from the trustee on the estate of Murdoch II a second disposition of the lands and barony of Moy, comprehending the lands therein described, but subject to the entailed fetters and conditions contained in the previous deeds.

In this state of his title, Donald Maclaine died in 1863, leaving a trust-disposition and settlement dated March 1862. The questions are—(1) Whether under these several titles, or any one or more of them, Donald Maclaine had not vested in himself the whole interest, right, and title which was in Murdoch II to the *dominium utile* of Scallastle and others; and (2) Whether he did not transfer the same to his trustees for the general purposes of his trust-disposition and settlement.

On the first of these questions I have explained the grounds on which—if the infeftment of 1832 by Murdoch II shall be held to be entitled to any consideration—it may be regarded as having feudalised the radical title to this *dominium utile* held under Lord Colonsay. But it may be thought that this cannot be held to be its legitimate effect, and that his possession as heir apparent, after as before 1832, was in virtue of his personal title as such; and it is not necessary that it should be otherwise held to support the view I take of this part of the argument. It is sufficient that the infeftment cannot be held to affect the personal right as heir apparent which Murdoch II all along had to those lands, and under which he and his predecessors had been the exclusive possessors from 1804. That title of possession remained with Murdoch II until his death in 1844. The infeftment under the reconveyance in 1832 was not intended and could not have the effect of placing the heirs of entail in the position of vassals to their own trustee. Be it that it did not feudalise the heir's personal title, it did not destroy it; and therefore on his death Murdoch III and then Donald, became successively heirs apparent under the entail, and in virtue of that title in possession of the lands, and no one else ever had such possession.

Assuming this to have been Donald's position, it is all material, in estimating the effect of the title completed by him after his succession, to observe that the Entail Amendment Act had come into operation before he succeeded in 1850. Under the provisions of that Act, the deed of entail being indisputably defective in at least one of its prohibitions, the estate became liable to be affected by the debts and deeds of the heir in possession, whether onerous or gratuitous. He had therefore complete power to deal with the estate, and complete his titles thereto in the manner best fitted to promote the object he had in view, of providing for the execution of a new entail under his trust-deed and settlement. Having this in view, what he actually did was to purchase from Lord Colonsay the whole real right he had in the lands of Scallastle, and to obtain from him the disposition of 1859. The terms of that conveyance, in strict conformity with the title in his Lordship's own person, were such as to carry the *plenum dominium* of the lands, subject only to the exception in the warrandice clause of all subsisting feu rights. This disposition, with warrant of registration thereon, was recorded in the General Register of Sasines 10th June 1857, and Crown-writ of confirmation thereon, dated 13th October 1859. In this way a Crown title to the *plenum dominium* was vested in Donald, and the radical right and title to the *dominium utile* which he had as heir apparent, became clothed with the formal title. Nor could the exception of the feu-rights affect its validity as such, for the feu-right of these lands of 1776 had been long previously extinguished.

The other proceeding adopted by Donald was to obtain from Mr Borthwick the conveyances, in 1855 and in 1863, of the whole estate and barony of Moy or Lochbuy, vested in him under his adjudication title as trustee in the sequestration of the estate in Murdoch II, in so far as those estates remained unsold after payment of the creditors. Donald had vested in himself the right to demand such reconveyance, the special service which he expede as heir of entail being impliedly a general service, and carrying to him every personal right and claim relative to the entailed estate. Even, therefore, were it to be held that the infeftment in 1832 had the effect of creating a separate title in Murdoch II (a view which I cannot at all entertain as the reality of the case), that estate, along with the rest of the entailed land, were carried to Mr Borthwick by his adjudication title; and if so he had full power to convey them to Donald in virtue of his personal right as heir apparent. The conveyance of 1863 was therefore *habile* to carry that right to Donald, and although the lands are not specifically mentioned, nor infeftment followed on it, the conveyance of the barony may be held sufficient for that purpose; but if not, the personal right or *jus crediti* to claim from Mr Borthwick still a conveyance to validate the right was certainly in Donald before his death, and formed part of his general estate conveyed to his trustees. Even this view, therefore, may be held sufficient to support Donald's right and power to deal with the lands in question as he did with the rest of his estate.

There remains the inquiry, whether by his trust-disposition and settlement Donald intended to convey for the purposes of the deed those parts of

the entailed estate of which he had not acquired the property by purchase, but had succeeded to as heir-substitute of entail? On this branch of the argument the views I entertain are the same with those held by all your Lordships. It is clear to me that the object and purpose of the granter of the deed was to convey to his trustees all the property that it was in his power to convey, with a view to that new entailed settlement upon the family of the barony and estate of Lochbuy, for which his deed provides. The ground on which the Lord Ordinary proceeds in pronouncing the interlocutor under review is explained in the Note, is that Donald "had no intention whatever of effecting a conveyance of the entailed estate, or of the portions thereof," which are the subject of this action, *i.e.*, not Scallastle only, but all the rest of the lands vested in him under the old entail, and to which he had right as heir of entail, and not as purchaser. I cannot so view the intended effect of this deed. Throughout its provisions reference is made to parts of the entailed estate other than those which he had purchased. The entail was no longer in existence as a bar to his dealing with the lands, as a fee-simple estate in his person. He had power to execute a gratuitous deed, regulating the succession to those lands. Then why is he to be held to have left the old entail to regulate the succession to one portion of his lands, over which he had power—while he made provision for a new entail as to the rest of his estate? I cannot think this at all probable. But, at all events, to exclude the operation of the general conveyance in the trust-deed of his whole lands, some evidence must be shown that such was his intention. But no such evidence exists. For I cannot think that subsequent bonds of provision can be viewed as demonstrative that the lands of Scallastle were not intended by Donald to be disponed to his trustees. The object of their execution appears to be to provide for the contingency of his not having succeeded in vesting himself with such a title to the lands, as would support his conveyance of them with the rest of the entailed estate and his other estates; and this is corroborated by the reduction provided to be made from the provision settled on his wife and family by the trust-deed in the event of bonds such as those in question being subsequently executed in their favour. Assuming that his general conveyance of "all and sundry lands and heritable estate of whatever kind" belonging to him at his death, were effective to carry these entailed lands, the full annuity and provisions which he intended to give to his family were provided for. And it may be remarked that the designation he assumes in these bonds of "heir of entail in possession of the entailed lands" of Scallastle, demonstrates that he himself held, whatever difficulties there might be from the state of the title as regarded his power to convey, that a full and complete feudal title to these lands had been vested in his person.

On these grounds, I am of opinion that this action of adjudication cannot be sustained, and that the defenders are entitled to be assoilzied.

LORDS NEAVES and BENHOLME concurred.

Agents for Pursuers—Tods, Murray, & Jamieson, W.S.
Agent for Defenders—John Martin, W.S.

Thursday, January 25.

BAILLIE *v.* CAMPBELL.

Process—Decree in name of agent—Expenses.

A defender who had been found entitled to his expenses died before the account was audited. The agent then moved for expenses in his own name, and no appearance was made for the pursuer. The Court refused the motion, holding that the representatives of the defender must be sisted before the agent was entitled to decree.

Friday, January 26.

FIRST DIVISION.

BAIRD & BROWN *v.* SELKIRK (HUGH STIRRAT'S TRUSTEE).

Bankrupt—Inhibition—Ranking of Creditors.

Held (*dubit* Lord Deas) that the proper order of ranking a body of creditors on the proceeds of the heritable estate of a bankrupt, where one of the creditors had used inhibition on his debt three months before the sequestration,—the debts of some of the creditors having been contracted *before*, and of others *after* the inhibition,—was, first, to rank all the creditors *pari passu*, and then to give the inhibiting creditor the difference between the dividend arising thereby, and what he would have drawn had no debts been contracted subsequent to the use of the inhibition, by way of drawback from the dividends of the creditors whose debts were contracted after the inhibition.

Bankruptcy Act 1856, *sec.* 127.

The trustee in a sequestration issued a deliverance, in which he explained the scheme of ranking, and addressed a copy to each creditor, stating the class in which he had placed his claim. *Held* that an appeal by a creditor against the deliverance on his own claim competently brought under review the whole scheme of ranking, and that it was not necessary for him to appeal against the deliverance on any other claim.

This was an appeal under section 170 of the Bankruptcy Act 1856, against an interlocutor of the Sheriff of Lanarkshire, affirming a deliverance of the trustee in the sequestration of the estates of Hugh Stirrat & Son, wrights and tun builders, Glasgow; and of Hugh Stirrat, the sole partner of the said firm, which were sequestrated on the 22d May 1871.

On the 22d February 1871 Robert Melville & Co. used inhibition on a debt due to them by the bankrupt. The debts due to the other creditors were not secured by inhibition. Some were contracted before, and others after the inhibition. Part of the bankrupt estate consisted of heritable properties, which were realised by the trustee.

On the 4th September 1871 the trustee issued and addressed to each creditor a deliverance, in which he explained the scheme of ranking which he adopted—"With reference to the rankings, I have to explain that an inhibition was used against the bankrupts on 22d February last, the effect of which is to separate the creditors into two classes: those whose claims existed at the date mentioned