there were charged, as fees to counsel for debate, six guineas for the senior and four guineas for the junior. The auditor in taxing struck a guinea off each fee. Fees were charged for the second day of the debate of four and three guineas, for the third day of five and three guineas, and for the advising of three and two guineas. The auditor allowed only three guineas to the senior for each continuation and two to the junior. He also struck a guinea off the fee sent to senior counsel for the advising.

The defender objected to the auditor's report, and, after hearing counsel, the Court took time to consider the matter.

To-day, judgment was delivered by

The LORD JUSTICE-CLERK—The Court considered this matter delicate, and thought it right to take time to consider it; and although we are always very unwilling to interfere in regard to such a matter as the amount of counsel's fee, we are bound, when a question is brought before us, to dispose of it. The fees sent for debate were six guineas to senior counsel, and four to the junior. We think these fees are perfectly reasonable. But we must take into account what follows. After the debate began on a Thursday it was resumed next day, and for that continuation of the debate four guineas were sent to senior counsel, and three to the junior. That also we should not, under ordinary circumstances, be inclined to interfere with. Then it appears that the discussion was to be resumed on the following Tuesday, and on Monday five guineas more were sent to senior counsel and three to the junior. We think these are fees which should not be allowed as betwixt party and party. As to the fees of three and two guineas sent for the advising, we think these are reasonable. The result is, that we are of opinion that eight guineas should be disallowed as betwixt party and party, and it so happens that that is just the sum which the auditor has by another process taxed off the account. We shall therefore, for the sake of simplicity, just approve of his report, but, at the same time, it must be distinctly understood that we do not approve of the cheese-paring plan which the auditor has resorted to for the purpose of reducing the aggregate amount of the fees charged.

Counsel for Pursuers—The Solicitor-General. Agent—William Mitchell, S.S.C.

Counsel for Defender—Mr Pattison. Agents—J. A. Campbell & Lamond, W.S.

Friday, Feb. 1.

SECOND DIVISION.

HOWDEN *v.* FLEEMING AND OTHERS.

Entail—Register of Tailzies—Act 1685—*Clause of Devolution—Sequestration—Trustee.* A deed of entail provided that if the heir of entail in possession should succeed to a peerage, the estate should devolve on the next heir entitled to succeed, just as if the person succeeding to the peerage were naturally dead. The entail was never registered in the Register of Tailzies, and the heir of entail to whom the clause of devolution applied, and who succeeded to a peerage in 1860, held possession of the estate until his death in 1861—Held (diss. Lord Benholme) that the heir of entail in possession having been allowed to continue in possession till his death on a title which, *ex facie* of the records, made him proprietor in fee simple, the estate was liable for the debts contracted by him during his lifetime, without distinction between those debts which were contracted by him before his accession to the peerage and those contracted by him subsequently to that event. The trustee on the sequestrated estate of the heir in possession accordingly preferred.

This was a petition at the instance of James Howden, C.A., trustee on the sequestrated estate of the deceased John, fourteenth Baron Elphinstone, concluding to have the lands of Duntiblae and others, which belonged to the Baron, transferred to and vested in the petitioner as trustee. The defenders, the Hon. Cornwallis Fleeming and another, maintained that these lands were not carried by the sequestration, inasmuch as by the express conditions and limitations of Lord Elphinstone's title to these lands, and the clause of devolution in the entail thereof, which provided that on any heir of tailzie succeeding to a peerage his right in the lands should cease, and the lands should devolve upon the next heir, Lord Elphinstone, by succeeding to this peerage in July 1860, ceased to have any right in the lands, and that, therefore, at the date of Lord Elphinstone's death in 1861, and the date of the sequestration, there was no right to the said lands which Lord Elphinstone could legally convey or his creditors could attach for his debts. The trustee in reply maintained that the entail having never been recorded in the Register of Tailzies, no devolution took place on Lord Elphinstone succeeding to the peerage, and the lands were attachable for debts of the bankrupt.

The Lord Ordinary (Benholme) rejected the claim of the trustee.

The trustee reclaimed.

LORD ADVOCATE, DEAN OF FACULTY, and MILLAR, for him.

PATTISON, for the defenders.

At advising,

LORD JUSTICE-CLERK—The question to be determined in this case is, whether the lands of Duntiblae were a part of the estate of the late Lord Elphinstone within the meaning of the 102d and 106th sections of the Bankrupt Act. After his death, Lady Hawarden, made up a title to these lands as his successor by special service as heir of provision. The case therefore apparently falls within the operation of these sections of the Act, if the lands belonged in fee-simple to Lord Elphinstone.

The deceased Lord received a conveyance of these lands by a disposition containing the prohibitions and fetters of a strict entail, and as he completed his feudal title under that conveyance, there can be no doubt that the estate would have descended to Lady Hawarden as the next heir of tailzie and provision, unaffected by the debts or deeds of the deceased, if the tailzie had been completed by registration in terms of the Act 1685.

But the tailzie never was registered in the Register of Tailzies, and therefore the deceased was in law, while he possessed the estate, the fee-simple proprietor, so far as regards the rights of his creditors or purchasers from him. His creditors could not be restrained from attaching the estate for debts either personal or real. Even if the entail were now recorded, provided these debts were contracted prior to the registration, the estate would be liable for them. This is settled law by the cases of Smollett *v.* Smollett, and Ross *v.* Drummond.

The peculiarity of the present case, however, on which the respondents chiefly rely, is that the dis-

position of tailzie under which the deceased made up his title and possessed the estate contained a clause by which it was provided that, in the event of the heir in possession succeeding to a peerage, the estate should devolve on the next heir entitled to succeed, just as if the person succeeding to the peerage were naturally dead. The late Lord Elphinstone did succeed to the peerage on the 19th July 1860. He died on 13th January 1861. In the interval he continued in possession of Duntiblae as before his accession to the peerage. No proceedings were taken to enforce against him the clause of devolution on his obligation to cede the estate to Lady Hawarden. The estate therefore was not made litigious during his life. And after his death, Lady Hawarden procured herself served heir of tailzie and provision in special to him, as the person who died last vest and seised as of fee in the lands.

It is contended by the respondents, that on the accession of the late Lord Elphinstone to the peerage, the estate *ipso facto* devolved on Lady Hawarden; that the late Lord was, during the remainder of his life, under an obligation to denude in her favour, and that the continuance of his possession, in spite of that obligation, cannot be allowed to benefit his general creditors represented by the petitioner. Even if this argument were otherwise quite unimpeachable, it could hardly be pressed so far as to exclude the claims of those creditors whose debts were contracted before the devolution took place, and that class of creditors is represented by the petitioner just as much as the other creditors of the deceased. But it appears to me that the argument is unsound, because it ascribes to the clause of devolution the same operation and effect (in a question between Lady Hawarden on the one hand, and the late Lord Elphinstone and persons contracting with him, either before or after his accession to the peerage, on the other hand) as if the tailzie containing the clause of devolution had been duly recorded in the Register of Tailzies.

The case formerly decided by the Court between the present parties and Mr George Dunlop, related to lands possessed by the late Lord Elphinstone under a valid entail duly recorded, and it was then found that the rents of that estate accruing after the deceased's accession to the peerage belonged to the next heir in competition with the deceased's creditors. The ground of that judgment necessarily was that the next heir, Lady Hawarden, had as substitute of tailzie such a *jus crediti* as entitled her to be preferred to other creditors. There can be no doubt that a substitute under a valid recorded entail has a *jus crediti*, which is secured to him as a right preferable to all creditors of the heir in possession by the operation of the statute 1685. But this *jus crediti* depends on the statute alone; and a tailzie which derives no benefit from the statute, by reason of its being unrecorded, can confer no *jus crediti* on anybody. Indeed this is simply the doctrine of Smollett *v.* Smollett and Ross *v.* Drummond, stated in other words, for it is impossible that any heir should have a *jus crediti* in an estate, or in the succession to an estate, of which another person is at the same time the fee-simple proprietor.

Such also is the doctrine involved in the Bourtreehill case (9 D. 1167, 6 S. Ap. 136), for there the rights of the substitutes of tailzie were secured by a duly recorded entail, the only defect of which was in the prohibition against sales. The sale was sustained because the personal contract of sale was complete before the devolution occurred; and it is, no doubt, assumed that had the devolution occurred before the present contract was complete, it would not have been effectual against the devolvee. This was the necessary consequence of the rights of the heirs in the destination being secured so as to create in them a *jus crediti* under the operation of the Act 1685. But where the destination of the estate is not fortified and secured by the fetters of an entail, or where the deed of entail is not recorded, no such *jus crediti* can exist.

The Bourtreehill case seems to me to establish the following propositions, which may be material in the determination of the present case:—

1. That a devolvee in such a destination as we have before us is truly an heir to all practical purposes, and can, at all events, have no higher right than that of an heir.

2. That where the devolution occurs in a perfect entail, the devolvee takes the estate on the occurrence of the devolution unaffected by the debts and deeds of his predecessor.

3. That where (prior to the Entail Amendment Act) the entail containing the clause of devolution is defective in the prohibition against sales, the devolvee will be bound by a sale effected by his predecessor during his possession of the estate, prior to the occurrence of the devolution, though he will not be affected by any other debts or deeds of his predecessor.

4. That so soon as the devolution occurs, all power of the heir in possession to sell or to do anything necessary to complete a contract of sale comes to an end, just as if he had at the same moment died, and the right of the devolvee emerges exactly to the same effect as if his predecessor had died.

5. It appears to me necessarily to follow that if the defect in the Bourtreehill case had been, not in the prohibition against sales but in that against the contraction of debts, it would *pari ratione* have followed that all debts contracted by the heir in possession prior to the occurrence of the devolution would have been effectual against the estate, and preferable in competition with the next heir.

Further than this I do not think the Bourtreehill case affords any guide to us in the present. For this is the case of a destination unprotected by fetters by reason of the non-recording of the deed under which every heir in possession is a fee-simple proprietor.

I am not disposed to controvert the position that a simple destination is effectual *inter hæredes*, in so far that it cannot be defeated gratuitously by the heir in possession. But it seems to be maintained that this clause of devolution has a higher legal effect than the clause of destination, and that it forms such a condition of the right of the heir in possession, that without being made a real burden in any known or ordinary form, it is effectual against third parties (purchasers and creditors) though the destination itself is quite unprotected and ineffectual to secure the interest of a substitute taking the estate on t he death of a previous heir against the debts and deeds of that heir. This argument appears to me to be founded on a misapprehension of the true nature of such a clause of devolution. For that clause is in truth nothing more than a qualification of the destination. The clause of destination provides that on the death of A., the institute, the estate shall descend to B., and on the death of B. to C. The clause of devolution merely superadds that on A. or B. succeeding to a peerage, the estate shall descend to B. or C. as the case may be. It is thus nothing more than one of the provisions of

the deed for regulating the order of succession. The heirs are prohibited from altering the order of succession, and therefore it may be assumed that they are not entitled to defeat the effect of the clause of devolution gratuitously. But the clause of devolution can have no greater effect against an heir in possession of the estate than is derived from the prohibition against altering the order of succession.

But the prohibitions of this tailzie being all of them ineffectual against purchasers and creditors, it follows that when the fact occurs which brings the clause of devolution into operation, the devolvee cannot take the estate, except subject to the debts and deeds of the last heir, whose creditors will be entitled to adjudge the estate for their debts even after the devolution has occurred, so long as their debtor's infeftment stands as the existing investiture. This was determined in the Earl of Marchmont against Horne of Aytoun. (5 B. Ap. 103.)

No doubt, when the feudal title has once been transferred in competent form to the devolvee, or after he has instituted an action for recovery of the estate and so rendered the subject litigious, no subsequent contractions of the heir affected by the devolution will be a good foundation for diligence against the estate.

But what is to be said of debts contracted after the fact inferring devolution has occurred by the heir, who, under the clause of devolution, is bound to denude, but who has not yet denuded, and still stands feudally vested in the estate, and has not even been judicially called upon to denude?

This may be a new question; but it does not appear to me to be attended with much difficulty. The infeftment, as it stood originally in the heir before his accession to the peerage, was an infeftment in fee-simple, and its legal character cannot be changed in a question with parties who are entitled to trust to the records, so as to become an infeftment in trust, giving a mere fiduciary fee, merely by the occurrence of an event which gives rise to a personal obligation on the part of the heir in possession, under that infeftment, to denude in favour of another heir.

The clear and consistent doctrine of our law is, that all debts contracted by a proprietor of an estate who stands, *ex facie* of the records, infeft as proprietor in fee-simple, may be made effectual to attach his estate, even though it should pass into the hands of a succeeding heir by the operation of an unprotected destination, before diligence is done to affect the fee. Nor can it, in my opinion, make any difference in the application of this principle that the debtor is continuing to hold the estate under his fee-simple infeftment after he has been brought within the operation of a claim, inferring a personal obligation *inter hæredes* to denude in favour of another heir.

Creditors are entitled to trust implicitly to the records, and so long as their debtor is, *ex facie* of the records, fee-simple proprietor, they are entitled to rely on the fee of his estate as a fund of credit. In this respect their position is more favourable than that of purchasers; for a purchaser who takes a conveyance in the knowledge of an antecedent obligation, though personal on the part of the seller to convey to another, may have his title cut down on the head of fraud. But with creditors it is not so. They are not affected by any knowledge of personal obligations of their debtor so far as real diligence is concerned, and are entitled to exclude any one with a weaker right than their own, without being liable to any investigation into their knowledge of their debtor's personal obligations or contracts when their debts were contracted.

My conclusion, therefore, is, that the late Lord Elphinstone having been allowed to continue in possession of the estate of Duntiblae till his death, on a title which, *ex facie* of the records, made him proprietor in fee-simple, that estate is liable for the debts contracted by him during his lifetime, without distinction between those debts which were contracted by him before his accession to the peerage and those contracted by him subsequently to that event.

I am for altering the interlocutor of the Lord Ordinary, and granting the prayer of the petition of Mr Howden, as trustee on the sequestrated estate of the deceased debtor, Lord Elphinstone.

Lord COWAN—This is an application by the trustee on the sequestrated estate of the deceased John Fleeming, fourteenth Baron Elphinstone. His death occurred 13th January 1861. The sequestration of his estates was applied for and obtained 19th June 1862. The present application was presented to the Lord Ordinary on 10th March 1866, in terms of the Bankruptcy Act, against the respondent, Cornwallis Fleeming, his tutors and curators, the eldest son of Lady Hawarden, now deceased, and nearest heir of tailzie and provision entitled to succeed to her in the lands and others described in the petition; and to which lands Lady Hawarden had completed titles on the death of Lord Elphinstone, as nearest heir of tailzie and provision to him.

The application is also directed against George Dunlop, in respect of his right and interest in and to the said lands, under a disposition in his favour in security of debts and obligations, of date 14th November 1859.

The petition sets forth section 102 of the statute, transferring to and vesting in the trustee *ipso jure*, as at the date of his confirmation, absolutely and irredeemably, the whole property of the debtor, and especially the whole heritable estate belonging to the bankrupt in Scotland; and also the 106th section of the statute, enacting that in the case of sequestration of the estate of a deceased person, whose successor has made up a title to his heritable estate, "the trustee may apply to the Lord Ordinary praying that such estate shall be transferred to and vested in him," and empowering the Lord Ordinary to declare to that effect if no cause is shown to the contrary.

The question under the record is whether the lands sought to be transferred to and vested in the petitioner belonged to the deceased Lord Elphinstone at the time of his death, to the effect and in the sense of being attachable for his debts. The 106th section of the statute declares that the estate to be transferred to the trustee shall vest in him to the same effect as the act and warrant of confirmation in the case of a living debtor under section 102, which enacts that if any part of the bankrupt's estate be held under an entail, or by a title otherwise limited, the right vested in the trustee "shall be effectual only to the extent of the interest in the estate which the bankrupt might legally convey or the creditors attach." Hence it is that if the lands to which the petition refers were in the person of John Fleeming at the time of his death attachable for his debts, his heir and successor in these lands is within the statutory obligation, and the demand of the trustee is beyond dispute.

The lands, being the mill and lands of Duntiblae and others, were conveyed by disposition and deed

of tailzie, dated 4th October 1847, to John Fleeming and other heirs and substitutes therein-mentioned, under the fetters of a strict entail; and titles were completed by him under instruments of sasine and instruments of resignation *ad remanentiam* in 1847, and 1848, and 1859 respectively. These instruments were duly recorded in the Register of Sasines. But while John Fleeming's feudal title in the lands and others was thus complete the deed of entail has never been recorded in the Register of Tailzies.

The deed of entail contains, amongst other clauses, one of devolution, to the effect that in case of any of the heirs succeeding to the peerage "then, and in that case, and how soon the person so succeeding," and so forth, in terms already cited.

This clause of devolution became operative during John Fleeming's lifetime, inasmuch as the succession to the Elphinstone peerage opened to him on 19th July 1860, upon the death of John 13th Baron Elphinstone; but no steps were taken by the next heir of entail (the now deceased Lady Hawarden) to enforce against him the obligation to denude of the lands. John Fleeming continued in the undisturbed possession of them in virtue of his feudal title until his death. Upon that event Lady Hawarden served heir of entail and provision to him as having died last vest and seised therein, and under that service she completed her title to the lands by infeftment in July 1861. The respondent Cornwallis Fleeming, is now in her right.

Laying aside the effect of the devolution clause, it is not doubtful that, notwithstanding the tailzied fetters in the title of John Fleeming, the non-recording of the deed of entail in the Register of Tailzies, had the effect of leaving the lands as much exposed to the diligence of his creditors, as if he had been in possession on a fee-simple title. The decision in the early case of Willison *v.* Creditors of Donator, 1723 (M. 15369) and in the more recent cases of Smollet *v.* Smollet's Creditors, 1807, and Ross *v.* Drummond, 30th August 1831, House of Lords, are conclusive on this point. Contrary to the opinion of the then Lord Justice-Clerk (Hope) and of the Lord President (Campbell), it was decided in Smollet's case that the estate was attachable for all debts contracted by the heir of entail, prior to the date of recording the deed in the Register of Tailzies. That decision not having been taken to appeal, the question was again brought forward in Ross *v.* Drummond, and the same decision was pronounced, the then Lord President (Hope) stating that he held the decision in Smollet's case to be binding in this Court. On appeal, the House of Lords declared by their judgment "that the registration of the deed of entail prior to the date of the decrees of constitution and adjudication does not, in this case, bar the claims of the creditors against the entailed estate, in respect of debts contracted prior to such registration."

Thus the creditors of the heir in possession are not affected by the prohibitions and fetters contained in the tailzie, even where infeftment has followed, and the conditions of the title appear in the Register of Sasines so long as the deed of entail has not been inserted in the Register of Tailzies. They may constitute their debts against the debtor or against his heir taking up the estate; and make them effectual by adjudication, just as in the case of their debtor having possessed the lands in fee-simple. The subsequent registration of the deed of entail is of no avail, whether that take place before or after the real diligence at the creditors' instance. The only inquiry is, whether the debt, proposed to be made effectual on the lands by adjudication, was contracted prior to the entry of the deed in the Register of Entails.

This being undoubted law, the next inquiry has regard to the effect of the clause of devolution upon the position and rights of the creditors of John Fleeming, standing feudally vested in the lands, and contracting personal debt, while his entail title was unrecorded.

There is no question as to the legal character of a clause of devolution. It is a condition or quality attached to the right of succession conferred by the destination; and when the event occurs which brings it into operation, the devolvee takes the estate as the heir called to the succession on the voidance of the possessor's right. He takes as heir of entail and not as creditor. But until the condition occurs which is to cause the devolution, the position of the heir in possession is in no way affected. All his acts as owner of the estate, in so far as not struck at by the entailed fetters, are perfectly effectual, as much so as if the deed contained no clause of devolution.

This principle was conclusively settled in the Bourtreehill case. The devolution was declared to come into operation so soon as an heir, having become a peer, should have a second son. It was strongly contended that Lord Eglinton's accession to the peerage altered his position as heir in possession, and constituted him *hæres fiduciarius* for his second son, when born, so as to incapacitate him from exercising rights of ownership he could otherwise have done. This was repudiated both in this Court and in the House of Lords; and the principle of the decision in the well-known case of M'Kinnon was held to be inapplicable.

From this it is clear that so long as John Fleeming remained in possession of the estates while yet a commoner, his debts and deeds not being struck at by the fetters of the entail, were in all respects effectual. Nor was the power of his creditors to lead adjudication of the lands at all impaired by his intermediate accession to the peerage. The emergency of that event did not divest him of the feudal right and title. It imposed on him a personal obligation to denude, and conferred on the next heir as devolvee the right of succession. But it did no more. The feudal estate was still in him, and so long as this state of the title remained, the real diligence to attach the lands, which was undoubtedly competent to his prior creditors, could be directed against no one else. And accordingly this has been expressly ruled in a very analogous case. I refer to the case of Earl of Marchmont *v.* Home of Ayton, reported in D. 10,624, 8th Dec. 1713, but more fully on this point in V. Brown's Supplement, p. 103, on 5th February 1714. The devolution, in that case as in this, was provided to take place on accession to the peerage. The debt was contracted of a prior date to the accession. But the adjudication which was sustained, was led subsequent to that event. In the Bourtreehill case I do not understand any doubt to have been felt by the judges on this point. Lord Fullarton in particular, in referring to the steps to be taken by the purchaser to complete his feudal title, observed—"Here the feudal title is still in the party who entered into the contract; he is willing to complete it; if he were to refuse, adjudication might proceed against him, just as it might have proceeded against his *hæreditas jacens*, in the event of his death." And in the House of Lords, the only points on which any doubt was expressed had re-

gard to Lord Eglinton's position prior to the birth of his second son and the applicability of M'Kinnon's case.

I think it certain, on principle and authority, that for the personal debt of John Fleeming contracted prior to his accession to the peerage, the lands of Duntiblae were open to be attached by real diligence directed against him, as the feudal owner, at any time of his lifetime; and therefore as at 20th January 1861, when his death occurred, the trustee, in so far as there are personal debts contracted prior to 19th July 1860, remaining unpaid and forming claims in the sequestration, must, in this view, be entitled to have the lands and others which were open to be adjudged for those debts thus conveyed to him by the heir of Lord Elphinstone.

This is not the place for determining how far the objections stated by the respondent, to the states of debt lodged by the petitioner, as due by John Fleeming, at the respective dates of his accession to the peerage, his death, and the sequestration of his estates, are well founded. So far it is enough if there be evidence that to a large amount, the debts due at the time of his accession and of his death, remain outstanding and are the foundation of claims on the estate; and that this is the fact, I cannot entertain any doubt, on full consideration of the statements in the record, and especially those in Art. 13 and answer to it with the relative states. In the six months which intervened between June 1860 and January 1861, the debts of John Fleeming increased from £43,000 to £50,000; and at the date of sequestration in 1862 the amount due, and on which dividends have been paid, is £36,700. An attempt is made, by observations in reference to the claim of Mr Dunlop (which of itself is admittedly ranked for upwards of £12,000), and upon the debt due to Joel (ranked for £15,000), to show that, to some extent, the debts thus ranked may on examination be found to consist of contractions subsequent to the date of the accession to the peerage and of the death. But, after giving every allowance to these views, I remain fully satisfied that the amount due at the sequestration cannot be so dealt with except to a limited extent.

But, besides debts in this situation, there are certainly other creditors of John Fleeming, for whose behoof the sequestration has been expede, in debts and obligations contracted subsequent to his accession to the peerage; and the question is, Can personal creditors in this situation insist on the lands of Duntiblae being declared within the adjudication title of the trustee for their behoof as heritable estate attachable for their debts? This is a question on which it may not be necessary, for the disposal of this petition, to form a conclusive opinion; and one not unattended with difficulty.

The case to be dealt with is that of the feudal owner of a property contracting debts, in whose title there is a personal obligation to denude, and a devolution of the estate. The entail not being recorded, the owner was fee-smple proprietor in all questions with creditors and singular successors. The destination of the estate was unprotected; and the prohibition against contraction of debt was unavailing. No matter although the fetters appeared in the Register of Sasines; they did not touch the power of the feudal owner to contract debt or to sell the lands at his pleasure, so long as the Act 1685 was not complied with by registration of the deed in the Record of Tailzies. The heirs of entail were as helpless, in every question with creditors or purchasers, as if the title of the owner had been unfettered. Yet it is contended that creditors, contracting on the faith and credit of the real right vested in their debtor, and noways affected by the recorded prohibition of contracting debt, are open to have their legal right to attach their debtor's real estate destroyed, by the personal condition attached to the destination clause, that in a certain event the estate is to devolve on the next heir of the destination. The order of succession itself is incapable of being enforced, while the entail is unrecorded; but this condition or quality annexed to the destination is capable of being enforced by the heir, in whose favour the devolution comes to operate; and that heir being devolvee can resist the otherwise indisputable right of the creditor to adjudge his debtor's estate. So it is contended. The reasoning leading to that result appears to me, as at present advised, to be not a little anomalous; and I know of no authority to sanction it.

In principle the heirs of the destination, whether called directly or under a devolving clause, have no *jus crediti* in the estate, entitling them to compete with the diligence of creditors contracting with the feudal owner possessing on a fee-simple title; or what is the same thing to all legal effects, on an unrecorded deed of tailzie. Until the tailzie be recorded, or until the personal obligation to denude be enforced, or the feudal estate otherwise taken up by the heir entitled to take under the devolving clause, the rights and remedies of creditors contracting with the owner of the estate remain entire. Such is the view I take of the legal principle to be applied in such cases.

There is not much light on this point to be gathered from any of the decisions that were referred to in the debate. The questions that have arisen, indeed—excepting in the case of the Earl of Marchmont and in the recent competition between the parties to this application—did not involve the rights and interests of creditors. They were all of them questions between heirs, the heir forfeiting and the heir taking by devolution; and they were, moreover, questions under deeds of entail duly recorded in the Register of Tailzies.

The Marchmont case did not raise the question, though it was incidentally alluded to in the argument; and the Bourtreehill case had regard to a contract of sale held to be complete as a personal contract prior to the birth of Lord Eglinton's second son, but not followed by infeftment. Hence the power of Lord Eglinton, while he remained feudal owner, to contract personal debt after that event was not argued; moreover, as regarded the contraction of debt, the fetters were complete, and the deed of entail was duly recorded.

Then the recent case, in which the whole Court were consulted, of Lady Hawarden against Howden and Dunlop, was decided in relation to a state of circumstances essentially different from the present competition. The rents were those of the estate of Wigton, held under a strict entail duly recorded. As between the two heirs—Lord Elphinstone, who forfeited the estate on his succession to the peerage, and Lady Hawarden, the heir of entail, taking as devolvee—the condition attached to the right of succession was held to become operative *eo ipso* of the conveyance of the devolving condition. And neither the trustee on Lord Elphinstone's estate, nor the creditor to whom the estate had been disponed, could plead any higher right to the rents than what was in Lord Elphinstone—the tailzied fetters under the recorded deed of entail having qualified their right

and title to the estate and its rents as effectually as they did the title of their author. The Court had no occasion to consider the rights of creditors to affect the lands by real diligence, for debts of the feudal owner, possessing on a title which did not debar from contracting personal debt, but left it open for the creditors to attach the estate, so long as the entail remained unrecorded.

For these reasons I cannot, at this stage of the proceedings, hold that the personal debts contracted by John Fleeming between June 1860, and January 1861, are to be excluded from ranking on the proceeds of the estate in question, or that the adjudication title of the trustee will not benefit them. There is at least *prima facie* ground for this view of the rights of those creditors; and *in hoc statu* I cannot draw any distinction between the different sets of creditors in the matter of this application. The lands are, in the view I take of the law, unquestionably liable to be attached for all the debts that had their origin prior to June 1860. The trustee's adjudication title supports his demand under the statute to have those lands conveyed to him, even viewing it as doubtful whether the other class of creditors can claim to be ranked *pari passu* on their proceeds when sold. And until it is seen that there is a surplus after paying off these debts for which it may certainly be attached, it is premature finally to dispose of the question as regards the rights of the other creditors. Indeed, in the argument, the distinction adverted to was not pressed with any earnestness—the general proposition contended for being that for none of the debts due by John Fleeming could the lands be held to be attachable to any extent or effect. This general proposition, as I have already said, appears to me quite untenable.

There remains for consideration the effect of the disposition of the lands executed by John Fleeming in favour of Mr Dunlop in 1859. This was an *ex facie* absolute conveyance; and with regard to the lands of Duntiblae carried the fee of them to Dunlop. It bore to be for an onerous consideration—viz., the sum of £15,000 instantly advanced. Under this disposition infeftment followed on 25th November 1859. Assuming this to have been as it bears an onerous deed, it was within the power of John Fleeming to grant it, and it had the effect of divesting him of the estate. At the time of his accession to the peerage, therefore, and at the time of his death, and of the sequestration of his estates even, the feudal title of the *dominium utile* was in Dunlop. The mid-superiority alone was in John Fleeming, Dunlop's infeftment being base and unconfirmed. But this conveyance, although *ex facie* absolute, was granted only as security for debts and advances made to John Fleeming. This was repeatedly declared by Dunlop, both before and since the sequestration, in various judicial proceedings connected with this matter; and in his affidavit and claim to be ranked on the sequestrated estate. Hence, subject to the burden of the debts, for which the land was held in security, the radical right to them remained with John Fleeming; and he had vested in him right to demand a reconveyance on making provision for the debts. It is in reference to this state of Dunlop's right under the disposition 1859 that its effect has to be judged.

Now, whether we regard the right and interest which was in John Fleeming as the radical right to the estate, or as a right of action which he had, to demand from Dunlop, a reconveyance under burden of the debt secured over the lands, the adjudication title of the trustee was efficacious to attach such right and interest. The trustee was entitled to require Dunlop to execute the deed of declaration, which he did in April 1863; and also to require from him the assignation and disposition in February 1865; and as will be seen from the terms of those deeds, the lands which Dunlop held under his absolute title, but truly in security of debt, have been reconveyed to the trustee; and he has under the open precept, contained in a prior deed executed in 1855, obtained himself duly infeft.

It is not at all necessary to enter farther on a consideration of this part of the case. That there were debts secured over the lands of Duntiblae to a large amount is certain; and it is equally certain that there are debts remaining unpaid which are alleged to be preferably secured over the proceeds of these lands when sold. This has been expressly stipulated for by Dunlop in the deeds which he has executed; and the price of the lands, after providing for the preferable debts, will be in the trustee's hands as estate, which belonged to John Fleeming, at the time of his death attachable for his debts. On this estate, the personal creditors, according to their several rights and interests, will be entitled to rank. There does not appear to me, therefore, any ground for holding that the disposition of 1859 can interfere with the principles, on which the lands of Duntiblae themselves, had the disposition of 1859 never been granted, must have been held to fall within the trustee's statutory title.

Upon implement being obtained from the heirs of John Fleeming, and the mid-superiority being conveyed to the trustee, he will be in a situation to resign the *dominium utile* into his own hands, and so vest in himself the same feudal right to Duntiblae, which was in John Fleeming before he granted the disposition of 1859 to Dunlop.

The Lord Ordinary's interlocutor ought, in my opinion, to be recalled, and the prayer of the petition granted.

Lord BENHOLME—The case we have before us is confessedly one of great difficulty, and I have looked at it with extreme jealousy from the circumstance that I was the Lord Ordinary who pronounced the interlocutor now under review. I paid great attention to the most able arguments at the bar, and in consultation afterwards, as your Lordships well know, I have done everything I could to mature my opinion upon the case. But I must confess that I remain of the opinion I originally held with respect to the effect of that clause of devolution which has so important a bearing upon the case. Let me recal the leading features by which this question falls to be settled. In 1741, the Wigtown entail was executed, and in its original construction that entail contained not only the property of that estate, but also what has been called the Duntiblae estate. The original entail contained both, and it was recorded in the year 1750. So far the registered entail referred to both estates, but it is equally true that a part of that entailed estate, consisting, I think, mainly of a superiority, was sold under an Act of Parliament, and vested in trustees, and again repurchased and united with the original estate. I presume it was a mistaken idea that this was just the same entail—the entail executed in 1847 I mean—as the original entail in 1741. It was identical in its terms, and especially identical in the important clause of devolution, and consequently, I suppose, the framers of that entail thought themselves relieved from the necessity of entering it in the register—a great

mistake, because it is perfectly certain that what had been detached for a time from the original entailed estate rendered the document a new entail when it was recommitted to writing. The peculiarity of both entails was that clause of devolution involving not only an obligation to convey the estate to the next heir of entail upon the accession of John Fleeming to the peerage, but declaring his right of possession to be that of a mere hand. A good deal may depend upon the question whether this is to be construed as a mere personal obligation, or whether it is to be construed as a real quality and right ascertained by the infeftment and inserted as a condition of entail. In the view I take of this case—and I think the view is conformable to the opinion of the whole Court in the former case—it is a condition, and not a mere personal obligation. The two entails and the two estates were then invested in John Fleeming when he became Lord Elphinstone in 1860 in precisely the same conditions, with one exception—viz., that the one entail was registered and the other was not. Now, for a moment contemplate what was the effect of that. It is very clear, and I agree with all the authorities that have been cited, that if the personal creditors of John Fleeming contracted whilst he was their proprietor unaffected by the entail, all these personal claims, their debts, were lawful, and capable of attaching to the estate. In whatever way that estate was to be reached, whether in the shape of personal representation against the next heir, or, as it rather appears to me, by diligence against the heir immediately in possession, even after the devolution took place, it is clear enough the personal creditors before the devolution were entitled to make a fund of credit of the lands contained in the unregistered entail. But it appears to me of very little consequence to inquire whether the remedy was upon a personal representation to the heir of entail of an estate unregistered, or whether it would be made directly by an adjudication against the heir himself when in life, although subjected to the event of devolution. In my view of the case that is of no consequence, because your Lordships are very well aware that a man who is feudally vested in an estate so as to be a means of complete diligence against that estate at the instance of a creditor entitled to attach it, may be in the situation of a mere hand or trustee in regard to all other estates. And that, I take it, your Lordships will find was exactly the situation of John Fleeming during his life in reference to the Wigtown entail. What was the decision of the Court upon that Wigtown entail? for upon that decision I found my opinion. The grounds of that decision appear to me to stand very strong, and I shall afterwards endeavour to show your Lordships that I do not think the grounds upon which that decision is founded can be affected by the circumstance that the entail was not registered. A person who stands vested feudally in an estate such as the estate of Wigtown, but who is fettered against the alienation of it, or the contraction of debt, notwithstanding such an entail, has perfect power to convey his life interest in that estate, No entail can prevent him from doing that. During his life his estate is a fund of credit to his personal creditors. The rents may be attached. His creditors may attach his life interest in them or he may convey them in security. No entail prevents that. Upon what principle was it that the court held that John Fleeming's life interest in the Wigtown entail passed over to Lady Hawarden, and could not be competed on by his personal creditors, or any of his creditors, except upon the principle that he, though feudally vested in the estate till his death, was a mere hand, a mere trustee? Now in saying that, my Lord, I think I affirm in the strongest way that can be stated that the clause of devolution by which this was effected operated *ipso facto* to render him legally dead, paralysed as to active right in the estate, as to dealing with it voluntarily, as to all real and patrimonial interest in the estate. Nor let that be considered an anomaly or unprecedented view. A trustee is vested in an estate, but he is vested in trust. Though he has no patrimonial interest in the estate, though he has no proprietary interest in the estate, he is feudally vested as trustee. Again, say where is the anomaly in holding that this real qualification contained in the sasine of John Fleeming as to the Duntiblae estate took effect against all subsequent contractions, and rendered him in the interest of the next heir of entail paralysed as to patrimonial interest? Where was the injustice of this? Did the creditors not know, when they looked on the record, and that was the only way in which they could know he was feudal proprietor—that this was a condition of his life interest, not to be enforced by any fetters of entail? Fetters of entail had no efficacy. It was the clause of devolution, and that clause of devolution, if it subsisted in the titles at the moment of the event, as I look upon it, must take effect upon the right of the proprietor. There is a good deal of difficulty—though it is apart—a good deal of difficulty and mistake has arisen in consequence of talking of a strict entail and of a protected destination. Let me examine what is a protected destination. By that I mean a destination which the heir cannot alter or defeat. Can there be a doubt that John Fleeming had as little power to alter the succession, to check and eliminate this clause of devolution in the one estate as in the other? It is the greatest possible mistake to suppose that the fetters of entail had anything to do with this. Why, John Fleeming had no right to alter or check that. It is a mistake to say the destination was protected by the registered entail, or by the fetters of the entail in the one case more than the other. The entail, no doubt, constituted a destination, but that destination was contained in the unregistered entail just as much as in the registered one. Nor do I do see how the fetters of entail could enforce the one more than the other or protect it. But waiving that point, and supposing that there was something in the registered entail which gave a higher protection, not a higher efficacy (that it could not give), but which gave a higher protection to the clause of devolution than the unrecorded entail could give—suppose it were so, what did that signify but that when the event of devolution took place the clause of devolution still subsisted in the infeftment? It had not been altered in the one more than in the other, and you may say it could not have been altered in the one whilst it might have been altered in the other, though I do not agree to that. What difference does it make, if the thing has not been done, that the destination still stands with this clause of devolution in it? Does it not take effect in the one as well as in the other? I do not see how it is not to take effect in the one merely because it might have been altered in the one case and might not in the other, when, in fact, it was not altered in either case. Now, nothing can be more certain than that a party vested in a feudal estate, whilst he remains proprietor, can deal with that estate by selling it

in liquidation of debt in any way constituted upon that estate whilst he remains proprietor. But shall you say that he still remains in the same position after the clause of devolution has evacuated his right and rendered him legally dead? You must assume the whole question before you are entitled to say that. The clause of devolution, then, has no effect in the one case, or no great effect—in point of fact no effect at all—and it has complete effect in the other.

Where contravention has not been incurred, such an entail, such an estate, stands in the same position as a fee-simple one. A *jus crediti* upon that consists in the power of the creditors to call into exercise the fetters of entail. That is the whole. Now, how can that operate upon the clause of devolution? The clause of devolution has nothing to do with contravention. The clause of devolution—such is the opinion of the consulted judges in the former case—does not operate at all as an irritancy on that entail, by the effects of that entail, through a contravention. It is held by them all that it is not of that quality, and it is that that makes it operate, *ipso facto*, from the moment of the event. It requires no declarator. In the case of the Wigtown estates the clause of devolution operated from the moment of Fleeming's succession to the peerage. In the opinion of the Court it had operated from the moment and would have done so had no steps whatever been taken in the meantime. Now, here is an estate where there is no registered entail and no effects. The fetters cannot be called into operation. The fetters do not intensify the clause of devolution. They merely protect it upon the hypothesis I am now urging. Suppose they do protect it—that is to say, prevent its being eliminated, because there is no contravention connected with the clause of devolution. Well, the registered entail may have prevented the possibility of John Fleeming altering the succession and evacuating the clause of devolution in the entail. He did not attempt it in the one case, nor did he attempt it, or at all events attempt it effectually, in the other. Do they not, then, stand exactly in the same position? I have been unable to see how the fetters of entail can have anything to do with this matter. If one does not analyse the effect of these fetters, and if you allow yourselves to say this was a strictly entailed estate, and therefore you are not to give to the clause of devolution in the one case the effect it would have in the other, that really is to involve the case in a sort of mystery which is unnecessary if you consider what the fetters are. These fetters, as I said before, are of no value whatever, and are of no efficacy and of no use where there is no contravention. Now, I ask myself this, How could the Court in the case of Wigtown hold that John Fleeming was deprived of his right of life interest and yet could have granted security over the estate of Duntiblae, and the rents that fell due after the devolution during his life, to any one of his creditors, whether to Dunlop whose debts were contracted before the devolution, or to the trustee upon the sequestrated estate, or any of the creditors? After the devolution they were all rejected. Lady Hawarden was found to have been the proprietor of the estate from the moment of devolution. Was that the effect of the entail? The entail would not have prevented John Fleeming conveying his liferent to the creditors. How are you to put the two things together and give them an effect of that kind, which the entail itself would not have, and which I think must be attributed only to the clause of devolution? There is a very instructive case which has been referred to by your Lordship, and which has guided me very much; and that was the case of Lord Eglinton. Just see what was the effect of entail and of devolution in that case. The facts were these: Lord Eglinton held his estate under a defective entail—defective as to its destination, that is to say—and he also held it under a destination like the present, by which his second son, when his Lordship died, was entitled to take the estate in preference to his eldest. Now, the able arguments conducted on both sides in that case were each carried to extremes. It was argued for the young Lord, whose guardian's wish it was to get rid of a sale that had been made by Lord Eglinton, that he was not elected a trustee of his life-interest. That was the only way by which the argument could be made of any use; for, supposing the personal contract of sale had been completed before the devolution took place, then the only way to get rid of it was to suppose that Lord Eglinton, even before the devolution, was a trustee. That was a view of the case which the Court would not adopt, but it is exactly the view of the case that I take with regard to John Fleeming after the devolution took place. On the other side the argument was carried too far also. It was said that even though a personal contract of sale had not been completed till after the clause of devolution, still, as this was an entailed estate, it was a good sale, and the clause of devolution could not affect it. That was also stigmatised by the Court as utterly untenable, and all the judges were of opinion that the question there to be solved was just this, whether there was a completed personal contract by Lord Eglinton in which he sold the estate before the clause of devolution came into effect. I think I may state, without the least doubt, that that was the issue upon which that case went. One of the Judges—the Lord President—was of opinion that in point of fact the contract was not fully completed, that it was suspended by a condition which was not purified until the clause of devolution came into effect, and his Lordship was of opinion that the sale was bad. The other three judges would have been of the same opinion had they not conceived that the personal contract was completed before the clause of devolution took effect. Now, that is a very instructive case, for here you have an entail registered, but a defective in one of its fetters. If the sale is made before the clause of devolution Lord Eglinton is in possession of his estate, and he consequently can sell. But if Lord Eglinton delays his sale until the clause of devolution takes place he cannot sell, not because the entail prevents him, for the entail does not prevent him. But why not? Because he is no longer proprietor of the estate. He may, in point of feudal form, be vested in the estate. He is now a mere trustee. Although he may execute a sale previously completed he cannot now make a sale. He is divested of his right—not of his feudal right but of his proprietary right. He is reduced to the situation of John Fleeming in regard to the Wigtown entail, and as I say in regard to Duntiblae. You see the distinguishing feature between a deed of entail and a clause of devolution. A registered entail or other entail acts through its fetters. If these fetters are incomplete in regard to the sale it has no effect. If the sale is made before the devolution it is a good sale. He may make a sale before the deed of devolution—but he is paralysed afterwards and can do nothing.

That case has assisted me very far in what I have found a very difficult case indeed. I have only one other case to mention to your Lordships—the Marchmont case. In that case there were no fetters of entail. The heir in possession was in this position simply—he could contract debt, but there was a clause of devolution. He contracted debt before the clause of devolution took effect. It was held in that case that the debts contracted before the clause of devolution took effect were good. The question occurred in consequence of diligence done against him upon that estate by the creditors to whom he had contracted debt before the clause of devolution, and the argument was this: although your debts are good you cannot make them good against this heir of entail because he is now no proprietor at all. Here the distinction comes in. He is not now proprietor having rights of dealing with the estate. He is a trustee, and he may execute obligations which are previously imposed upon him, and his estate is liable to be attached for good obligations at the time he is proprietor, and the estate may be taken out of him, because he he is feudally vested, although that feudal investiture is now deprived of all power of dominion. That is the explanation of that case. But in the report there is a saving intimation that however all this may be in regard to the debts contracted before the devolution, much might be said against the debts contracted after the devolution. That question is not decided, but there is a pregnant distinction taken, and the result is that that doubt then intimated appears to me now to receive its solution. I do not think that after the clause of devolution takes effect—for that clause of devolution operates *ipso jure*—I do not think it is possible to say that in the present case John Fleeming was anything more, after his accession to the peerage, than a mere *locum tenens* as to both estates. As to the Wigtown estate, his creditors both before and after the clause of devolution took effect were rejected. In the same way in the present case, and after attending to all the considerations which have been urged at the bar, and urged also in consultation and repeated to-day, I remain of the same opinion which I pronounced in the interlocutor now before the Court.

Lord NEAVES—I concur with the majority of the Court in thinking that this petition must be successful. The case is one of very great interest, and both in reference to my own views of it, and still more in reference to the very able argument and opinion and judgment that has been delivered upon it by my friend Lord Benholme, it is impossible to regard this case as one that is not attended with very considerable difficulty. At the same time, in some respects and to the effect of supporting the judgment we are about to pronounce, I must say that I have arrived at a conclusion with considerable clearness and considerable confidence. The case we have to deal with turns upon this clause of devolution in the unrecorded entail, and I shall in the first instance lay out of view altogether what was done in the other case, though I shall not leave that out of view before I conclude my observations. But this is clear that in this case, as has already been shown by your Lordship who first spoke, that the titles of this estate of Duntiblae depend not upon the deed of entail of 1741, but depend upon Turnbull's deed of 1847. That deed is the only substantive entail that could have become effective, because the other, though it contains names of this property sufficient to recover, had been evacuated by the alienation of real beneficial interest in these estates, which came back again, and, indeed, as subsisting estates, were disponed under the deed of entail of Turnbull in 1847. That was a deed of strict entail, but it was unrecorded, and therefore, as I think all of us are of opinion, it was, at least up to the time when the event took place which led to the devolution, ineffectual as against creditors and third parties. The question arises upon the deed of devolution and upon the clause of devolution in a deed that cannot be supported as a deed of entail. In July 1860 Mr Fleeming became a peer of the realm, and the question was what was the effect of that occurrence. Now, one view might be taken of the effect of that occurrence which would go very far to put an end to all dispute, if it could be well founded. If it could be maintained that this was of the nature of contravention that required to be declared, then of course no right whatever would have arisen till it was declared, and therefore, if John Fleeming died, no personal actions of any kind, no personal claims of any kind could have arisen until declarator. That was the main point said to be determined in the former consultation—not what was the exact effect of it, but whether any effect whatever arose until the declarator was brought that fixes the rights of the parties, and at the same time irritated the right of the other parties. The question here is what was the effect of the entail. Now, is the occurrence of the event that involves a devolution an extinction of the infeftment of the heir in possession? That is one question, and I do not exactly know that that is maintained on the other side. I do not think Lord Benholme even regards it that way, though I think it comes to this, that it converts his infeftments as a fiar to an infeftment of a fiduciary character. That is a pretty strong change to take place upon an occurrence of that effect. This clause of devolution occurs among the restrictions of this entail, and I do not see it singled out as a thing to be put into the infeftment as a clause of devolution more than anything else. The heir of entail is to make up his titles upon all the restrictions of every kind contained in the deed, of which this is one. But now it is in his infeftment, and upon that I understand Lord Benholme to begin his argument, holding that, being in his infeftment, it is a condition of his right. I am afraid that at this early stage of the journey he and I must part company. I cannot hold that such a clause as this, because it occurs in a party's infeftment, can be justly designated as a condition of his right. That is a phrase, "condition of right," which is very well known. Many conditions being inserted in a sasine are conditions of the right, and are not mere personal obligations upon the first disponee or any one disponee. It requires to be inserted in the sasine, and published according to form, but being so inserted, and being so published, certain obligations and qualities of a certain kind may become conditions of the right. And what is the effect of anything becoming a condition of the right in these circumstances? It is that not only the man so infefted, but all his singular successors, are bound by that condition. This matter was elaborately and fully reviewed in a very important case—"the Taylors of Aberdeen against Coul"—in an elaborate judgment by Lord Corehouse. The case went to the House of Lords, and an elaborate review was taken of the whole law upon the subject, and these obligations that may become conditions of the right, and having become conditions of the right, have attached to the sub-

ject itself and to the successive holders of it, without fetters of any kind exigible from them by the party interested in these conditions of the right to the end of time. Building houses upon a feu, and the various other matters that were held to be conditions of the right in that case, were sold. Was this devolution a condition of Mr Fleeming's right in that sense? Suppose that Mr Fleeming, whilst still a commoner, had sold this estate, would the purchaser have been bound by that condition? How it would have operated upon him I do not very well see myself. Would it then have become a condition that the purchaser of that estate from a fee-simple proprietor was to lose that estate upon Mr Fleeming succeeding to the peerage? Or would it become a clause of this kind that if the purchaser succeeded to a peerage he would thus be debarred from the estate? To say that this can become a condition of the right attaching to the subject, and following the singular successors of it so that they shall be obliged to implement it, seems to me to be an entire misapplication of that phrase altogether. It is not a condition of the right; it is a condition under which John Fleeming takes up the right, but it is a personal condition to him—a condition which, if before he succeeds to the peerage he disposes of the estate, flies off and is thoroughly null and void. Can that be a condition of right? It is impossible; that is not a real burden; that is not a real quality affecting the infeftment. That is a thing extrinsic to the infeftment which contains the rights, but does not modify the infeftment, into whose soever hand it passes. In the same way in the contraction of debt, if it were a real condition of the right of this kind, the creditor could no more get quit of it than the heir could. The case of the Tailors of Aberdeen was a burgage subject held by ground-annual, but it was held to be perfectly competent to declare in the original right, and if it is inserted in the infeftment, to make it pass from successor to successor with that inherent and intrinsic condition. That is not a case of this kind. I think it seems to be admitted that this infeftment stared the creditor in the face. One could have paid, and the other could have adjudged, and yet it would have been a perfectly good adjudication upon the right of the subject without the slightest obligation upon that party. No creditor could have voided in that way, if it had been a proper condition. Now, it is a condition, and a condition which in one sense qualifies Fleeming's right to the subjects, that is to say, his powers, as in a matter of obligation. But when you say a thing is a condition of the right, you mean that it is a condition of the tenure—that it is a condition that qualifies, that clings to and adheres to his tenure of that land, and which runs with the land whoever has it. That is the only true legal idea of a thing that is a condition of the right. I have no hesitation in saying that in this case the condition is not of that nature. Well, then, does it operate as an *ipso facto* extinction of the infeftment, or as an *ipso facto* conveyance by John Fleeming to the party who is his next heir? If that is a peculiarity of this case—the *ipso facto* conveyance of the lands denuding John Fleeming of that in which he stands infefted, and investing his next heir as the disponee—I must confess that the idea of that being the result is very singular; it is unheard of by me that anything acts in that way except it is provided in a resolutive clause that shall resolve the parties' rights, and that is not what the law has much favour for. But the peculiar nature of this clause is that it commences with obligations merely.—[Reads clause.] Now, I confess I can see nothing else in this but a personal obligation imposed upon John Fleeming that, upon the fact occurring of his accession to the peerage, he should execute a conveyance in favour of his next heir, and that obligation might be enforced by an action compelling him to do so. It might be enforced, possibly, by an adjudication in implement of the obligation therein contained, but some steps may be taken to enforce it. Otherwise, the right remains what it was before, and his power over the estate seems to me to be unaffected. His title remains unchanged as originally infeft as heritable fee, as the fiar of this estate, and I can see no legal principle under which a party has been turned at once into the character of anything else than an original proprietor. If it is suggested that the granting of that fee is equal to his granting a back-letter, that is a considerably forced view of the matter, for it would result in the declaration of the Act 1696, that that makes him a trustee. He was not a trustee originally, and to adopt that view would involve this, that if he received a telegram that his predecessor in the title was *in articulo mortis*, he might sell the estate, as well as attempt to sell it, and the sale would have been quite good. But the occurrence of the fact of his predecessor's death, unknown to anybody, in a distant country at the opposite side of the globe, is *ipso facto* a divestiture of his infeftment. These seem strange things to bring out, and I cannot discover the legal principle which can justify them. The only footing on which they can be attempted to be established is the case of the Wigtown entail, and I confess it is with some distrust of myself, because it is with some wonder that I see my Lord Benholme does not think that that case was at all connected with the fact of its being an entail. But I must say, before I go on to that, with regard to the opinions delivered in that case, they did not go to decide in the present case. In the leading opinion of the Lord President and the opinions of the other Judges it is not stated that this was a provision regulating the right, but regulating the order of succession. Lord Deas thought it an irritative. Lord Kinloch very clearly expressed his opinion in a note appended to his original interlocutor, and so little was he of opinion that the clause of devolution took effect *ipso facto*, or that it absolved John Fleeming from creditors and purchasers, that he said the opposite. Lord Barcaple also gave his opinion against such a view. He said—"I am not of opinion that the devolution took effect *ipso facto*, except in so far as it created an immediate obligation upon John Fleeming to denude himself of the estate." He then goes on to say that that is not of practical importance because of elements that existed in that case that do not exist here, to the effect that immediate steps were taken by the action of John Fleeming to denude himself of the Wigtown estate, but that that was not attempted with the Duntiblae estate. But independently of that see how the entail in the Wigtown estate supports the devolution. Lord Benholme has justly said that under a strict entail upon the ordinary footing of succession the life interest of the heir of entail is as much his own as the fee-simple of a fee-simple estate. That is true in the ordinary case, but if there is an entail fettered and protected, by which the heir is not to have his full life interest in the estate, but that his interest in the estate is to be terminated at a certain time different from the time of his own death, and if that is a protected entail, then he is prohibited from contracting debt or from selling

the estate after the event which gives rise to the devolution. He is prohibited from doing anything at that time because, when under the entail and the devolution together his right of possession of the estate ceases, his attempt to convey that life interest which other heirs of entail have would be quite ineffectual, for it would then come to be that he would have no more right to convey an interest in the estate during his life than to convey the prospective fee of it. His right of possession was limited by the terminus which was to transfer the estate to the next heir who was entitled to all the estate. A creditor under these circumstances is claiming upon a thing done upon that estate, while his debtor was prohibited from doing it. In general, therefore, while an heir upon an estate is not prohibited from contracting debt upon his life interest in it, he is prohibited from contracting debt when the term of his successor begins; and he is just as much contracting illicit debt when he contracts debt which is to be made the foundation for conveying his life interest after his interest has ceased, as if he carried a prospective conveyance of the estate into the life of his successor after his own death. The way in which these two different things are reconciled seems to me as plain as possible, and therefore I have no difficulty in reconciling the case of Wigtown with the judgment we are about to pronounce. Here is the explanation. The Court in the former case did not express any opinion upon any point now before us. In the case of the Duntiblae estate John Fleeming remained infefted in the estate, and the consequence of that was, as it seems to be now admitted by Lord Benholme, that the estate would have been adjudged after the event of devolution took place, either for his personal debt contracted before that event, or for a sale that he had made previous to its occurrence. I am inclined to think it goes further, and the fiar of that estate being quite free of contract debt because there is no obligation of contract debt upon that entail, and there not being anything that could impair or reduce his infeftment from its original status to a lower right, I think it also laid it open to all those who by diligence might attempt to take it. Upon these grounds, with considerable confidence I concur in the opinion of the majority of your Lordships.

The Court accordingly granted the prayer of the petition, and remitted to the Lord Ordinary to give effect to the judgment.

Agents for Trustee—Scott, Moncrieff, & Dalgety, W.S.

Agent for Defenders—T. Ranken, S.S.C.

Tuesday, Feb. 5.

FIRST DIVISION.

JOHNSTONE-BEATTIE *v.* HOPE-JOHNSTONE.

Husband and Wife—Marriage-Contract Provision—Husband's Adultery—Divorce. A father bound himself in his son's marriage-contract to pay an annuity of £200 to his son, whom failing to the son's wife, whom failing to the children of the marriage. The son was divorced for adultery. Held, (diss. Lord Curriehill) that on divorce taking place the annuity enured to the wife, although the son had previously assigned his right to it to others for onerous causes.

This was an advocation from the Sheriff Court of Dumfries. The pursuer was married to the defender's son in 1860, and the marriage was dissolved by divorce on account of the husband's adultery in 1865. There was an antenuptial contract of marriage to which the defender was a party, and in it he undertook the following obligation:—"Further, the said John James Hope Johnstone binds and obliges himself, during his lifetime, to pay to the said David Baird Hope Johnstone; whom failing, to the said Margaret Elizabeth Grierson; whom failing, to the children of the said intended marriage, a yearly annuity of £200 sterling, and that at two terms in the year, Whitsunday and Martinmas, by equal portions, beginning the first payment thereof at the term of Whitsunday next to come for the half-year preceding that date, and the next payment thereof at the term of Martinmas following, and so forth half-yearly, termly, and proportionally thereafter during the lifetime of the said John James Hope Johnstone, with a fifth part more of the said annuity due at each term of liquidate penalty, in case of failure in the punctual payment thereof."

In 1863 and 1864, before the divorce, the defender's son had assigned his rights under this obligation to onerous creditors.

After the divorce the pursuer raised an action against the defender for payment of the annuity, and her right to recover it depended on the question whether, by reason of the divorce she was entitled to it under the contract.

The Sheriff-Substitute (Trotter) and Sheriff (Napier) held that she was not, on the ground that the words "whom failing," in the contract, meant failing the husband by predecease during the subsistence of the marriage. On advocation the Lord Ordinary (Kinloch) altered the judgments of the Sheriffs, and found that, on the dissolution of the marriage between the pursuer and David Baird Hope Johnstone, by decree of divorce obtained against the latter on 17th March 1865, in respect of adultery, the defender became bound to pay to the pursuer the annuity of £200 libelled." He thus explained his reasons for so finding:—

"A discussion arose before the Lord Ordinary as to the precise import and latitude of the words 'whom failing' inserted in this contract, as the condition of the husband which created the emergence of the right in favour of the wife. The defender contended that the words, legally construed, implied failure by death exclusively. The Lord Ordinary is disposed in this matter to agree with the defender. He can find no sufficient authority for holding the words 'whom failing' to mean anything else in a Scottish deed than 'whom failing by death.' He reads the deed as if the defender became bound to pay the annuity 'to the said David Baird Hope Johnstone; whom failing by death, to the said Margaret Elizabeth Grierson.' The defender cannot ask a more limited construction of the deed.

"But whilst so reading the deed, the Lord Ordinary holds it to be the settled rule of the law of Scotland that in the case of a divorce in consequence of adultery on the part of the husband, the innocent wife is entitled to all the provisions contained in her antenuptial contract, in exactly the same way as if the husband were naturally dead. The law transfers to the case of the divorce the provisions made in words for the case of death, and enforces the obligation in both cases alike. In the eye of the law, the wife is in such a case made prematurely a widow, and is entitled to her provisions as such, whether legal or conventional. All the parties to the antenuptial contract transact in the knowledge of the law, and on the footing