practice, which has undoubtedly been to send such cases to a jury. There have been a good many cases in which the verdicts of juries were held by the Court not to have been well-founded on the evidence. I am afraid that this must be so in cases which depend on evidence of long continued possession.

I see no reason for holding that a jury is a better tribunal than the Court for trying questions of servitude roads. In such cases there are always peculiarities and questions of mixed law and fact, which are more fitted to be tried by the Court.

It may be doubted if the two rights claimed should properly be included in the same action. The difficulty is that you have a double set of claims referable to the same possession. If the pursuer will abandon his conclusions for the servitude road there is no reason why the question of a public right of way should not be tried by jury. But if the action is to be tried as it stands I think it should be tried before the Court.

An observation on the allegation of the right is that it is doubtful how far the termini is sufficiently distinct. It might, perhaps, be amended so as to make it similar to the Burntisland case (*Cuthbertson* v. *Young*, 13 D. 1308).

LORD COWAN—If the case had simply contained an allegation of a public right of way, I would have had no hesitation in saying that it was a case to be tried, as such cases have up to this time been tried, by a jury. Whether the allegations on record are sufficient to enable the Court to frame an issue to send to a jury may be doubtful. The two *termini* must be alleged to be public places; and I doubt if there be any sufficient statement to that effect in the record. But assuming the pursuer to limit his case to the assertion of a right of public way, it will be for the Lord Ordinary to consider whether there is room for an alteration such as will allow the case to go to a jury. There is, however, conjoined with that primary assertion of public right, a claim personal to the pursuer and the tenants of his lands and estate to a servitude road, now the property of the defender. I agree with your Lordship that there may be much nicety in questions of servitude between the owner of the dominant tenement and the owner of the servient tenement. This makes it at least questionable whether this alternative action can, with safety to the just interests of the defender, be tried under alternative issues by the same jury in one trial. And on the whole, it seems to me, now that the Court have power to try such cases, we should exercise it, and let the proof be taken before the Lord Ordinary.

LORD BENHOLME—The general question, Whether cases of public right of way ought to be tried by jury, does not appear to me to be governed by any inflexible rule of law. Right of way is not one of the enumerated cases. It is within the discretion of the Court in each particular case, although I am free to admit that the practice has been to send such cases to be tried by jury. Without seeing our way more clearly, I should not be inclined to send this case to be tried by a jury. What determines me against doing so is the complex nature of the pursuer's demand.

LORD NEAVES concurred.

Agents for Pursuer—Finlay & Wilson, S.S.C.
Agents for Defender—M'Ewen & Carment, W.S.

Friday, January 19.

HOPE *v.* WEBSTER.

*Superior and Vassal—Feu-duty—*16 *and* 17 *Vict. c.* 80.

A vassal was bound by his charter to pay as feu-duty "two pounds Scots money, twelve capons, or twelve shillings Scots for each capon, and four shear dargs, or 6s. 8d. for each darg not performed, all in our (the superior's) option." Circumstances in which *held* that the superior had sufficiently intimated his option of taking capons, and not their money conversion, and that the shear dargs could not be demanded after the year in which they were exigible was past.

This was an appeal from the Sheriff-court of Fife. Mr Hope of Craighall sought to remove his vassals, Mr Webster and others, from a feu in Ceres, for which, as he alleged, they had failed to pay the feu-duty. The case was brought under the Act 16 and 17 Vict. c. 80, which gives jurisdiction to the Sheriff in cases where the feu-duty is under £25 yearly. The feu-duty stipulated to be paid was "two pounds Scots money, twelve capons, or twelve shillings Scots for each capon, and four shear dargs, or six shillings and eight pennies for each darg not performed, all in our (the superior's) option." The vassal maintained that, having tendered the money he had done all that was required of him.

After various procedure, a proof was led in the Sheriff-court, and thereafter the Sheriff-Substitute (BEATSON BELL) found that the superior had not intimated his option to take the capons, and that if he wished to do so he was bound so to intimate to the vassal, and not having done so, the remedy of the statute did not apply. Upon appeal the Sheriff (CRICHTON) adhered.

The superior appealed.

MARSHALL for him.

SOLICITOR-GENERAL and ADAM in answer.

The Court recalled these judgments, holding that the vassal was bound to pay or tender his feu-duty to the superior, and that it was not the duty of the superior to go and ask for it. The superior had sufficiently indicated his option by taking capons for a number of years. With regard to the shear dargs, the Court held that such services could only be demanded within the year, and that if the superior did not demand them, and kept the vassal waiting to do his work, he was not entitled to ask for their money value after the time was past. They remitted the case to the Sheriff to pronounce decree of irritancy, but reserved the vassal's right under the statute to purge the irritancy by paying the feu-duty.

THE LORD JUSTICE-CLERK—I am of opinion that the judgment of the Sheriff is wrong and ought to be altered. It is conceded that the option of taking capons or the money conversion rested with the superior. I think it is proved that the superior sufficiently intimated his option to take the capons, and not their money conversion. For a series of years the feu-duty had been paid by delivery of capons or by payment of what was held to be their value in money. It is the duty of the vassal to pay or tender the feu-duty, not of the superior to go to him and demand it. The vassal appears to have thought that he has been paying too much, and a misunderstanding arose, the result of which was that the feu-duty fell into

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.