it were a burden on the fee-simple succession, and this burden must not be unwarrantably enlarged. It often happens, or may happen, that even an institute of entail may, by surviving all the substitutes called, and all the special heirs called, become absolute proprietor. But the pursuer cannot say this in the present case, for undoubtedly under the marriage-contract Sir John M'Donald could call by the entail any number of substitutes or any number of heirs he might "think proper" to the succession, and the pursuer has no interest whatever in the order in which they may be placed.

I agree, therefore, in the conclusion at which the Lord Ordinary has arrived, but I doubt how far the form of his judgment is strictly accurate. He simply dismisses the action for want of title. I should have been disposed to have allowed the production to be satisfied and thereafter to have granted decree of absolvitor, and not a mere dismissal of the action. I think the pursuer, the institute of the entail seeking to get quit of its fetters, has sufficient title to insist on its production, and thereafter the defenders are entitled not merely to have the action dismissed, but to decree of absolvitor. Perhaps, however, this is a mere matter of form and may not require amendment.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for Colonel Alastair M'Iain M'Donald against Lord Curriehill's interlocutor of 10th March 1876, Refuse said note, and adhere to the interlocutor complained of, with additional expenses, and remit to the Auditor to tax the same and to report, and decern."

Counsel for Pursuer—Lord Advocate (Watson) —M'Laren. Agent—A. P. Purves, W.S.

Counsel for John A. M'Donald — Fraser — Trayner. Agents—Dewar & Deas, W.S.

Friday, January 11.

SECOND DIVISION.

[Lord Shand, Ordinary.

M'DONALD *v.* M'DONALD.

Entail — Entailer's Debt — Confusio — *Forfeiture — Relief.*

Where an institute of entail had acquired by assignation from the marriage-contract trustees of his father and mother a security over the entailed estates in lieu of a sum which had been apportioned to him by his father (the entailer) and mother, under a joint power reserved in their marriage-contract, and had executed assignations of this security — *held* that there had been no *confusio* in the person of the institute, and that the assignations inferred no contravention of the entail, or forfeiture of the institute's rights.

Entail—Entailer's Debt—Clause of Relief—Executor.

In 1837 a proprietor entailed his estates on a certain series of heirs, reserving his own liferent; and infeftment immediately followed in favour of the entailer in liferent and the institute of entail in fee. By the deed of entail the entailer bound and obliged himself and his heirs-at-law, executors, and successors whomsoever, to free and relieve the entailed lands, and the heirs to succeed thereto, "of and from the payment and performance of all the debts and obligements to which I, the said John M'Donald, for myself, or as representing all my ancestors, are or shall be liable, and of and from all claims and demands whatever, whereby the said lands and estate, or any part thereof, may be evicted." The estates entailed were burdened with a debt of £25,000. In 1853 the entailer purchased another estate, which he entailed on the same series of heirs, but expressly reserved power to revoke. On the death of the entailer the institute of entail (who was the entailer's eldest son and his executor) came into possession of the estates under both entails.— *Held* that the institute was not bound to free and relieve the estates entailed in 1837 of the debt upon them, merely in respect of his having succeeded to the estate purchased in 1853 as heir of entail and provision of his father under the deed of entail of the latter estate.

Opinions as to (1) the liability of the estate purchased in 1853 to relieve the estates entailed in 1837 of the burden affecting them; (2) the liability of the institute as the entailer's executor; and (3) the title of a substitute of entail to demand that the relief should be operated.

This was a declarator of irritancy and forfeiture, brought by John Alan M'Donald, residing at Croyde House, Croyde, in the county of Devon, the second son of General Sir John M'Donald, against Colonel Alastair M'Iain M'Donald of Dalchosnie, eldest son of General M'Donald. The action concluded for declarator that the defender had forfeited his right to the whole lands contained in the deed of entail of Dalchosnie, Kinloch Rannoch, and Loch Garry executed in 1837; that the same had devolved to the pursuer; that the defender ought immediately to cede possession of the estates of Dalchosnie, Kinloch Rannoch, and Loch Garry; and that the said lands and the writs ought to be adjudged from the defender to the pursuer as at the next term of Lammas (the summons being signeted on 17th June 1876). There was also an alternative conclusion that the defender, as heir-at-law and executor, or heir-at-law or executor of and as successor to his father General M'Donald, should be ordained to free and relieve the entailed lands of—(1st) a sum of £25,000, contained in a bond and disposition in security over the said estates, granted on 13th October 1828 by General M'Donald, the entailer, in favour of Mrs Elizabeth M'Inroy and others, trustees under the trust-disposition and settlement of the deceased James M'Inroy, recorded in the Books of Council and Session 27th August 1825, and relative instrument of sasine; and (2) the sum of £9000 contained in a bond and disposition in security over the said estates, granted by the defender with the authority of the Court of Session, on 5th July 1867, in favour of the Central Bank of Scotland. By an amendment lodged in

the Inner House, the pursuer alternatively concluded for decree that it was a condition of the defender retaining possession of the estates of Loch Garry and Kinloch Rannoch that he should relieve these estates of the debt of £25,000. In a previous litigation between the parties (*ante*, vol. xii. p. 635) it had been determined that the sum of £25,000 contained in the said bond and disposition in security was validly apportioned to the defender by a joint settlement and deed of division, executed by his parents in 1837. Since the judgment of the House of Lords in that case, the defender had assigned to three separate lenders the said bond, in security of advances of £4000, £5000, and £16,000. The pursuer founded on these assignations as constituting a contravention of the fettering clauses of the entail. The said sum of £9,000 was originally due on a promissory note by General M'Donald; and on the defender's succeeding to his father he obtained the authority of the Court to charge the amount on the entailed estate. The pursuer averred that the defender, as executor, ingathered his father's moveable estates to the extent of £3528, 1s. 4d; but the defender explained that this had been exhausted by payment of debt. The pursuer further averred that in 1857 General M'Donald acquired at the price of £22,500 the estate of Mount Alexander or Dunalastair, marching with the estate of Loch Garry. On this he erected a mansion-house at a cost of £20,000. The estate was then entailed on the same series of heirs as those of Dalchosnie, &c., and the defender had entered into possession of the whole estates. The pursuer maintained that this estate, entailed in 1857, was liable in relief to the estates entailed in 1837. The conclusions against the defender for relief were founded on a clause contained in the entail of 1837, whereby the entailer, in order to render the entail more effectual, bound and obliged himself and his heirs-at-law, executors and successors, to free and relieve the lands and estate before disponed, and the heirs named or to be named to succeed thereto, of and from the payment and performance of all the debts and obligations to which the entailer, for himself or as representing any of his ancestors, was then or should be liable, and of and from all claims and demands whatever, whereby the said lands and estate, or any part thereof, might be evicted. The pursuer further averred that the defender had contravened the entail by granting certain tacks of the mansion-house, and of certain portions of the entailed lands; but it clearly appeared that the prohibitions founded on were not directed against the defender.

The defender pleaded that he had not contravened the entail, and further—"(5) The defender is not bound to disburden the estates contained in the entail of 1837 of the debts in question; (1) In respect that the defender has taken no benefit by the entailer's succession, except as heir of entail under the entails of 1837 and 1860; (2) That the obligations in the entail of 1837 to relieve the estates thereby entailed of debt does not on a sound construction import an obligation to relieve the said estates at the expense of estates entailed by the entailer on the same series of heirs; (3) That the debt of £9000 was charged under the authority of the Court; (4) That the pursuer has no title or interest to insist on the debts in question being charged on the estate of Dunalastair."

The Lord Ordinary (SHAND) pronounced the following interlocutor:—

"*Edinburgh, 22d November* 1876.—Having considered the cause, finds that the pursuer has stated no relevant grounds in support of the conclusions of the action for declarator of forfeiture and denuding by the defender in favour of the pursuer of the estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, and assoilzies the defender from these conclusions, and also from the conclusions that the pursuer shall be found entitled to be now infeft in the lands, and to delivery of the title-deeds thereof, and decerns; and with regard to the remaining conclusions of the action, Finds that it is not disputed that the free executry of the estate of the late Sir John M'Donald is liable in relief for the debts mentioned in said conclusion; and in respect the parties are not agreed as to the amount of the executry estates, appoints the defender, as executor of his late father, to lodge an account thereof within the next eight days; further, Finds that the defender is not bound to free and relieve the estates of the said debts in respect merely of his having succeeded to Dunalastair as heir of entail and provision of his late father under the deed of entail of these lands of 1860, and assoilzies the defender from the conclusions of the summons to that effect, but reserving to the pursuer to take all competent proceedings directed against the lands of Dunalastair and the heirs of entail called under the deed of 1860 to have these lands sold, in order to free and relieve the lands held under the entail of 1837 of the entailer's debts affecting the same, and meantime reserves all questions of expenses; and grants leave to the pursuer to reclaim against this interlocutor.

"*Note.*—This action presents practically two questions for decision—the first, whether the defender has incurred a forfeiture of his right to the entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch; and the second, assuming that no forfeiture has taken place, whether the defender is bound to disburden the entailed estates of certain debts of £25,000 and £9000 which now affect them.

"The pursuer maintains the conclusions of forfeiture on two grounds. The first of these is, that in contravention of the entail the defender has assigned to third parties, in return for money advanced by them, his right to a bond and disposition in security for £25,000, granted by his late father over the estates in favour of marriage-contract trustees, and which has been the subject of much discussion in two previous litigations between the parties. It is maintained on record that forfeiture of the estates also resulted from certain leases which the pursuer granted, but this point was given up in the argument, and the assignation to various creditors of the £25,000 security is now the sole ground on which the alleged forfeiture is maintained. I have no difficulty in holding that the defender is entitled to succeed on this part of the case.

"It cannot be disputed that the debts of the entailer, the late Sir John M'Donald, the father of the pursuer and defender, form a proper charge against the entailed estates, and may lawfully be made burdens upon the estates by bonds and dispositions in security in ordinary form. The entailer at his death was indebted to the Central Bank of Scotland the sum of £9,000, and assum-

ing that there was no executry or other estate to meet this debt, the pursuer does not dispute the right and obligation of the defender to grant the bond and disposition which he executed in security of this debt affecting the entailed estates. The conclusion for forfeiture is not based to any extent on the fact that the defender granted this heritable security. It cannot be disputed that the defender was entitled to charge the estates with entailer's debts, which could not be provided for out of his general estate.

"The decision of the case, as regards the alleged forfeiture, thus depends on the question, whether the £25,000 security was an entailer's debt, and, if so, whether there be any obligation on the defender in the deed of entail to discharge the debt, or any provision which precludes him from assigning the debt to other creditors.

"There is no doubt that the debt was due by the entailer. It was not only due, but the entailer himself, on 13th October 1828, nine years before he executed the entail, which is dated 18th July 1837, granted a bond and disposition in security for the amount in favour of his marriage-contract trustees, from whom he borrowed the money, which was part of his wife's fortune settled by the marriage-contract. By this deed the entailer acknowledged the debt, and granted a disposition in security over the lands, containing a power of sale in common form.

"The defender acquired right to this entailer's debt by assignation in his favour granted by the marriage-contract trustees, in terms of a direction to that effect contained in the mutual general settlement and deed of division by his father and mother, executed on the same day as the entail, viz., on 18th July 1837. It is clear that in ordinary circumstances an institute or heir of entail acquiring right to an entailer's debt, and to a security over the estate granted by the entailer, held by a creditor, is under no obligation either to pay the debt or to refrain from assigning it to third parties. If an institute or heir of entail purchase a debt, he is in no different position from any other creditor, except that he cannot charge succeeding heirs with the interest becoming due year by year during his possession. It was at one time contended that the debt became extinguished *confusione*, but a series of decisions settled that this was not so; that the estate was practically the debtor, and the heir of entail, as an individual, the creditor (Bells Principles, 6th edition, sections 1728 and 1743; *Welsh* v. *Barstow*, 11th February 1837, 15 S., 537, and authorities there cited.

"It makes no difference in the case that the defender acquired right to the security for £25,000 by succession, or by virtue of the provisions of the marriage-contract of his parents, and relative deed of division. So far as the deed of entail is concerned, all entailer's debts are in the same position. They are properly chargeable against the estates, whoever may become the creditor, and whether the creditor's title has been derived by purchase or succession. An entail might no doubt provide that an institute, or any succeeding heir, by accepting the estates should be bound personally to pay off the entailer's debts, but there is nothing of the kind in this entail, which contains only prohibitory clauses to the usual effect, that is, prohibiting alienation of the estate or the contraction of debt by the succeeding heirs; and I think, therefore, there is no room for the pursuer's contention on this subject.

"The declarator of forfeiture is founded entirely on the provision of the deed of entail; but even if the provisions contained in the deed of settlement and division can be imported into this question it would make no difference, for it has been settled beyond question by the decision of the House of Lords in the former litigation between the parties (Law Reports, Scotch App. vol. ii. p. 482) that the deed imposed no obligation on the defender to discharge the debt, or to refrain from enforcing it. It was there held that he was entitled to a conveyance of the security in favour of himself, and that the expressions in the deed of settlement, which the present pursuer pleaded as creating an obligation on him to allow the debt to be discharged, were either an expression of a wish merely, which was of no legal effect, or an attempt to adject a condition which was void. The result is, that this provision of £25,000 is in no different position from any other entailer's debt; and that being so, there is no reason for saying that the defender is under restriction as to his power of assigning it, any more than another creditor would be.

"The alternative conclusion of the summons is founded on the clause contained in the deed of entail of 1837, by which the entailer bound and obliged himself, and his heirs-at-law, executors, and successors whomsoever, to free and relieve the entailed lands, and the heirs to succeed thereto, 'of and from the payment and performance of all the debts and obligements to which I, the said John M'Donald, for myself, or as representing all my ancestors, are or shall be liable, and of and from all claims and demands whatever, whereby the said lands and estate, or any part thereof, may be evicted.' This clause in express and stringent terms binds the entailer and his heirs, executors, and successors, to relieve the entailed estate of all his (the entailer's) debts.

"The pursuer alleges that the defender succeeded to free executry estate; and he claims that this estate shall be applied, so far as it will go, in extinguishing the debts for £25,000 and £9000 which now affect the lands. The defender does not dispute that if there had been free executry estate he would be bound so to apply it. He explains, however, that there was no free executry. Inquiry into this matter of fact is therefore necessary, and the defender has been appointed to lodge an account of the executry, to which the pursuer will have an opportunity of objecting.

"But the pursuer further maintains that the defender is bound to relieve the entailed estate of the entailer's debts, because the defender succeeded as heir of entail to the estate of Mount Alexander, now called Dunalastair, on the death of his father in 1866. This estate was purchased by Sir John M'Donald in 1853, at the price of £22,500; and the pursuer explains that after the purchase his father expended about £20,000 in the building of a mansion-house and on the policies, and that the debt of £9000 to the Central Bank was incurred in consequence of this expenditure. The estate of Dunalastair adjoins the lands and estate contained in the deed of entail of 1837; and the pursuer explains that it was his father's intention that the house built by him should be the mansion-house for all the estates. The entail

of this estate is in favour of the same series of heirs as are called by the deed of 1837. It is dated and registered in the Register of Taillies in July 1860, and was conceived in favour of the entailer himself, and to the heirs thereinafter called, of whom the defender and the heirs-male of his body are the first; but the deed contained a reserved power of revocation which might be exercised at any time during the entailer's life.

"It appears to me to be beyond question that, however desirable it may be for the whole series of heirs that Dunalastair and the other estates should continue in time coming to be practically one entailed estate, yet, if the pursuer should insist on it, he is entitled to have the estate of Dunalastair sold, in order that the price should go towards the extinction of the entailer's debts affecting the estates contained in the entail of 1837. Dunalastair must be regarded as having been within the power of Sir John M'Donald on the day of his death. He might have disposed of it as fee-simple estate by revoking the entail. It follows that Dunalastair in the same way as the executry was liable for Sir John M'Donald's debts and obligations, and one of these was the obligation, contained in the deed of 1837, to free the lands thereby entailed of all the entailer's debts.

"In a proper action to that effect, therefore, I think the pursuer, as a near heir of entail, would succeed in having Dunalastair sold to meet the debts affecting the other estates. I am, however, of opinion that the present action is not one in which a decree to that effect could be given. The pursuer concludes that the defender, as successor to his father in the lands of Dunalastair, should be decerned to pay the debts which affected the other estates. But Dunalastair is not fee-simple property in the person of the defender. It is entailed, and has been held by the defender as an entailed estate for the last ten years. The defender is not personally liable to disburden the lands held under the entail of 1837 merely because he has taken the other estates as heir of entail under the fetters of the deed of 1860, which is the view presented by the conclusions of the summons and the pursuer's third plea-in-law in support of them. The obligation by the late Sir John M'Donald, binding his 'successors whomsoever,' will no doubt give relief against the lands, but cannot be construed as imposing personal responsibility for the debts on each individual who obtains the limited rights of an heir of entail in possession.

"It has been maintained, however, that at least the defender is bound to take the initiative by a petition to the Court, or by an ordinary action, to obtain authority to sell the estate of Dunalastair, and that a decree to that effect should be pronounced in this action. With every desire to avoid the necessity of other legal proceedings between the parties, I do not think that even to this extent the pursuer can succeed in this particular case. There is no conclusion to the effect now suggested. The only conclusion on the subject, and relative plea, are based on the view that the defender has become personally liable to pay the debts because he has succeeded to Dunalastair, and it is clear that his limited interest in Dunalastair imposes no such liability. There is no conclusion to have the defender ordained to take proceedings to bring Dunalastair to a sale in any action for that object. It appears to me it would be necessary, in an action with such conclusions, to call the other parties having interest in Dunalastair under the entail of 1860.

"It was assumed that the defender could proceed to have Dunalastair sold to meet the entailer's debts by a petition to the Court under the Entail Statutes; but even if the present action were not open to the objection that it is without any conclusion either in form or in substance to that effect, it appears to me that the provisions of the Entail Statutes are not such as could be made available for the sale of the estates. The Rosebery Act, 6 and 7 Will. IV., chap. 42. throughout its provisions contemplates and provides for the case of the sale of a part of the entailed lands only to meet debts affecting the whole, and not the case of a sale of the whole estate to meet the entailer's personal obligations otherwise. The Rutherfurd Act limits the power of sale to entailed lands other than the mansion-house and offices, and this power would be of no use in the present case, where the mansion-house also must be sold. It seems to me that if the pursuer or any of the heirs of entail desire to have the lands of Dunalastair sold in respect of the obligation contained in the deed of 1837, the proper course of proceeding is by action of declarator (probably having conclusions for reduction of the entail of 1860 as a deed *ultra vires* of the granter) to have it found that the estate was liable in relief of the debts which might affect the lands in the entail of 1837, and to have the estate of Dunalastair sold at the sight of the Court. The defender does not desire that this should be done, and for obvious reasons does not propose to raise such an action. The pursuer appears to have the same title to enforce the obligation as the defender has. It therefore appears to me that the pursuer's remedy is by an action of the kind indicated, with conclusions directed against the lands, and in which all parties interested should be called; and at all events I do not think the pursuer is entitled to succeed in the conclusions in this action for decree against the defender requiring him to pay the debts in question."

The pursuer reclaimed.

At advising—

LORD JUSTICE-CLERK—[*After stating the nature of the case*]—In this case the Lord Ordinary has repelled the first alternative conclusion of the summons for irritating the right of Colonel M'Donald to these estates; he has sustained the second alternative conclusion, which is directed as against Colonel M'Donald personally, in so far as regards his character of executor, but he has dismissed the action *quoad ultra*, reserving to the pursuer to assert his claim against the estate of Dunalastair in any competent action. In this case also I am of opinion, although it raises some questions of difficulty, that the views of the Lord Ordinary are correct, and that his judgment should be adhered to.

The conclusion of the summons, for declaring the right of the defender to the entailed estate to be forfeited, is not attended with any difficulty. The entail did not bind any of the heirs of entail to pay off this debt, and therefore the obligation to pay or discharge it is not within the fettering clauses, but if it exist at all is a personal obligation arising outside the entail. It is said that when Colonel M'Donald paid these debts,

although he took an assignation to them, they were extinguished *confusione*; and that conveying them to third parties was a violation of the prohibitions of the entail, and infers an irritancy. But it is very clear on the authorities that there is no ground for this proposition. It may be true that an heir of entail cannot keep up as a charge against the other estate of the entailer a debt which was specifically made a real burden on the entailed estates. But it is quite fixed that an heir of entail paying off a debt which burdens the entailed estate, out of his own proper funds, and not out of the separate estate of the entailer, may keep up the debt against the entailed estate by taking an assignation to it, even in his own name. Here Colonel M'Donald paid this debt out of the sum appointed to him as his share of his mother's fortune by the deed of appointment, and the other heirs of entail could have no interest whatever to object to his doing so, unless he lay under an obligation to discharge these debts, which is not at all events to be found in the deed of entail.

The case in the alternative conclusion of the summons, turns, in the first instance, on the true construction of the clause of relief contained in the deed of entail. In regard to this I have felt a little difficulty—[*Reads clause of relief quoted in Lord Ordinary's interlocutor*]. Now, first, this is a clause in favour of the heirs of entail. It does not burden the heirs succeeding to the estate, but it gives them right to be relieved of a burden. The heirs called are the creditors in the obligation, and that right of credit became fixed when infeftment was taken on the conveyance in 1837, In the second place, the burdens, in regard to which they have this right of relief, are any debts of the maker of the entail which may affect or burden the entailed estates. Whatever question might arise in regard to personal debts which had not been claimed or made effectual against the entailed estate, I have no doubt that it does at once apply to personal debts secured over the entailed estate. The intention, in this case, of the clause of relief was, I think, beyond all doubt to leave the entailed estate entirely free of the entailer's debts, and I cannot see any ground for giving it a more limited construction. I am further of opinion that any heir-substitute has a title to make this obligation effectual against any debts which actually affect the lands. To hold that each heir must wait until he himself succeeds would frustrate the object of the clause, for before that event occurred the property in the hands of the executor, or the heir-at-law, who might be liable to fulfil it, might be entirely dispersed. So much for the nature of the obligation, the burdens to which it applies, and the creditors who are entitled to enforce it. The remaining question is, Who are the debtors in the obligation?

Colonel M'Donald is the executor of his father, and although the obligation is conceived in his favour as the heir in possession, as well as in that of the other members of the destination, as executor he is beyond doubt liable to fulfil it, and so the Lord Ordinary has found. He could, however, only reach this conclusion by giving to the obligation the construction which I think it truly bears. The other branch under this conclusion stands in a different position. Long after the entail of 1837 had been executed, General M'Donald purchased other lands, which he named Dunalastair, and conveyed them to Colonel M'Donald by a disposition entailing them on Colonel M'Donald and the same series of heirs, but expressly reserving a power to revoke. The entail was recorded, but no infeftment passed on the disposition during General M'Donald's lifetime. It is now contended that this estate of Dunalastair is liable for the debts of the entailer, and that Colonel M'Donald by taking up the succession has made himself responsible for this obligation.

As regards the estate itself, it is enough to say that its liability to bear the burden of the obligation contained in the Dalchosnie entail is in no degree affected by the fetters of the entail under which it was conveyed, or even by any indication of intention, if there were any such disclosed in the conveyance on the part of the granter. This is not an adjusting of burdens between heirs succeeding to separate estates, but a question between creditors and gratuitous disponees. The estates under the Dalchosnie entail were vested in Colonel M'Donald and the other heirs of entail by the infeftment in 1837, under which nothing but a liferent remained with the granter. The latter had no power to infringe upon the obligation contained in that deed by any gratuitous alienation *mortis causa*. The obligation would certainly have attached to the funds by which Dunalastair was purchased in the hands of the executor, nor could that liability be discharged by any conditions which the debtor in the obligation might attach to his gratuitous conveyance. It is unnecessary, however, to consider this matter further, because no steps have been taken to make the obligation effectual against the fee of the estate. The action is directed solely against the heir in possession personally, as if he by taking up the estate had incurred a universal representation. I am of opinion that there is no ground on which that conclusion can be sustained, nor is there any doubt as to the law on this matter. An heir of provision under a gratuitous deed, although it may be fenced with irritant clauses, certainly represents the maker, and that in his just order in which heirs are liable. But it has been long fixed that he only represents *in valorem* of the property which he takes. It was otherwise in the times of our older writers, and Erskine elaborately disputes the doctrine. But the point was settled in the case of *Baird* v. *The Earl of Rosebery*, reported in Morrison 14,019, and confirmed in the House of Lords in 1767. In this case Lord Monboddo says—"The Lords determined a very general point of law, viz., that an heir of provision of a particular estate, such as an heir of tailzie, is not by his service universally liable, but only *in valorem*, like an heir *cum beneficio inventarii*." Of course where an heir takes under an entail made by a third party, he does not represent his immediate predecessor to any effect, but this proposition refers to heirs of provision taking by a gratuitous title directly from the granter, although under the fetters of an entail. In the case of *Mackenzie*, 9 D. 836, which is instructive on this branch of the law, Lord Jeffrey doubted whether the liability of an heir of provision could be properly called representation at all, but he differed from the majority of the Court, who did not adopt his views.

It is therefore clear that, although the liability of the lands of Dunalastair for implement of this

obligation of the granter is in no degree affected by the terms of the disposition to that estate, the interest taken by the defender is materially limited by it. Had this been an action directed simply against the defender to relieve the estates of Dalchosnie and others of the debt of £25,000, in so far as the value of his life-interest could extend, the case might have been different; but even then, I think, the heir in possession would have been entitled to insist that the fee of the estate ought to be represented, because before he could be made liable for the value of his succession it was necessary to determine the liability of the estate to the full amount. But this is not the conception of the action, and it is impossible to deal with it on that footing.

It was said, not without force, that if the estate was liable for this obligation of the entailer, the defender, as heir in possession, had the means of making this claim effectual against it, in respect that under the Entail Statutes he had the means of relieving himself of his personal obligation, by adopting the necessary procedure for that purpose. But whatever force there might be in such views, there is one essential preliminary which is absent, viz., that it must be judicially found that this obligation does affect the fee of the estate, and until that be done it is premature to raise the question, what powers in that event the heir in possession may have of freeing himself and the lands from the burden. What steps these should be it is not necessary that I should point out. The pursuer must proceed as he may be advised, but we propose to add to the Lord Ordinary's reservation of his right of action a reservation of any answer which the defender may have thereto.

I must, however, say in conclusion, that if this be the issue to which this part of the pursuer's contention comes, it seems to me a very idle dispute. The estate of Dunalastair will come to the pursuer at the same time as that at which Dalchosnie reaches him, and not sooner. If he never succeeds to the one he will never succeed to the other; and it cannot matter to him whether it is burdened or not. He ought to consider well whether, if he fail in irritating the right of the defender, he has any real interest in the rest of this action.

Lord Ormidale—The summons in this case has various conclusions, to the effect, 1st, that the entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, of which the defender is the heir of entail in possession, have been forfeited by him and now belong to the pursuer; and to the effect 2dly, that the defender is bound to free and relieve these estates of and from certain debts of considerable amount at present a burden on them.

The Lord Ordinary has assoilzied the defender from the whole conclusions of the action, except as regards the free executry, if any, of the late Sir John M'Donald, a matter about which the defender raises no dispute.

(1) The first branch of the summons proceeds on the assumption that the defender by assigning the debts in question to third parties has contravened the conditions of the entail and therefore forfeited his right to the estates, which consequently devolve upon the pursuer as next heir of entail entitled to succeed. But I am unable to see how any contravention of the entail has taken place. It is true that the defender, as in right of the debts referred to, has assigned them to third parties. But it does not necessarily follow that this operates as a contravention of the entail. That no such contravention is specified in the deed of entail appears clearly enough in the pursuer's own showing in the various articles of his condescendence, where the conditions and provisions of the entail are enumerated. It is conditioned and provided that it shall not be lawful for the heirs of entail to sell, alienate, wadset, impignorate, dispone, burden, or affect the entailed estates, but the mere granting of an assignation to the debts referred to—debts which were not incurred by the defender,—is certainly not alienating, wadsetting, impignorating, or disponing, burdening, or affecting the entailed estates, and it was scarcely contended that it was.

Accordingly the pursuer did not seem to rely upon any positive or direct contravention by the defender of the conditions of the entail, so far at least as I have yet noticed them. He founded chiefly, as I understood his argument, upon the provision in the entail, to the effect that the heirs of entail succeeding to the entailed estates are limited and restrained from doing any act and granting any deed, directly or indirectly, whereby the said lands or any part thereof may be affected, apprised, adjudged, forfeited, confiscated, or be in any manner of way evicted. The argument of the pursuer was, that the debts in question having been extinguished *confusione* on the defender's succeeding as heir of entail, and thereby becoming, as the pursuer maintained, both debtor and creditor in them, he had no right thereafter to rear them up in third parties, thereby enabling these third parties to enforce their recovery against the entailed estates. Now, supposing the debts to have been once extinguished, which *ex hypothese* they were in the pursuer's argument, it is difficult to understand how they could be afterwards reared up by assignation. But, independently of this, it appears to me that the reasoning of the pursuer is founded upon an entire fallacy in assuming that the debts were or could be extinguished *confusione* merely by the defender's succeeding to the entailed estates. The defender, in place of forfeiting his right to the £25,000 on succeeding to the entailed estates, rather obtained right to that sum, just in respect of his being the heir in possession of the estates. Such seems to be the import of the marriage-settlement of the entailer and his wife, and, as explained by the Lord Ordinary, it has been determined in a former litigation that there is no obligation on the defender to discharge the debt or to refrain from enforcing it. On this point the authority of Mr Bell (Principles, § 1728 and 1743), and the case of *Welsh* v. *Barstow*, referred to by the Lord Ordinary, appear to me to be conclusive, to the effect that the debts here in question were not extinguished *confusione* in the person of the defender.

Assuming this to be so, it was not, and could not well be, said that there is any reason for holding that the pursuer had contravened the conditions of the entail, or any of them, except that he had assigned the debts in question in the way he did. But that very point was the subject of discussion in the case of *Welsh* v. *Barstow*, and was determined adversely to the pursuer's contention in the present case. Mr Bell also, in section 1728 of his Principles, expressly says that the heir of

entail is not bound "as such to pay the entailer's debts as not being his representative, but only for the interest during his possession, as the rents are bound; and he may either neglect to pay the debt, or, paying it, may, by assignation keep it up as a debt against the estate."

(2) The second branch of the pursuer's action is founded on the obligation of relief.

Now, in so far as it may turn out that there has been any free executry of Sir John M'Donald intromitted with by the defender—although he denies there was any such—he has never disputed his liability, and accordingly the Lord Ordinary has so found. That matter may therefore for the present be laid aside. Nor has the pursuer shaped his action so as to enable him to get at the rents of the entailed estates, either drawn or to be drawn by the defender, and he did not propose to restrict or amend to any effect his summons or record.

But the defender denies and disputes that the pursuer has any good ground as against him for insisting further or otherwise in this branch of the action.

By the obligations referred to, the entailer binds himself and his "heirs-at-law, executors, and successors whomsoever to free and relieve the entailed lands and the heirs named or to be named to succeed thereto" of and from payment of all debts and obligements to which he was liable, and of and from all claims and demands whereby the entailed lands or any part thereof might be evicted. Is this an obligation enforceable against the defender on any of the grounds laid in the present action? It cannot well be maintained that he has incurred such liability by taking as heir of entail the lands which are intended to be relieved, for the obligation is obviously one in which the heirs of entail are creditors and not debtors. The obligation expressly bears that its object was not only to free and relieve "the entailed lands," but also "the heirs named or to be named to succeed thereto." The defender might, no doubt, be, but in different characters, both debtor and creditor in the obligation. Thus, if, besides taking as heir of entail, he had succeeded to property as heir-at-law or executor of the entailer, he might, to the extent of his succession in these characters, be debtor in the obligation, but it is not averred that the defender has succeeded to anything as heir-at-law, or in any other character than heir of entail except as executor; and as to his liability as executor on the qualified footing already referred to, there is no dispute.

If the defender, then, cannot be made liable in relief as heir of entail, under an obligation in which, so far as his character as such is concerned, he is creditor and not debtor, the question occurs, Is there any other ground of liability in respect of which he can be subjected in relief as concluded for? I cannot observe any, unless it is to be found in article 32 of the condescendence, where the pursuer says the defender has made up a title to the estate of Dunalastair under a strict entail thereof executed by the late Sir John M'Donald. But, neither in that article nor anywhere else is it said that the defender undertook a personal liability for the debts of Sir John M'Donald by entering to that estate as an heir of entail; and it is clear on the authorities before referred to, and especially the authority of Mr Bell, in sections 1728 and 1743, that he has come under no such liability. Whether and how far the estate of Dunalastair itself might be proceeded against for the debts referred to, is a question which has been reserved by the Lord Ordinary, and in regard to which I offer no opinion. It is sufficient I think that the present action is directed against the defender personally, and it is a personal decree, if any, and not one against the lands, that would require to be pronounced, having regard to the form of action and the conclusions of the summons.

In these circumstances, I am of opinion that the interlocutor of the Lord Ordinary reclaimed against ought to be adhered to.

Lord Gifford—I agree in the result which the Lord Ordinary has reached, and in the mode in which he has disposed of this action. I agree also in the views which the Lord Ordinary has expressed in his note, with one exception, namely, as to the right which the pursuer has to insist that the entailed estate of Dunalastair shall be sold, and that the price shall be applied towards extinction of the entailer's debts affecting the other estates of Dalchosnie, Loch Garry, and Kinloch Rannoch. On this point I am inclined to differ from the views expressed by the Lord Ordinary, but though the question is a very important one, I do not think its decision is at all necessary for the disposal of the present case, and therefore I concur in the judgment; while, merely to preserve entire the question about Dunalastair, which the Lord Ordinary has reserved, I would be disposed to add to his Lordship's reservation a reservation of the defenders' answer to the claim as accords.

The first question raised in the summons is whether the defender has incurred an irritancy under the entail of 18th July 1837, and has thereby amitted, lost, and forfeited his whole right and interest in the entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, and whether these estates now belong to the pursuer as the next heir of entail. The alleged irritancy is founded in the first place on the fact that the defender, as the institute of entail, has acquired in his own favour, and has then assigned to third parties, an entailer's debt of £25,000—by means of which assignations to third parties it is said the whole three entailed estates above mentioned are liable to be sold or adjudged, and carried off by the creditors in the said entailer's debt of £25,000.

I am very clearly of opinion that none of the acts done by the defender on which the pursuer founds constitute in any sense an irritancy of the entail, or are in any view contraventions of its prohibitions. It was hardly maintained that the mere acquisition by the defender of the bond for £25,000 due by the entailer constituted a contravention or an irritancy of the entail. We know from a previous litigation in this Court the circumstances in which the defender acquired that debt as his own property in virtue of a decree of this Court, and of the House of Lords, as being his share of the fortune of Lady M'Donald, the defender's mother, settled and apportioned in terms of the ante-nuptial marriage contract. The Court found that the bond which was originally due to the marriage contract trustees was the absolute and unfettered property of the defender

under the deed of apportionment, and that the defender was entitled to it absolutely and in his own right, and free from any obligation to extinguish it or apply it in freeing and relieving the entailed lands. The bond was as much the unqualified property of the pursuer as if he had bought it with his own earnings.

Nor is it possible to hold that this debt of £25,000 was extinguished *confusione* by the mere fact of its acquisition by the defender, who was at the same time heir of entail in possession. The bond was not discharged or extinguished. On the contrary, it was assigned and kept up. The assignation was taken to the defender, his heirs and assignees whomsoever, and not to the defender as heir of entail, or to the defender and the series of heirs in the entailed destination. In short, it was simply an entailer's debt kept in force, and kept separate from the entailed estate in the mode in which such debts are always, or almost always, preserved as valuable and preferable burdens upon the entail. It is absolutely impossible to hold that the debt was extinguished merely by its being assigned to the defender.

But the pursuer went on to contend that an irritancy was incurred not by the defender himself holding the bond, but by the defender assigning it to third parties, by whom it is said diligence may be used against the entailed estates. But there is no prohibition in the entail against the defender assigning debts due to himself, even although they happen to be entailer's debts. The defender did not contract the debts. He is the creditor and not the debtor in them. It is not in consequence of the defender's act that the estate is liable to be attached for entailer's debt. It is the act of the entailer himself who contracted the debt and granted the bond therefor, and the estate is in no greater degree liable for the debt than it was when the debt remained vested in the marriage contract trustees. It is no doubt conceivable that there might have been a condition in the entail providing that if any of the heirs of entail should acquire in any character entailer's debts affecting the estates, they should not be entitled to assign the same. Such a clause would be very unusual, perhaps unprecedented, and it might raise very curious questions. But it is enough that there is no such clause in the present entail, and no provision whatever as to the mode in which entailer's debts are to be dealt with so long as they are unpaid. Accordingly we have here just the common case of entailer's debts purposely kept up by the heir of entail for his own behoof and for behoof of his executors, and the very purpose for which such debts are so kept up is, that the heir who is vested may use them at his own pleasure, may leave them to his own executors, or use them either *inter vivos* or *mortis causa* as his own proper funds.

It is perhaps needless to shew the difficulties which the pursuer's contention involves. What if the defender should die intestate? This debt would then belong to his executors or next of kin, or to his heir at law if different from his heir of tailzie—What then? Would that be an irritancy? Or suppose the debt to be adjudged from the defender by the defender's own personal creditors or to be otherwise attached by diligence, would an irritancy arise out of such proceedings? Such difficulties might be multiplied, but it is needless. I think it perfectly plain that the defender, by assigning the entailer's debt was merely exercising his right and disposing of his (the defender's) own absolute property.

I am clearly of opinion, therefore, that the pursuer has failed to establish that the defender has incurred any irritancy or forfeiture of the entailed estates, or of any of them, and accordingly the defender is entitled to absolvitor from the declarator of irritancy and forfeiture, and from the conclusions auxilliary thereto.

But there remains other conclusions, which seek to have the defender ordained to pay off or free and relieve the entailed estates not only of the said bond for £25,000, but of another bond for £9000, which was granted under the authority of this Court for another entailer's debt; and still farther, by the amendment tendered for the pursuer, an alternative conclusion is introduced that it is a condition of the defender retaining possession of two of the estates, Loch Garry and Kinloch Rannoch, that he free these estates from the burden of the said debt of £25,000.

I am of opinion that none of these conclusions are well founded, and that the defender should be assoilzied therefrom. I think it quite clear, on the grounds already mentioned, that the £25,000 bond is simply, and in the strictest sense, an entailer's debt, duly, validly, and effectually kept up against the entailed estates; and the same must be said still more clearly as to the other debt for £9000, the bond for which was granted under the authority of the Court and in terms of the recent Entail Acts. Now, the moment the character of the debts as ordinary entailer's debts is established, then all that the heir of entail in possession is bound to do is to keep down the interest on the entailer's debts accruing during such heir's possession, and that out of the rents which such heir is receiving. No heir of entail is bound to pay off the principal or capital of entailer's debts, unless this be a condition of the entail, or unless, of course, the heir of entail has incurred a separate or general representation of the entailer. *Qua* heir of entail, he is not the debtor in the bonds, and he is only bound to pay out of the rents the interest accruing during his possession.

This brings the question simply to this: Whether it is a condition of the present entail—a condition validly made by the entailer—that the pursuer, as institute or first heir of entail, or that any subsequent heir of entail, shall, as a condition of succeeding, be bound out of his own means to pay off the principal or capital sums constituting the entailer's debts. Now, there is no such condition in the entail, and no such condition is implied at common law, and therefore there is an end to the pursuer's whole action, both as originally laid and as amended or proposed to be amended. The defender is entitled to absolvitor from the whole conclusions of the action.

In regard to the liability of the separate entailed estate of Dunalastair to be sold or made available in some way for paying off the previous entailer's debts affecting the other entailed estates of Dalchosnie, Loch Garry, and Kinloch Rannoch, I wish entirely to reserve my opinion, although, as I have already mentioned, I incline to differ from the opinion expressed by the Lord Ordinary in his note. My difficulty is this, that both entails—that is the entail of Dunalastair as well as the

previous one—bind the granter Sir John M'Donald alone, and his heirs, executors, and representatives whatsoever—that is his general representatives—to relieve the entailed estates of the granter's debts. There is no obligation laid upon the heirs of entail in any of the entailed estates to pay entailer's debts, even those affecting the estates respectively entailed, far less is it made a condition that the heirs succeeding to one entailed estate shall pay off the debts affecting other and separately entailed lands. None of the heirs of entail are bound at common law to do so, although of course all the estates are attachable at the instance of the creditors. Now, when the question of liability for entailer's debts, or questions as to the right to be relieved therefrom, arise, not between the heirs of entail and the general representatives of the entailer, but between two series of heirs of entail under separate deeds of entail, I do not think it is material, at least it is not conclusive, that one of the entails was executed long before the other, or that one of the entails contains a power of revocation while the other does not. These may be indications of intention, but they are no more. In particular, the power of revocation though reserved was never exercised, and I think it impossible to hold that the entail must be held revoked *eo ipso* from the mere fact that the entailer left debts unprovided for. It appears to me that in all such cases the real question is a question as to the intention of the testator or entailer. Did the late Sir John M'Donald really mean and intend that the estate of Dunalastair, carefully and specially entailed, should be burdened with—made answerable for—and probably be sold to pay off—an heritable debt which he had previously constituted effectually as an entailer's debt and a real burden affecting and against the separate entailed lands of Dalchosnie, Loch Garry, and Kinloch Rannoch? Reading the deeds, I should have the greatest possible difficulty in holding that this was Sir John M'Donald's intention, and when we remember that Sir John M'Donald himself at great expense built upon Dunalastair the mansion house which he intended to be the mansion house of the whole entailed estates, viewed as one estate and settled upon the same series of heirs, then, if it should turn out that Dunalastair must be sold in order to pay off the heritable debt affecting Dalchosnie, Loch Garry, and Kinloch Rannoch, I cannot help thinking that this would be defeating, and signally defeating, the intentions of the testator. While I say this much, however, in consequence of the clear opinion to an opposite effect expressed by the Lord Ordinary, I do so merely for the purpose of expressing my difficulty and reserving my opinion entire, for I think that the question cannot be decided under any of the conclusions of the present action.

The case may go back to the Lord Ordinary to ascertain the amount of the free executry, which, so far as it will go, is admittedly liable for the entailer's debts.

The Court pronounced the following interlocutor:—

"The Lords having heard counsel on the reclaiming note for John Alan M'Donald against Lord Shand's interlocutor of 22d November 1876, Refuse said note, and adhere to the interlocutor complained of, with the following addition to the Lord Ordinary's reservation—'and to the defender his defences thereto:' Find the defender entitled to expenses since the date of the Lord Ordinary's interlocutor: Appoint the defender to lodge the executry accounts in this Court within eight days: Remit to the Auditor to tax the expenses now found due, and to report, and decern."

Counsel for Pursuer—Fraser—Trayner. Agents—Dewar & Deas, W.S.

Counsel for Defender—Lord Advocate (Watson)—M'Laren. Agent—A. P. Purves, W.S.

Friday, January 12.

FIRST DIVISION.

[Lord Young, Ordinary.

THE HUNTINGTON COPPER AND SULPHUR COMPANY (LIMITED) *v.* HENDERSON.

Company—Director—Trustee—Promotion-Money.

A mining company sued one of their directors for £10,000, which they averred he had received from the persons from whom the company had purchased their mines, out of the price paid therefor, as an inducement to him to become a director, and to promote the formation of the company and the consequent purchase of the mines. The defender admitted that he had received £10,000 from the vendors, but averred that this sum was paid to him in terms of an agreement between him and the vendors, whereby he undertook to render various services to the company, when formed, outwith his duties as a director. These services he claimed to have actually rendered. There was no mention of any such agreement in the prospectus; none of the other directors were made aware of any such agreement, nor did they understand that the defender rendered any services to the company, except in his capacity of director.—*Held* that the defender was bound to repay the £10,000 to the company.

Trustee.

Observed that whenever it can be shewn that a trustee has so arranged matters as to obtain an advantage, whether in money or in money's worth, to himself personally through the execution of his trust, he will not be permitted to retain it, but will be compelled to make it over to his constituent.

This was an action brought by the Huntington Copper & Sulphur Company (Limited) against William Henderson, chemical manufacturer in Glasgow and Irvine, for the sum of £10,000, with interest from 1st April 1872, in the following circumstances:—

The Huntington Company was incorporated and registered under the Companies Acts of 1862 and 1867, upon the 1st of April 1872, with a nominal capital of £200,000 in 20,000 shares of £10 each. The Company was formed for the purpose of adopting and carrying out a contract, dated 25th and 26th March 1872, between John