or sums of money to be thereafter lent, advanced, or paid, it is still liable to the duty. If it is granted for repayment of a sum which may become due upon an account-current, but which is not due when the bond is granted, it is still to be the subject of duty. And if the money secured, or to be ultimately recoverable, is limited by a maximum amount, then the duty is to be imposed upon the maximum which is stated in the bond; and if no maximum is stated in the bond, but a penalty is stated in the bond, then the duty is to be levied on the penalty; but if there is no maximum amount, and no penalty, the statute exhausting the ingenuity of its framer to reach every case, goes on most skilfully to provide that where there shall be no penalty of the bond in such last-mentioned case—that is, where there is neither a sum stated to be paid, nor a penalty stated, and the sum is thus left perfectly uncertain and definite, then such bond shall be available for such an amount only as the *ad valorem* duty denoted by any stamp or stamps thereon will extend to cover, that is to say, the provision is just this—If you choose to frame your bond in such a way that I, the taxing officer, cannot find any sum to take as the *valor* on which my duty is to be imposed, then take notice that, according to the amount of duty that you impress in the form of a stamp upon that obligation, will be your right to recover when the time comes. You cannot recover one penny more under the bond than you have *ad valorem* duty to cover, so you take the risk. Now, putting all these things together, is it not perfectly clear that it was intended—whether it is accomplished is another affair—but that it was intended by these different provisions of this part of the schedule to reach every personal bond whatsoever which might afterwards come to be an obligation for the payment of a sum of money. Now, let us consider how this affects the present case. In the first place, there is no sum payable at all under this bond, except upon a certain condition or contingency—that is to say, that there shall be children. There is not anything in the provisions of this schedule which excludes from its operation the case of a bond for a sum of money payable upon a contingency. I can find nothing so to limit the operation of the words. I think the words are perfectly broad enough in their natural meaning to reach the case of a bond payable only upon a contingency. But then it is said further, this is not merely a contingency, because when the time arrives we don't know what sum is to be payable; it may be either £15,000, or £20,000, or £30,000. Now, that at first sight is very plausible and very taking, but when you come to analyse it, it is nothing more but contingency after all. It is three contingencies instead of one—that is to say, the husband here has undertaken, in the contingency of his having one child, to pay £15,000, and in the contingency of his having two to pay £20,000, and in the contingency of his having three to pay £30,000. Well, the Commissioners of Inland Revenue might perhaps have said, "There are three contingent bonds, one for £15,000, one for £20,000, and one for £30,000." I don't think that would have been a very fair construction of the Act of Parliament, I must say, because in no event will the whole three sums come to be payable, but only in the worst event for the obligant the maximum sum of £30,000. It may be that something less may be payable, but it may be also that the largest sum will be payable. Now, I must say, it would be in my mind an unfair and an irrational construction of this schedule of the Stamp Act to say that this obligation for payment of £30,000, in the event of Sir William having three or more children is not within the operation of these provisions; and therefore I am for dismissing this appeal, and confirming the determination of the Commissioners of Inland Revenue. I may say, further, that I am quite clear, as indeed was conceded in argument latterly by the counsel for the commissioners, that this part of the marriage-settlement does not fall within the title "settlement" in the schedule, but falls under the title "bond," under which they have classed it.

The other Judges concurred, and the appeal was accordingly dismissed.

Agents for Appellant—Dundas & Wilson, C.S.

Agent for Respondent—The Solicitor of Inland Revenue.

PATTISON *v.* HENDERSON AND OTHERS

(*ante*, vol. i. p. 210).

Trust—Substitution—Superiority—Dominium utile—Consolidation—Death-bed—Title to Reduce. By a deed conveying the truster's whole estate, heritable and moveable, to another, a number of substitutes were called, upon whom it was to devolve in certain fixed proportions if certan events occurred. The residue was conveyed to certain legatees. One of the substitutes acquired a right by the deed to the superiority of some lands, in which the truster was then vested. After the date of the deed, and without making any special destination of it, the truster also acquired the *dominium utile* of these lands. The institute under the deed made up separate titles to these estates, and afterwards consolidated them in his own person. Held that the effect of this consolidation was not to give the substitute the right both to the property and the superiority, and that he had only a personal right under the deed which gave him a title to sue a reduction of a deed executed on death-bed by the institute, to the effect of making good his right to the superiority but no further.

The late William Dunn, Esq. of Duntocher, merchant in Glasgow, by disposition and deed of settlement, dated the 17th day of April 1830, disponed and conveyed his whole estate, heritable and moveable, from him after his death to and in favour of the now deceased Alexander Dunn, residing in Duntocher, his brother, but with and under certain burdens and conditions therein set forth. It was thereby specially provided and declared, but without prejudice in any respect to or limitation of the rights and powers of the said Alexander Dunn, under and by virtue of the conveyance in his favour thereinbefore written, to exercise the most full and absolute control in the disposal of the said estates and effects, either during his lifetime, or by settlements or other writings, to take effect at his death, that in the event of the said Alexander Dunn's dying intestate, and without leaving heirs of his body, and of his not otherwise disposing of the subjects and estate thereby conveyed to him, the same should fall and devolve, and accordingly the said William Dunn thereby, in these events, but under the burdens and provisions thereinbefore written, disponed and conveyed his said estates, heritable and moveable, in the terms therein mentioned.

Last year the Court held that this was a good conveyance in favour of the substitutes called by the declaratory clause of the deed, which was to

be held as a continuation of the dispositive clause, and not a qualification of it, as was contended by the heir of Alexander Dunn, and therefore ineffectual. Alexander Dunn having died intestate, and the other conditions specified by William Dunn not having been purified, the devolution of the estate fell upon the substitutes. The case then came a second time before the Lord Ordinary in an action at the instance of Mr Dunn Pattison, one of the substitutes, in the deed of William Dunn, in which he concluded for reduction of a deed executed on death-bed by Alexander Dunn, which he said was made to his prejudice. The Lord Ordinary (Jerviswoode) held that Mr Pattison, not being an heir of provision under the deed of William, had no title to challenge the deed of Alexander. Last session, on advising a reclaiming note for Mr Pattison, the Court altered this interlocutor, and sustained his title to sue. There being then only one question on the merits undisposed of, the Court on the motion of the pursuer, retained the case in the Inner House without again remitting to the Lord Ordinary. The case now came up upon this question.

William Dunn by his deed in 1830 provided and appointed that his lands in the parish of Kilpatrick (exclusive of the cotton mills and houses, ground and gardens connected therewith, and of the reservoirs, dams, and other appurtenances thereto belonging, and of his right and interest in any lochs and other waters necessary for carrying on the said mills, and also exclusive of his lands of Duntiglennan, thereinafter mentioned) should be divided into three parts, and should fall to the respective persons therein mentioned—viz., his lands of Mountblow and Dalmuir, and the superiority of that part of the lands of Boquhanran feued out by the late Sir Charles Edmondstone to Edward Collins of Dalmuir, with the feu-duty of £300 sterling, and casualties of superiority thereto attached, should fall and devolve to the eldest lawful son of the said Mrs Janet Park or Pattison, his niece, whom failing, to the persons thereinafter set forth. The pursuer, Mr Alexander Dunn Pattison, is the only lawful son of the said Mrs Janet Park or Pattison, niece of the said William Dunn. At the date when his deed was executed, William Dunn was the proprietor of the *dominium directum* of the part of the lands of Boquhanran referred to in his deed of settlement. In the year 1832, he acquired by purchase the *dominium utile* of these lands under a disposition or conveyance in his favour by Edward Collins, paper manufacturer in Glasgow, on which he was infeft. William Dunn died in 1849, and was succeeded under his deed of settlement by his brother Alexander. Alexander Dunn, who had power to control the destination of the estate by any valid deed executed by him, made up titles to the lands of Boquhanran, superiority, and property, and afterwards resigned the property thereof into his own hands, as superior *ad remanentiam*. The following is the clause in the procuratory of resignation:—"I, the said Alexander Dunn, do hereby resign and surrender, and *simpliciter* upgive, overgive, and deliver, All and Whole the lands and others hereinbefore particularly described, with the pertinents thereof, together with all right, title, and interest which I have or can pretend to the same, in the hands of myself, the said Alexander Dunn, or my foresaids, as immediate lawful superiors of the same, or of my said commissioners, or either of them, *ad perpetuam remanentiam*, to the effect that the right of property of the foresaid lands and others, which stands in my person as aforesaid, may be united and consolidated with my right of superiority of the same, and remain inseparable therefrom in the person of me, my heirs and successors, in all time coming, acts, instruments, and documents, in the premises to ask and take, and generally every other thing thereanent, to do as freely in all respects as I, the said Alexander Dunn, could do myself, or which to the office of procuratory in such cases is known to pertain; all which I promise to ratify and confirm." Mr Pattison contends that the effect of this act was to give him right to the property as well as the superiority of the lands of Boquhanran, in the event of Alexander Dunn dying without otherwise validly disposing thereof by conveyance *de presenti* or *mortis causa*, granted *in liege poustie*. Alexander Dunn died in June 1860. Previous to his death, and a few days before it, he executed a trust-disposition and deed of settlement by which he altered the destination and conveyance in favour of Mr Pattison, contained in the deed of William, and disponed the lands of Boquhanran in favour of others. The following is the clause in the deed referring to these subjects:—"In the fourth place, my said trustees shall assign and dispone the lands, part of Boquhanran and others, with the mansion-house of Dalmuir situated thereon, acquired by my late brother since the date of the said disposition and deed of settlement from Edward Collins, paper manufacturer in Glasgow, to and in favour of the eldest lawful son of the late Sarah Park or Black, my niece; whom failing, as provided by the foresaid disposition and settlement with respect to the third portion or division of the lands specially destined in the foresaid disposition and deed of settlement; but the said conveyance shall be granted subject to the payment to the eldest lawful son of Janet Park or Pattison, my niece; whom failing, as provided with respect to the first portion or division of the lands specially destined by the foresaid disposition and deed of settlement of a yearly feu-duty of three hundred pounds sterling per annum, payable at the terms, and with interest and others, and in the same manner in all respects as the feu-duty which was included in the said last mentioned share or division, at the date of the foresaid disposition and deed of settlement, and in lieu of the said feu-duty, the same having been since distinguished or sopite in the making up of my titles; and the said trustees and their foresaids shall expede the deeds necessary for constituting the said feu-duty in the terms foresaid." It is this deed which Mr Pattison seeks to set aside, on the ground that it attempts ineffectually to convey away from him the property and superiority of the lands of Boquhanran, to both of which he is entitled. Defences to this action of reduction were put in on behalf of the heir-at-law of Alexander, his trustees, and the several beneficiaries under William's deed.

YOUNG, A. R. CLARK, and SHAND, for the pursuer, argued—Being an heir of provision under William Dunn's deed, the pursuer has a title to sue this action of reduction. In regard to the lands of Boquhanran, the *dominium utile* having been consolidated with the *dominium directum* by Alexander Dunn in 1852, the right to these lands must be regulated by the destination applicable to the *dominium directum*, and therefore the pursuer is entitled to insist in the present action, both as regards the property and the superiority of these lands. The deed of Alexander being executed on death-bed, is an ineffectual conveyance of heritage.

The SOLICITOR-GENERAL, and GIFFORD, for James Black, the disponee under the deed of Alexander, in the lands of Boquhanran, argued—The pursuer, in respect he does not possess the character of heir of provision to the deceased Alexander Dunn, alleged by him, so far as regards the lands of Boquhanran and others, with the mansion-house thereon, conveyed or directed to be conveyed to the defender, has no title to challenge the trust-disposition and settlement of the deceased, so far as it conveys or relates to the said lands. The pursuer's title to sue is excluded by the disposition and settlement of William Dunn. The pursuer has no title or interest to challenge the settlement of Alexander Dunn, in so far as regards the *dominium utile* of the said lands of Boquhanran, in respect he has no right to or interest therein under the settlement of William Dunn, or otherwise. The provisions in favour of the pursuer in William Dunn's settlement being conditional, and such conditions not having taken effect, in respect the property was disposed of by Alexander Dunn by his trust-disposition and settlement, the pursuer has no title to sue the present action. The provisions in the pursuer's favour under the settlement of William Dunn having been granted under burden of a power or faculty to Alexander Dunn to alter or revoke the same, all challenge of Alexander Dunn's trust-deed is excluded, in respect of its having been validly granted in virtue of, and in the exercise of, such power and faculty. The trust-disposition and settlement of Alexander Dunn having validly conveyed or directed the said lands to be conveyed to the defender, he is entitled to absolvitor from the conclusions of the present action, so far as it relates to the said subjects or the conveyance thereof in his favour. The titles expede by Alexander Dunn, in reference to the superiority and property of Boquhanran were not intended to operate, and did not operate, as a disposal of the property in favour of the pursuer, or in any way alter or affect the rights of succession thereto.

HECTOR and LEE, for the heir-at-law, argued—The pursuer has no title to pursue this action, in respect that—(1) he is not heir of provision of Alexander Dunn in the lands and heritages referred to, and his averments are not relevant or sufficient in law to support his allegation that he is such heir of provision, (2) William Dunn's settlement contains no terms whereby his heritable estate, or any part thereof, was in habile or sufficient form disponed to the pursuer, (3) The pretended substitution in William Dunn's settlement founded on by the pursuer never took effect, the contingencies on which said alleged substitution is dependent not having occurred, (4) The title alleged by the pursuer is excluded by the titles made up, and deeds executed by Alexander Dunn, who had full power to dispose of the subjects, and did dispose of them in such manner that if Alexander's settlement and codicils relative to the subjects in question shall be set aside, the said subjects fall to the defender's ward as Alexander's heir-at-law, (5) The deeds sought to be reduced are not to the prejudice of the pursuer, (6) The only party who has any title to reduce the said deeds *ex capite lecti* is the defender as *curator bonis* to William Park.

WATSON, for one of the residuary legatees of Alexander Dunn, argued—The pursuer has no interest to insist in the present action, in so far as the *dominium utile* of the lands of Boquhanran is concerned, in respect that, even in the event of the trust-deed of Alexander Dunn being set aside in so far as it affects the pursuer, he has no right or interest in the property of said lands under the disposition and deed of settlement of William Dunn or otherwise; and that said property is destined, both by the deed of William Dunn and by the trust-deed foresaid, to the defenders and other residuary legatees. The pursuer has no title to pursue a reduction, *ex capite lecti*, of the trust-disposition and settlement of Alexander Dunn, in respect that the disposition and deed of settlement of William Dunn, upon which the pursuer founds, did not confer upon him the character of a proper heir of provision. The whole provisions in the pursuer's favour contained in the settlement of William Dunn having been made and granted under the express burden and limitation of a power or faculty to his brother Alexander Dunn to alter or revoke the same, the pursuer is excluded from all challenge of the trust-deed in question, in respect that it was validly executed by the said Alexander Dunn in the exercise of the power or faculty foresaid, *et separatim*, in respect that it was competent to the said Alexander Dunn to exercise such power or faculty even on death-bed. The superiority and *dominium utile* of the lands of Boquhanran having been consolidated by Alexander Dunn merely for the purpose of expeding a title thereto in his own person, and without any intention of changing the investiture, or of conferring any additional right on the pursuer, such consolidation cannot, in any view, be held to operate as a disposal of the *dominium utile* in favour of the pursuer. By raising and insisting in the present action, the pursuer has forfeited, for the benefit of the defenders and the other residuary legatees of Alexander Dunn, the whole provisions in his favour contained in the trust-disposition and codicils under reduction.

The other beneficiaries had no special interest.

The following authorities on cases were referred to in the discussion :—Hamilton, 23d February 1819, F. C.; Gardner *v.* Trinity Hospital, 16th February 1841, 3 D. 534; Lord Elibank *v.* Campbell, 21st November 1833, 12 S. 74; Bontine *v.* Graham, 2d March 1837, 15 S. 711; Wilson *v.* Pollock, 2 D; Roxburgh, 14th Dec. 1815, F.C., 1 W. and S.; Heron, 1 Pat. 98, Duff's Feudal Conveyancing, 323; Bell's Dic., "Destination."

At advising—

Lord COWAN—The trust-deed of settlement brought under challenge in this action of reduction, as well as in the action recently disposed of by the Court, was executed by the late Alexander Dunn, admittedly on deathbed.

The pursuer of the former action was the heir-at-law of Alexander Dunn, represented by his *curator bonis*; and the deed was, on one hand, held reducible at his instance, in so far as regarded the heritable estate conveyed by it, to which the granter had not succeeded under the deed of settlement of his brother William Dunn; and was, on the other hand, held not reducible as regarded the heritable estate, to which he had succeeded under his brother's deed. To that part of his heritable estate it was held there had been an effectual substitution created by William's deed in favour of Mr Dunn Pattison and others, which excluded the title of the heir-at-law of Alexander Dunn to set aside the deathbed deed by depriving him of that interest to do so, on which his right and title to challenge depended.

The present action, again, is instituted at the instance of Mr Dunn Pattison, as heir of provision under William Dunn's deed to certain of the heritable subjects to which the deathbed deed of Alex-

ander Dunn relates, and his title to pursue the reduction of the deed, in so far as prejudicial to the pursuer's rights as heir of provision, has been sustained by our judgment of 9th March last. The question for decision now regards the effect of that judgment upon the claim advanced by the pursuer to the *dominium utile* or property of the lands of Boquhanran, the title to which stands in the very peculiar circumstances explained in the 2nd and 3d article of the condescendence.

The disposition and settlement of William Dunn was executed on 17th April 1830. At that date he was possessed of the *dominium directum* of Boquhanran, to which he had completed titles by infeftment in 1827. And by his deed of settlement, as construed by the judgment of the Court, he destined to the pursuer, failing his brother Alexander and his heirs and assignees, *inter alia*, this right of superiority or *dominium directum*.

Subsequent to the date of his settlement, William Dunn acquired the *dominium utile* of the lands of Boquhanran, and was infeft under the disposition in his favour in 1832. No alteration after this date was made by William Dunn, and consequently this portion of his heritable estate fell under the general disposition of the residue of his whole estate, heritable and moveable, not specially conveyed by the deed to the several parties named as residuary disponees, including the claimants Black and others.

Thus standing the succession to Boquhanran superiority and property by the deed of William, his brother Alexander, to whom his whole estate was primarily disponed, completed his title to those subjects (1) by precept of *clare constat* in his favour, obtained from his overlord Monteith of Carstairs, and infeftment thereon as nearest and lawful heir of his brother William in the *dominium directum*; and (2) by charter of confirmation and precept of *clare*, granted by him in his favour, and infeftment thereon, as nearest and lawful heir of his brother in the *dominium utile* of the said lands. These several deeds were granted, and the title of Alexander to the two estates as his brother's heir, completed in 1852. Thereafter, or rather of the same date with the deeds just mentioned, Alexander Dunn executed a procuratory of resignation *ad remanentiam*, for the purpose set forth in the deed, in these terms:—"Whereas it is proper and advisable that my right of property of the said lands and others should be united and consolidated with the right of superiority of the same in my person, therefore I, the said Alexander Dunn, do hereby," &c., "resign and surrender, and *simpliciter* upgive, overgive, and deliver all and whole the lands and others hereinbefore particularly described, with the pertinents thereof, together with all right, title, and interest which I have or can pretend to the same, into the hands of myself, the said Alexander Dunn, or my foresaids, as immediate lawful superiors of the same, or of my said commissioners, or either of them, *ad perpetuam remanentiam*, to the effect that the right of property of the foresaid lands and others, which stands in my person as aforesaid, may be united and consolidated with my right of superiority of the same, and remain inseparable therefrom in the person of me, my heirs and successors, in all time coming."

Under the feudal title thus completed in his person, Alexander Dunn possessed the *plenum dominium* of Boquhanran during his life, and at his death in 1860 the superiority and property then consolidated as one estate was vested in him by completely feudalised titles to himself, his heirs and successors.

The only deed of settlement executed by him and found in his repositories was the deed brought under reduction by the pursuer as his heir of provision, and in the previous action at the instance of his heir-at-law. That deed being executed on deathbed is reducible by the heir, whether of line or of provision, whose interests, as entitled to succeed to the heritable subjects, have been affected by the unavailing attempt to alter the succession on deathbed. The primary question thus is, to what extent the pursuer's right of succession as regards the lands of Boquhanran has been attempted to be affected or injured by this deathbed deed? I apprehend that the measure of the injury of which the pursuer is entitled to complain is to be sought for in the extent of his right to succeed to the heritable subjects vested in Alexander Dunn on his death, supposing that no attempt had been made to alter the destination, and that Alexander Dunn had died intestate.

Now (1) as heir of provision under William Dunn's deed simply, and without regard to the act of Alexander in consolidating the *dominium utile* with the *dominium directum*, it cannot be disputed that his right as heir related only to the superiority, and did not in any way apply to the *dominium utile*. No higher heirship right or title was conferred on him by William's deed, and under the terms of that deed alone it was that the pursuer could assert any right or privilege as heir of provision of Alexander, viewing the case apart from Alexander's act of consolidation.

(2) It is important to observe that the mere completion of Alexander's feudal title as William's heir-at-law in the superiority and property as separate estates cannot be held to affect the destination of the *dominium utile*, or enlarge the right of the pursuer as heir-substitute to Alexander under William's deed in the *dominium directum* or superiority.

The case, in this aspect of it, cannot be assimilated to what has occurred in authoritative decisions where a person standing infeft in the superiority of lands destined to heirs-male, purchases the *dominium utile*, taking the disposition to heirs whatsoever, and the property as an accessory of the superiority has been held to go to heirs-male under the destination to the more eminent right. For (1) Alexander took infeftment in the superiority as heir-at-law of William, the feudal title being in favour of him, his heirs and successors, without any ulterior destination whatever. (2) He did not purchase the *dominium utile*, but succeeded to it also as his brother's heir, taking the feudal title to himself and his heirs and successors.

So far as the titles to the two estates stood feudalised in the person of Alexander Dunn, no competition could have arisen with regard to the heir entitled to succeed to the one estate or the other. His heir of line was entitled to succeed to both estates, and there could have been no room for contending, on feudal principles, that the destination to the *dominium utile* was open to be controlled by personal deed which related to the destination of the superiority as a separate estate. However, the succession to the superiority might be regulated under such a personal deed, the destination of the *dominium utile* would remain unaffected. A right under a personal deed to claim the succession of the superiority, though standing under the feudal title destined to the heir of line, would be no ground for claiming the succession to the separate estate to which the parties' right did not extend, and which was by the feudal title destined to the heir of line.

The present case, viewing it apart from the

effect of the consolidation, is one precisely of this kind. It is even stronger than the supposed case. The deed of William Dunn, which is the foundation of the pursuer's claim, gives to him right to claim as an heir-substitute in express terms only the superiority or *dominium directum*, and by the same deed William's estate in the *dominium utile* fell as part of his residue to the different parties altogether. On his brother Alexander completing his title to the two estates, therefore, so long as they continued separate estates in his person, there can be no room for holding that the pursuer's right to claim the superiority as heir of provision afforded him any right or title to claim the property as in competition with the heirs of line of Alexander. Assuming the completion of titles in his person as heir-at-law had not the effect of evacuating the substitutional rights created by the deed of William in either estate, the pursuer has no more ground for claiming the property because of his right to the superiority than those other parties who claim the superiority in virtue of their claim to the *dominium utile*. Both estates stood destined on Alexander's death to his heirs and assignees, and although William's deed gave the pursuer right to have that destination controlled by the substitution in his favour, the destination of the *dominium utile* to heirs and assignees remained effectual to the heir of line, except in so far as controlled by the destination in favour of the parties called by William's deed to succeed to the residue of his estate, including the property of the lands in question.

(3) Alexander Dunn, however, consolidated the two estates, and this act of his is alleged by the pursuer to have enlarged his rights as called to succeed to the superiority by William's deed. The *dominium utile*, it is argued, has been merged in the *dominium directum*, and the consolidated estate thereby created devolves upon the pursuer as alone entitled to take it as heir of provision in the superiority title, which, by the act of Alexander, came, in his person and by his act, to comprehend the *dominium utile*. The deed of settlement of William Dunn, creating the substitutional right in his favour, and the act of consolidation of the two estates by Alexander while *in liege poustie*, are contended by the pursuer to give him right to insist in this action of reduction as heir of provision of Alexander Dunn in the *plenum dominium* of the lands of Boquhanran, and to have it found and declared that he has the only good right and title to these lands, superiority and property as consolidated into one estate.

That there is difficulty and nicety in the question thus raised by the pursuer cannot be disputed; but there appear to me good grounds in law, having regard to the state of the title and to the circumstances in which the question arises, for refusing effect to the pursuer's claim.

A good deal of discussion occurred in the course of the argument as to the effect and operation of a resignation *ad remanentiam* when duly completed. Our institutional writers leave no room for question on this point—*vide* Ersk's Prin. ii. 7. 9. The *dominium utile* is extinguished as a separate fee or estate. It is sunk in this *jus eminens*, and, as a consequence, the heirs of the investiture in the superiority title become heirs of the *plenum dominium*. The full estate would be carried by the service of the heir under that investiture. Again, it follows that consolidation operates as a transference of the estate from those heirs who might have succeeded to the *dominium utile*, or as stated in Mr Bell's Principles, p. 788, it has all the effect of a conveyance of that right to the same series of heirs in whose favour the doner's direction stands vested in the person of the owner of the estate thus consolidated.

The practical application of these views in the present case is not doubtful. On the one hand, any separate destination which might have become operative had the *dominium utile* continued to be a separate estate is extinguished; and, on the other hand, the only substitutional rights to be regarded must be sought for in the feudal investiture of the superiority. Consequently the claim of the residuary legatees (Black and others) under William's deed must be disregarded; and it is under the destination of the consolidated estate in the person of Alexander Dunn that the pursuer must vindicate his claim to the *plenum dominium*.

Now, as regards the feudal investiture under which Alexander Dunn held the estate, it is his heir-at-law, and not the pursuer, to whom it is destined. There is no ulterior destination under which the pursuer can assert any heirship right. The succession has opened to the heirs and successors of Alexander Dunn, and no service can be expede by the pursuer as entitled to take under that destination.

But then it is maintained that under the substitutional clauses in William Dunn's deed, as the Court has construed them, a right of succession to the lands in question has vested in the pursuer, to which he can insist upon the heir-at-law, after completion of his feudal title, giving full effect.

As regards the other separate estate or *dominium directum*, the ground of this contention by the pursuer is clear enough. As heir of provision in that estate, the pursuer is entitled at once to set aside the deathbed deed of Alexander, and to take proceedings to vest himself, by adjudication or otherwise, with that heritable subject to which he was thus *alioqui successurus*. It is on a different ground altogether that the *dominium utile* now merged in the superiority must be vindicated by him. The act of Alexander is and must be founded on as the ground of this assertion of right. In *liege poustie*, Alexander consolidated the two estates. By this act the property was by him destined to the pursuer, as entitled to have the superiority. The deathbed deed has injured that right of succession in the pursuer, as *hærus factus* of Alexander; and this deed being set aside, the pursuer, under his combined right of succession, maintains his claim to the *dominium plenum*.

I do not wish, as no objection has been taken by the parties, to raise any doubt as to the sufficiency of the summons to enable the pursuer to assert his combined title as heir of provision to his two brothers. All I wish to keep before you in estimating the extent of the pursuer's rights is, that whatever right he has to the *dominium utile* must be supported as springing exclusively from Alexander's act in consolidating the two estates.

By that act the estate, thenceforward consisting of the *dominium plenum*, was vested in Alexander's own person at his death. But although the prior existing fee in the *dominium utile* was thereby extinguished, the property was at any time capable of being of new separated from the superiority. By the creation of a new estate, no doubt, but still, at any time Alexander, or the heir succeeding him in the feudal estate, chose, this separation might have been or may now be effected. A stronger illustration could not be found of this than occurred in the case of Galbraith *v.* Graham, 14th January 1841. The superiority of the lands was held under a strict en-

tail. The *dominium utile* was acquired by the heir, and his title was completed by resignation *ad remanentiam*. No prescriptive possession had followed on the consolidated title. The Court held that the fetters of the entail did not apply to the *dominium utile* thus consolidated, and that the heir in possession might separate the estate of new from the superiority, and deal with it as an estate vested in him in fee-simple. Thus, I apprehend, that wherever it is necessary for the execution of the just rights and interests of the parties interested, there is clearly power in the heir taking up the feudal right to the consolidated estate, to give out of new the *dominium utile* to be dealt with in consistency with such rights and interests, and so as to give them their full legal effect.

There being then no want of power to separate the two estates, although consolidated by Alexander's act when *in liege poustie*, the pursuer in asserting his right to the *plenum dominium* must maintain that by that act Alexander intended and did create a destination in his the pursuer's favour to the *dominium utile*. He cannot connect himself otherwise with that portion of the combined estate. But apart from the real act of consolidating the estates under one feudal title in his own person, there is no trace of an intention on Alexander's part to call the pursuer to be his heir of provision in the *dominium utile*. On the contrary, before consolidation, the feudal title in Alexander to the *dominium utile* was to him, his heirs and successors. This would have carried the fee to Alexander's heir of line but for the claim advanced by the residuary legatees under William Dunn's deed. Then the mere act of consolidation did no more than carry the *dominium utile* to Alexander's heirs and successors, without any indication otherwise of intention that the pursuer was to be thereby benefited. Had the superiority title, failing Alexander, carried that, the pre-eminent right, in terms to the pursuer, the resignation *ad remanentiam* might then have been held, as it has been in other cases, evidence of an intention on Alexander's part, and carried by him into full effect, to let the combined estate descend to the heirs of the superiority investiture. Nothing of the kind was actually effected by the mere consolidation of the estate; and no argument can be drawn from the act that Alexander intended the pursuer to be his heir of provision in the *dominium utile*. Thus it is that the pursuer is driven to maintain that merely because of his right under the separate personal deed of William to claim the rights of heir of provision in the superiority, the *dominium utile* also must be his, the two estates having been consolidated. But if there exist no just ground for holding the heir-at-law, who is the heir of investiture, superseded in his right to succeed to the *dominium utile*, it has been shown that there is no want of power on his part to separate the two estates, and thus give full effect to the just rights at once of the pursuer, and his own rights as well.

The case, then, stands thus. On the one hand, the deathbed deed being set aside, the pursuer is entitled to require Alexander's heir-at-law so to deal with the combined feudal estate as to give over to him that right of superiority which William Dunn's deed conferred on him as heir of provision; and on the other hand, the heir-at-law of Alexander, after completing his feudal title to the *plenum dominium*, is entitled to make effectual his right of succession to the *dominium utile*, or property of the lands, by separating of new that estate from the superiority, and thereafter conveying to the pursuer the superiority burdened with the feu-right thus constituted in his own favour.

Lord BENHOLME—This is a case of extreme difficulty, and must be resolved, in my humble opinion, upon principle. And I think the principles by which we ought to be guided are those that arise out of the feudal law of this country, as well as out of those considerations of intention which must always enter into the matter of succession, but which intention, I apprehend, is best ascertained by the feudal acts of the proprietor. Lord Cowan has so clearly stated the situation of the titles to this succession when Alexander succeeded, that I shall only add one observation, and it is this: William Dunn was vested with the superiority of Boquhanran at the time that he made his settlement in 1830, but he had not then acquired the *dominium utile;* and the only question, and that a grave one, is, whether, when he afterwards acquired the *dominium utile*, and took it to his heirs and assignees, those heirs are not to be considered the heirs in the superiority. The importance of this question, and its difficulty, are very obvious, because, if it could be held that William Dunn intended, by purchasing the *dominium utile*, that it should go to the heirs of the superiority under his personal deed, *cadit quæstio.* But then there is this objection to that, that in his deed of 1830 he left his whole residue to particular heirs of provision; and it may be a hard thing to suppose that under that disposition of residue would not fall this *dominium utile*, though afterwards acquired. Clear I am that under the authorities, had it not been for this disposition of residue,—had his title remained upon a conveyance to himself and his heirs and assignees, and he had died intestate with regard to the *dominium utile*, it would certainly have gone to his heirs of destination in the superiority; for if there is anything fixed in the law of Scotland by decided and authoritative judgments, that is fixed. Now, it is right to observe what has been the course of procedure. In the first place, the heir-at-law brought a reduction of Alexander's deathbed deed; and how far has he been found entitled to succeed in that reduction? Only in regard to that half of Alexander's property which he did not succeed to from William. I take it he has been excluded from touching, by his challenge, the deed of Alexander, in so far as relates to Boquhanran, because that—both property and superiority—descended.

But then Mr Dunn Pattison, who says he is heir of provision in the *dominium plenum* of Boquhanran, brought his action of reduction, and challenged the deed so far as Boquhanran was concerned. That action was defended, and a special plea was put up by some of the defenders that the conveyance, so far as Boquhanran was concerned, could not be impeached by Mr Dunn Pattison, because he had no right to it under William's deed. That is a special plea which was put up to the title of Mr Dunn Pattison to pursue the reduction. Now, whilst we sustained his title generally to insist in the reduction, we made a special reservation of this plea. The objection was to his title, and in the second action, the Lord Ordinary having sustained an objection generally to Mr Dunn Pattison's title, we recalled that interlocutor, "repel the objection to the pursuer's title to sue this action as a reduction *ex capite lecti*, but reserving the second plea in law for James Black, the first plea for John Macindoe, and the second plea for Mrs Boyd and others"—[reads]. There was a special reservation of the title to pur-

sue in regard to the *dominium utile*, and now we are called on to deal with that plea. How, then, are we to deal with it? Has Mr Dunn Pattison a right to reduce this deathbed deed, so far as the *dominium utile* is concerned, or has he not? Has he any title? His title is identified with his right to succeed. Has he a right to succeed in regard to the *plenum dominium?* If he has not, we cannot absolutely sustain his title or reduce it; but if he has, we very well may. And I take it that upon that question, whether he has any title to reduce the deathbed deed, in so far as the *dominium utile* is concerned, the whole of this case depends. Unless I were of opinion—which I humbly am—that he had right, in consequence of the consolidation to the *plenum dominium* of Boquhanran, I could not repel this plea on the part of Black and others. But being humbly of opinion, as I shall explain immediately, that he is heir of provision to the *plenum dominium*, I think his title is unquestionable to reduce the deathbed deed. Now, what was the effect of this consolidation? What was the object of Alexander in resigning on the procuratory? He tells us in the deed himself; and if his intentions were doubtful upon other grounds, I think they are intimated very clearly by the consolidation which he expede expressly for the purpose of uniting the *dominium utile* and the *dominium directum* in all time coming. The instrument of resignation sets out [reads]—What is the effect of this in point of feudal form? What is its import as matter of intention? Can there be a doubt that it extinguishes the *dominium utile*, which is merged in the superiority? that there is now a *plenum dominium*, and not two estates? As to the matter of intention, can words be clearer than that that single estate was to descend undivided to Alexander's heirs and successors? Can that be doubted? And yet the proposal of Lord Cowan, as I understand it, is, that immediately upon his death his heir shall effect that division—shall vest himself with the *plenum dominium*, and shall then do the very thing which it was the intention of his predecessors should not be done—divide the *dominium utile* from the *dominium directum*. This appears to me certainly to be a very strong way of executing Alexander's intention, considered with reference to the very words that he has used, and to the feudal form that he has adopted. Before going farther, I shall explain what I understand to be the effect of consolidation in cases where the destination of the superiority is different from the destination of the *dominium utile*. I think I stated to Mr Hector a case of this kind—that the *dominium directum* was destined to heirs-male, or to a certain special order of heirs—that the party purchases the *dominium utile*, taking it to his heirs and assignees whatsoever, and resigns upon a procuratory of resignation *ad remanentiam*, and my statement was that it had been decided that that gave the *dominium utile* to the heir of the superiority; but as that was questioned, I have now to produce my authority. I refer to the case of Selkirk *v.* Hamilton, affirmed in the House of Lords, 1 Craigie and Stewart, 3d April 1740. The report says—"William, Duke of Hamilton, had issue" [reads to] "had not been delivered." I take it this means that it had not been delivered at the time that the Earl, who was substitute in that entail, acquired the *dominium utile* of Balgray and Mosscastle; for certainly in the course of the Earl's life he did become vested feudally with the superiority as substitute of entail at the death of his father. "The Earl had purchased the property of these lands from the vassal"—[reads to] "was executed." Now, the case I put to Mr Hector applied to the case of Mosscastle, where the procuratory was executed, and it will be seen that that procuratory so executed was held to carry the *plenum dominium* to the heirs in the superiority. But there is more in the case than this, because the property of Balgray was never resigned *ad remanentiam*, but having taken Balgray by purchase, with a conveyance to himself and his heirs whatsoever, that was interpreted to be the heirs in the superiority; and the judgment of this Court and of the House of Lords was that both the one and the other descended to the heirs in the superiority. The argument is very shortly stated thus:—The Duke of Hamilton was the appellant. "As to the 8th and the 9th findings"—[reads]. But the Court disregarded that argument. This decision, I think, throws a great deal of light upon the relation of *dominium utile* and superiority,—superior and vassal, where that relation has been innovated by consolidation. In the present case Alexander Dunn had not purchased the *dominium utile;* but had he purchased the *dominium utile*, and taken it to his heirs and assignees, and had not consolidated, I venture to say that under this decision it must have gone to his heirs who were to take the superiority—not merely to the heirs of investiture who were not to take, but to the heirs who were to take under the ruling personal deed which Alexander left as the governing destination of the superiority; because if there be anything at all in the rule that you are to interpret the heirs of the *dominium utile* to mean the heirs in the superiority, it surely must mean the heirs that are to take, and not the heirs that are not to take, otherwise there would be no sense in the rule, the object being that the two estates should go in the same succession. Now, suppose Alexander, instead of succeeding to this *dominium utile*, had purchased and taken the conveyance to himself and his heirs whatsoever, would consolidation following upon that have altered the succession? If his heirs in the superiority might have taken without consolidation, I cannot hold that consolidating would confirm the right; because if what I have said be correct, it seems to follow *a fortiori* that they must take them both when they are consolidated, because they are no longer separate; they are one, and at the time inseparable. It is very true that notwithstanding consolidation it is always in the power of an heir, who takes beneficial right in both, to separate the one from the other. He may create a new *dominium utile* either exactly the same as the former, or in any way he pleases, but in order to have that power he must be in beneficial right of the *plenum dominium;* and I take it that in this case it is impossible to say that the heir-at-law ever can be in the beneficial right of this *plenum dominium*. It is true that in point of feudal form he can serve in the *plenum dominium*, but that certainly is not a beneficial operation to himself. That is merely a way of making up the title. It is a secondary question altogether whether he has a beneficial interest in the estate which he thus takes; and if he has no beneficial interest in the *plenum dominium*, I am at a loss to see how he can deal with it in separating again the two estates for the purpose of retaining one to himself. Now, the only nicety in this case (for a nicety it is, certainly) arises from this circumstance, that the heirs who are to take the superiority in the present case are not the heirs of investiture. That is the only specialty, otherwise it certainly would fall under the direct effect of these

decisions. But there is this specialty that the heirs who are to take the superiority by the will of Alexander, allowing William's deed to stand, are not the heirs in the *dominium utile;* and the question is this, shall the heirs by personal deed which rules the feudal investiture not be considered the heirs entitled to take the *dominium utile*, merely because they happened to take, not by the feudal investiture, but by an overruling conveyance of a personal kind? That is the question. I fairly admit it is a question different from those that were decided here, but I humbly think in principle it ought to be decided the same way. The principle of that decision is that the two estates shall go together. That is the feudal effect of consolidation. That must be understood to be the intention of the man who consolidates; and the argument on the other side involved this *petitio principii* that Alexander was not aware of the way in which the superiority was to go here. For if you suppose for a moment that he was well aware that the superiority must go to Mr Dunn Pattison if he was childless, you cannot interpret his operation of consolidation in any other way than by supposing that he intended the *plenum dominium* to go to him. If you suppose that he was under a mistake in thinking that the superiority was to go to his heir-at-law, then I admit that his consolidating the two estates might infer that he intended the *plenum dominium* to go to his heir-at-law too. But if you suppose, which I think is the natural supposition, that he was aware how his estates were to stand—that, failing his own issue, the superiority would go to Mr Dunn Pattison—I cannot interpret his consolidation of the two estates as one to mean anything else than that the *plenum dominium* was to go to him. Thus, in point of intention, equally, as I think, in point of feudal effect, I cannot see how this *plenum dominium* can be split. I think it must go to one and the same person. Now, holding that the consolidation makes one undivided estate of Boquhanran, there are several suppositions that may be made. The heir in this *plenum dominium* may be the heir-at-law; or it may be the heir of provision in the superiority; or lastly, as Mr Hector argued, the superiority title as well as the *dominium utile*, may be vested in the heir-at-law. And another supposition is that the heir in the *dominium utile* may carry both. That they shall both be taken by one heir is, I think, the necessary consequence of consolidation. Now, consider who is to take this *plenum dominium*. In the first place, I think it is hardly to be contested that the consolidation defeats the provision in favour of the residuary legatees. I think that can hardly be doubted. It is no longer left upon William's personal deed, but there is an actual conveyance which must always alter a personal deed when the power of the succession is unlimited. Therefore it is impossible to maintain, and I hardly think it has been maintained, that the heirs of provision in the *dominium utile* are to carry the *plenum dominium*. But Mr Hector says—and I think there was logic in his contention—he says, not, as I understand his argument, that there shall be a splitting of the succession, but that his client shall take both. That was his contention; and I can understand that, if there was any authority for saying that the *dominium utile* being consolidated, shall carry along with it the *dominium directum*, and evacuate the controlling personal destination of the *dominium directum*, his contention would be good. But that, I think, is altogether put an end to by these cases; because it is quite plain that although the destination of the *dominium directum* may swallow up and evacuate the previous destination of the *dominium utile*, there is no such case on record in which the destination of the *dominium utile* swallowed up the other. The one may be much more valuable, but the *jus nobilius* in the law swallows up the inferior right. Well, then, there is only one remaining alternative, and that is, that the man to whom the superiority is destined, though not by feudal destination, yet by prevailing personal destination, shall take the *plenum dominium*; and that contention, which I humbly think is a good contention, is supported not only by feudal principle, but also by the intention of Alexander, who made this consolidation. These are the views upon which I cannot concur with the opinion of Lord Cowan. I should think it would be rather inconsistent in us to reduce in terms of this summons—a reduction which would carry the *plenum dominium*—the superiority as well as the *dominium utile*—to reduce in the interest of Mr Dunn Pattison, and then to refuse to give him the benefit of that reduction—to reduce by virtue of his interest as heir of provision, and then to tell him—"You are not heir of provision, but you shall allow the heir-at-law to separate this estate which his ancestor consolidated permanently, and to reserve to himself the part of it which you by your summons of reduction have carried away from the trustee in the deathbed deed."

These are the grounds of my opinion in this case, which involves considerations of extreme difficulty, and which is well worthy of being looked at in every possible view.

Lord Neaves concurred with Lord Cowan.

Lord Justice-Clerk—I have felt, in common with your Lordships, that this is a case of very great difficulty, but after the opinions which have been delivered I think that I shall be able to express the grounds of my judgment in a very few sentences. If Mr Dunn Pattison had been the heir of investiture of the superiority I should have thought the reasoning of Lord Benholme perfectly conclusive, and should have concurred with him in the result at which he has arrived; and the reason why I differ from him is that Mr Dunn Pattison is not the heir of investiture in the superiority, and has nothing under the deeds before us but a personal claim to an estate of superiority under the deed of William Dunn. In order to make the question clear I think it is useful to consider exactly what is the state of the titles apart altogether from the deed of William Dunn, and any influence which that deed is to have upon his succession. Mr William Dunn in his own lifetime was the proprietor of the superiority of Boquhanran, under titles which are not particularly before us, but which vested him simply with a fee-simple right to that estate of superiority. In his lifetime he also acquired the *dominium utile*, and that he took to himself likewise in fee-simple. Therefore as regards both these separate estates, during the lifetime of William Dunn the investiture was to William Dunn and his heirs whatsoever, or his heirs and assignees. Now, when he died, his heir-at-law was Alexander Dunn, and he made up a title to each of those estates separately. He entered by precept of *clare constat* to the *dominium directum* with the immediate over-lord, Mr Monteith, and then he entered with himself by precept of *clare constat* and charter of confirmation as regards the *dominium utile*. The effect of that was to vest in his person, just as they had stood in the person of William Dunn, a fee-simple title to

each of the two estates of superiority and property. In other words, according to the state of the investiture, each of those estates stood distinct to the heirs whatsoever of Alexander, and upon his death they would necessarily both of them pass to the same heir, because they were both estates taken by him in succession—they would both pass to his heir-of-line. Now, in these circumstances he consolidates these two estates by resigning the *dominium utile* into his own hands as the owner of the superiority; and, no doubt, in the procuratory and instrument of resignation it appears that the *dominium utile* is resigned in favour of himself and his heirs and assignees whomsoever. But these are the heirs of investiture in the superiority, and the effect, as far as legal succession is concerned, would have been exactly the same whether the *dominium utile* had been resigned or no, because they both stood upon the same investiture. Well, then, upon Alexander's death what would be the effect in law of this state of the titles? His heir-of-line would take up those estates whether they were one or separate. He would have the only feudal title to take them up. That is plain enough. Nobody else could have any access to the *hæreditas jacens* at all as regards these estates, and so the heir-at-law must take them up. Now, what, upon that state of the feudal title, is to be the effect of William Dunn's deed? We are all agreed that as regards the *dominium utile* it is to be held as having been intended to be comprehended by William Dunn in his destination of the residue of his estate; and we are also agreed that Alexander, having resigned *ad remanentiam*, did thereby convey to himself by a deed of conveyance that estate of *dominium utile* which stood destined to the persons whom I may call the residuary legatees of William, and that that had the effect of evacuating the substitution in favour of the residuary legatees, as regards the *dominium utile*. We are also, I think, all agreed that that resignation had no adverse effect upon the right of Mr Dunn Pattison as heir of provision to the superiority in William Dunn's deed. But then what was the right of Mr Dunn Pattison under William's deed? He has nothing, so far as I can see, apart from the effect of the resignation *ad remanentiam*, which I shall consider immediately. He has nothing but the right which is given to him by William's deed. Now, that is a purely personal right; he has no feudal right of any kind; he has no feudal title in his person of any kind. He has a mere personal claim, which I apprehend must be enforced against the heir-at-law of Alexander Dunn. But what is his personal claim? Is it not defined and limited by that very deed which creates it, and which is not a feudal but a personal deed? In the words of Lord Neaves he has just a right which gives him a personal claim to the superiority of these lands and to nothing else. Must he not go against the heir-at-law of Alexander Dunn to make effectual that personal claim? And when he goes against the heir-at-law of Alexander Dunn to make effectual that personal claim, is he not restrained as to the extent of the claim by the very words in which it is constituted? If it be intended to be said that Alexander must be presumed to have made a present to Mr Dunn Pattison of the *dominium utile* of these lands, then I think we are altogether out of feudal principles, and we are entirely upon the doctrine of presumed will, because, as I said before, Mr Dunn Pattison not being the superior, and not being the heir of investiture of the superiority, the resignation of the *dominium utile* gave nothing to Mr Dunn Pattison directly, because he had no present right. It gave nothing to Mr Dunn Pattison as an heir, because he was not an heir in any proper sense of the term, but merely the substitute with a personal claim. And the principles to which Lord Benholme has referred, and the soundness of which I do not in the least degree controvert, where there are nothing but feudal titles to deal with, would, I think, go too far even for his own argument in this case. I do not know exactly where they would land us. If it is to be held that a person acquiring to himself the *dominium utile* of an estate of which he is superior, but against which superiority, in the event of his not otherwise devising it, somebody else has a personal claim—if the acquisition of *dominium utile* is to operate in favour of that person with a personal claim to the superiority—let us consider, in the first place, what was the effect of William Dunn's purchase of the *dominium utile*. He had by that time made a settlement of his estate in terms of the deed with which we are all familiar; and he had expressed his will and desired that the superiority of this estate should go to Mr Dunn Pattison. Well, if the feudal principles relied on by Lord Benholme are applicable to a case like that, was not the acquisition by purchase of the *dominium utile* by him just such an event as would have the effect of giving it to the person to whom he had left the superiority? and in that case, Mr Dunn Pattison would have been entitled under the deed of William Dunn—altogether irrespective of the resignation and consolidation which afterwards took place by Alexander—to claim both the one estate and the other. But nobody has maintained that, and the plain reason why it could not be maintained is, that it is a rule of construction totally inapplicable to such a deed as this personal deed of William Dunn. But then, when I come to the next heir succeeding to Alexander Dunn, suppose that he, without consolidating at all, makes a disposition to himself of this *dominium utile*, and does it for the purpose of evacuating the substitution which he imagines exists in favour of the residuary legatees—he wants to take the *dominium utile* out of the residuary legatees, and to evacuate the substitution to that effect—I can conceive no better or more direct way in which he could do it than by disponing it to himself and his heirs whatsoever. Well, according to the doctrine of the cases referred to, if they be applicable to this case, it required nothing more than that to vest the *dominium utile* in the heirs of the superiority, although those heirs were not proper heirs, but persons in the situation of Mr Dunn Pattison, having only a personal claim to get the superiority. Now, I think it would be a very strong thing, indeed, to say that in the case which I have been supposing, of a disposition by Alexander Dunn to himself of this *dominium utile*, that would have the effect of giving it to Mr Dunn Pattison. And yet the doctrine which is sought to be imported into this case, from the case of the Duke of Hamilton *v.* the Earl of Selkirk, goes that full length, and makes no distinction whatever between the case where a conveyance is taken of the *dominium utile* to the owner of the superiority, and the case where, after having taken that conveyance, he proceeds to consolidate. It is for these reasons that I find it quite impossible to apply that doctrine to the present case; and it is just in the application or non-application of that doctrine that I think the whole difficulty and the whole question here arises. I concur

with the majority of the Court, and I hold that Mr Dunn Pattison has a good title to sue a reduction of the conveyance in the deathbed deed of Alexander of the *plenum dominium* of Boquhanran, to the effect of enabling him to obtain a right to the superiority of these lands, which, of course, will involve a separation of the two estates just as they stood before, by steps which one can easily understand, under the obligation which I hold to be imposed by William Dunn's deed to that effect on the heir-at-law of Alexander. There is just one other matter to which I would wish to advert before this advising is concluded. The effect of our judgment now is, to hold that, as regards the *dominium utile* of Boquhanran, that belongs—under the title made up in the person of Alexander with the consolidation—to the heir-at-law of Alexander, and the claim of the residuary legatees of William is ousted, in so far as regards that *dominium utile.* But unfortunately this result, and any judgment we may pronounce to that effect, is in some degree inconsistent with a judgment which we pronounced in a question between the heir-at-law and the trustees of Alexander Dunn in a previous action of reduction at the instance of the heir-at-law. That, however, I must take leave to observe, is not the fault of the Court, but the fault of the heir-at-law, because, while he was suing a reduction of the deathbed deed of Alexander, and contending that he was entitled to take as Alexander's heir-at-law the whole estate which Alexander succeeded to as heir of William, and when we held that the substitutions in the deed of William controlled the succession and ousted him, so far as they were not evacuated by any deed of Alexander, the heir-at-law failed to point out to us that there had been any evacuation of the substitution in so far as concerned the *dominium utile* of the lands now in question. If he had done so, the question which we are now considering would then have arisen, and we should have decided it in favour of the heir-at-law in one shape or other then, just as we are doing at present. What may be necessary in order to put that right in point of form I am sure I do not know. Perhaps an appeal will do; and as this case is not unlikely to go elsewhere at any rate, it can be very easily done in the event of an appeal being taken. But I desire to make this explanation in order that it may be perfectly understood afterwards and elsewhere why our present judgment seems to be in some degree in conflict with the judgment pronounced in the first action.

Mr HECTOR—Your Lordships' judgment of last year was this—"Sustain the objections to the title of the pursuer to sue for reduction of the trust-disposition of the deceased Alexander Dunn, in so far as the same operates as a conveyance of the heritable estate formerly belonging to the deceased William Dunn, and settled by his disposition and settlement, dated 17th April 1830.' Now, I understand that your Lordships are deciding to-day that the *dominium utile* of Boquhanran and the lands in a similar situation are not settled by the disposition and settlement of William, dated 17th April 1830.

LORD JUSTICE-CLERK—Oh no. On the contrary, we are assuming that they are so settled. They are not affected by William's deed now, because the substitution has been evacuated, but they were certainly settled by William. I am afraid that won't avoid the difficulty.

SOLICITOR-GENERAL—I understand your Lordships are deciding against Mr Dunn Pattison that he has no title to sue.

LORD JUSTICE-CLERK—On the contrary, we are sustaining his title to sue.

SOLICITOR-GENERAL—But as regards the *dominium utile?*

LORD JUSTICE-CLERK—We are sustaining his title to sue a reduction of the conveyance of the *dominium plenum.*

SOLICITOR-GENERAL—It has not been argued that he was entitled to reduce to the effect of getting the *dominium directum.* The argument was, that he was entitled to have it reduced so as to get the whole.

LORD JUSTICE-CLERK—It was argued alternatively.

Mr YOUNG—I began my argument by saying that the case with respect to the *dominium directum* was clear, and I endeavoured to state the grounds on which I thought so; and then I went on to maintain that the *dominium utile* having been thrown into it, it followed the other. But I venture to doubt whether your Lordships can make any finding in favour of the heir at law in this process.

LORD JUSTICE-CLERK—Perhaps not. I am anxious to receive any assistance from the bar that they can give me in framing the interlocutor, because it is rather a delicate matter.

Lord COWAN—I have no doubt the parties are willing and anxious to get a final judgment, which shall not be open to any objection in point of form. Now, suppose we had the final judgment to deal with in the whole case, I understand the judgment of the Court to be this, that the combined title of the heir of the superiority and of the heir-at-law are sufficient to set aside the whole of the deathbed deed. But unfortunately the two titles are not before us, and we have disposed of the title of the heir-at-law in his action; and I think it is very desirable that the parties should lay their heads together to devise means by which, without any defect in point of form, we should give full effect to the right which we hold to be in the heir-at-law.

Mr LEE—There are declaratory conclusions, which I think would enable us to put the thing right in point of form.

LORD JUSTICE-CLERK—Our last interlocutor was this—"Repel the objections to the pursuer's title to sue this action as a reduction *ex capiti lecti,* but reserving the second plea in law for James Black, the first plea for John Macindoe, and the second plea for Mrs Boyd and others, so far as these may involve an objection to the title to sue, to be discussed with the pleas on the merits." Now, If I rightly understand, we have got all the merits before us, and the case is in a position for final judgment.

Mr LEE—There are no defences as to the declaratory conclusions.

LORD JUSTICE-CLERK—We can consider these pleas not only as an objection to the title to sue, but as far as they affect the merits of the reduction and the declarator. So far as they involve an objection to the title to sue, observe what they are. James Black says, "The pursuer has no title or interest to challenge the settlement of Alexander Dunn, in so far as regards the *dominium utile* of the lands of Boquhanran, in respect he has no right to or interest therein under the settlement of William Dunn." That makes a clear distinction between the two rights. Then John Macindoe's plea is limited to objection to title to sue, so far as regards the *dominium utile* of Boquhanran; and Mrs Boyd's is the same. Now, we cannot give effect to these pleas, according to the view of the ma-

jority of the Court, *in terminis*, because in regard to the pursuing of this reduction we have the two estates consolidated, and they are one. Alexander conveys them by the deathbed deed as one estate. He cannot convey them in any other way. Mr Dunn Pattison must therefore have a title to sue a reduction of that conveyance, but only to certain effects; and therefore we must make a special interlocutor.

Mr YOUNG—The finding upon that matter of the *dominium utile*—that is, that although the pursuer is *in titulo* to pursue a reduction with respect to the conveyance of the *plenum dominium*, yet it is only to the effect of preventing the alienation of the right to the *dominium directum*—would require to be with reference to the plea to that effect of the heir-at-law only, because the others have no title to state it.

LORD JUSTICE-CLERK—The heir-at-law's pleas don't very well come up to that.

Mr LEE—I think they do. Your Lordships previous interlocutor only dealt, as I understand, with the action as an action of reduction. Now, the action is not only an action of reduction, but of declarator specially applicable to the lands of Boquhanran, both *dominium utile* and *dominium directum*. The defences were held to be defences on the merits, and the plea was reserved.

LORD JUSTICE-CLERK—I see within the fourth subdivision of your first plea there is something that will do. The conclusion of declarator is, that you have good and undoubted right and title. That is far too high; you have merely a claim.

Mr YOUNG—I wish it to be quite under the notice of the Court that I am making no motion for reduction. It is matter of very serious consideration whether Mr Dunn Pattison will avail himself of his title to reduce after the finding of the Court to the effect now stated; and therefore the judgment will be given effect to in findings, if your Lordships please, at present.

LORD JUSTICE-CLERK—Then we had better not proceed farther than as regards the matter of title at present. That makes the interlocutor more simple. It had better bear that we resume consideration of these pleas which were reserved, and also of the defences stated for the heir-at-law, and repel the objection to Mr Pattison's title to sue a reduction of the deed, in so far as it conveys the *plenum dominium* of the lands of Boquhanran and others, but reserving the effect of that reduction in so far as it affects his right to the superiority of the said lands. If the result of your farther consideration were that you withdrew this reduction, then it would be very desirable that nothing should be done at present except the mere dealing with objections to title.

Mr YOUNG—That is really what I meant to suggest to the Court.

LORD JUSTICE-CLERK—Then I think we had better go no farther than that; repel the objections to the pursuer's title to sue a reduction of the deathbed deed in so far as it is a conveyance of the *plenum dominium* of the lands of Boquhanran, to the effect of making good his claim to the superiority of the said lands. I think that makes it safe for everybody.

Mr LEE—In regard to the declaratory conclusions, does your Lordship do anything at all?

LORD JUSTICE-CLERK—No; we cannot go any further unless we are to reduce.

Mr LEE—Then the interlocutor will be so expressed as to enable the heir-at-law still to get a judgment in his favour under the declaratory conclusions as regards the *dominium utile*.

LORD JUSTICE-CLERK—Unless Mr Dunn Pattison withdraws his reduction. He is not asking anything against you at present either under the reductive or declaratory conclusions.

Mr YOUNG—Mr Dunn Pattison was maintaining his right to reduce to the effect of getting the whole subject, the *plenum dominium*. His right to the whole was opposed by both sides; he has succeeded so far as the *dominium directum* is concerned, and he will consider what his farther course will be. I presume it will be the view of the Court to reserve all questions of expenses, so far as not already disposed of.

LORD JUSTICE-CLERK—Yes.

The following interlocutor was pronounced:—

"*Edinburgh, 20th July* 1866.—The Lords having resumed consideration of the cause and heard counsel for the parties on the pleas reserved by the interlocutor of 9th March 1866, and on the defences for the curator of the heir-at-law, repel the objections stated by the defenders to the pursuer's title to sue a reduction of the deathbed deed of Alexander Dunn as a conveyance of the *plenum dominium* of the lands of Boquhanran, the superiority and property of which were consolidated by the said Alexander Dunn during his lifetime, and sustain the title to sue such reduction, but only to the effect of enabling him to vindicate his claim as an heir of provision to the superiority of said lands under the disposition and settlement of William Dunn, reserving in the meantime all questions of expenses not hitherto disposed of.

"JOHN INGLIS, *I.P.D.*

Agents for Pursuer—Dundas & Wilson, C.S.

Agents for Dunn's Trustrees—A. G. R. & W. Ellis, W.S.

Agents for Curator for Heir-at-Law—Murray & Beith, W.S.

Agents for other Parties—John Ross, S.S.C., Webster & Sprott, S.S.C., and Maconochie & Hare, W.S.

OUTER HOUSE.

(Before Lord Jerviswoode.)

GARDNER *v.* M'GAGHAN (*ante* pp. 6, 95).

Expenses—Jury Trial—Abandonment of Action. A pursuer having abandoned an action after obtaining a verdict in his favour, which the Court set aside, granting a new trial, the defender held entitled to full expenses.

The pursuer brought an action against the defender claiming £500 of damages for slander and wrongful apprehension on a charge of theft. The jury, after deliberating for three hours, found for the pursuer by a majority of 11 to 1, and assessed the damages at £10. The defender then moved for a new trial on the ground that the verdict was contrary to evidence, and obtained it, the question of expenses being reserved. The Lord Ordinary fixed the 3d of July for the new trial. Thereupon the pursuer put in a minute abandoning the action, consenting that the result of the second trial, assuming it to have taken place, should be held to be a verdict for the defender, and that the defender should be assoilzied. Each party moved for expenses, the pursuer on the ground that he had been successful in the first trial, and the defender because by his minute the pursuer had confessed himself to be wrong from the commencement, and that the action was one which never should have been brought. The Lord Ordinary pronounced the fol-