any kind in . . . betting . . . shall in any street engage in . . . betting . . .” I had difficulty in seeing how the whole of this transaction could be said to have taken place in the street. I think, however, that if we attend to the facts as stated by the Magistrate the difficulty is solved. It appears from statement 5 that the betting transaction took place in the following way:—“Gibson stood on Quay Road and held up his hand with his betting slip and money to the appellant, who leaned over said fence and extended his arm over said fence and above the *solum* of Quay Road until he reached Gibson's hand, when he took the slip and money from him.” From these facts I think only one conclusion can be drawn, and that is that the offer and acceptance which constituted the betting transaction took place in the street and nowhere else, because the hand that offered and the hand that accepted were both in the street. Mr Watt's argument really amounts to this, that so long as a bookmaker takes care to keep his feet off the street he cannot be prosecuted for betting in a street. I cannot assent to this, and upon the facts as stated in this case my opinion is that the betting transaction took place in a street within the meaning of the statute.

The Court answered the question in the case in the affirmative and dismissed the appeal.

Counsel for the Appellant—Crabb Watt, K.C.—Spens. Agent—James G. Bryson, Solicitor.

Counsel for the Respondent—A. M. Anderson, K.C.—D. P. Fleming. Agent—W. A. Hyslop, W.S

## COURT OF SESSION.

*Wednesday, March* 16.

### FIRST DIVISION.

### HAY *v.* PATERSON.

*Property—Consolidation—Prescription—Possession of Lands for Forty Years on Superiority Title by Party with Personal Title to Dominium utile—Extinction of Personal Title.*

Where a party with a personal title to the *dominium utile* of lands possesses for forty years on a title to the *dominium directum*, the personal title is extinguished by consolidation.

A stood infeft in 1777 in the lands of M, the destination being a simple one. In that year he entered into an antenuptial contract of marriage, in which he disponed the lands to himself and the heirs therein mentioned, subject to the declaration that in the event of the succession opening to females the eldest should exclude the others. No infeftment was ever taken under the marriage contract. A died in 1791 and was succeeded by his eldest son B, who in 1794 acquired the superiority of the lands from the then proprietor, and in 1798 obtained a Crown charter of adjudication and resignation in favour of himself and his heirs whomsoever and assignees, on which in 1800 infeftment followed. B never made up any other title or served himself heir to any of his predecessors. In 1807 B was put under curatory, and remained so till his death in 1868. In 1852 C, his curator, granted in B's name, as superior of the lands of M, a precept of *clare constat* in favour of B, on which B was infeft. C thereafter, as curator foresaid, executed a procuratory of resignation *ad remanentiam* of the said lands in favour of B as superior thereof, which was followed by an instrument of resignation duly recorded. B was succeeded by his grandnephew D, who made up his title by expeding and recording in 1869 a decree of service as nearest and lawful heir in special to B. In this decree the lands were described as in the Crown charter above mentioned. He thereafter granted in his own favour a writ of *clare constat*, which was duly recorded. On D's death a question arose as to whether his two nieces—to whom the succession had opened—were entitled to succeed as heirs-portioners under the destination in the Crown charter of adjudication and resignation, or whether the elder was entitled to exclude the younger in virtue of the destination contained in the marriage contract of 1777.

*Held* that by B's possession for upwards of forty years on his superiority title of the lands of M, consolidation had been effected and his personal title to the *dominium utile* had been extinguished; that the ruling destination therefore was that contained in the superiority title, viz., the Crown charter; and that, accordingly, D's nieces were entitled to succeed equally as heirs-portioners.

*Authorities reviewed—Gray* v. *Smith & Bogle* (1752), M. 10,803, and cases following upon it, *distinguished.*

On 27th January 1909 Miss Amy Charlotte Paterson Balfour Hay, Mugdrum House, Newburgh, Fife (*first party*), and Miss May Marguerite Balfour Hay Paterson, also residing there (*second party*), brought a Special Case for the determination of their rights in the lands and estate of Mugdrum.

The following *narrative* is taken from the opinion (*infra*) of the Lord President:—“John Balfour Hay of Leys stood infeft in 1777 in the lands of Mugdrum. His infeftment proceeded upon a precept of *clare constat* granted by the then superior of the lands, Viscount Stormont, and the destination was a simple one. In that year he entered into an antenuptial contract of marriage, in which he provided and secured and conveyed and disponed the lands to be after mentioned to and in favour of himself, and failing him to the heirs-male to be procreated of the marriage,

whom failing to the heirs-male of his body by any subsequent marriage, whom failing to the heirs whatsoever of the intended marriage, whom failing to his nearest heirs and assignees, but also with and under the provisions and declarations to be inserted in the procuratory of resignation therein contained. By the said procuratory he appointed his procurator to resign the lands of Mugdrum into the hands of the lawful superior for new infeftment in favour of himself, whom failing—and then follows a destination in the same terms as that already quoted, but with the additional declaration that in the event of the succession opening to heirs-portioners the eldest heir-portioner should exclude all others. No resignation was ever made and no infeftment taken in virtue of the conveyance contained in this marriage contract.

"John Balfour Hay died in 1791 and was succeeded by his eldest son David Balfour Hay, who was born in 1779, and who made up no title. In 1794 David Balfour Hay acquired the superiority of the lands from the then proprietor James Thomson, and in 1798 he obtained a Crown charter of adjudication and resignation proceeding upon a procuratory of resignation by a Dr Orme, a predecessor of James Thomson, to which procuratory David Balfour Hay had right by virtue of the disposition of Thomson. Upon this Crown charter infeftment followed in August 1800. The description of the subjects conveyed was in terms practically identical with those used in the original deed granting right to the *dominium utile* of Mugdrum.

"David Balfour Hay possessed the lands until his death in 1868. But he never himself made up any other title or served himself as heir to any of his predecessors. In 1807 he was put under curatory upon the ground that he had been insane in 1804, and he remained insane until his death. In 1852 his nephew, Peter Hay Paterson, his heir-presumptive, who was also his curator, granted, in name of David Balfour Hay as superior, a precept of *clare constat* in favour of David Balfour Hay. David Balfour Hay was infeft on this precept, and Peter Hay Paterson, as his curator, then executed a procuratory of resignation *ad remanentiam*, which was followed by an instrument of resignation which was duly recorded.

"David Balfour Hay was succeeded by his grand-nephew Edmund Paterson Balfour Hay, the eldest son of Peter Hay Paterson. He made up his title by expeding decree of special and general service as nearest and lawful heir in special to David Balfour Hay. This decree was recorded in the Register of Sasines in 1869, the recording being by this time equivalent to infeftment. In this decree the lands are described as in the Crown charter of adjudication and resignation above mentioned. He thereafter proceeded to grant a writ of *clare constat* in his own favour, in which he erroneously stated that David Hay of Leys, who was the elder brother of John Balfour Hay of Leys first-mentioned, was the person last vest and seised in the lands. This writ of *clare constat* was recorded in 1871. Edmund Paterson Balfour Hay thereafter died, intestate and without issue. Upon his death the persons next entitled to succeed were the parties to this case, the daughters of his only and younger brother, who had predeceased him. If the ruling destination of the estate is a simple destination, which is the case if the ruling destination is that contained in the Crown charter of adjudication and resignation of 1798, then they succeed as heirs-portioners. This, however, is resisted by the first party, the elder daughter, who contends that the ruling destination is to be found in the marriage contract of 1777, and that in virtue of it she is entitled to exclude her sister, the younger heir-portioner."

The destination in the Crown charter of adjudication and resignation, dated 5th July 1799, was as follows—"Georgius, &c., omnibus, &c., Sciatis, &c., Dedisse, &c., Dilecto nostro Davidi Balfour Hay (olim David Hay Balfour Armigero de Leys et Randerston et hæredibus quibuscunque et Assignatis hæreditarie et irredimabiliter Terras aliaq. subscribt, vizt. . . . Totas et integras terras de Mugdrum. . . ."

The *contentions of parties* as stated in Case were as follows—"The party of the first part maintains that she is entitled to complete title to the *dominium utile* of said lands and estate by service as heir of provision to the said Edmund Paterson Balfour Hay under the special destination contained in the foresaid marriage-contract between John Balfour Hay and his wife Mrs Katharine Moncrieff or Hay. She maintains that the *dominium utile* was not consolidated with the superiority by prescription, and that the resignation *ad remanentiam* by David Balfour Hay's curator was not a necessary act of administration, and had not the effect of altering the succession to his estate, and that the marriage-contract of 1777 is still the ruling investiture as regards the succession to the said lands and estate of Mugdrum. She further maintains that she, as elder heir-portioner of Edmund Paterson Balfour Hay, is entitled to the superiority of Mugdrum. The second party, on the other hand, maintains (*a*) that in respect that the destination in the marriage-contract of 1777 was never feudalised, and that David Balfour Hay possessed both the superiority and *dominium utile* of the lands of Mugdrum for more than forty years after 30th August 1800 under and in virtue of the Crown charter of adjudication and resignation of 1798 and under no other title, the superiority and *dominium utile* were thereby consolidated, that the investiture contained in said charter thereby became and still is the ruling investiture, and that accordingly the second party is entitled to the said lands along with the first party as heirs-portioners; or otherwise (*b*) that in respect of the resignation *ad remanentiam* of 1852, the destination in the marriage-contract was evacuated, and the destination in the Crown Charter of 1798 became and still is the ruling investiture, and that accordingly the second party is entitled to the said lands along with the first party as

heirs-portioners. (c) In any event, that the destination in said marriage-contract affects only the *dominium utile* of said lands, and that the second party is entitled along with the first party to the superiority thereof as heirs-portioners."

The *questions of law* were—"1. Is the party of the first part entitled to the *dominium utile* of said lands and estate of Mugdrum as heir of provision of Edmund Paterson Balfour Hay under the marriage contract entered into between John Hay Balfour (afterwards John Balfour Hay) and Katharine Moncrieff on 15th August 1777? Or 2. Are the first and second parties hereto entitled to the said estate as heirs-portioners of the said Edmund Paterson Balfour Hay? Or 3. In the event of the first question being answered in the affirmative, are the first and second parties entitled to the superiority of the said lands as heirs-portioners foresaid? Or is the first party, as elder heir-portioner, entitled to the undivided superiority."

Argued for the first party—(1) The ruling destination was that contained in the marriage-contract of 1777. *Esto* that there had been possession on the superiority title for more than forty years there had been no consolidation, for consolidation did not operate *ipso jure*. That being so, and there being no indication of intention on the part of David Balfour Hay to extinguish the personal title by which he also held the lands, the destination in the marriage-contract remained effective—*Smith and Bogle* v. *Gray*, (1752) M. 10,803, 2 Ross' L.C. (L.R.) 577; *Durham* v. *Durham*, (1802) M. 11,220, 2 Ross' L.C. 582, 5 Pat. App. 482; *Zuile* v. *Morrison*, March 4, 1813, F.C., 2 Ross' L.C. 591; *Ogilvy* v. *Erskine*, May 26, 1837, 15 S. 1027; *Earl of Glasgow* v. *Boyle*, January 28, 1887, 14 R. 419, 24 S.L.R. 329. D. B. Hay could have evacuated the destination in the marriage-contract without making up a title—it was sufficient that he possessed on apparency—*Edgar* v. *Maxwell*, 1736, M. 3089, 2 Ross' L.C. 596. (2) The resignation *ad remanentiam* by D. B. Hay's curator did not alter the succession to his estate, for no act of a curator could alter the order of his ward's succession—*Ross* v. *Ross' Trustees*, (1793) M. 5545; *Kennedy* v. *Kennedy*, November 15, 1843, 6 D. 40; *Moncrieff* v. *Miln*, July 16, 1856, 18 D. 1286; *Macqueen* v. *Tod*, July 6, 1899, 1 F. 1063, 36 S.L.R. 854. (3) The first party as elder heir-portioner was entitled to the superiority of the lands in question—Stair, iii, 5, 11; Ersk. Inst., iii, 8, 13; *M'Neight* v. *Lockhart*, November 30, 1843, 6 D. 128.

Argued for the second party—(1) The question was settled by authority in the second party's favour—*Walker* v. *Grieve*, February 27, 1827, 5 S. 442 (469), 3 Ross' L.C. 577; *Lord Elibank* v. *Campbell*, November 21, 1833, 12 S. 74, 3 Ross' L.C. 534; *Wilson* v. *Pollok*, November 29, 1839, 2 D. 159, 3 Ross' L.C. 571. The only title to which D. B. Hay's possession could be ascribed was the Crown charter, for the marriage-contract was never feudalised. Under the Crown charter and sasine thereon he was infeft in (a) a new and distinct property never held by the grantor of the marriage-contract, viz., the *dominium directum*, and (b) the *dominium utile*, and where, as here, possession had followed for forty years, these were thereby consolidated. (2) *Alternatively*, the second party maintained that the act of the curator in 1852 was a valid act of administration sufficient to evacuate the destination in the marriage-contract. (3) The contention of the first party on this point was admitted.

At advising—

LORD PRESIDENT— . . . [*After narrative ut supra*] . . . The argument for the first party is admittedly founded upon a series of old cases, of which the first is *Gray* v. *Smith & Bogle*, June 30, 1752, Mor. 10,803, which will all be found in the second volume of Ross' Leading Cases—Land Rights. The general doctrine to be deduced from these cases is well put by Mr Ross in his head-note to the whole series of the cases, and I am content to take it as accurately expressing the law as decided. It is as follows—"Where a party has a right to lands as heir under the last investiture, and has also right under a personal title, and both titles are unlimited, the personal title is not extinguished by the party neglecting it and completing a title under the investiture, and the succession to the lands continues to be regulated by the personal title." Whether this ought ever to have been so decided is open to considerable doubt. More than one learned Judge has expressed his regret that it was so—*e.g.*, Lord Gillies in *Lord Elibank* v. *Campbell* and in *Zuille* v. *Morrison*, Lord President Hope in *Zuille* v. *Morrison*, and Lord Corehouse and Lord Mackenzie in *Ogilvie* v. *Erskine*. Indeed its fate bears a strong family resemblance to that of the even better known case of *Frog's Creditors*, which, consistently followed and always regretted, has been carefully guarded against the slightest possible extension. It is well, therefore, to see what the underlying principle of the doctrine as stated by Mr Ross really is in order to ascertain whether it may properly be applied in a case like the present.

I think the doctrine will be found to rest on two propositions. The first is that anyone who claims as a gratuitous taker from an ancestor or predecessor in respect of a particular subject is bound by that ancestor's or predecessor's obligations in regard to that subject. Let us take the most simple case; and, as is always necessary for lucidity, let us take it apart from the abbreviations and alas! mystifications of modern conveyancing. A is infeft in a property which he holds of a superior, the destination being to a certain series of heirs specified in the title. A executes a conveyance in favour of himself and a series of heirs which is the same in the earlier branches as in the existing destination, but afterwards calls a different set of heirs. A dies and is succeeded by his eldest son, who is equally the first called under both destinations. Let us suppose that

the son makes up no title at all, a quite possible occurrence if the holding is blench and the entry of heirs equally so. He in his turn is succeeded by his eldest son, who again makes up no title, and so on till at last by failure of issue the time arrives when the claimants for the estate are different persons, B and C, who are entitled to succeed according as the ruling destination is held to be the old destination of the last infeftment, viz., A's, or the destination contained in A's conveyance. Now in this case the property is still in the *hæreditas jacens* of A. If therefore B were to serve as heir under the old destination he would immediately become bound by the obligations of his ancestor—that is to say, he would have to allow the property to go according to his ancestor's deed—and accordingly on the ground of *frustra petis quod mox restituturus es* such a service could never prevail as against a service by B as heir of provision. Indeed the most striking example is given in the case where the disposition is without feudally executory clauses, *i.e.*, without a procuratory, in which case C might charge B to enter as heir simply in order to give him the executory clauses necessary to get a warrant for new infeftment in terms of the new destination from the superior. As a matter of fact, however, though possible, it is not at all likely that persons will lie out for many years without infeftment, and the most of the cases have therefore occurred where the successive takers have made up their titles by service or precept of *clare constat* under the old investiture, neglecting the personal title under which they had the ruling right.

And this brings us to the second proposition, viz., that making up a title by service or precept of *clare* is not a habile mode of evacuating a destination, and that prescription will not be held to apply to such a case when there is no obvious reason (such as a preference for an unlimited, *i.e.*, a fee simple as against a limited, *i.e.*, fettered title) why possession should be ascribed either to the infeftments upon the retours or the precepts rather than to apparency under the personal title. This is the step which is probably to be regretted, and we may share the doubt of Lord Gillies whether it would not have been better to have held that a man intended his estate to go according to the investiture which he took up; and that by making up titles under a particular investiture he changed the destination of all others. There, however, it stands, but it will be seen that all this has to do with the question of a proper double title to the same subject, *i.e.*, in all the decided cases the *dominium utile* of the lands.

Now here there is no case of a double title to one subject, but there was a title to the superiority in virtue of the Crown charter of 1798 and infeftment thereupon, and there was apparency in respect of the *dominium utile*, which apparency may be considered either as referable to the destination contained in the old infeftment prior to 1777 or as referable to the destination contained in the marriage-contract of 1777. If the contest had been between the heirs called by these two destinations as such, then the old double title cases would be applicable in terms. But there is no such competition. The second party claims here not in virtue of the old pre-1777 destination of the *dominium utile*, but in virtue of the Crown charter of 1798. The only question therefore is, has there or has there not been consolidation; and I think this question is settled both by principle and by authority. In very ancient times the *dominium utile* being regarded as a mere burden on the *dominium directum* could be, like other burdens, simply extinguished by renunciation or discharge. But long ago the *dominium utile* came to be regarded as a proper and separate feudal estate, and it followed from that that although the property and the superiority came into the same hands, consolidation was not effected *ipso jure*. The appropriate method of effecting consolidation was by resignation *ad remanentiam*. But at the same time it was, I think, always recognised that prescription would produce the same result. Accordingly I find that Bell in his Principles, section 821, expresses himself thus—"The two estates of superiority and vassalage are sometimes vested separately in the same person. It was long contended that the absurdity of a man being his own vassal necessarily inferred, *ipso jure*, a consolidation of estates thus circumstanced. But this subtilty has been fully refuted, and there is an end to all these doubts and questions. Consolidation of the two estates separately vested can be directly accomplished only by resignation *ad remanentiam* in the proprietor's hands as his own superior. But if on a title to the superiority (which correctly is constituted by sasine in the lands) there has been possession for forty years, it has been held to work off the base infeftment in the property, and so to consolidate the two estates—a most important qualification of the general doctrine."

The earliest authority on the point is the case of *Bruce of Arnot* v. *Bruce-Carstairs* in 1770, Mor. 10,805, affirmed in the House of Lords, 2 Paton 258. It is true that, as in that case the competition was between an heir under the unentailed superiority and an heir under the entailed *dominium utile*, it has been sought to explain it upon the principle of the free title prevailing against the fettered, and such is the view taken of it by Duff in his Feudal Conveyancing. A perusal of the report given in Hailes' Decisions raises considerable doubt in my mind as to whether the *ratio decidendi* given in Morison was the true one—the interlocutor in it being right on either view. But it matters little, as the point came up again in a case where there was no competition between free and fettered titles, viz., *Walker* v. *Grieve*, 5 S. 469, which was decided on the pure ground that possession on a superiority title where a possible *dominium utile* title had been disregarded, was a good title to the lands themselves and operated consolidation;

and the opinions of Lord Balgray and Lord President Hope, though very short, are much to the point.

The non-applicability of the question of free *versus* fettered titles to such cases was still more strikingly illustrated by the case of *Lord Elibank* v. *Campbell*, 3 Ross's Leading Cases, p. 534, 12 S. 74, where the effect of the consolidation was to bring a parcel of lands within the fetters of an entail when if they had been allowed to stand on the *dominium utile* title they would have remained in fee-simple. It is true that this case was not *inter hæredes*, but the same doctrine was applied *inter hæredes* in a subsequent case of *Bontine* v. *Graham*, 3 Ross's Leading Cases, p. 568, 15 S. 711, and the general doctrine is nowhere more clearly put than by Lord Corehouse in his note to his interlocutor in that case. He says—"The *dominium directum* of these lands had been in the family of Gartmore for a long period. In the year 1708 Robert Graham of Gartmore acquired the *dominium utile*, and both it and the *dominium directum* were possessed by him and his successors for a period of more than forty years before the entail was executed by his descendant Nicol Graham. According to a fundamental and most expedient principle in our law of conveyancing, a consolidation of the superiority and property was thus effected." The judgment was affirmed in the House of Lords.

The same point also arose in a case a little earlier—*Wilson* v. *Pollok* (3 Ross's Leading Cases 571, 2 D. 159)—and judgment was given in the same way. It was a case of objections being taken to a profered title, and in the judgment he delivered Lord Mackenzie said that he was puzzled to reconcile the cases of *Lord Elibank* and *Bontine* with those of *Smith* and *Durham*, and he goes on to say that he proposes to limit the doctrine of consolidation to the case where the two fees stand destined throughout to the same series of heirs. He says that he got this idea from the remarks of Lord Gillies in a former case. Now this observation is only *obiter*, and is not involved in the judgment, and with full respect to such an eminent authority as Lord Mackenzie I think his view is not only utterly unsupported by authority, but also that for the moment he had lost sight of the difference between the two classes of cases. For so far from countenancing the idea, Lord Gillies had been at pains to explain the difference in his opinion in *Elibank*, an opinion which he reincorporates by reference in this very case. In the case of *Elibank* he had in his opinion, after stating that he regretted the tenor of some of the decisions and referring to the case of *Bald*, in which it had been held that consolidation was not effected *ipso jure*, expressed himself thus—"I therefore consider that the case of *Bald* is not an authority against the doctrine that consolidation is effectual where a course of prescription has run upon titles containing the lands out and out, *tanquam optimum maximum*, while a prior subaltern right has remained entirely neglected. And I know of no decision against that doctrine"; and then he goes on with a very racy commentary upon some of the Judges who thought they knew the true principles of the feudal law better than Lord Stair and the older lawyers. Lord President Hope agreed with Lord Gillies. I am not, therefore, surprised to find that Ross, at the end of his chapter on Prescription on Double Titles, has the following comment—"In practical conveyancing the principle that a base fee may be extinguished by possession for forty years on a title to the superiority where both the *dominium utile* and the *dominium directum* are vested in the same party, is so important that it may be doubted whether the suggestion of Lord Mackenzie in the case of *Wilson* v. *Pollok* ought to be adopted. It may be inconsistent with the nature of prescription to allow that principle of law to be applied to such cases at all; but if it is to be applied it may be doubted whether its application should be restricted to the case where the heirs under the two titles are the same. The better course would seem to be to allow prescription to effect a consolidation of the property with the superiority in every case, whether the heirs under the two titles are the same or different."

With that opinion I agree, and I therefore think that in this case by forty years' possession on the Crown charter from 1800, when infeftment was taken, David Balfour Hay acquired a good prescriptive title to the lands, and that all rights under the personal unfeudalised title which might have been made up by him under the marriage-contract became extinct. The result is that the contention of the second party must be upheld.

Had it been otherwise I could not have given any effect to the attempted conveyancing of 1852 by the curator, for it is clear that no act of the curator could affect the succession to the lands. But as it was, it was inept, consolidation having taken place before that date.

LORD JOHNSTON and LORD SKERRINGTON concurred.

LORD M'LAREN and LORD KINNEAR were absent.

The Court answered the first question of law in the case in the negative, and the second question in the affirmative, and found it unnecessary to answer the remaining questions.

Counsel for First Party — Blackburn, K.C.—Chree. Agents—Russell & Dunlop, W.S.

Counsel for Second Party — Fleming, K.C.—Hon. W. Watson. Agents—J. & F. Anderson, W.S.