[Heard, *May* 21, 1840. — Judgment, *Sept.* 23, 1841.]

(No. 17.) SIR JAMES GIBSON CRAIG, Bart., Appellant.

[*Lord Advocate.*]

SIR THOMAS JOHN INGLIS COCHRANE, Knight, Respondent.

[*Follett — Walker.*]

Service of Heirs. — Proceedings in a service held to shew that it was expede by the party, as an heir of entail, and not of line merely.

Superior and Vassal. — *Titles.* — The title of a vassal made up by entry with the party, appearing by his infeftment upon the record to be the superior, will not be affected by any defect in the title of such superior, as in a question between the vassal and other parties claiming the dominium utile, as never having been vested in the vassal, in respect of such defect in the superior's title, — more especially if the vassal have charged all parties to enter as superior, and none appeared to challenge the entry of the party with whom he entered.

Fiar and Liferenter. — *Superior and Vassal.* — A superior uninfeft may competently dispone the superiority in liferent, with power to the disponee to enter vassals, and an entry by the liferenter, given in exercise of the power, will be valid and effectual.

Titles — Accretion. — Decree at the instance of a superior reducing an infeftment taken upon a precept in a crown charter, as in contravention of an entail, and declaring the infeftment of the party pursuer, taken upon the same precept, as the only good title, will draw back to validate a precept of clare constat, previously given by the pursuer, and the vassal's infeftment upon it.

1st DIVISION.

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Statement.

THIS was a competition of titles in regard to the lands of Murdieston, between the appellant, as adjudging creditor of Dr Ramsay, heir general and of line to Alexander Inglis, the maker of an entail in 1719, and the respondent, as heir of entail under a deed executed in 1802, by one of the substitutes under the entail of 1719.

Alexander Inglis, the original entailer, was proprietor in fee-simple of the lands of Murdieston, which were held by him in feu of the Duke of Hamilton. On the 12th February, 1719, Inglis executed an entail of the lands in favour of his nephew, Alexander Hamilton, and the heirs-male of his body, and a series of substitutes; and failing them, his nearest and lawful heirs and assignees whomsoever,—the eldest heir-female succeeding without division. This entail did not contain any prohibition against altering the order of succession. One of its conditions was, that the heirs should assume the name of Inglis.

On 9th May, 1719, Alexander Hamilton Inglis, the institute, took up the estate by infeftment upon the precept in the deed of entail, and by charter of adjudication in implement from the superior, the Duke of Hamilton. After this, Alexander Hamilton Inglis died, leaving four sons, Alexander, Gavin, James, and Walter.

On the 4th May, 1772, Alexander, (second,) was infeft in the entailed lands upon a precept of clare constat from Douglas, Duke of Hamilton.

On 6th August, 1772, Douglas, Duke of Hamilton, with the view of taking advantage of the 20 Geo. II. cap. 50, empowering heirs of entail to sell the superiorities of their lands to their own vassals, granted a procuratory of resignation in favour of himself, and there-

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upon expede a charter of resignation under the great seal, of the lands held by him, including Murdieston, in favour of himself and the heirs in the entail of the dukedom, under the fetters of that entail.

On 21st September, 1772, the commissioners of Duke Douglas disponed the superiority of Murdieston to the vassal, Alexander, (second,) his heirs and assignees, and assigned to them the procuratory, as yet unexecuted, in his grace's crown charter.

On 24th September, 1772, Alexander, (second,) while yet uninfeft upon the Duke's disposition, conveyed the superiority of one half of Murdieston to his brother, James, in liferent, and to the Duke of Hamilton in fee, "with full power to the said James Hamilton, during "his life, to enter and receive all vassals in the said "lands, and receive the composition due by law there-"for, fully and freely in all respects, without the con-"sent of the said Duke and his said foresaids, the fiar "of the said lands." This conveyance assigned the crown charter of 6th August, 1772, and the precept therein.

On the same day, 24th September, 1772, Alexander, (second,) disponed the superiority of the other half of Murdieston to his brother, Walter, in liferent, and the Duke in fee, with the same power as in the other conveyance to James and the Duke. James and Walter were both infeft upon the precept in the crown charter of 6th August, 1772, by virtue of the assignations of that charter in their respective dispositions,—the instruments of sasine merely noticing the above power in setting out the disposition in which it was contained.

On the death of Alexander, (second,) without issue, his immediate younger brother, Gavin, obtained a precept of clare constat from his brother James, the liferent

superior of one half of Murdieston, and from Douglas, Duke of Hamilton, the superior in fee of the other half, — Walter Inglis, the liferent superior of this half, being dead at this time,—and took infeftment upon this precept.

On the death of Douglas, Duke of Hamilton, his successor, Duke Archibald, made up his titles by general service to Duke Douglas in March, 1801, and by infeftment upon the precept in the charter of 6th August, 1772, as if still unexecuted. This infeftment was taken on 23d March 1801.

On the 14th March, 1802, Gavin Inglis having died without issue, his brother, James, who had resumed his original family name of Hamilton in conjunction with that of Inglis, "as immediate lawful superior in the "liferent of the lands and others after mentioned, with "power to enter and receive all vassals in the said "lands, and receive the composition due therefor, con- "form to disposition and assignation in favours of me "in liferent, and to the deceased Douglas, Duke of "Hamilton and Brandon, his heirs or assignees, in "fee, granted by the also deceased Alexander Inglis, "formerly of Murdieston, dated the 24th day of Sep- "tember, 1772 years, and our infeftment following "thereon, dated said 24th of September," granted a precept of clare in favour of himself, as immediate younger brother to Gavin Inglis, "and nearest and "lawful heir of tailzie to him in the said lands and "others foresaid," for infefting himself in that half of the lands of Murdieston of which he was liferent supe- rior; "but allwise with and under the provisions, clauses "irritant and resolutive" in the entail of 12th Feb- ruary, 1719, which were especially set forth. Under this precept he was duly infeft on 14th June, 1802.

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On the 15th June, 1802, James Inglis Hamilton, as heritable proprietor of that part of the lands in which he had been infeft, and as heir-apparent to Gavin as to the other part, executed a new entail of the lands in favour of his own natural son, James Hamilton, and the heirs-male or female of his body; whom failing, to the respondent's father, Sir Alexander Inglis Cochrane, and the heirs-male of his body, and a series of substitutes, thereby altering the destination from that contained in the original entail of 12th February, 1719. By this deed the granter bound himself to procure himself infeft in that part of the lands which he held only in apparency, and thereafter to infeft the disponees. The warrandice in this deed was personal from fact and deed only.

With the view of completing his title according to the above obligation, James procured a brieve for serving him heir "in special and of line" to his brother Gavin, which was duly retoured on 7th September, 1802, — the retour bearing, that Gavin Inglis died last vest in the lands, — "Sed cum et sub provisionibus, "declarationibus, clausulis irritantibus et resolutivis, "inibi contentis, et in dispositione et Tallia per demor- "tuum Alexandrum Inglis de Murdiston, in favorem "etiam defuncti Alexandri Inglis alias Hamilton, ejus "patris, et aliorum hæredum inibi mentionat. de data "duodecimo die mensis Februarij, anno domini mille- "simo septingentesimo et decimo nono et in cartis et "Infeofamentis desuper sequen. et non aliter, viz." &c. "Et quod dictus Jacobus Inglis Hamilton est imme- "diate junior frater germanus dicti Gavini Inglis "Hamilton defuncti, et propinquior et legitimus hæres "Talliæ illi in terris et alijs suprascript."

James Inglis then, in ignorance that Duke Archibald had been already infeft in the superiority, raised and

executed letters of horning against Lord Stanley, the heir of line of Duke Douglas, the commissioners of Duke Douglas, and Duke Archibald, setting forth, that he had been served "heir in special and of line" to his brother, Gavin, in the lands of Murdieston, and charging them to procure themselves infeft, and thereafter to grant precept for infefting him.

Duke Archibald made up his titles as heir-male and of tailzie to Duke Douglas, and on 27th November, 1802, granted a precept of clare constat for infefting James Inglis Hamilton, which bore, that "Gavin Inglis "Hamilton, Esquire, last of Murdieston, brother of "my lovite, General James Inglis Hamilton, now of "Murdieston, bearer hereof, died last vest and seased," &c.; "but with and under the provisions, declarations, "clauses irritant and resolutive after-mentioned, and "contained in a disposition and tailzie of the five-pound "land of Murdieston, comprehending the lands afore-"said, by the deceased Alexander Inglis of Murdieston, "in favours of the also now deceased Alexander Inglis, "alias Hamilton, and the other heirs therein mentioned, "dated the 12th day of February, 1719, and no other-"ways, viz." (Here followed the conditions of the entail.) "And that the said James Inglis Hamilton, "bearer hereof, is the immediate younger brother of "the said deceased Gavin Inglis Hamilton, and nearest "lawful heir to him in the foresaid lands, conform to "his special service," &c., and directed infefment to be given to James Inglis Hamilton "as heir aforesaid."

James Inglis Hamilton expede infeftment upon this precept. The instrument of sasine bore date the 29th November, 1802, and was duly recorded in the particular register of sasines; but the certificate of registration on the instrument bore to be dated in the year "seven-

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teen hundred and eighty-two." The instrument was, however, docqueted thus, in the handwriting of the person by whom the body of it had been written:—

"Dated 29th Nov.
"Regist. 2d Dec. } 1802."

And the minute-book of the keeper of the register and the record itself, both bore entries of the sasine, of the date 2d December, 1802.

In 1803, James Inglis Hamilton, the maker of the new entail of 15th June, 1802, died, and was succeeded by his son, James Hamilton, who made up titles under that entail, by taking infeftment upon the precept in the deed. James Hamilton died in 1815, without issue, and was succeeded by Sir Alexander Inglis Cochrane, the next substitute, who, on 10th November, 1815, made up his title by service, as heir of tailzie to James Hamilton, and charter and confirmation of James's infeftment, and precept of clare constat from Archibald, Duke of Hamilton, and by infeftment upon this precept.

In February, 1832, Sir Alexander Inglis Cochrane died, and was succeeded by his eldest son, the respondent, who made up his title, by precept of clare constat, as heir-male and of tailzie to his father, and by infeftment thereupon.

The title to the superiority of the lands stood thus:

In 1796, Douglas, Duke of Hamilton, had conveyed the whole real estate of which he should die possessed in favour of certain trustees, for behoof of Mrs Westenra and Mrs Esten. On his grace's death, the trustees divested themselves by conveyance to these ladies; and thereafter Mrs Westenra and Mrs Esten entered into a contract with Sir A. Inglis Cochrane for a sale to him of the superiority of Murdieston, as comprehended under Duke Douglas's conveyance to the trustees.

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In 1801, Archibald, Duke of Hamilton, as formerly mentioned, made up his titles under the entail of the dukedom. This he did by serving himself heir-male of tailzie and provision in general to Duke Douglas, and by taking infeftment upon the crown charter to Duke Douglas, dated 6th August, 1772, as if that precept had been still unexecuted.

Duke Archibald then brought an action against the trustees under Duke Douglas's conveyance in 1796, Mrs Westenra, Mrs Esten, Lord Stanley, as the heir of line of Duke Douglas, and Sir Alexander I. Cochrane, concluding for reduction of Duke Douglas's disposition to Alexander Inglis, of 21st September, 1772, of Alexander Inglis's dispositions to James and Walter Hamilton, of 24th September, 1772, respectively, and the infeftments which followed thereupon, and of Duke Douglas's trust-disposition of 1796, and the conveyance by the trustees, and the contract between Mrs Westenra and Mrs Esten, upon the ground, that the charter of resignation expede by Duke Douglas, and the conveyance by him to Alexander Inglis, were not in conformity to the provisions of the statute under which they professed to be executed.

In May, 1817, the Lord Ordinary repelled the defence of prescription founded on the infeftment of 24th September, 1772, in favour of the late Duke of Hamilton, sustained the reasons of reduction, "and reduced, "retreated, rescinded, cassed, and annulled, and here- "by reduces, retreats, rescinds, casses, and annulls "the foresaid disposition made and executed by "the said Duke and his commissioners, particularly "before narrated, with the whole conveyances thereof, "and instruments of sasine, and other deeds that have "since followed thereon, the foresaid trust-disposition,

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" in so far as concerns the said lands, and the said con-
" tract entered into, and disposition granted or to be
" granted in favour of the said Sir Alexander Forrester
" Cochrane, and any charters or infeftments to follow
" thereupon, and decerned and declared, and hereby
" decern and declare, the same to have been from
" the beginning, and to be now, and in all time
" coming, void and null, of no avail, force, strength, or
" effect in judgment or outwith; that although the
" aforesaid disposition appears to have been granted
" under the foresaid Act of Parliament, yet the foresaid
" Alexander Inglis, the vassal, having executed disposi-
" tions of the superiorities so conveyed to him, in favour
" of the persons above narrated, in liferent, and to the
" said Duke, and his heirs and assignees whatsoever, in
" fee, the simulate and collusive nature of the transactions
" above libelled is from thence apparent; and the said
" dispositions and infeftments taken in favour of the said
" Duke, and his heirs and assignees, in fee, can transfer
" no real right or interest in the foresaid lands and
" superiorities to his said trustees and heirs whatsoever,
" or those deriving right from them, but the said
" infeftments must be held to have been taken in favour
" of the said Duke and his heirs of entail, in respect
" they proceeded upon the foresaid disposition by him
" to his vassal, and reconveyance by him to his grace,
" and assigned to him the unexecuted precept of sasine
" contained in the foresaid charter of resignation under
" the great seal, of the estate and dukedom of Hamilton,
" comprehending the lands and others above described,
" in favour of his grace, and the heirs-male of his body,
" whom failing, the other heirs of tailzie specified and
" contained in the foresaid deed of entail made and
" executed by the said William and Anne, Duke and

" Duchess of Hamilton, but always with and under the
" conditions, provisions, restrictions, reservations, clauses
" irritant and resolutive, contained in the said deed of
" tailzie, and in the foresaid charter itself, in favour of
" the said Duke; and found and declared, and hereby
" find and declare, that the pursuer has now the only
" good and undoubted right and title to the estate and
" dukedom of Hamilton, comprehending therein, among
" others, the lands and superiorities before narrated,
" notwithstanding the said nominal and fictitious aliena-
" tions thereof, and to uplift the rents, maills, feu-duties,
" and casualties of superiority due by the vassals in
" the said lands from and since the term of Whitsunday,
" 1799, when his entry to the said estate commenced,
" upon the death of the said Douglas, Duke of Hamilton
" and Brandon, his predecessor, and that none of the
" said defenders ever had any right or title to any part
" of the said rents and duties, and that the titles before
" narrated of the said pursuer, viz. the said charter of
" resignation of the said lands and dukedom, in favour
" of the said Douglas, Duke of Hamilton and Brandon,
" and his heirs of entail, dated the 6th day of August,
" 1772, with the retour of the pursuer's general service
" as heir-male and of tailzie to him, dated the 11th of
" March, 1801, and the instrument of sasine following
" upon the precept contained in the said charter, and
" on the said retour in the pursuer's favour, dated the
" 23d day of March, and registered the 14th day of
" April, 1801, form and constitute the only good right
" and title to the said lands and dukedom, comprehend-
" ing the whole lands and superiorities above narrated,
" notwithstanding the fraudulent and fictitious aliena-
" tions thereof before specified."

Successive representations by Sir Alexander Cochran

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among others were presented against this interlocutor, and refused. Ultimately a petition to the Inner House was presented, to which answers were boxed on the 10th September, 1818, in the name of the pursuer, Duke Archibald.

On the 16th February, 1819, Duke Archibald died, and was succeeded by Duke Alexander.

On 9th June, 1819, the defenders, Sir Alexander Cochrane and Miss Hamilton, gave in a note in the following terms: — "The defenders have now resolved "to acquiesce in Lord Pitmilly's interlocutor, and to "withdraw from farther litigation upon the question. "This they feel it their duty to state to your Lordships, "to prevent the Court having the trouble of perusing "the petition and answers, and that your Lordships "may strike the case from the roll, as it stands for "advising upon Tuesday, the 15th of June current."

On the 10th of June, 1819, the Court appointed the cause to be struck out of the roll, as prayed for. On the 11th, the cause was put to the roll, when, as alleged by the respondents, a minute was put in, stating, "that "since the cause had come into Court, and the answers "had been boxed, his grace the late Archibald, Duke "of Hamilton and Brandon, had died," and craving leave to sist his grace Alexander, now Duke of Hamilton and Brandon, his eldest son, as the party pursuer, in place of his father, deceased, and that the action might proceed, and decree be pronounced in his name.

On 11th June, 1819, "the Lords having advised this "petition, additional petition, answers thereto, and a "note for the petitioners, of consent adhered to the "interlocutor complained of, and refused the desire of "both petitions."

This decreet was extracted, and a regular extract

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produced in this process, which bore, — " In the course " of which action the pursuer, Archibald, Duke of " Hamilton and Brandon, having died, his grace Alex- " ander, now Duke of Hamilton and Brandon, sisted " himself as pursuer of said action, conform to minute " in process."

The appellant in the present case, however, alleged, that Duke Alexander was not served heir to Duke Archibald until 14th February, 1820; that the minute stated by the respondents to have been lodged on the 11th June, 1819, was indorsed as of the year 1820; that the decree was extracted in January, 1820; and that the extract shewed on its face, and various parts, that it was originally an extract of a decree in favour of Duke Archibald, and had been altered so as to make it a decree in favour of Duke Alexander.

With the view of obviating any objection to the decree on these grounds, Duke Alexander brought an action, concluding for reduction of the decree and extract, to the effect of enabling him to waken and revive the original action, and bring the same to a conclusion, and to obtain decreet therein anew.

In this action, the Court, on 10th July, 1835, " wakened and transferred in terms of the conclusions " of the libel, conjoined the action with the original " action of reduction, and of new having advised the " petition and additional petition given in in said ori- " ginal action, with the answers thereto, and note for " the defenders, adhered to the interlocutor complained " of in the said petitions, and refused the desire thereof."

Thus stood the title to the superiority of the lands.

In January, 1819, Dr Ramsay, as heir of line of the original entailer of the lands of Murdieston, commenced a series of attempts to disturb the title of Sir

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Alexander Cochrane, the heir in possession under the new destination of 1802, in all of which he was unsuccessful.

Finally, on the 22d May, 1833, he procured himself to be served heir general and of line to Alexander Inglis, the maker of the entail of 12th February, 1719. In that character, the appellant, Sir James Gibson Craig, adjudged from him the lands of Murdieston, upon a trust bond, and then brought the action which was the subject of this appeal, concluding for reduction, 1st, Of the precept of clare by James Inglis Hamilton, of 14th March, 1802, and sasine following thereon. 2d, The retour of James Inglis Hamilton's service of 7th September, 1802, and the brieve whereon it proceeded. 3d, The precept of clare constat by Duke Archibald, in favour of James Inglis Hamilton, of 27th November, 1802, and sasine following thereon. 4th, The deed of entail executed by James Inglis Hamilton on 15th June, 1802, and sasine following thereon. 5th, The retour of Sir A. Cochrane's service of 10th November, 1815. 6th, A charter of confirmation and precept of clare constat by Duke Alexander in favour of Alexander Cochrane, of 21st July, 1820, and sasine following thereon. And 7th, A precept of clare constat by Duke Alexander, on 27th February, 1832, in favour of the respondent, and sasine following thereon; and to have it declared, that the titles called for did not constitute any valid title to the lands of Murdieston; and that the right to the same was still in hæreditate jacente of Gavin Inglis Hamilton; and that the appellant, in virtue of his decree of adjudication, had the only right to the lands.

After hearing parties upon the summons and defences, and condescendence and answers, the Lord Ordinary ordered cases to be boxed to the Inner House; and the

Court, after a hearing in presence on the 10th July, 1838, pronounced an interlocutor, assoilzieing the defenders. Against this interlocutor the appeal was taken.

Appellant's Argument.

The Appellant. — I. In regard to that portion of the lands of Murdieston, the superiority of which was conveyed by Alexander Inglis to James Inglis Hamilton in liferent, and Duke Douglas in fee.

1. The title made up by James Inglis Hamilton upon his own precept of clare constat was void, because he was merely a liferenter by constitution, who, as such, has not power to enter vassals. The power to this effect given to him by the conveyance of Alexander Inglis's disposition and assignation of 24th September, 1772, was a mere nullity, and could not confer any right which a liferenter could not by law enjoy. Alexander Inglis was not infeft in the superiority, he had a mere personal right; he could not therefore himself have entered vassals, and still less could he confer power upon another to do it. Ersk. II. 9, 42; Mack. II. 9, 38. But even if Alexander Inglis had been infeft, a superior cannot separate the power of entering vassals from the dominium directum, which would be the necessary effect, if such a power, given to a liferenter, were to receive support, as a liferenter, unless by reservation, has not any estate in the dominium, but possesses a mere burden upon it, for the enjoyment of the yearly fruits. Stair, II. 6, 1; Ersk. II. 9, 39. Moreover, the gift of the power, whatever its character be, does not appear in the conveyance until the clause assigning the writs. The power, therefore, given by A. Inglis to James I. Hamilton, could operate, at most, only as a mandate or commission, Ersk. II. 3, 23, and was necessarily limited to the life of the granter, whereas it had been exercised

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by James I. Hamilton after Alexander Inglis had died. Still farther, even if the power did not fall by the death of A. Inglis, it could only be exercised as in his name, whereas the precept of clare constat by James I. Hamilton was made as plenus dominus in his own right. But moreover, the infeftment of James I. Hamilton, though it states narrativè the power in Alexander Inglis's disposition, makes no mention of the power expressly, as conferring any authority for the act about to be done, neither does it bear that sasine was given in respect of it.

2d, The crown charter of 6th August, 1772, contained a precept for infefting Duke Douglas personally, without mention of any other, and that under the fetters of the entail of the dukedom. This precept could not be a warrant for infefting another party, and in a liferent incompatible with the provisions of that entail.

3d, The precept of clare constat by James I. Hamilton in favour of himself, is inept, because he had not previously established, by service or otherwise, the death of Gavin without heirs of his body; and the precept is not, per se, any evidence of the failure of such heirs, without which James I. Hamilton had not any right to the lands.

II. With regard to that portion of Murdieston the superiority of which was conveyed by Alexander Inglis to Walter Hamilton in liferent, and Duke Walter in fee.

The sasine taken by Walter Hamilton upon the precept in the charter of 6th August, 1772, by virtue of the assignation of it in Duke Walter's conveyance to Alexander Inglis, of 21st September, 1772, and in Alexander Inglis's disposition of 24th September, 1772, exhausted the precept in the charter. Carnegie v.

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Scott, Mor. 8858; Murdoch v. Cheslie, Mor. 6923. The infeftment, therefore, by Duke Archibald in 1801, upon the same precept, was void, and did not feudally vest the superiority in him. By necessary consequence, Duke Archibald had no power to enter vassals, and the precept of clare constat granted by him to James Inglis Hamilton on 27th November, 1802, with the infeftment that followed upon it, did not vest any right in that party.

Though Duke Archibald's infeftment was put upon record, that could not in any way better its validity; Wilson v. Agnew, 9 S. 357; Cleghorn v. Elliott, 11 S. 259; Agnew v. Stair, 3 S. 229; and still less could it have the effect of validating the titles of third parties in a case such as this, where there is not any question between two titles flowing from one and the same author, the one latent, and the other public — the case to which the act 1617, cap. 16 was alone intended to apply, — but where the competition is between two titles, both upon the record, and the question is as to the validity of one of the titles, upon other grounds altogether from those to which the statute is applicable.

Though there be, in the entry of a vassal, onerosity between him and his superior, by payment of the relief duties, and the obligation to perform the other prestations in the feu right, and though this onerosity may perhaps be considered as relieving the vassal to some extent from the consequences of omission by the superior in making up his titles, this cannot have any place in a case where the party giving the entry has not, in fact, any feudal title as superior; and Duke Archibald was not in any way the superior. Duke Douglas was infeft in the superiority, and on his death, that right descended to his heir, whom Duke Archibald never was; and,

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for any thing done in the life of Duke Archibald, it remained in hæreditate jacente of Duke Douglas. Duke Archibald brought a reduction of Duke Douglas's infeftment, but the decree in that action could not operate retroactively to validate the precept of clare constat given by him to James Inglis Hamilton, the efficacy of which expired at his grace's death, while the decree of reduction was not until after his death. The decree might operate to perfect his grace's title to the dominium directum, but could not in any way affect the title to the dominium utile, never derived from him or his authors. Still less can the decree operate the latter effect to the prejudice of the appellant, who, and his predecessors, were not parties to the proceeding, more especially as the proceeding was pendente hoc lite, and in apparent collusion with the respondent; Erskine, II. 7, 3 and 4.

Admitting Duke Archibald to have been the feudal superior, James Inglis Hamilton, at the date at which he executed the new entail, held the lands in apparency only. That deed was executed on 15th June, 1802, and the precept of clare constat on which the maker was infeft, was not granted until November of that year. He had not, therefore, any power to make the entail at its date. Stair, III. 3, 43 and 59; Bank. I. 3, 133; Act 1695, cap. 22; Carmichael v. Carmichael, 16 F. C. 17. If so, the subsequent titles made up by James Inglis Hamilton could not validate the entail by accretion, as it was a gratuitous deed, and with warrandice from fact and deed only; Stair, II. 2, 2; Ersk. II. 7, 3 and 4.

But the title made up by James Inglis Hamilton subsequent to the date of the entail of 1802, was not itself valid. 1st, The brieve which he expede was for serving him heir in special and of line; but the Jury found him to be heir of tailzie, a character in regard to

which no question was put to them. 2d, The proceedings against the superior to compel an entry, and the precept of clare constat granted by Duke Archibald in consequence, bore no reference to the character of heir of entail, but were confined to that of heir in special and of line. A title thus made up did not feudally vest the lands in James Inglis Hamilton. Reid v. Wood, Mor. 14483; Cathcart v. Cassilis, Mor. 14447; and App. voce Service of Heirs, No. 2.

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Finally, the disconformity between the record of the sasine taken by James Inglis Hamilton on Duke Archibald's precept, with the certificate of registration upon the instrument, is sufficient to invalidate the sasine, and make the title inept. Kibbles, 9 S. and D. 233; Fulton, 9 S. and D. 442; M'Queen, 2 S. and D. 637; Denniston, 3 S. and D. 285.

III. In regard to both portions of the lands.

The decree in the action of reduction, if it be in any way available, reduced the disposition by Duke Douglas to Alexander Inglis in 1772, and the dispositions by the latter to James and Walter Hamilton; their right, therefore, to the superiority was cut down, and then Gavin Inglis possessed only in apparency. In that case, the precept by James Inglis Hamilton flowed a non habente potestatem, and the precept by Duke Archibald becomes inept, as being in favour of James, as heir to Gavin, the heir last vest, whereas, in this view, Alexander Inglis was the heir last vest.

Respondent's Argument.

The Respondent. — I. As to the first half of the lands. The power expressly given to James I. Hamilton by Alexander Inglis's disposition to enter vassals, takes the case out of the principle, in regard to the want of such

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powers in ordinary liferenters, by constitution. Alexander Inglis had in him an absolute right to the superiority, as disponee of a party duly infeft, and without being himself infeft, he could indubitably convey the superiority to one in liferent, and another in fee; and if so, whether he could confer upon the liferenter the power of entering vassals, no way depended on his being himself infeft before doing so, but upon the completion of the title of the liferenter by infeftment. The general rule, that an ordinary liferenter, by constitution, has not power to enter vassals, does not proceed from any notion of incompetency in him to enjoy such a power, but from a presumption of law that it was not intended to be conferred upon him, but was reserved to the fiar. That there is not any incompetency, is shewn in the fact of the much more substantial powers, as to the enjoyment of the estate, in regard to leasing and perception of rents, which may unquestionably be conferred upon liferenters by constitution, and by the power as to entry of vassals confessedly enjoyed by a liferenter by reservation, though divested of the fee. Waddel v. Waddel, 16 F. C. 481; Swinton v. Roxburgh, 1st February, 1814, 17 F. C. 532; Forbes, Mor. 9931; Roxburgh, 25th June, 1818, 19 F. C. 541.

But that the power of entering vassals may be enjoyed by a liferenter by constitution, was expressly decided in Redfearn v. Maxwell, 7th March, 1816, 19 F. C. 111, where resignation ad remanentiam, into the hands of a liferenter by constitution, with power to enter vassals derived from fiars of the superiority, who were not then, or at any time, infeft, was deliberately sustained.

That the power was more than a mandate or commission, is evident from the nature of the deed by which it was given, which was to divest the granter out and out,

and give the right to James in liferent, with this power as a part of his right, and to Duke Douglas in fee; the death, therefore, of Alexander Inglis before the date of the precept which James granted in execution of the power, could not have any effect upon the validity of the precept, neither could it be at all necessary, that the precept should have been directed to the bailies of Alexander instead of James.

Whatever objection might be competent to the heirs under the entail of the dukedom of Hamilton, in respect of the use made of the precept in the charter of 6th August, 1772, that precept was a good warrant for infeftment as regarded other parties.

II. As to the second half of the lands.

Any objection to the infeftment taken by Duke Archibald, upon the precept in the crown charter of 1772, in respect of the precept having been exhausted by the previous infeftment taken upon it by Duke Douglas, was cured by the decree in the action of reduction by Duke Archibald, which found that the charter of 1772, with the retour of his grace's service, and his sasine upon the precept in the charter, "formed the only good right "and title to the lands, comprehending," &c.

That action was not directed against the liferenters of the superiority under Duke Douglas's conveyance, but against the fiars alone. The effect of the decree, therefore, was to find that the disposition of the fee of the superiority by Alexander Inglis to Duke Douglas, his heirs and assignees, did not prejudice the rights of Duke Archibald and the other heirs in the entail of the dukedom.

Although the decree pronounced by the Inner House was pronounced after Duke Archibald's death, yet in his

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lifetime the decree, to which the Inner House only adhered, had been pronounced by the Lord Ordinary, and was unrecalled; and before the interlocutor by the Inner House had been pronounced, the defenders in the action had, by minute, withdrawn from the litigation, so that the necessity of any interlocutor by the Inner House at all was done away with. The interlocutor of the Lord Ordinary thereby subsisted, without challenge, and the jus quæsitum which Duke Archibald had acquired in it ensures to him, and those claiming through him. At all events, the decree obtained by Duke Alexander, which was unobjectionable on any ground, validated the title to the superiority, not from the date of that decree, but from the date of the title; and the vassal being infeft after the superior, and not before, the necessary effect is likewise to validate the vassal's title.

If the effect of the decree, acccording to its terms, was to make the title of Duke Archibald, completed in 1801, the good title, and constitute him the true superior from that date, the necessary consequence is to validate the precept of clare constat, granted by him to James I. Hamilton in 1802. After the decree, the vassal could not, because of any previous real or supposed defect in his grace's title, have required him to make up his title of new, or have passed him over in case of refusal; every benefit from the decree which accrued to Duke Archibald's title accrued to James I. Hamilton's title, in respect of any defect in it, by reason of any previous objection to Duke Archibald's title.

When James I. Hamilton, in 1802, took the precept of clare constat from Duke Archibald, and made up his titles under it, his grace's infeftment as superior was upon record, and unchallenged. It was no part of James I. Hamilton's duty to question the validity of his

grace's title, nor was it within his power to do so; any challenge by him would have been at the risk of disclamation; neither could he have refused to take an entry, unless at the risk of declarator of non-entry. Stair, II. 4. 6; Ersk. II. 5. 40, and 41. Previously to accepting the precept from Duke Archibald, James I. Hamilton had charged the heir of line of Duke Douglas as well as Duke Archibald, to enter to the superiority. If the heir of line, or any other party, did not choose to challenge Duke Archibald's title, the only course that was left for the vassal was to acknowledge the title, and avail himself of it, for the purpose of obtaining an entry. In a question between parties claiming the dominium utile of lands, any irregularity or defect in the mode in which the party truly the superior may have made up his title to the superiority, cannot have effect given to it without involving the most inconvenient and most impracticable consequences, and has been disregarded even when the entry of the vassal was with a party not truly the superior. Wilson v. Irving, 5th March, 1805, not reported. In that case, an heritable bond, granted by a party who had made up his title by entry with the crown, and infeftment put upon the record after the crown had conveyed away the superiority, was sustained against an heir of the granter of the bond, who had made up her titles by entry with the true superior, passing by the granter of the bond, as never having been vested in the lands; the creditor in the bond being held entitled to rely upon the record, as shewing the vassal to have a good title.

The writs in the service of James I. Hamilton bore sufficient reference to the entail to make his service one as heir of entail; but objection on this ground is irrelevant, because the precept of clare constat, which he obtained

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from Duke Archibald, was sufficient, without the necessity of any service; and that was expressly in his character as heir of entail; and even if a service were necessary, the retour is fortified by the vicennial prescription.

Respondent's Argument.

No objection to the sasine of James 1. Hamilton is libelled, and if it were, that which is taken must be unavailing; the date of the sasine itself, and the entry in the minute-book and the register are quite correct. The correctness of the attestation on the instrument is then of no importance. Act 1693, c. 14; 1696, c. 18; Stair, II. 3. 22; Ersk. II. 3. 42.

Though, as to this portion of the lands, James I. Hamilton had but a personal right at the date at which he executed the entail of 1802, the feudal title which he afterwards made up drew back to the date of the entail, and accresced to that deed. The granter not having made any adverse deed to which his title could by possibility relate, and the entail taking him expressly bound to make up such a title, so far as the title of the vassals was independent of the precept of clare constat by Duke Archibald to James I. Hamilton, it could not be affected by the decree in the reduction. The title made up by Gavin Inglis was in 1786, while the reduction was not brought till 1816; that title, therefore, was fortified by the long prescription, and, moreover, was not called in question by the reduction.

Ld. Chancellor's Speech.

LORD COTTENHAM. — My Lords, In this case, it appears that the entail of 1719 not having been properly fenced, General Inglis Hamilton, who became entitled under it to the property in question in 1802, created a new entail, under which the defender claims. The pursuer, who claims under the entail of 1719, does not pretend that that entail was incapable of being destroyed,

but contends that it was not effectually destroyed by the act of General Inglis Hamilton in 1802, upon the ground that the supposed superior through whom it was effected, had not at that time a proper feudal title, so as to enable him to give effect to it. This objection was in the course of the cause attempted to be supported upon various grounds, which have been since abandoned; and with good reason, as the answers given upon those points are conclusive. I propose, therefore, to confine my observations to those points which were still insisted upon in the cases before this house, and by the arguments of the counsel at the bar.

The superiority which had belonged to Douglas, Duke of Hamilton, was by him conveyed to Alexander Inglis, who conveyed it, as to one moiety of the lands, to General Inglis Hamilton for life, and to the Duke of Hamilton in fee; and as to the other moiety, to Walter Hamilton for life, and to the Duke in fee. General Inglis Hamilton completed his title under a precept of clare constat, granted by himself as superior; and the first objection to his title was, that being a liferenter by constitution, he had no power to enter vassals. Had he been merely a liferenter by constitution without more, the objection might have been good; but it has no application to the present case, for it was not in that character that he assumed the power, but under an express grant and conveyance from Alexander Inglis Hamilton, in whom the whole superiority was vested, "of full power to him, General Inglis Hamilton, during "his life, to enter and receive all vassals in the said "lands, and receive the composition due by law there-"for, fully and freely in all respects, without the con-"sent of the Duke and his foresaids, the fiar of the said "lands," — Alexander Inglis, by the same deed, con-

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veying the superiority to him, General Inglis Hamilton, in liferent, and the fee to Douglas, Duke of Hamilton. That the owner of the superiority might dispose of that part of it which consisted in the right of entering vassals, to such persons, and for such interests, as he might think fit, is not disputed. It was therefore competent for him to convey it to the liferenter. To say that it would not pass as incident to the conveyance of the life estate, proves nothing, and no authority has been referred to for the purpose of proving that the owner of the superiority could not so grant this power; and if it was competent for him so to deal with, and dispose of, this power, he, beyond all doubt, did so dispose of it in favour of General Inglis Hamilton by this deed. This objection, therefore, wholly fails.

That Alexander Inglis was not himself enfeoffed is not insisted upon as affecting his right to pass any interest in the estate, to which he had a personal title, as with such interest he conveyed the means of obtaining the proper feudal title; but it is urged by the appellant, upon the supposition that General Inglis Hamilton's power of entering vassals was in exercise of a right vested in Alexander Inglis, and so exercised by virtue of an authority from him for that purpose, and as he, not being himself enfeoffed, could not enter vassals, it is urged that he could not delegate that power to others; all which reasoning assumes that General Inglis Hamilton acted, not by virtue of an interest or estate in the superiority vested in himself, but by virtue of a power delegated to him by Alexander Inglis, by virtue of the superiority remaining in him, Alexander, which was not the fact; and yet upon this misapprehension the whole of the first reason of the appellant's case is founded.

The second reason stated in the appellant's case was,

that James Hamilton had no power to grant a precept of clare constat in his own favour, as nearest and lawful heir of tailzie to Gavin Inglis, without establishing in the first place the death of Gavin, and the extinction of his heirs, in terms of the entail of 1719. That Gavin did in fact die without issue entitled under the entail, and that General Inglis Hamilton was at the time entitled as next heir of tailzie under that entail, is not disputed; and that he made up his title as such is proved by the retour of his special service of the 7th of September, 1802, which states the death of Gavin, and that Inglis Hamilton was the propinquior et legitimus hæres talliæ, and the other documents referred to in the appendix to the appellant's case. He stands, therefore, upon the record as nearest heir of tailzie, which character it is not disputed that he in fact holds.

As to this portion of the estate, it appears to me that the objections raised to the respondent's title are not maintainable.

As to the second portion of the estate, as to which in September, 1772, the superiority was conveyed to Duke Douglas in fee, and Walter Hamilton in liferent, the objection was, that Archibald, Duke of Hamilton, had not made up a legal title to the superiority when he granted the precept of clare constat in favour of General Inglis Hamilton, and that it was therefore null and void; and the objection to Duke Archibald's title is alleged by the appellant to consist in this, that the precept of sasine contained in the crown charter of 1772, was exhausted by the sasine taken in favour of Duke Douglas in fee, and Walter Hamilton in liferent, and consequently, that the infeftment taken by Duke Archibald in 1801, upon the same precept, was inept and null.

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Ld. Chancellor's Speech.

The facts appear to be, that Duke Douglas, holding the superiority entail under which Duke Archibald was heir, was not justified in taking to himself the fee-simple in 1772; and consequently, in 1801, Duke Archibald procured himself to be served as heir of entail, and took infeftment accordingly under the precept in the charter of 1772, which was in favour of Duke Douglas and his heirs of entail. The infeftment thus taken by Duke Archibald was in conformity with the precept and the charter, which the infeftment of Duke Douglas was not; and in 1802, when General Inglis Hamilton made up his title under the clare constat from Duke Archibald, he, the Duke, appeared upon the record as regularly enfeoffed of the superiority. But this is not all, for, as if to remove all possibility of error, General Inglis Hamilton previously obtained letters of horning against superiors directed to the heir of line of Duke Douglas, to the trustees under his trust-settlement, and to Duke Archibald, calling upon them severally to obtain themselves entered and enfeoffed, and to complete the title of him, General Inglis Hamilton, to the dominium utile. Neither of the former parties made any claim under this proceeding, but permitted Duke Archibald to take enfeoffment as before stated, and thus to become feudally vested in the superiority; and so he continued enfeoffed up to the time of his death, and those who claim after him, under the same title, so continued enfeoffed up to the present time.

The vassal, therefore, in this case, did all that could be done to ensure his own title, and if, after all this, any objection can be raised to such title through any supposed defect in the title of the superior, it is obvious, that it will be impossible in many cases for vassals to

obtain unimpeachable titles. Apprehensions are expressed on the part of the appellant, of the grounds upon which the Court of Session proceeded upon this point, but such apprehensions appear to me to be wholly misplaced. Not only danger to property, but necessary insecurity would arise, from the Court recognizing the doctrine contended for by the appellant.

This question, indeed, does not appear to have been decided for the first time in the present proceeding, for in 1817 Duke Archibald raised a process of reduction and declarator for reducing the title made by Duke Douglas in 1772, and, separatim, for having it found and declared, that the Duke Archibald, by the aforesaid title completed in 1801, had the only right and title to the property which included the superiority in question; and that the title so made up in 1801 constituted the only good right and title; and in that process, decree in terms of the conclusions of the libel was pronounced by Lord Pitmilly, and adhered to by the Court; and owing to some alleged informality in those proceedings, a decree has since been pronounced in terms of Lord Pitmilly's interlocutor.

It appears, therefore, that the title to the superiority, under which General Inglis Hamilton made up his title in 1802, and under which the respondent now claims, has been the title upon record for nearly forty years; and that the Court of Session has twice declared, that it constitutes the only good right and title to such superiority; and in this title all persons who could have claimed the superiority by adverse title, have acquiesced.

By the English law of copyholds, the copyholder can only complete his title through the intervention of the lord, but the act of the lord is considered as merely ministerial; and if the title of the copyholder was capable

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of being affected by any defect in the title of the lord, this tenure, now sufficiently inconvenient, would become perfectly intolerable.

Ld. Chancellor's Speech.

This is a case of purely Scotch conveyancing, in which this House would, under any circumstances, be very unwilling to act in opposition to the unanimous opinion of the Judges of the Court of Session, by whom the case was decided. I have, however, in this, as in all other such cases which have come before this House, thought it my duty to examine the authorities cited, and the arguments urged against the judgment appealed from, and I have had much satisfaction in finding so much of reasoning and authority in support of a judgment which I consider of the highest importance to the security of property in Scotland. I therefore move your Lordships to affirm the interlocutor appealed from with costs.

Judgment of Court.

Ordered and Adjudged, That the petition and appeal be dismissed this House, and that the interlocutor therein complained of be affirmed, with costs.

GEO. WEBSTER — RICHARDSON and CONNELL, Agents.