either side, was this: I looked upon the litigation as a whole. It was necessary to bring up here the whole of the litigation. We have altered the finding of the Court below in one very material respect, because in place of basing the right of the respondent upon usage we have based it upon his titles. I thought that, under these circumstances, the respondent certainly could not ask that the appeal should be dismissed with costs, and that the more just conclusion to arrive at was to hold, that there should be no costs given to either side. I think, that, although in point of form there has been a separate appeal upon the question of interdict, in substance the litigation is to be looked upon as a whole, and the observations I made apply to both the appeals.

Interlocutors affirmed, with an alteration, and appeals dismissed.

Appellant's Solicitor, A. Dobie, London.—*Respondent's Solicitors*, W. H. and W. J. Sands, W.S.; John Graham, Westminster.

JULY 23, 1868.

CHARLES MURRAY BARSTOW, *Appellant, v.* ROBERT BLACK and Others, *Respondents.*

ALEXANDER DUNN PATTISON, Esq., Advocate, *Appellant, v.* JOHN HENDERSON, Esq., and Others, *Respondents.*

Succession—Deathbed—Reduction *ex capite lecti*—Substitution—Heirs and Assignees—*W. by* mortis causâ *settlement gave his heritage to A., and his heirs and assignees whatsoever, declaring, without prejudice to A.'s rights and powers to dispone in his lifetime or on deathbed, that in the event of A. dying intestate or without heirs of his body, or otherwise disposing of the subjects, the same shall devolve to M.*

HELD (affirming judgment), *That there was no repugnance in the above disposition, and that this was not an absolute disposition to A., but that the declaration was a sufficient substitution of heirs of provision in the events specified.*

Superiority—Consolidation—Succession—Deathbed—Heir of Provision—*W. by* mortis causâ *deed gave to A. a superiority, and in the event of A.'s death without issue to P., and the residue of the estate to others. After the date of the deed W. acquired the* dominium utile, *and at his death held both* dominium directum *and* dominium utile. *On W.'s death A. made up titles and effected a consolidation by procuratory of resignation* ad remanentiam, *in favour of himself, his heirs and successors. A. having no issue made a deed on deathbed dealing with his heritable estate.*

HELD, *That the* dominium directum *only, and not the* plenum dominium, *went to P. by W.'s deed; and that the heir of A. had title to reduce the deathbed deed of A.* quoad *the* dominium utile *only.*

BARSTOW *v.* BLACK.

This was an action of reduction of a trust disposition, dated 11th June 1860, and two codicils dated 13th and 14th June 1860, made by Alexander Dunn, who died on 15th June 1860. His heir at law was William Park, his nephew.

Alexander Dunn had acquired right to several lands and heritages through succession to his deceased brother William Dunn. Other lands he had acquired by conquest. The trust disposition and codicils were subscribed by the testator a few days before his death, on deathbed. The heir at law sought to reduce these so far as concerned the lands and heritages thereby alienated to his prejudice. The deed of settlement of William Dunn, who died in 1830, disponed the lands and heritages to his brother Alexander Dunn, and his heirs and assignees whomsoever, but with this declaration, "declaring, as it is hereby specially provided and declared, but without prejudice in any respect to, or limitation of the right and powers of, the said Alexander Dunn, under and by virtue of the conveyance in his favour before 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 his dying intestate, and without leaving heirs of his body, and of his not otherwise disposing of the subjects and

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[1] See previous reports 3 Macph. 779; 4 Macph. 555, 1104; 37 Sc. Jur. 284, 397, 570. S. C. L. R. 1 Sc. Ap. 392; 6 Macph. H. L. 147; 40 Sc. Jur. 642.

estates hereby conveyed to him, the same shall fall and devolve, and accordingly I do hereby, in these events, but under the burdens and provisions before written, dispone, alienate, and convey my said subjects and estates, heritable and moveable, to the persons, and in the terms after mentioned."

The heir at law, and his *curator bonis* Charles Murray Barstow, contended, that Alexander Dunn's trust settlement and codicils were reducible *ex capite lecti* as regards the lands acquired by him from his brother William, as well as those acquired by Alexander himself.

The Second Division, by interlocutor dated 27th March 1865, (recalling Lord Jerviswoode's interlocutor of 10th January 1865,) sustained the pursuer's title to reduce, so far as the same operated as a conveyance of the heritable estate formerly belonging to William Dunn. Against that interlocutor the heir at law appealed.

The appellant, in his *printed case*, stated the following reasons for reversing the interlocutors :— 1. The whole heritable estates which form the subject of the action, belonged to, and were vested in, the deceased Alexander Dunn, as absolute and unlimited fiar, and the objections to the title of the appellant's ward, Willam Park, as Alexander Dunn's heir at law, to reduce his deathbed deed, were and are wholly unfounded. 2. The deed of William Dunn, founded on by the respondents, is insufficient to support their objections, or to afford any sufficient title and interest to insist in these ; as at Alexander Dunn's death the succession to the said estates opened under the existing titles and investitures thereof to Alexander Dunn's heir at law, and the deed of William Dunn contains no provision or substitution affecting, or capable of being made to affect, the said titles and investitures. 3. The alleged clause of substitution founded on by the respondents is repugnant to the disposition of the said deed of William Dunn, and is void. 4. A disposition in the terms of William Dunn's deed, to an individual and his heirs and assignees whomsoever, cannot be effectually qualified by any destination over, or substitution of heirs. 5. Estates disponed absolutely to an individual and his heirs and assignees whomsoever, in the terms and form employed in William Dunn's deed, cannot, at the death of the institute, and after having become vested in him as absolute fiar, be conditionally transferred to different heirs by means of a clause in the terms and form of the declaration founded on by the respondents. 6. Assuming that it was the purpose of the declaration in William Dunn's deed to make a new distribution of his estates to come into effect, in the events specified in the declaration, at Alexander Dunn's death, and intended to have the effect, at that date and in these events, of transferring the fee conferred on and taken up by Alexander Dunn to the various other persons named in the said declaration,—such purpose could not be effected, and was not effectually expressed by that clause ; inasmuch as (1.) if the declaration be regarded as a mere destination or nomination of heirs, the law of Scotland does not admit of such purpose being effected by mere words of destination, or by a mere nomination of heirs. Such purpose on the part of the author of a deed like William Dunn's, disponing his whole estates in unlimited fee, to an individual named and his heirs, implies and requires, not merely a nomination of heirs to the original disponee, but the making of a new and different disposition of the estate on his death ; and (2.) if the declaration be regarded as a new disposition of the estates to come into effect, in the events specified, on the death of Alexander Dunn, such a disposition is incompetent, by the law of Scotland, according to which law a present act of conveyance by the proprietor is essential to the validity of a conveyance of land, and a proprietor cannot dispone his estates after he is dead, and after those estates have become the absolute property of his heir or disponee. 7. There has been a failure of the conditions on which the alleged substitution in favour of the respondents was dependent. Alexander Dunn has not died intestate ; but has died leaving a settlement which effectually disposes of his moveable estate, being the only part of his estates upon which he could test. 8. The conditions of the declaration have also failed, inasmuch as Alexander Dunn otherwise disposed of the heritable subjects and estates conveyed by William Dunn's deed. The titles completed by him in effect left the estates to descend to his heir at law ; and no express conveyance was requisite to enable him so to leave the estates. 9. The destination said to be contained in the declaration of William Dunn's deed was extinguished in the person of Alexander Dunn by his succession to the estates, his entire freedom from the said destination, and his completion of his titles under the old investitures. 10. With respect to the subjects and estates to which Alexander Dunn obtained charters from the superior in favour of himself and his heirs and assignees, any destination contained in William Dunn's deed was thereby evacuated. 11. With respect to the superiority and property of the lands of Boquhanran, and the *dominium utile* of the lands of Kilbowie, and also any other subjects in a similar situation, the effect of the titles completed by Alexander Dunn, and of his resignation *ad remanentiam* and acceptance thereof, was to extinguish all claims under the alleged personal destination in William's deed, either as regards the property or superiority, and to leave the *plenum dominium* to be taken up by the heir at law of Alexander Dunn entirely unaffected by any destination in William Dunn's deed. 12. At all events, as to the *dominium utile* of Kilbowie, and the *dominium utile* of Boquhanran, Alexander Dunn's resignations *ad remanentiam* of these subjects exclude any claim to these by

any of the respondents, and extinguish all objections to the appellant's title to sue a reduction of Alexander Dunn's deathbed deed so far as it relates to these subjects.

PATTISON *v.* HENDERSON.

The settlement of William Dunn also contained this clause:—"In the *first* place, I provide and appoint, that my 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 my right and interest in any lochs and other waters necessary for carrying on the said mills, and also exclusive of my lands of Duntiglennan after mentioned, shall be divided into three parts, and shall fall to the respective persons after mentioned, namely, my lands of Mountblow and Dalmuir, and the superiority of that part of the lands of Boquhanran, feued out by the late Sir Charles Edmonstone to Edward Collins of Dalmuir, with the feu duty of £300 sterling, and casualties of superiority thereto attached, shall fall and devolve to the eldest lawful son of the said Janet Park or Pattison, my niece, whom failing, to the next eldest surviving lawful son of the said Janet Park or Pattison who may be in life when the succession opens up after the death of the said Alexander Dunn, my brother, and failing sons, to the eldest lawful daughter of the said Janet Park or Pattison, whom also failing, to the next eldest surviving lawful daughter of the said Janet Park or Pattison who may be in life when the succession opens up after the death of the said Alexander Dunn, my brother; whom all failing, to my residuary legatee after mentioned."

After the date of the deed, William Dunn purchased the *dominium utile* of the lands of Boquhanran. He did not, however, consolidate the property with the superiority, but possessed the two feudal estates on separate titles. He died in 1849. Alexander Dunn, instead of making up a title as disponee under the deed of settlement, made up titles by entry as heir at law to the various estates of his brother, including the *dominium utile* of Boquhanran. Alexander Dunn, in 1852, consolidated the property and superiority of Boquhanran. Mr. Alexander Dunn Pattison, the eldest son of Mrs. Janet Park or Pattison, and pursuer of the second action, contended, that, by the consolidation, Alexander Dunn evacuated the residuary destination, in so far as regarded the lands of Boquhanran, and also subjected the entire estate to the destination appointed with respect to the superiority, under which it would pass to the said A. D. Pattison.

The Second Division held the first of these points in favour of Alexander D. Pattison, but not the second; whereupon the pursuer, A. D. Pattison, appealed.

The appellant in his *printed case* stated the following reasons for reversing the interlocutor:—1. Because the estate of superiority provided to the appellant under the substitution in William Dunn's settlement, was in its nature capable of comprehending the *plenum dominium* of the lands in question; and because the subsequent consolidation of the base fee with the superiority extinguished the base fee as a separate estate, and subjected the consolidated estate to the destination of the leading title. 2. Because the resignation *ad remanentiam* made by Alexander Dunn, the institute under the said settlement, in the hands of himself as superior, was equivalent to an alienation, and had the effect of evacuating the substitution in favour of the residuary legatees of the settlement, and of defeating their expectant succession to the surrendered estate. 3. Because by the said consolidation, no new destination was impressed upon the consolidated estate; and because the alleged destination to the heir at law is not, in fact, contained in the procuratory of resignation by which the consolidation was effected. 4. Because in a resignation of a base fee to the superior, *ad remanentiam*, and for the purpose of consolidation, a destination to heirs other than those of the superiority is repugnant to the nature of the grant, and ought in construction to be rejected. 5. Because the appellant does not take the estate in question as succession of Alexander Dunn, but takes it as an heir of provision under William Dunn's settlement; and he has therefore a title to sue this action of reduction in a question with Alexander Dunn's representatives. 6. Because, even if it were held, that any part of the estate accruing to the appellant is succession of Alexander Dunn, the appellant would still be entitled, in the character of his disponee or heir of provision, to reduce his last settlement, as having been executed on deathbed. 7. Because the estate claimed by the appellant being an estate of inheritance, there are no grounds for inferring an equitable obligation on his part to communicate the benefit of any part of it to the other party or parties; or for imposing any restriction upon his title to reduce the deed by which that estate was alienated on deathbed to his prejudice.

Sir R. Palmer Q.C., *Moncreiff* D.F., and *Anderson* Q.C., for appellant Barstow. *Lord Advocate* (Gordon), *Mellish* Q.C., and *J. T. Anderson*, for the respondent Black. *J. Pearson* Q.C., and *G. Young*, for appellant and respondent Pattison. *Druce* Q.C., and *Kinnear*, for other parties.

Cur. adv. vult.

LORD CHANCELLOR CAIRNS.—My Lords, the first of the appeals now to be considered by your Lordships has arisen out of an action commenced in the Court of Session in 1862, by the *curator bonis* of William Park, a lunatic. William Park is heir at law of Alexander Dunn. The object of the action is to reduce, *ex capite lecti*, a disposition made by Alexander Dunn of heritable property, some part of which he had himself acquired, and to the other part of which he had succeeded under a disposition made by his brother, William Dunn. It is with the property derived by Alexander Dunn under the disposition of William Dunn, that this appeal is concerned.

That the deed, executed by Alexander Dunn with reference to this property, was a deathbed deed according to the law of Scotland on the subject was not denied by the defenders in the action. But the defenders contended, that, by the law of Scotland, the heir cannot reduce a deed *ex capite lecti*, unless he can shew himself damnified by it, that is to say, unless he can shew, that if the deathbed deed were reduced, he, the heir, would take the property. And it was insisted for the defenders, that if Alexander Dunn's deed had not been executed, or were to be set aside, the heir of Alexander Dunn would not take the property, but that it would go over under the deed of William Dunn to other parties. The heir of Alexander Dunn, on the other hand, contended, that this disposition or limitation over in the deed of William Dunn was inoperative, and that the first or ruling disposition in the deed of William Dunn to "Alexander Dunn, his heirs and assignees whomsoever," remains undisturbed, and gives the heir of Alexander a right to reduce the deathbed deed.

The Lord Ordinary, by his interlocutor of the 10th of January 1865, decided in favour of the right of the heir of Alexander Dunn, the appellant in the first appeal, to reduce the disposition made by Alexander Dunn of his heritable property. This interlocutor was recalled by the Lords of the Second Division in their interlocutor of the 27th March 1865, their Lordships sustaining the objection to the title of the heir of Alexander, to sue for a reduction of the deed, *quoad* the estate of William Dunn, and it is against this interlocutor that the heir of Alexander Dunn now appeals to your Lordships.

Your Lordships have therefore to determine the construction and operation of the deed of William Dunn. It is dated the 17th of April 1830, and is a disposition and deed of settlement, not by way of trust, but operating as a *de presenti* feudal conveyance.

I will read shortly the first words of disposition—"I, William Dunn, have given, granted, and disponed, as I hereby do give, grant, and dispone, alienate, convey, and make over from me after my death, to and in favour of Alexander Dunn, and his heirs and assignees whomsoever, all and sundry lands, etc., with and under the burdens and conditions following." Then follow provisions as to various legacies and annuities, and an appointment of Alexander Dunn as executor.

The deed, after the nomination of the executors, proceeds thus:—"Declaring as it is hereby 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 before 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 in other writings to take effect at his death, that in the event of his dying intestate, and without leaving heirs of his body, and of his not otherwise disposing of the subjects and estates hereby conveyed to him, the same shall fall and devolve, and, accordingly, I do hereby, in these events, but under the burdens and provisions before written, dispone, alienate, and convey my said subjects and estates, heritable and moveable, to the persons and in the terms after mentioned." Then follows a specification of the persons to whom, and among whom, the property was to go over and be divided in the events thus described, among whom are the respondents, or some of them.

In the argument at your Lordships' bar, it was strenuously contended on behalf of the respondents, that by reason of the form of limitation or substitution which I have just read, the words of the leading disposition at the commencement of the deed must be modified, and that the disposition to Alexander Dunn, his heirs and assignees whomsoever, must be read as a disposition to Alexander Dunn, and the heirs of his body. The deed, it was argued, would thus run aptly and consistently as a disposition to Alexander Dunn, and the heirs of his body, with a regular and proper substitution, on termination of Alexander Dunn's estate tail, by failure of heirs of his body at his death.

I find myself, after a careful consideration of the argument in support of it, wholly unable to adopt this construction. In the first place, the words "heirs and assignees whomsoever" appear to me to be words which would naturally be used, not as the equivalent of, but in contradistinction to, the words "heirs of the body," and in this sense, as the Lord Justice Clerk says, they have, in Scotch conveyancing, a technical meaning which never varies. In the next place, even after doing violence to the words "heirs and assignees whomsoever," by reducing them to the meaning of "heirs of the body," we should not after all have reconciled the first disposition with the limitation over or substitution, in as much as this substitution is to take effect, not on failure of heirs of the body generally, but only in the event of Alexander Dunn not leaving heirs of his

body, that is, as was admitted, leaving heirs of his body at his death. But further than this, even assuming, that a general disposition to Alexander and his heirs, followed by a limitation over if Alexander die without heirs of his body, might be moulded into a disposition to Alexander, and the heirs of his body, I am not aware of any authority for doing this, when the gift or limitation over is to take effect, not merely on Alexander dying without heirs of his body, but on the occurrence or concurrence of another event, namely, the non-disposition, either *mortis causâ* or *inter vivos*, of the property by Alexander.

Rejecting, therefore, as I am compelled to advise your Lordships to do, this construction, I have next to inquire whether there is anything to prevent the disposition taking effect, according to the natural meaning of the words used in the deed. No person reading over the deed could, in my opinion, entertain any doubt, that what William Dunn meant was, that his brother Alexander should be to all intents and purposes absolute fiar and owner of the estates, with absolute powers of disposition over the estates, but that if Alexander should not dispose of the estates, and should die childless, the estates should go over. This limitation over is one which, in my opinion, would in an English deed or will be invalid, because by English law you cannot, generally speaking, make a man absolute owner of an estate dependent on the absolute owner not exercising his rights of ownership by disposition.

The position of an unlimited fiar with a conditional gift over is unknown to the English law. But the position of an unlimited fiar, that is, a fiar with unlimited power of ownership, and disposition followed by substitutions or limitations over is well known to the Scotch law. It would, in my opinion, have been a perfectly good disposition to have settled these estates on Alexander Dunn, his heirs and assignees, with a limitation over to other persons in the event of Alexander Dunn dying childless. Under such a settlement, Alexander Dunn would have had an absolute power of disposition over the estates, and, in my opinion, the words of apparent contingency, "in the event of his not disposing of his estates," are not more than a recognition of that power of disposition which was by Scotch law inherent in the estate given to Alexander Dunn.

I therefore propose to move your Lordships, that the interlocutor of the 27th March 1865, pronounced in the first action, should, with one variation which I shall afterwards mention, be affirmed, and the appeal of Barstow in that action be dismissed with costs.

In the *second action*, and in the appeals arising out of it, another question has arisen in this way. The disposition over in William Dunn's settlement professed to carry to Mr. Dunn Pattison the superiority of Boquhanran. William Dunn, after the date of this settlement, acquired the *dominium utile* in Boquhanran, and this *dominium utile* passing to Alexander Dunn, he (Alexander Dunn) completed his title to it in 1852, and by proper instruments and conveyances effected a consolidation of the *dominium utile* with the *dominium directum*, which at that time belonged to him under the leading disposition in William Dunn's deed.

Mr. Dunn Pattison contends, that this consolidation enured to his benefit, and that he is now entitled not to the superiority of Boquhanran merely, which is mentioned in the deed, but to the *plenum dominium* of Boquhanran, or, in other words, to the superiority plus the *dominium utile*. That the destination of the *dominium utile* to the residuary legatees in the settlement of William Dunn was evacuated by the acts of Alexander Dunn, I have no doubt; but that, according to the argument of Mr. Dunn Pattison, he can benefit by the evacuation, I feel compelled, after much hesitation, to reject. I think the conclusion of the majority of the learned Judges in the Court of Session was on this question also correct, and that Mr. Dunn Pattison was never intended by Alexander Dunn to have more, and that he cannot claim more, than what the deed of William Dunn gives him, namely, the superiority of Boquhanran without the *dominium utile*, which *dominium utile* must be severed from *dominium directum* for the benefit of Alexander Dunn's heir at law. The reasons which lead me to this conclusion are those given by Lord Cowan and the Lord Justice Clerk, which I do not think it necessary to repeat.

This limited right of Alexander Dunn's heir at law as to the *dominium utile* of Boquhanran was, as it seems to me, either overlooked by or not sufficiently pressed upon, the Court when the interlocutor of the 27th March 1865 in the first action was made, and a variation must now be made in that interlocutor, in order to sustain the right of the heir of Alexander Dunn to reduce the deathbed deed *quoad* the *dominium utile* of Boquhanran. Had the appeal in the first action by the heir been directed merely or mainly to obtain this variation, I should have thought, that no costs could be given against the heir, but as he raised in that appeal the much broader and larger question, on which he has failed, I think the first appeal should be dismissed with costs.

In the second action I propose to move your Lordships, that, inasmuch as both the appeals have failed, if you concur in the opinion I have expressed, they should all be dismissed with costs.

The *variation* in the interlocutor, which I should humbly offer as the proper one to be made, would run thus: Declare that the pursuer, as curator for the heir at law of Alexander Dunn, has good title to sue for reduction of the trust disposition of the said Alexander Dunn, in so far as it conveys *plenum dominium* of the lands of Boquhanran, but only to the effect of enabling the

said curator to vindicate the claim of the said heir at law as such to the *dominium utile* of the said lands, subject to such feu duty or other rights as would have been exigible by or have belonged to the owner of the *dominium directum* if there had been no consolidation by Alexander Dunn, and remit to the Court of Session, with this declaration, to proceed in accordance therewith, subject to this declaration, and remit. I shall move your Lordships to affirm the interlocutor appealed from, and dismiss, as I have said, the appeal with costs.

I have reason to know, that those of your Lordships who have heard this appeal, and are present, concur in a measure with the conclusion at which I have arrived. But I have had a communication from my noble and learned friend LORD CRANWORTH, who is prevented by indisposition from attending the House to-day, in which it is proper that I should tell your Lordships, that he states, that in the first appeal he concurs in the opinion which I have expressed, though he has had doubts upon it; but in the second he is unable to concur. He thinks, that when Alexander Dunn had become absolute owner both of the superiority and of the *dominium utile*, he caused them ever afterwards to go together, and the ownership of the property must go with the superiority.

LORD WESTBURY.—My Lords, I might properly content myself with expressing my concurrence in the conclusion of my noble and learned friend on the woolsack; but the range of argument at the bar was so wide, and embraced so many topics of importance, that I have thought it right to commit to paper the opinion which I have formed upon the various points in the case.

The first question relates to the validity of the conditional substitution contained in the deed of William Dunn. There has been much argument at the bar on matters which I have always thought were well settled in Scotch jurisprudence. If a destination be made to A, his heirs and assignees whatsoever, there is no room for further disposition, because the whole property and right of ownership are comprised in and exhausted by the first disposition, which in the hypothesis of law will never come to an end. In such a case nothing remains to form the subject of ulterior ownership. But a complete disposition of this nature may be followed by a conditional substitution, that is, by a new disposition or gift depending on a contingent event, the declared effect of which, should it occur, is to reduce or put an end to the anterior disposition, and give birth to a new or substitutionary gift. The condition, when purified, puts an end to the first disposition and introduces the second.

This is the proper province of a conditional substitution. In the English law of real property it is called a conditional limitation; but there is this important difference between the two systems; by the English law the grantee in fee, subject to a shifting use or a conditional limitation, cannot defeat the limitation or prevent its taking effect; but in Scotland the first disponee is absolute fiar, and, unless fettered, may, by alienation *inter vivos* or settlement *mortis causâ*, make an absolute conveyance of the estate.

Various examples may be given of conditional substitutions. If lands at X are disponed to A, his heirs and assignees whatsoever, subject to a proviso that, if the lands of Y shall descend to A, then the lands at X shall go and be disponed to B and his heirs; the descent of the lands of Y is a contingency which, when it occurs, operates by way of condition to defeat the disposition to A and his heirs, and gives rise to the ulterior disposition to B and his heirs, which is therefore properly called a conditional substitution. So if the condition be, that, if A, to whom lands are disponed in fee, *shall die without leaving issue living at his death*, the lands shall go and be disponed to B and his heirs, the gift to B is a conditional substitution; and whether it takes effect or not will be ascertained at the death of A. But if the disposition be to A, his heirs and assignees whomsoever, and on his dying without issue, then to B and his heirs, (an event which may not happen for several generations,) the better construction would seem to be, that the disposition to A, his heirs and assignees whatsoever, shall be read as if it had been to A and the heirs of his body, whom failing, to B and his heirs; and thus the gift to B becomes a simple and not a conditional substitution. In the nomenclature of English law the gift to B and his heirs in the case supposed would be a remainder and not a conditional limitation, the difference being, that the remainder expects and awaits the termination of the antecedent particular estate, whereas a conditional limitation defeats and puts an end to it. Therefore, in English law, there can be no remainder limited after an estate in fee simple, for nothing remains to be given; but, as I have already observed, an estate in fee simple may be followed by a conditional limitation. This is mere illustration, and affords no ground for conclusion in a matter of Scotch law; but there is no reason, and certainly no authority, that I am aware of in Scotland, for holding, that a destination to A, his heirs and assignees whatsoever, may not be followed by a conditional substitution.

The next question is, What, according to the true construction of William Dunn's deed, is the condition on which the gift over depends?

In the Court below it seems to have been considered, that this condition involved several contingent events, one the event of Alexander Dunn making no alienation in his lifetime, and another his dying intestate. But I am not of opinion, that these events form any part of the condition on which the substitution over is made to depend. I consider the words that refer to these events as not expressive of any conditions, but as amounting only to a declaration *ex majore*

cautelâ, that the disposition over in the event of Alexander Dunn dying without leaving issue, should not prejudice or detract from the right of alienation which Alexander Dunn, as fiar, would possess either by disposition *inter vivos* or by a settlement *mortis causâ*. The disposition to Alexander Dunn and his heirs made him absolute fiar, and gave him the right of alienation. This right is by law incident to the estate which is given. When, therefore, the deed says, that the conditional substitution shall take effect if Alexander Dunn shall not make any alienation by deed or gift by will, these words are simply *expressio eorum quæ tacite insunt*, and say nothing more than what the law says without them. If I dispone to A and the heirs of his body, whom failing, to B and the heirs of his body, the gift to B is at the mercy of A, and depends on the event of A making no alienation. If I added to the words "whom failing" these words, "and in the event of A's dying intestate, and of his not otherwise disposing of the estate," they would be words of superfluity, as expressing what the law implies, and would operate nothing.

It is not correct to say, that this construction takes away all operation from the disposition to "heirs whomsoever," or renders the limitation to heirs one which never can have effect; for if Alexander Dunn leaves issue at his death, the conditional substitution flies off, and the disposition to Alexander Dunn and his heirs is left in full force and integrity.

Some misuse was here made of English law. In England you cannot make a gift over dependent on a condition which is repugnant to the estate first given. Neither can you prohibit the first taker from doing something which is incidental to his estate, that he should be able to do, and take away the estate from him on his breach of the prohibition. Nothing of the kind occurs here. The law attaches to the disposition in favour of Alexander Dunn and his heirs the right of alienation *inter vivos* or *mortis causâ*, and the words of the gift over, if Alexander Dunn shall not have exercised this right of alienation, thereby remaining fiar of the estate, and shall die leaving no issue, are not at variance with, or derogatory from, the prior estate, but simply in affirmance of what the law has already said.

It is asked, if I dispone to A and his heirs, making him absolute fiar, can I make an ulterior disposition to B and his heirs, on the event of A not making any alienation? I am not prepared to admit, that the condition and the disposition over would be bad; but that is not either the case or the true question here. The true inquiry is, first, can I dispone to A and his heirs whomsoever; but if he die without leaving issue living at his death, to B and his heirs? If the answer be, that the disposition over is good, the second question is, whether the disposition over is made void because I add to the condition of A dying without leaving issue words expressive of that which the law implies, namely, that the gift over must depend on the prior disponee dying intestate, and without having made *inter vivos* any alienation? If the right of disposition attached by law to the estate of the first disponee does not affect the validity of the conditional gift, the description or reservation in terms of that right cannot certainly have any effect. The legal mind is often the victim of its own ingenuity. The language of the deed when read by a man of plain understanding simply amounts to this, if Alexander Dunn dies without leaving issue, I make a different disposition of my estate; but this is not to affect the right of Alexander Dunn to dispose of the estate by deed or will.

The only contingency that gives birth to the ulterior disposition is the event of Alexander Dunn dying without leaving issue, and the substitution arising thereon is to take effect subject to any alienation or any valid *mortis causâ* settlement which he may have made in his lifetime.

This construction supersedes the question much argued at the bar, whether the settlement of Alexander Dunn is not to be regarded as made by virtue of a specially reserved faculty, and therefore irreducible by means of the law of deathbed? There is not, in my opinion, any special faculty, but a mere reference to the ordinary *jus disponendi* which belongs to every fiar. Therefore, as the event happened which constitutes the condition, namely, the death of Alexander without leaving any issue, I am of opinion, that the substitution took effect, and that the heir of provision, entitled by virtue of that substitution, has a right to reduce the settlement of Alexander Dunn, on the ground of its having been made *in lecto*.

The rights of all parties entitled under the settlement of William Dunn are personal only, that is to say, they are equitable rights, collateral to the feudal estate or title. The deed of William Dunn does not contain *in gremio* any power of feudalizing the estates which are given.

The argument has been, that, by virtue of certain feudal conveyances, Alexander Dunn has evacuated the conditional substitution, for, that, having by virtue of such feudal acts acquired a new estate, the personal right under the settlement is defeated, and no longer attaches on the *feodum novum*. This appears to me to be wholly unfounded both in reason and in law. If the party who has a pure personal right under a settlement as disponee, subject to substitution, proceed extra the settlement to acquire a complete feudal title, the right of the heir under the disposition of the personal right attaches as a trust or obligation upon the complete feudal estate. Without, therefore, examining the merits of the arguments on the effect of the resignation, but assuming the feudal conveyance to have had the operation of giving a new feudal estate, I am of opinion, that this does not affect the validity of the personal right.

It remains to examine another ingenious argument pressed by the counsel for the appellant,

Mr. Pattison. It was contended, that the effect of the procuratory of resignation was to unite and blend the *dominium utile* with the *dominium directum*, so that the former was merged and lost by its union with the latter, and that Mr. Pattison, claiming under the deed of William Dunn as conditional substitute of the *dominium directum* of the lands of Boquhanran, was now entitled to receive them under that gift free from the *dominium utile*. In other words, that he was entitled, under the gift to him of the *dominium directum*, to receive the *plenum dominium* or absolute ownership of the lands.

I apprehend, that this argument is wholly unfounded. Assuming, that the effect of the resignation was to merge and extinguish the *dominium utile*, the person who is the owner of the feudal *plenum dominium* by virtue of that act, subject to the personal right given by the conditional substitution in favour of Mr. Pattison, may, by proper conveyance, sever the *dominium utile* again from the *dominium directum*, so as to be in a condition to grant Mr. Pattison that which alone is given to him, namely, the *dominium directum* in the lands of Boquhanran. If this can be made good to him, as it clearly may, he gets the benefit of the gift contained in the deed of William Dunn, and is entitled to no more. The case is very different from one in which two things have been wrongfully blended together, so as not to admit of separation.

These few plain remarks dispose of the different questions which were discussed at the bar, and the result is, that, in my opinion, the contention of the heir at law fails except as to the *dominium utile* of the land of Boquhanran, but which ought not under the circumstances to save his being directed to pay the costs of his extended appeal; and that the contention of Mr. Pattison touching the right to the *dominium utile* also fails, and that his appeal ought, as to that, to be dismissed with costs, and the interlocutor of the Inner House is correct, and must be affirmed, but with the accompanying declaration which has been already stated by my noble and learned friend on the woolsack, and that accordingly the causes should be remitted to the Court below, to do that which may be necessary to give effect to that declaration.

LORD COLONSAY.—My Lords, in regard to the first of these appeals, that of Barstow, as *curator bonis* to the heir at law of Alexander Dunn, it is right to look at the shape in which the case is presented to us. It is an action for reducing and setting aside the deed of his ancestor as having been executed *in lecto*. Other parties dispute his title to reduce it, and it is very clear and settled law, that an heir at law has no title to sue such a reduction, if there exists any previous deed which would come into operation and prevent his getting the subject which he seeks to get.

Now in this case, the Court have held, that the heir of Alexander Dunn, or his curator, has no title to sue such a reduction of Alexander Dunn's deed, in so far as regards certain properties, but that he has a title to sue reduction of that deed in so far as regards other properties, namely, those that belonged to Alexander Dunn himself, and the reason why they have found that he is not entitled to sue a reduction in regard to the property that belonged to William Dunn, is, that William Dunn himself had, by a valid deed, given that property by substitution to parties who would be entitled to take the property, if the deed of Alexander Dunn were set aside. Alexander Dunn's deed had been made as regards the property which he had succeeded to from William Dunn very much with a view to giving effect to what William Dunn had done by his deed.

Was the Court right in holding, that the heir of Alexander Dunn had no title to sue that reduction, so far as regards the property which had been derived from William Dunn? I think it was, except as regards the *dominium utile*. The argument that was submitted to us in regard to that matter was put with great ability and great ingenuity, and the ingenuity which was involved in it, and the admixture which was introduced of English principles, made me think it proper to put down upon paper what were my own views as regarded the simple case before us, judged by the laws of Scotland. The view I took of that case, with regard to the first appeal, was this:—

The deed of the 17th April 1830 is a *mortis causâ* deed, the testamentary settlement of William Dunn, whereby he declared his intentions as to the succession to every part of his estate, heritable and moveable. As parts of his estate consisted of heritage, it was necessary, that the deed should contain words of disposition, and the deed in question has such words. In considering what effect is to be given to such a deed, it is necessary to read the whole deed, and to collect from it the intentions of the testator, and if those intentions are clearly evinced, to give effect to them, unless there be some legal or formal obstacle to so doing.

As to the intention of William Dunn, I think it is impossible to entertain a doubt, for he has stated it in express terms in a clause obviously constructed for the purpose of giving full expression to his intentions, and of giving effect to them. I do not think, that the intention has been seriously questioned by any one either in the Court below, or at the bar of the House. He intended, that in the event of his brother Alexander surviving him and dying childless, without having disposed of the estates, they were then to go in certain portions to certain relatives named. That destination of his heritable estates is set forth by him with great particularity. The detail in which the different families, including Alexander's heir at law, are substituted in separate portions of the estate, excludes all room for doubts as to the settled purpose of the testator. The event of Alexander having died childless, and without having disposed of the estates, has

happened, and the question is, Whether effect is to be given or to be denied to William's declared purpose?

Setting aside for a moment the argument founded on the words "heirs and assignees whomsoever," which occur in the early part of the dispositive clause of the deed, and looking merely to the thing itself that William contemplated, it was a thing not only within his competency to do, and perfectly consistent with the principles of Scotch conveyancing, but it was the thing that is done in effect, though less fully expressed, in almost every case of substitutions in heritage to a man and the heirs of his body, not fenced with what was called fettering clauses. In every such case, the first disponee or institute is unlimited fiar. He may contract debt on the estate, or he may dispose of it for onerous causes, or gratuitously by deed *inter vivos* or *mortis causâ;* but if he does none of these things, and leaves no heir of his body, the substitute first named will succeed to him, and will have the same power of disposal. It seems unnecessary to cite authority for a proposition now so elementary. It was therefore quite within the legal competency of William Dunn to settle his heritage so that it should go first to his brother Alexander, who should be fiar with unlimited power of disposal, and that in the event of Alexander dying childless, and without having disposed of the estate by deed either *inter vivos* or *mortis causâ*, it should go to certain parties pointed out as substitutes in that event. It is also clear, that this was what William Dunn intended and endeavoured to do, and that the declaration or conditional substitution upon which so much depends, was introduced expressly for that purpose.

The question is therefore reduced to this, Whether the words "heirs and assignees whomsoever," in the early part of the dispositive clause, make it impossible to give effect to the intention of the testator fully and unmistakeably expressed in the subsequent part.

The Lord Ordinary does not appear to have had any doubt as to what William Dunn intended, but his Lordship appears to have thought "the mode" adopted ineffectual, and says "it rather appears to him" that the deed of William Dunn amounts to an attempt to do something that could not be competently done. That was also the contention of the appellants. If by that is meant, that William could not effectually give the estate to Alexander and his heirs and assignees whomsoever, and at the same time not to give it to them, that would be little else than a truism, and would not advance the argument. It is obvious, however, that William Dunn did not intend to attempt to do that. If the meaning be, that the words used in the first part of the dispositive clause, viz. "heirs and assignees whomsoever," taken by themselves, are inconsistent with the destination contained in the subsequent part, then supposing that to be so, it would not necessarily, or by sound legal inference, or the rules of construction applicable to such deed, lead to a rejection of the latter, containing as it does the fullest and latest declaration of his purpose. On the contrary, the latter ought to prevail if there be an apparent conflict.

It is a mistake to suppose, that because the deed begins with words of disposition to Alexander and his heirs and assignees whomsoever, the testator deprived himself of the power of attaching conditions to the destination to heirs whomsoever, or of qualifying, or explaining, or restricting, or altering by subsequent words the effect that would have been due to those previous words if they had been allowed to stand without any such condition, qualification, or explanation. The whole matter was still within his power, and his whole purpose had not been finally declared; what then does he go on to do? He expressly declares his meaning and purpose to be, that while he does mean or intend to restrict the absolute power of disposal given to Alexander, he does mean and intend, that there shall be a substitution of certain parties conditionally, that is, in the event of Alexander dying intestate without issue. Notwithstanding the substitution thus made, Alexander, as in other cases of substitution, was unlimited fiar, and his gratuitous *mortis causâ* deed, disposing of and distributing the estates, could not have been challenged by any one apart from the ground of deathbed.

No particular form of words was necessary for effectuating the purpose intended, but the clause is very anxiously expressed. It combines almost every form of expression that could be suggested for giving effect to the purpose, "fall and devolve," dispone, alienate, and convey, etc. Some of these words are perhaps superfluous, but they do not detract from the import or efficacy of the clause as a conditional substitution. The Lord Ordinary appears, from some expressions in his note, to have treated this part of the deed as if it was no part of the dispositive clause, and that idea seems to have had some influence on his judgment. But I cannot agree with him in that. I do not doubt, that it is to be regarded as part of the dispositive clause, and not of any other clause, notwithstanding the parenthetical mention of certain burdens that were to affect the subjects conveyed. It does not appear to me, that either the position or the phraseology of this part of the deed presents any serious difficulty.

All the Judges of the Second Division were of opinion, that there was here a perfectly habile exposition by William Dunn of the true meaning and import of his deed, and that there was no obstacle in form or substance to giving effect to it. One of them, Lord Benholme, thought, that the word "heirs" should be read as "heirs of the body," but said, that he did not consider that necessary for the decision of the case, plainly indicating his concurrence in the view taken by all the other Judges, as being sufficient for the decision of the case. Other Judges hesitated

or declined to hold, that the word "heirs" was to be construed as "heirs of the body," with reference to every combination of circumstances that might have occurred, although in the case that did occur, the result, or at least the primary result, was practically the same. The Lord Justice Clerk in particular thought, that the word "heirs and assigns whomsoever," had such a fixed meaning, that he could not simply read them as "heirs of the body," but he did not doubt, that the testator could qualify the earlier part of the dispositive clause so expressed by a subsequent part, or that such qualification should receive effect, giving as it did, in apt language, full and clear expression to the testator's purpose, as to the destination of his heritable estates.

While I concur with the Lord Justice Clerk in holding as a general proposition, that the words "heirs and assigns whomsoever" have a known meaning which is not the same as "heirs of the body," and which is so far a fixed meaning, that it cannot easily be wrested from them, I am not disposed to go the length of holding, that these words may not admit of construction. But I concur with him, and all the Judges of the Second Division, in thinking, that it was competent for the granter of the deed, after having used these words, still to attach conditions as to the succession of the heirs whomsoever, or to qualify or explain his disposition and settlement by subsequent words and provisions, and that he has effectually done so.

I therefore think, that the judgment of the Court below in this case is substantially right. But there is a point in the case which appears not to have been adverted to when the case was under the consideration of the Court, and with reference to which it may be necessary that some alteration should be made in the terms of the judgment, I mean with regard to the point as to the *dominium utile* of Boquhanran. I think, with reference to that, the judgment of the Court ought to be altered or explained in the way proposed by my noble and learned friend on the woolsack.

Then as to the *second appeal*, the question raised by Mr. Dunn Pattison in that appeal presented to my mind much more difficulty than the one which was raised in the appeal on which I have expressed my opinion. I think that was a very difficult question, and one as to which there is little or any precedent. But I think there are principles that settle it. There is in some degree a conflict of principles in the circumstances that occurred. The general rule is, that, when a consolidation of the *dominium utile* and the *dominium directum* takes place, the *dominium utile* is merged or swallowed up in the *dominium directum*, and that the whole will go in the same direction, that is, in the direction of the *dominium directum*. That is certainly the general principle, and if in this case Alexander Dunn had held the *dominium directum* destined to himself and one series of heirs, and had held the *dominium utile* destined to himself and another series of heirs, without there being any other controlling interest in the matter, it might have been held, and probably would have been held, that by consolidating them he sent the *dominium utile* in the direction in which the *dominium directum* was to go. But then there is another principle, another power which comes into operation in this case, and that is founded upon the circumstance, that there was a controlling personal destination as to the *dominium directum*, a controlling personal right, and so long as Alexander Dunn merely made up his titles by entry, that personal title controlled it.

Now, then, the *dominium utile* being hooked on as it were to the *dominium directum*, the question arises, How is the right which Mr. Dunn Pattison had under William Dunn's deed, which was a controlling right, to be rendered effectual? Upon that the first question is, What was his right under William Dunn's deed? His right under William Dunn's deed was to have the *dominium directum*, but it gave him no right to get the *dominium utile*. Then what right has he to the *dominium utile?* His only right to the *dominium utile* must be this, that he claims that Alexander Dunn gave it to him by consolidating it with the *dominium directum;* that Alexander enriched as it were the *dominium directum* for his benefit. That is said to be apparent from the words of resignation, which import a resignation *ad remanentiam*, that the two were to remain united together. Those are words of style, but still the question remains, whether we are to hold, that Mr. Dunn Pattison is, through and by virtue of the rights he had, entitled, under the personal title which William Dunn gave him, to demand from the heir more than was given to him by William Dunn, and whether we are to hold, that it was the intention of Alexander Dunn so to enrich the *dominium directum*. I cannot hold that to be so. I think, upon the whole, that the prevailing rule ought to be, that the heir of the *dominium directum*, the heir of provision, was not the heir Alexander Dunn had in his mind when he resigned the *dominium utile* into his *own* hands, to remain with him and his heirs. And if that be so, if we are to hold, that that was not the purpose of Alexander Dunn, and I think there are various circumstances which indicate that it was not his purpose, I do not think, that we can apply the rigid rule which might exist in other circumstances of the *dominium directum* swallowing up the *dominium utile*, to a case where it is only upon a limited personal title as the heir of provision that Mr. Dunn Pattison comes in claiming that which Mr. William Dunn gave him. It was in the power of Alexander Dunn during his life to have separated these interests. It was in his power to have left them to his heir at law, or to any other of his grandnephews or nieces, and it is impossible to say, that he intended them to go to Mr. Dunn Pattison, rather than that he intended to deal with them in a way which would not have sent them to Mr. Dunn Pattison. I

therefore think, that the Court have arrived at a sound conclusion upon the difficult question, for difficult it is, and that their judgment should be affirmed.

Mr. Anderson.—Perhaps your Lordships will allow me, before the question is put, to explain that there are some other parcels of land called by other names in the same position as Boquhanran, and for the sake of accuracy I presume your Lordships' declaration will include all the parcels which are in the same position as Boquhanran. We make no distinction between them and Boquhanran, which was taken merely for the purpose of argument, as the primary subject to be dealt with. We understand your Lordships' judgment, I think, thoroughly, and I believe the parties will have no difficulty in adding words which will make it embrace all the lands in the same position as Boquhanran.

LORD CHANCELLOR.—Are all the parties agreed as to that?

Lord Advocate.—I did not receive any notice of this until just now, but Boquhanran was the only estate which was the subject of discussion in the Court below. The other estate,—Kilbowie,—I refer to that estate particularly, in which my client Mr. Black is interested,—that was not mentioned in the Court below at all. It has been introduced, I see, in the reasons of appeal, but no argument was submitted upon it separately, and I have special answers to any such claim if it is made at the instance of the heir at law, for instance under William Dunn's deed.

LORD WESTBURY.—I do not think we can enter into this.

LORD COLONSAY.—No, I think not.

LORD CHANCELLOR.—My Lords, I think your Lordships will agree with me, that nothing can be more inconvenient than that after the argument has proceeded throughout on the title of Boquhanran alone, without touching upon any property whatever, a suggestion should now be entertained, that other properties will be found to be in the same position as Boquhanran, unless all parties are agreed, that that is the case. If they are, there may probably be no objection to including the other properties, but if they are not agreed, it appears to me, that it would be wholly impossible for us to do what has been suggested.

Barstow v. *Black, et al. ex parte* as to certain respondents:—

Interlocutors of the 27th March 1865 *affirmed, with a variation: Cause remitted, and subject to such variation and remit, the appeal dismissed with costs.*

Pattison v. *Henderson, et al.; Barstow* v. *Pattison, et al.*, First Cross Appeal.—*Black* v. *Pattison, et al.*, Second Cross Appeal.—*Boyd, et al.* v. *Pattison, et al.*, Third Cross Appeal—*ex parte* as to certain respondents:—

Interlocutors of the 20th July 1866 *affirmed, and the original appeal and three cross appeals against the said interlocutor dismissed with costs.*

Appellant Barstow's Solicitors, Murray, Beith, and Murray, W.S.; Martin and Leslie, Westminster.—*Appellant Pattison's Solicitors*, Dundas and Wilson, C.S.; Connell and Hope, Westminster. *Respondent Mrs. Boyd's Solicitors*, J. Webster, S.S.C.; Loch and Maclaurin.—*Respondent Black's Solicitors*, J. Ross, S.S.C.; Simson and Wakeford, Westminster.

FEBRUARY 25, 1869.

THE LORD ADVOCATE, *Appellant, v.* WALTER STEVENSON, *Respondent.*

Succession Duty Act, 16 and 17 Vict. c. 51—Apparent Heir—Taking Possession—*On J.'s death W. was heir* ab intestato *to the heritable property, but never made up titles nor drew any rents and died within three months, when S. succeeded and completed his title as heir to J.*

HELD (affirming judgment), *That W. was not liable to succession duty, having never had any interest in possession in the property.*

This was an information for succession duty. Janet Finlay died in June 1862, infeft in a fee simple dwelling house. Williamina Finlay was her heir at law, but never made up any title nor drew any rents, and died in September 1862. Walter Stevenson, being heir at law of both

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[1] See previous report 4 Macph. 322; 38 Sc. Jur. 165. S. C. L. R. 1 Sc. Ap. 411; 7 Macph. H. L. 1: 40 Sc. Jur. 304.