David Sneddon senior consists of the bill No. 40 of process for £170, dated 22d January 1869, at four months, and signed by James Snowdowne and James Fyfe, as acceptors. It is material to notice that this bill has never been completed by the signature of the drawer, who was intended to have been the respondent, David Sneddon senior.

"The defence is, that the acceptance in question was given to David Sneddon senior, not as a preference at all, but simply as a composition due to David Sneddon senior and his son, assuming the composition contract to which they assented to have been carried through. The Lord Ordinary thinks that this defence is sufficiently substantiated.

"The question is a jury question, depending on the evidence. The depositions both of James Snowdowne, the bankrupt, and of David Sneddon senior, are a little confused and unsatisfactory; but all doubts seems to be removed by the evidence of Mr Ewing, who, although the agent of the respondent, has no interest in the matter, and against whose credibility there is no insinuation. If Mr Ewing's evidence is believed, there was no preference either intended or taken; and although the bill was drawn at four months, this seems to have been a mere mistake, sufficiently accounted for by the haste with which, in order to meet the bankrupt's view, the transaction was carried through.

"It is sufficiently instructed, that besides the debts claimed by the respondents in the sequestration, they had other claims against Snowdowne which were judicially stated in the Sheriff Court action, and which appear *prima facie* to be instructed to an extent more than sufficient to justify a composition bill for £170—the debts claimed on in the sequestration being included. If the composition contract had been carried through, it seems sufficiently made out that a composition of 3s. 4d. per pound on the whole of the respondent's debts would have exceeded £170; and even adding the advantage which the bill gives in point of time, no real preference was given if the bill was simply a composition bill.

"The Lord Ordinary cannot hold it proved, in opposition to the testimony both of Sneddon and of Ewing, that the bill was ever intended as a preference, to be paid over and above the amount of composition.

"The real evidence of the case strongly negatives the idea that any preference was either intended or given by the bill in question. It appears that the day before that on which the bill was granted, David Sneddon sen. and the bankrupt Snowdowne had exchanged letters expressing the terms upon which the respondents were to accede to the bankrupt's composition. One of these letters cancelled still exists, and is No. 9 of process, and *prima facie*, certainly it expresses an agreement which seems to constitute a preference in favour of David Sneddon sen.; but this transaction was submitted the same day by David Sneddon sen. to his agent, Mr Ewing, for advice and approval, when Mr Ewing at once, and very emphatically declared the bargain illegal, and tore up the missive on the spot. In consequence of this advice the duplicate missive or counterpart (No. 9) was at once got back and cancelled. Parties were thus put upon their guard against giving or taking any illegal preference; and when they came to Mr Ewing again, that same night and next morning to arrange in his presence Sneddon's assent to the proposed composition contract, it is hardly conceivable that they should arrange an illegal preference, either deceiving Mr Ewing or making him a party to the fraud.

"The *onus* of establishing that the respondents took or stipulated for an illegal preference is entirely on the petitioner. The Lord Ordinary thinks that the petitioner has entirely failed to prove his case.

"II. Even if an illegal preference has been taken by or promised to David Sneddon senior, the Lord Ordinary thinks that there is room for applying the principle given effect to in *Carter's* case above quoted, that 'cause has been shown to the contrary'—that is, reasonable ground has been shown why the forfeiture and penalty should not be enforced. In *Carter's* case, the 'cause to the contrary' consisted in the instant repentance of the creditors, and repayment of the money by them. In the present case, the preference, supposing one intended, was never carried out. The bill was never completed by the drawer's signature; and before the present petition was presented it was intimated to the respondents' agent, on 21st April 1869, that no use would be made of the bill. The previous letter of 13th April 1869 by Sneddon's agent seems to show the agent's good faith, as it expressed his understanding of the footing on which the bill had been granted.

"The question, however, whether, assuming an illegal preference to have been taken, there was timeous repentance, is one of much nicety; and the Lord Ordinary prefers to rest his judgment on the broad ground that the petitioner has failed to prove his case."

Agents for Petitioner—J. & J. Milligan, W.S.
Agent for Respondents—W. B. Glen, S.S.C.

Wednesday, March 9.

SECOND DIVISION.

(Before Seven Judges.)

BARSTOW (PARK'S CURATOR) *v.* BLACK AND OTHERS.

Property—Superiority—Dominium Utile—*Consolidation—Evacuation.*

Declarator—Meaning of Judgment—Competency—Lis alibi pendens—Res judicata. A died in 1830 leaving a trust-disposition and settlement conveying his heritable property to B. B died in 1860, leaving a deed of settlement by which he conveyed all his heritable estate belonging to him, or which might belong to him at his death, whether he had succeeded to it through A or had acquired it himself. This deed was executed on deathbed. The heir-at-law of B thereupon raised an action of reduction of B's deed *ex capite lecti.* In the defences to this action it was maintained that the heir-at-law had no title to sue a reduction of B's deed, in so far as that operated as a conveyance of the heritable estate formerly belonging to A, and settled by his disposition in 1830. This defence was sustained by the Judges of the Second Division, but, *quoad ultra*, B's deed was reduced upon the head of deathbed. A had acquired both the property and the superiority of certain lands under separate titles. The superiority was acquired by him prior to the date of his settlement, and stood destined in favour of a certain individual and other heirs of provision,

while the *dominium utile* was acquired subsequent to the date of the said settlement, and stood destined thereby to other heirs as a part of the residue and remainder of the estate of A. B, after his succession, made up titles to these lands, and consolidated by resignation *ad remanentiam*. The judgment of the Second Division above referred to was appealed to the House of Lords, which affirmed the judgment, adding a declaration that the heir-at-law was entitled to reduce B's deed so far as it operated as a conveyance of the *plenum dominium* of these lands, but to the effect only of vindicating the right of the heir-at-law to the *dominium utile* of the lands. Other lands which formed the subject of the present action stood upon a different footing. Of these the *dominium utile* alone had belonged to A, and they stood specially conveyed under his deed to one of the defenders in the action. B succeeded to the *dominium utile* of these lands under the settlement of A, and subsequent to A's death he acquired the superiority of the lands by purchase. Having both the estates in his own person, he afterwards consolidated by first entering as heir to the *dominium utile* by precept of *clare*, and then making a resignation *ad remanentiam* in his own hands. In regard to the latter lands, an action of declarator was brought by the heir-at-law to have it found that the *plenum dominium* of these lands belonged to him, as the same stood vested in B at the period of his death. It was maintained by the heir-at-law that these lands, as well as the lands first above referred to, fell within the reduction, and not the absolvitor of the former judgment of the Second Division. *Held*—(1) On the assumption that the former judgment of the Court was doubtful as to whether the lands in question in this action, were included in or dealt with by it, that an action of declarator to obtain the judgment of the Court upon that point was competent; (2) That the effect of the resignation by B was an evacuation of the destination in favour of the defender in the settlement of A, and that B's heir-at-law was entitled to the *plenum dominium* of the lands in question.

This was an action brought by the *curator bonis* of William Park, heir-at-law of the late Alexander Dunn of Duntocher, for the purpose of declaring the said William Park's right to the *plenum dominium* of certain lands known as Wester and Easter Kilbowie, which are particularly described in the summons. The action is brought in the following circumstances, as stated by the pursuer:—"The pursuer, C. M. Barstow, is *curator bonis* to William Park, a person of weak mind, now or lately residing in or near Hamilton. He was appointed, on June 2, 1866, in room and place of the deceased Andrew M'Ewan, conform to act and warrant of the Lords of Council and Session. The said William Park is nephew and nearest and lawful heir of line of the late Alexander Dunn, Esq. of Duntocher, being the only son of the only sister of the said deceased Alexander Dunn, and the said Alexander Dunn having died unmarried and without being survived by any brother or lawful issue of a brother. The said Alexander Dunn died on 15th June 1860, vest and seized as of fee in various lands and heritages, and among others in the subjects particularly described in the summons. Some of the said lands and heritages, and, *inter alia*, the *dominium utile* of the lands particularly described in the summons, Alexander Dunn had acquired by his succession to his brother William Dunn, who died on 13th March 1849, leaving a disposition and settlement, dated 17th April 1830, in favour of the said Alexander Dunn. The said Alexander Dunn left a trust-disposition and settlement, dated June 11, with codicils dated respectively 13th and 14th June, 1860, whereby he conveyed his whole lands and heritages and estates (including subjects which he had acquired by succession to his brother William) to John Henderson and others, as trustees, for the purposes therein expressed. The defender Robert Black was one of the said original trustees, and the defenders James Wyllie Guild and Colin Dunlop Donald went into the trust subsequently as assumed trustees. By the said deed a part of the lands of Kilbowie, described in the summons, was destined to the defender James Black, and the other portions thereof were destined to the defender John Macindoe. The said trust-disposition and settlement and codicils having been executed on deathbed, the pursuer's predecessor, as *curator bonis* foresaid, on June 19, 1862, raised an action of reduction of the said deed and codicils *ex capite lecti*. In the said action defences were lodged for Alexander Dunn Pattison, and also for the defenders James Black and John Macindoe, and others, objecting to the pursuer's title to sue the action. On March 27, 1863, the following judgment was pronounced in the said action by the Court of Session (Second Division):—'The Lords having heard counsel on the reclaiming notes against Lord Jerviswoode's interlocutor, dated 10th January 1865, recall the said interlocutor, sustain the objections to the title of the pursuer to sue for reduction of the trust-disposition of the deceased Alexander Dunn, in so far as the same operates as a conveyance of the heritable estate formerly belonging to the deceased William Dunn, and settled by his disposition and settlement, dated 17th April 1830: To this extent sustain the defences, and assoilzie the defenders: *Quoad ultra* reduce, decern, and declare in terms of the conclusions of the libel: Find the defender Alexander Dunn Pattison entitled to expenses: Find no other expenses due, and remit to the auditor to tax the expenses now found due, and to report.' On appeal to the House of Lords the above judgment was affirmed, subject to the following declaration, viz. —'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 the *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. The said lands of Boquhanran, both property and superiority, had belonged to the said William Dunn by separate titles, the superiority having been acquired by him prior to the date of his settlement, and having been destined in terms thereof to Alexander Dunn Pattison, and other heirs of provision therein mentioned, while the *dominium utile* was acquired subsequent to the date of the said settlement, and stood destined thereby to other heirs as a part of

the residue and remainder of the said William Dunn's lands and estates. Alexander Dunn, after his succession, made up titles to the said lands of Boquhanran, and consolidated by resignation *ad remanentiam* in his own hands. Among the subjects which Alexander Dunn acquired by succession to his brother William was the property or *dominium utile* of the lands of Kilbowie above described, and which were held of Sir Archibald Edmonstoune as immediate lawful superior thereof. Subsequently to his brother's death, Alexander Dunn acquired from Sir Archibald Edmonstone the superiority of the said lands of Kilbowie above described, and having completed a title thereto, and also to the *dominium utile* thereof, he consolidated by resignation *ad remanentiam* in his own hands in favour of himself and his heirs and successors, conform to procuratory of resignation *ad remanentiam*, dated Dec. 22, 1853, and instrument of resignation following thereon, dated 31st December 1852, and recorded in the Register of Sasines of date 15th January 1853. The pursuer, as *curator bonis* foresaid, is in course of making up titles under the authority of the Court to the lands and heritages which belonged to Alexander Dunn at the time of his death, and which were not excepted from the foresaid decree of reduction. But in the course of the proceedings objection has been taken on the part of the defender James Black that the succession to the *dominium utile* of the said lands of Kilbowie above described is settled by the deed of William Dunn in favour of him, in so far as not settled upon the defender John Macindoe. He opposes any title being made up in the person of William Park to the said lands of Kilbowie. And the Court, on May 29, 1869, in consequence of the question raised by him as to the right to the *dominium utile* thereof, refused, *hoc statu*, to grant authority for completing a title to said lands."

The defenders maintained the following pleas:—"(1) *Lis alibi pendens* as regards the declaratory conclusions. (2) In respect the *dominium utile* of the lands of Kilbowie, described in the summons, forms part of the heritable estate which belonged to William Dunn, and was settled by his disposition and settlement, it is *res judicata* that the pursuer has no title to sue a reduction of the trust-disposition and settlement of Alexander Dunn, so far as it conveys that subject. (3) In respect of the judgment and pleadings set forth in the defenders' statement of facts, the pursuer is excluded from claiming the *dominium utile* of the lands of Kilbowie, at least so far as the defender is interested therein. (4) In respect of the provisions in the defender's favour in the disposition and deed of settlement of William Dunn, and in the trust-disposition and settlement of Alexander Dunn, the defender is entitled to the *dominium utile* of the lands of Kilbowie, so far as situated to the east of the Kilbowie Road. (5) And the pursuer, if he shall make up a title to the *plenum dominium* of said subjects, is bound to convey the *dominium utile* thereof, so far as situated to the east of the Kilbowie Road, to the defender, to be held by the defender, under the said William Park, as superior thereof, subject to the same duties and casualties as were exigible from the said William Dunn for said lands."

The Lord Ordinary (ORMIDALE) reported the case to the Court with the following note:—"The very peculiar circumstances in which the present action has been brought, and the nature of the pleas which fall to be determined, as immediately to be explained, have led the Lord Ordinary to think it right, contrary to the usual practice, to report this case, in place of deciding it himself. He has reported it to the First Division of the Court, in respect that it has been marked as belonging to that Division, although not unlikely it may yet be thought right, for the reasons afterwards adverted to, that it should be transferred to the Second Division.

"The object of the action is to have it found and declared that certain lands, known as Wester and Easter Culbowie or Kilbowie, which formerly belonged to Mr William Dunn of Duntocher, should, notwithstanding the terms of the interlocutor of the Second Division of the Court, disposing of a former action between the same parties (27th March 1865, 3 M'P. 779), and judgment of affirmance of that interlocutor by the House of Lords (23d July 1868, 6 M'P. 147), now belong to the pursuer, as the heir-at-law of Mr Alexander Dunn, the younger brother of Mr William Dunn. It is maintained on the part of the defenders that the question now raised in the present action is either still depending in that former action, or has already been determined in it. The defenders have accordingly pleaded in bar of the present action—1st, *Lis alibi pendens*, and 2dly, *Res judicata*. The former of these pleas is maintained in respect that the judgment of the House of Lords in the former action not having been yet applied, the matter now in dispute may yet be considered and dealt with in that former action when the judgment of the House of Lords therein comes to be applied, and the plea of *res judicata* is maintained, in respect that, if it be held that nothing remains to be disposed of in the former action, then the question now in dispute must be held as having been determined therein.

"As it is obvious that the Lord Ordinary is not in a position to judge of these points so well or so satisfactorily as the Court in which the former action depended, and, according to the contention of the defender, still depends, he has thought it right at once to report the case. He has, for the reason already mentioned, being obliged to report it to the First Division of the Court, from which, however, it may, if thought right, be transferred to the Second Division, where the former action was decided, and where it still depends, if it is in dependence at all.

"The terms of the interlocutor of the Second Division of the Court in the former action are set out in condescendence 6. It was by that interlocutor found that the pursuer had no title to sue for reduction of the trust-disposition and settlement of Alexander Dunn, 'in so far as the same operates as a conveyance of the heritable estate formerly belonging to the deceased William Dunn, and settled by his disposition and settlement,' and to this extent absolvitor was pronounced, but *quoad ultra* Alexander Dunn's deed of setlement was reduced *ex capite lecti*. The pursuer having appealed that interlocutor to the House of Lords, pleaded, *inter alia*, that this Court had gone too far, and ought at least to have held that the pursuer had a good title to reduce Alexander Dunn's settlement, so far as it conveyed the *dominium utile* of the lands of Boquhanran; in respect that, although these lands had formerly belonged to William Dunn, and were settled by his disposition, that settlement had been evacuated by Alexander Dunn, and, as the lands consequently stood vested at his death in him in his heirs and successors,

were no longer affected by William Dunn's deed, and so did not come under the scope of the defender's plea of want of title to reduce. This contention of the pursuer was sustained in the House of Lords, who pronounced an affirmance of the judgment of this Court, subject only to the declaration quoted in condescendence 7.

"The pursuer now contends that the lands of Kilbowie stand in precisely the same position as the lands of Boquhanran, and therefore that they must be held to fall, not under the absolvitor, but under the decerniture of reduction in the interlocutor of the Second Division above referred to, in respect that the only estate in the person of Alexander Dunn at the date of his death was the *dominium directum* which he had himself acquired by purchase, enriched by the consolidation effected by him by resignation *ad remanentiam* in his own hands, and consequently that he is entitled to prevail in the present action. On the other hand, the defenders maintain that, even supposing the pursuer is right in his contention that the lands of Kilbowie stand in the same position as those of Boquhanran,—and from what is stated in articles 8, 9, and 10 of the condescendence, taken along with the admissions in the answers to these articles, this would appear to be the case,—the pursuer is barred by one or other of the two pleas of *lis alibi pendens* and *res judicata* from taking any benefit from that circumstance in the present action. They maintain, with reference to the plea of *lis alibi pendens*, that, keeping in view the terms of the judgment of affirmance in the House of Lords, whereby the case was remitted in the usual way to this Court, to proceed in accordance therewith, the question now in dispute may be raised, considered, and disposed of, in applying the judgment. But if this cannot be done, in respect of its being held that the former action was finally and exhaustively disposed of by the judgment in the House of Lords, then, in that view, the defenders contend that their plea of *res judicata* applies, and must be given effect to. Whether the latter plea be sound or not depends very much on what is the true meaning and interpretation of the interlocutor of the Second Division of the Court, set out in the sixth article of the pursuer's condescendence in the present case. The pursuer says that, according to the true meaning and interpretation of that interlocutor, the lands of Kilbowie, as well as the lands of Boquhanran, and all other lands similarly situated, fall under the decree of reduction, and not under the decree of absolvitor in that interlocutor. This may be so, and whether it is so or not, can, it is thought, be best determined and explained by the learned Judges by whom the interlocutor in question was pronounced. All that the Lord Ordinary thinks it necessary to add on the subject is, that if the pursuer be right in his present contention, it is not very easy to understand how it was thought necessary to qualify the judgment of affirmance of the House of Lords with the declaration which it contains regarding Boquhanran only, without any allusion to Kilbowie.

"A decision on the defenders' two pleas of *lis alibi pendens* and *res judicata* will be substantially a decision of the whole cause, so far at least as the declaratory conclusions are concerned."

The case was first argued before the Judges of the Second Division, and was afterwards re-argued before seven Judges.

SOLICITOR-GENERAL and LEE for pursuer.

LORD ADVOCATE and GLOAG for the defender James Black.

At advising—

LORD PRESIDENT—This is an action maintained on behalf of William Park, a lunatic, by his curator *bonis*, for the purpose of establishing his right, as heir-at-law of the deceased Alexander Dunn, to certain heritable subjects mentioned in the summons; and the argument which we heard was confined, as I understand the Judges of the Second Division intended it should be, to a consideration of the declaratory conclusions of the summons, with the conclusion for obtaining possession of the subjects; and the defences stated upon the part of the defender Black to these conclusions; and that we have not at present any concern with the conclusions for accounting, or with any of the pleas maintained on behalf of Dunn's trustees, the other defenders.

The declaratory conclusion seeks to have it found and declared that William Park, as the nephew, and nearest and lawful heir-at-law of the deceased Alexander Dunn, has the sole right to the *plenum dominium* of certain lands called Easter and Wester Kilbowie, as the same stood in the person of the deceased Alexander Dunn at the time of his death; and upon that being declared, and it being further declared that the defender Black and the trustees have no right to the subjects, the trustees are to be decerned and ordained to cede possession to the pursuer.

The defences which are maintained by Mr Black, in answer to these conclusions, are of two descriptions. In the first place, they are founded upon the proceedings and judgment in a former action at the instance of Mr Park's curator against the trustees of Alexander Dunn and the beneficiaries claiming under his settlement. And the other defences are upon what may be properly called the merits of the declarator.

As regards the proceedings in that previous action, and the judgment pronounced by the Second Division in it, I shall postpone in the meantime what I have to say upon that subject, until I consider the defences upon the merits of the declarator. The defence upon the merits is this, that in respect of the provisions in the defender's favour in the disposition and settlement of William Dunn, and of the trust-disposition of Alexander Dunn, the defender Black is entitled to the *dominium utile* of the lands of Kilbowie claimed in the summons. And it is further pleaded, that if the pursuer makes up a title to the *plenum dominium* of the lands of Kilbowie, he shall be bound to convey the *dominium utile* thereof to the defender Mr Black. The pursuer therefore claims the *plenum dominium* of the lands of Kilbowie, consisting of an estate of superiority and a *dominium utile*, which had been consolidated, and form one estate. The contention of the defender is that he is entitled to what was the *dominium utile* before the consolidation, and that he is entitled to have the consolidation undone for the purpose of restoring that subject to its former condition, and having it transferred to him in property. Now, looking to the terms of the conclusion of declarator, which claims for the pursuer the estate as it stood in the person of the deceased Alexander Dunn at the time of his death, the first point of inquiry is, what that estate was at that time? and the history of it may be very easily stated. The *dominium utile* of the subject called Kilbowie, which belonged to William Dunn, was held by him under Sir Archi-

bald Edmonstone as his superior, and that was the only estate that was possessed by William Dunn. He never had, and never acquired during his lifetime, any right to the superiority which belonged to Sir Archibald Edmonstone. But he died in 1849, and that *dominium utile* was conveyed by his settlement in favour of his brother Alexander, in the first place in full fee, but with a substitution, and the substitution was to what may be called the residuary legatees, or residuary beneficiaries under William Dunn's deed. The subject of Kilbowie was specially conveyed to Mr Black by William's deed.

Now, that being so, the *dominium utile* became the property of Alexander Dunn under his brother's settlement at his death in 1849. Subsequently, upon the 11th of September 1852, Mr Alexander Dunn acquired the superiority of these lands from Sir A. Edmonstone. The superiority therefore was conquest in his person, whereas the *dominium utile* he obtained by succession to his brother; and having both the estates in his own person, he proceeded to consolidate, and he did it in the usual way,—by first entering himself as heir to the *dominium utile* by precept of *clare*, and then making a resignation *ad remanentiam* in his own hands. We have in the appendix to the present record the deeds by which this was accomplished;—in the first place, the disposition by Sir A. Edmonstone, dated the 11th of September 1852; a procuratory of resignation *ad remanentiam* on the 22d of December of the same year; and the instrument of resignation following thereon upon the 31st of the same month. By that instrument of resignation the lands of Easter and Wester Kilbowie are resigned, "together with all right, title, and interest which the said Alexander Dunn had or could pretend to the same, in the hands of the said commissioner for the said Alexander Dunn, immediate lawful superior of the said lands and others, *ad perpetuam remanentiam*, to the effect that the right of property of the foresaid lands and others which stood in the person of the said Alexander Dunn as aforesaid, might be united and consolidated with his right of superiority of the same, and remain inseparable therefrom in the person of the said Alexander Dunn, his heirs and successors, in all time coming." Now what is the effect of this proceeding? In the first place, the resignation being a conveyance of the subject, is an evacuation of the destination in favour of Mr Black in the settlement of William Dunn. But, in the second place, it appears to me that the effect of this proceeding is to extinguish and destroy the estate of the *dominium utile* which formerly existed in the person of William Dunn, and was the subject of settlement in his deed, and to put an end to it for ever—to merge it in the superior right, so that at the date of Alexander Dunn's death the only estate with which he was vested was the estate of Easter and Wester Kilbowie, acquired from Sir A. Edmonstone by purchase—no doubt rendered more valuable by the resignation which extinguished the burden of the feu-right, and put an end to it; but still there was the estate in Alexander Dunn at the time of his death, not held of Sir A. Edmonstone, but, on the contrary, an estate which formerly belonged to Sir A. Edmonstone. Now I think the *plenum dominium* of Easter and Wester Kilbowie, as thus vested in Alexander at the time of his death, was his own estate, and was not an estate derived from his brother William by succession, that consequently it could not be carried by his deathbed deed, and that, *quoad* that estate, the deathbed deed was reducible at the instance of the pursuer as the heir-at-law, and that if there is no other difficulty in the case, this estate in terms of the conclusions of the summons, belongs to the pursuer. So much for the merits of this action of declarator.

But then it is said upon the part of the defender that this cannot now be maintained by the pursuer, because the matter has already been otherwise decided in the previous action; or if it has not been decided in the previous action, it is still open to consideration in that action, and consequently lets in the plea of *lis alibi pendens*. In short, the two pleas maintained by the defender, in respect of these previous proceedings, are *lis alibi pendens*, and *res judicata*. Now, for the purpose of disposing of these, it is necessary to advert to that original action. It was an action in which Mr Park and his guardian for the time sought to reduce a trust-disposition and settlement of Alexander Dunn, in so far as by that disposition and settlement he gave, granted, and disponed to the trustees, all and sundry lands, tenements, teinds, tacks, mills, and other heritages, and in general his whole heritable estate, including the whole heritable subjects and estate to which, as therein alleged, he succeeded under a disposition and deed of settlement by his deceased brother Mr Dunn, as well as those otherwise acquired by or belonging to, or which might be belonging to him, the said Alexander Dunn, at his death, and also in so far as he thereby pretended to confirm the conveyances and destinations alleged to be conveyed in his brother's settlement. It will be observed, therefore, that in the conclusions of the summons the distinction is taken by the pursuer between the lands which belonged to Alexander Dunn in his own right, being his own acquisition, and those which he succeeded to under the settlement of his brother William. And this distinction is brought out still more clearly in the condescendence, particularly in article 4, which, for the sake of greater precision refers to two schedules appended to the record, in one of which, schedule A, are included the lands which Alexander succeeded to under the settlement of his brother William, and the other includes the lands left by Alexander Dunn, but acquired by him otherwise than by succession to his brother. Now, it is in the second of these schedules that we find the estate of Easter and Wester Kilbowie, and it is entered under this description, "part of the lands of Easter and Wester Kilbowie acquired by Alexander Dunn from Sir Archibald Edmonstone in 1852." That is the description of the subject in the schedule, and it is quite accurate in its terms for the reasons that I have already stated. The *dominium utile* which had belonged to William Dunn no longer existed, but was merged in the estate of superiority. But in the specification of the titles, which is given in another column of this schedule, it is very properly explained in what way the estate was derived from Sir Archibald Edmonstone, and how the *dominium utile*, which had come by succession from William, was merged in the superiority acquired from Sir Archibald. All that is distinctly brought out. The important fact is, that the lands are entered distinctly, and by specific description, and with reference to the titles in that list of heritages which is said to be acquired by Alexander Dunn otherwise than by succession to his brother. The answers to the article of the condescendence in which this allegation is made

with reference to these schedules, do not contain any explicit or detailed admission with regard to the parcels of lands that are embraced in these schedules, or as to whether each parcel of lands is put into its proper schedule; but there is certainly no objection taken of any kind, on the part of any of the defenders, to the classification which is to be found in these two schedules. Mr Black's plea in law, in answer to the summons, I think is also very important, not because it differs from those of the other defenders, but because he is the party with whom we have to deal in the present action. His leading plea is this:—"William Park, in whose right the pursuer sues, has no title to challenge Alexander Dunn's trust-deed and settlement, except in so far as that deed conveys away subjects to which the said William Park would have succeeded as heir-at-law of the said Alexander Dunn. He has no title to sue the present action as regards any lands and heritages which belonged to William Dunn, and were conveyed by his settlement." Now, here the distinction is again clearly recognised by the defender between those lands which at the date of Alexander Dunn's death belonged to himself, otherwise than as the heir under his brother William's deed, and those lands to which he succeeded and which he then held as the heir of William Dunn. But there is no plea to the effect that any portion of lands that are alleged by the pursuer to be the proper estate of Alexander, not acquired from his brother William, have been entered in the wrong schedule, or that there is any dispute or difference between the pursuer and this defender, or indeed any of the other defenders, as to any particular parcel of lands. The sole question is, whether the pursuer is entitled to prevail in the conclusion of reduction entirely, or whether he must be limited to those lands which belonged to Alexander in his own right, and not as the heir of his brother William? Upon that question, accordingly, the judgment of the Court was pronounced; and it appears to me to dispose of that question quite distinctly. The interlocutor of the Second Division of 27th March 1865 is—"The Lords sustain the objections to the title of the pursuer to sue for reduction of the trust-disposition of the deceased Alexander Dunn, in so far as the same operates as a conveyance of the heritable estate formerly belonging to the deceased William Dunn, and settled by his disposition and settlement, dated 17th April 1830; to this extent sustain the defences, and assoilzies the defenders. *Quoad ultra*, reduce, decern, and declare in terms of the conclusions of the libel." The trust-settlement of Alexander Dunn therefore is reduced except in so far as regards those portions of land which are embraced in it, and which were part of the heritable estate of William Dunn, and settled by his disposition and settlement. It would appear that the only question remaining is, whether the estate of Easter and Wester Kilbowie, as it stood in the person of Alexander Dunn when he made the disposition under reduction, was part of the heritable estate belonging to William Dunn, and settled by his disposition and settlement? and in my opinion it is not. And it is not for the very same reasons that I have given in stating my opinion upon the merits of the present declarator; for it rather appears to me that it is one and the same question. If the estate of Easter and Wester Kilbowie, as it stood in the person of Alexander Dunn at the time of his death, was part of the estate of William Dunn, or could be described in that way at all, then the merits of this declarator must be decided otherwise than I have indicated that I am prepared to decide them. But upon both the one question and the other I think it is clear that this estate, as it stood in the person of Alexander Dunn, does not answer the description of being any part of the heritable estate of William, or settled by his disposition and settlement. Therefore, in so far I confess I arrive at a very clear opinion upon this case; and the only matter that remains for consideration is a suggestion which was made in the course of the argument, partly I think from the Bench and partly from the Bar, as to the competency of the present action. I think it right to say a word or two on that subject before concluding. It seems to be thought that when a judgment like this of the 27th of March 1865 by the Second Division is pronounced between two parties such as we have before us, if any question arises afterwards as to the precise meaning and effect of that judgment, it is not competent to ascertain the meaning and effect of it by a process of declarator. Now, I must say I should be very sorry if there were any such rule, or if there existed in our legal system any reason for such a rule. I don't see why, if a judgment is capable of a double construction, it should not be cleared up in this manner. But, indeed, that is not so much the question before us. The question before us is a more simple one than even that, for we must attend to the way in which the dispute arose which is intended to be settled by this action. After the previous judgment had been pronounced, Mr Barstow, as Park's curator, proposed to make up titles to this estate of Kilbowie, and accordingly he presented an application to the Court for special powers. He came in the ordinary course before the Lord Ordinary on Petitions, and he granted the powers which were asked by Mr Barstow; and Mr Black, the present defender, reclaimed against that interlocutor. The Lord Ordinary in his note, after mentioning that the difficulty was about the right of Mr Park to this estate as it stood in the person of Alexander Dunn at his death, said this, "what the effect of this feudal operation was, and whether it evacuated the destination in Mr Dunn's settlement, so as to carry the right of property away from the contingent disponee under William's deed, is a question of considerable nicety and difficulty, which the Lord Ordinary does not propose or think it necessary to decide in the incidental way in which it is here presented. But in the meantime it is obviously expedient that a title to the lands should be made up." Now, the First Division of the Court thought that, as a question of nicety, as the Lord Ordinary said, might be raised upon the effect of the consolidation, it was not right to permit these titles to be made up in the meantime, until that question had been set at rest; and so the trial of that question became an indispensable necessity. Both the parties appealed to the judgment of the Second Division in the previous case as deciding the question one way or other, but they did not agree about the effect of the judgment. One party said that it had been decided that the *dominium utile* must belong to Mr Black, and the other party held that it decided that the *plenum dominium* must belong to Mr Park; and certainly some mode must be adopted of trying the question, and that led to the institution of this declarator. Now, the summons of declarator for the purpose of clear-

ing away an obstacle or obstruction in making up a title is surely a form of process with which we are very familiar; and the competency of which I don't believe anybody ever doubted before. But there is a case upon a very different kind of question, which seems to me to afford a remarkable illustration of the utility, and if I may say so, the elasticity of our process of declarator as applied to questions of this kind. In the case of *Morton, Whitehead, & Greig* v. *Smith*, 3 Macph. 29, there will be found a report which shows that the dispute between the parties as to the precise meaning of a decree for expenses, whether it was a decree for expenses against a party individually and personally, or as trustee only, and the way in which the parties came to differ about that, was as to the terms of the receipt to be granted when the money was paid. The real difficulty, if there was a difficulty at all, was merely as to what was the meaning of the decree for expenses, and a process of declarator was instituted for the purpose of setling that important question. The competency was objected to, and the Lord Ordinary sustained the objection to the competency, but the Second Division, upon reviewing his interlocutor, came unanimously to the opposite conclusion, and held that the action was competent; and they sustained it accordingly, and gave decree of declarator. So that really, as regards the competency of this action, I don't think there is any room for doubt. Upon the whole matter, the case seems to me to be so very clear, as I have now stated it, that I should not think it worth while to detain your Lordships one minute longer if it were not that a great deal of perplexity has been thrown into the discussion of this case by reference to another parcel of lands, with which Kilbowie has no connection whatever. I mean the lands of Boquhanran, and it is by mixing up these two subjects, and supposing that the one has a bearing upon the other, that I think the difficulty has arisen which has ended in this hearing before seven judges. The history of Boquhanran is entirely different from that of Kilbowie. The superiority of Boquhanran belonged to William Dunn at the time that he made his settlement in 1830, and he settled that superiority upon Mr Dunn Pattison and certain other persons, failing his brother Alexander. Subsequent to the date of his settlement he acquired the *dominium utile* of Boquhanran, and as there was a general direction to convey the residue of his estate to certain persons named in his deed, the *dominium utile* fell under that provision of his deed. Now these estates—the *dominium directum* and the *dominium utile*—both stood vested in William at the time of his death; and after his death Alexander, who had succeeded to both the one and the other, consolidated them. He resigned the *dominium directum* into his own hands as superior, and thereby effected a consolidation. The effect of the judgment of 27th March 1855, to which I have just referred, was certainly somewhat doubtful in its effect upon that subject. It was not very easy to see how it could be applied, and the reason why the judgment was so expressed as to be of doubtful effect in regard to the lands of Boquhanran was, that the very peculiar situation of these lands of Boquhanran had not been brought under the notice of the Court before they pronounced that judgment; indeed, the Court never had any opportunity of knowing anything about the lands of Boquhanran at all, until a new action was brought at the instance of Mr Dunn Pattison, the heir of provision under William's deed to the superiority of Boquhanran, for the purpose of vindicating his right to it in the form of a reduction of Alexander's deathbed deed, so as to take the estate of Boquhanran out of the operation of the deathbed deed. When that action came before the Second Division it was found to be attended with a very great deal of difficulty, upon its own merits. I am not going to say anything about the merits of that case, for they are not here, and don't bear upon the present question; but when the Court came to a conclusion on the merits, and pronounced judgment in favour of Mr Dunn Pattison, as far as the superiority was concerned, they found that the *dominium utile*, having been resigned by Alexander into his own hands *ad perpetuam remanentiam*, the destination of that *dominium utile* in William's deed had thereby been evacuated, and that Mr Park, the heir-at-law, was the party who was entitled to succeed to the *dominium utile* of these lands, and was therefore entitled to reduce the deathbed deed in so far as they were concerned. But unfortunately it appeared by that time as if the judgment in the previous case at Mr Park's instance rather cut him out from that, because unquestionably the *dominium utile* was conveyed by William's deed; and therefore, to say the least of it, it was extremely doubtful whether, without some alteration on that previous judgment of 27th March 1865, William Park, as heir-at-law, could vindicate the *dominium utile* of these lands to himself. Now, it was in these circumstances that I took the liberty, with the concurrence of the other Judges of the Second Division, of calling attention to this matter, and suggesting that, if the case were taken to appeal, as I supposed it would be, some means should be taken, in reviewing the judgment in the previous action, to prevent its having a prejudicial effect against the heir-at-law as regarded the *dominium utile* of Boquhanran; and the consequence was, that the House of Lords, acting upon that suggestion, and being satisfied of its justice, appended to their judgment of affirmance in the first case, a declaration specially applicable to Boquhanran. The judgment is thus expressed—"The judgment is hereby affirmed, subject to the following declaration"—(*reads*). Now, as I read that judgment of the House of Lords, it does not touch the judgment of the Court of Session except as regards the lands of Boquhanran, and it does not direct any further proceedings to be taken in this Court except as regards the lands of Boquhanran, and it declares and specifies most particularly to what effect it is that the judgment is to be qualified in so far as regards the lands of Boquhanran. Whether for the purpose of giving full and complete effect to that declaration it must be necessary in the original action to pronounce any further interlocutor, I do not for the present inquire; but supposing it to be both proper and necessary, any interlocutor which can be pronounced under that remit must, in my apprehension, be confined exclusively to the lands of Boquhanran, and cannot touch any of the other subjects embraced in the original action. And therefore I don't see how there can be any *lis pendens*, in respect of which we cannot entertain this process of declarator, or that there can be any question whether this case or the previous cause, viewed as a still depending cause, is the proper place to give effect to the judgment which we are prepared to pronounce upon the merits of this declarator, because I think that previous case is to all intents and purposes

exhausted, except in so far merely as regards the necessity or convenience of having some further interlocutor specially applicable to the lands of Boquhanran. I am very sorry to have detained your Lordships so long in expounding this matter, but as my acquaintance with this case is perhaps greater than some of your Lordships possess, I thought it was right to give as clear a history as I could of the whole proceedings.

The result is, that I think judgment ought to be pronounced in favour of the pursuer, in terms of the declaratory conclusions of the summons, and repelling the defences which have been stated by Mr Black against these conclusions.

LORD JUSTICE-CLERK—After the very full and conclusive statement of your Lordship, I have very little to add. I come to the same result without any hesitation. This action of declarator concludes at the instance of the heir-at-law that he has right to the *plenum dominium* of the lands of Kilbowie. I think there can be no doubt that that action is a competent proceeding, because when he was making up his titles to the lands he has been interrupted by a claimant who alleges a better title, and I think it cannot make the action incompetent that that which proves his right to prevail in his declarator is a previous judgment of this Court. If I could look upon the action of declarator as a kind of supplement to the judgment already pronounced, I think it would be a different question, but in the present circumstances I cannot doubt that a declarator is not only competent but was the proper and appropriate proceeding. The defenders are James Black and Dunn's trustees. James Black appears for his own interest. The pleas put on record by Dunn's trustees relate to the matter of accounting, and with those we need not deal at present. Mr Black does not say that he is entitled to the *plenum dominium*, which is the subject of this suit. He does not allege that he has a right to the property that is claimed. He certainly does not allege that he has right to the superiority title of Kilbowie, and he thereby admits that that superiority title must pass to the heir-at-law, and substantially that the deathbed deed, as far as that is concerned, has been reduced. But then, he says, that he is entitled to the *dominium utile* of these lands. There is no estate corresponding to his claim in existence at present, because the original right of the vassal which William Dunn had has been extinguished by consolidation, and consequently the substance of Mr Black's plea is that he is entitled to have that *dominium utile* again separated from the superiority title, on the terms on which it was held by William Dunn, and conveyed to him. Now I am of opinion, in the first place, that there is no grounds whatever upon which this plea can be sustained; for this simple reason, that although the *dominium utile* of Kilbowie was contained in William's deed, and fell under the destination, that destination has been evacuated by the consolidation of the *dominium utile* with the *dominium directum;* and as the superiority never belonged to William at all, the destination is at an end, and, of course, Mr Black's right to it is at an end along with it. If the question, therefore, had arisen in the former action, and Mr Black had contended in regard to Kilbowie what the heir-at-law afterwards successfully contended with regard to Boquhanran, that although the superiority title—the only title subsisting to the lands—was in favour of the heir-at-law, he was entitled to have it declared that the *dominium utile* must pass to him under the destination, it is too plain for argument that that plea must have been repelled. But then it is said it is *res judicata*, and that this estate of the *dominium utile* is notwithstanding to pass to Mr Black, and that is discovered in the judgment of the Second Division. I can find nothing that warrants that at all. The *dominium utile* is not mentioned in it, but the title which Alexander Dunn had at his death, and which he conveyed to his trustees under his deathbed deed, was the superiority title, in which was absorbed the *dominium utile*—the old right of the vassal which had come to an end. Now that never belonged to William Dunn at all, and therefore it cannot possibly be brought under the first limb of the judgment; and as it cannot be brought under the first limb of the judgment, the deathbed deed stands at this moment reduced by the very terms of the second limb of the judgment, carrying with it the superiority title of the lands of Kilbowie which embraced the whole estate. I have thought it right, though only recapitulating what your Lordship has very fully expressed, to state the ground of my opinion upon this matter, because I should not have been disposed in the least to have held that this judment was only an interim or tentative judgment—a judgment fixing principles to be applied afterwards. It was a judgment on the title in the action of reduction, and that title is either finally sustained or finally repelled, and where it is finally sustained the deed stands reduced at this moment, and there can be no further question about it. Neither should I have been disposed to give the effect contended for to the word "settle," which I read truly to mean nothing more than this, that the lands fell under the destination in William's deed; but in the view I have expressed it is quite unnecessary to deliver any opinion on that matter. The real perplexity—if perplexity there be—has arisen from the use made of the question in regard to Boquhanran, which in truth had no relation to this question at all. The case of Boquhanran is exactly the converse in one view, because the superiority title there fell under the destination of William's deed, and therefore it was argued that it was necessary to appeal to the judgment in order to make good the undoubted claim of the heir-at-law to the *dominium utile*. But, in the first place, no such demand was made here by Mr Black, who was the proper person to have made it, if there had been any such claim. But, in the second place, there were no materials for making such a claim, seeing that the destination in William's deed, as regarded the *dominium utile* of Kilbowie, had been evacuated and entirely extinguished by the consolidation.

On these grounds I entirely concur with the view which your Lordship has taken, but I do not think that there is anything further to be done in the former action. In my opinion it neither requires nor admits of any variation, and I should think that any further procedure in it was unnecessary for the purposes of this case, and incompetent. Therefore, on the whole matter I entirely concur with the view of your Lordship. The conclusions for accounting will of course fall to be disposed of in the Second Division after this judgment is pronounced.

LORD COWAN—Adopting the explanatory statement which has just been made, and the general views stated by his Lordship in the chair, my

object in the few observations I have to make on the case will be to state the grounds on which the competency of this action of declarator, and the judgment pronounced in it on the merits, ought in my opinion to be determined.

The object of the action is to have it declared that certain lands called Kilbowie belong to the heir-at-law (represented by the pursuer Mr Barstow) of the deceased Alexander Dunn in *pleno dominio*, this being maintained by the pursuer to be the necessary sequence of a judgment pronounced by this Court on 27th March 1865, and affirmed in the House of Lords on 23d July 1868.

That action was instituted by the heir-at-law of Alexander Dunn, on the ground that his disposition and settlement was executed on deathbed, and therefore ineffective to carry heritable estate away from the heir entitled to succeed to the heritage, supposing no such deed to have been executed. The heir-at-law of a deceased has no right to challenge a deathbed deed except in so far as it is to his prejudice, that is, in so far as it excludes him from taking heritage which otherwise the law would have given to him. It follows that where lands and heritages are possessed under a settlement destining them on the death of the possessor to substitute heirs other than the heirs-at-law, there is no room for a challenge at his instance of a deathbed deed with regard to such heritages. His title depends upon his interest in the succession, and the want of interest is destructive of his title to impugn the validity of the deed. The only title and interest to challenge the deed are in the heir of provision—the heir substitute entitled to take up the succession supposing the deathbed deed had not been executed.

Alexander Dunn did, at the time of his death, possess lands conveyed to him by the settlement of his brother William, which, upon his death intestate, were destined to heirs-substitute; and he did further possess heritages destined to his heirs and successors, which, on his death intestate, fell to his heir-at-law. This was specially set forth in the record of the action in which the interlocutor to be immediately noticed was pronounced: and schedules of the several lands alleged to stand in the one situation and in the other were specially set forth and referred to in the averments of the parties. The deathbed deed which the pursuer brought under reduction dealt with the whole lands and heritages possessed by Alexander Dunn at the time of his death; and the pursuer, on the ground that no valid substitution settling the lands which had belonged to William Dunn on substitutes other than the heir-at-law had been created to which any legal effect could have been given, supposing Alexander to have died intestate—maintained that, as heir-at-law, he was entitled to have the deed set aside as regarded the whole heritages possessed by Alexander Dunn, no matter whether in the one situation or the other. Such was the nature of the action, its object and effect. The Court held that there was a valid and subsisting substitution created by William's deed to the heritages, by which Alexander was called to the succession in the first place, and which must have received effect on Alexander's death intestate. The consequence was, that Alexander's heir-at-law had no interest, and consequently no title, to set aside the deathbed deed in regard to such heritages. His only title was to have it set aside as to heritages which would have come to him as heir-at-law, for to that extent alone his rights were prejudiced.

The interlocutor pronounced by the Court gave effect to these principles. The pursuer's title was sustained in so far as his rights as heir-at-law were prejudiced—that is, in so far as the deed conveyed lands which Alexander, the granter of the deed, possessed and enjoyed under titles which on his death intestate would have opened the succession to the pursuer as his heir-at-law. But the objections to his title were sustained in so far as the deathbed deed operated as a conveyance of the heritable estate which belonged to William Dunn, and stood settled on substitute-heirs by his disposition and settlement. I do not think that any other view of the interlocutor can be reasonably taken. For my own part, I could not have concurred in an interlocutor having any other meaning or effect; and although a great deal has been said as to the effect of the word "settled" in this interlocutor, it creates no real difficulty when the questions at issue between the parties, and disposed of by the interlocutor, are kept in view. The *punctum temporis* for determining the state of Alexander's title to his several heritages, so as to determine the heir-at-law's right to set aside the deathbed deed, is the date of its execution, or rather the date of Alexander's death, for the two dates are the same as to this matter; and hence, in any question as to the application of the finding in the interlocutor that the pursuer had no title to reduce the death-bed deed as regarded the heritage settled by William Dunn's deed, this necessarily falls to be solved by the inquiry, Did Alexander, at the time of his deathbed deed, possess such estate under the destination of them fixed by William's deed? And in any question as regards heritage alleged to be within the operation of the reductive decerniture, this, in like manner, falls to be solved by the title on which such heritage was possessed by Alexander at the date of his deathbed deed. This view of the effect of the interlocutor is alone consistent with the averments of the parties, and specially with the two schedules embodied in the record, and professing to set forth the whole lands possessed by Alexander Dunn, and descendable, should he die intestate, to his heirs-at-law in the one case, and to the heirs called by the substitution in William Dunn's deed in the other.

Taking this to be the correct view of the former action, and of the principle of construction applicable to the interlocutor pronounced in it, the present contention of the pursuer admits of easy solution. The lands in question are those of Kilbowie. On what title was it that these lands were possessed by Alexander Dunn at the date of his deathbed deed? Was it a title under which, had he died intestate, his heir-at-law would have succeeded? I apprehend that no doubt whatever exists on this point. The title completed in his person was such as inevitably to carry the *plenum dominium* of the lands to his heir-at-law. He had succeeded, indeed, to the *dominium utile* of those lands under the deed of William, and subject to the substitutional rights thereby created in the event of his death intestate. But by the express terms of that deed he had unlimited powers of disposal of these lands; and it is beyond all doubt that the substitutions created by William's deed might be altered by him at his pleasure, or that he might have disposed of the lands to strangers. But what he actually did was tantamount to this in its legal effect. After his brother's death he purchased the *dominium*

directum, or superiority of the lands, from the overlord, and took a conveyance thereto in favour of himself, his heirs and assignees. Thereafter he completed his title to the *dominium utile*, and resigned the same in his own hands as superior in the terms and to the effect your Lordship has explained. He thereby effected a consolidation of the *dominium utile* with the *dominium directum*. He no longer had two estates in his person, but one only—the *plenum dominium*—and in that estate alone, destined to himself and his heirs and successors, he had stood invested since 1852 till his death. The answer, therefore, to the question, on what title Alexander possessed at the date of the deathbed deed, is and can be no other than that it was a title which, on his death intestate, must have carried the estate to his heir-at-law. Hence his interest, and therefore his title, to set aside the deathbed deed.

On this simple view of the question at issue I arrive at the conclusion that Kilbowie is within the heritages to which the reductive decree applies, and it is excluded from those to which the objections to the pursuer's title were sustained. It was heritage possessed by the granter of the deed at the time of his death, descendable to his heir-at-law. As such it was included in the schedule of those lands set forth as standing in the same situation. And at the date of Alexander's death it was not heritage settled by William Dunn's deed of 1830 upon substitute-heirs, by whom it could have been taken on Alexander's death intestate.

One word as to the competency of this declaratory action. A doubt having been stated by the defender as to the true meaning of the interlocutor, and this doubt having been acted on to the effect of opposing the completion of the pursuer's title to the lands of Kilbowie, it was the proper course for the pursuer to bring such an action as the present. In no more suitable or less expensive manner could the judgment of the Court be obtained, whether Kilbowie was under the interlocutor now claimable by him as his exclusive and absolute property. It was so if that view of the proceedings in the former action for which he contended is held to be correct. Assuming that to be the judgment of the Court, he will be free to complete his titles to the *plenum dominium* of Kilbowie, and he could only obtain such judgment in an action like the present. I concur in the views which have been stated on this point by your Lordship.

After what has been so fully explained with regard to Boquhanran in the declaration, as to those lands contained in the judgment of the House of Lords, no observations from me are necessary. All I shall say is, that in the judgment pronounced as to those lands and the result arrived at by this Court, we acted on the same principles to which we will give effect in this case by decerning in favour of the pursuer.

As regards the defences stated to this action, I see no room for the plea of *lis alibi pendens*, nor for the plea of *res judicata*, seeing that, according to the views which I have stated, judgment in the pursuer's favour in terms of the conclusions of declarator will in reality be no more than giving practical hearing and effect, as regards the lands of Kilbowie, to the principles recognised by the findings in the final interlocutor in the former action.

Lord Deas—After the full explanation and history which your Lordship has given of this case, the only difficulty that I entertain about it may be very shortly stated. Alexander Dunn left a deed of settlement by which he conveyed in a certain way all his heritable estate belonging to him, or which might belong to him at his death, whether he had succeeded to it through his brother William, or whether he had acquired it himself. An action of reduction of that deed was brought by his heir-at-law upon the head of deathbed, and one of the answers which was made to that action was that certain of the subjects were destined by the deed of William in a certain way and had never been taken up, and the destination never evacuated by Alexander. The interlocutor which was pronounced by the Second Division sustained the objections to the title of the pursuer to sue the reduction in so far as the trust-disposition and settlement operated as a conveyance of the heritable estate formerly belonging to William, and settled by his disposition and settlement dated 17th April 1830. But that judgment did not determine with reference to all the subjects, whether they belonged to the one class, or whether they belonged to the other. It did not determine, in express words at least, whether Boquhanran belonged to the one class or to the other, nor whether Kilbowie belonged to the one class or to the other. The question, to which class each of these estates belonged, appears to me to have been a question clearly involved in that action, competent to be entertained in that action, and falling properly to be decided in it. Accordingly, when the case went to the House of Lords it was decided by the declaration embodied in the judgment that Boquhanran to a certain extent, distinguishing between property and superiority, fell under the one class and not under the other. I am not very able to see how the same distinctions might not have been drawn between Kilbowie and the other. The House of Lords declined to entertain the question whether Kilbowie fell under the same rule or not, because they said the argument before them had been closed, and had been confined solely to the question with reference to Boquhanran, and therefore they would not listen to any question about Kilbowie, because the question came too late to be entertained by them at the stage at which it was brought forward. They remitted the cause to this Court with a declaration in regard to Boquhanran—(*reads declaration*). The cause comes back accordingly to this Court, undoubtedly without being exhausted. To what extent it is exhausted is another matter, but it does come back to this Court without being exhausted, and with reference to Boquhanran the Court are to proceed in concurrence with the declaration which is inserted in that judgment. I don't say that that is an express remit to consider the case of Kilbowie, but my difficulty is to find that there is anything there that excludes the consideration of the case of Kilbowie. Boquhanran had not been specially dealt with before; and Kilbowie had not been specially dealt with before. Both of them were included in the action, and both of them were included in the appeal, and both might have been disposed of by the House of Lords. It is a strong thing to say, that when the cause comes back to this Court it is not to be open to consider with reference to Kilbowie which class it fell under as well as with reference to Boquhanran which class it fell under. But assuming the words "in accordance therewith" to be read

"in accordance with the declaration with reference to Boquhanran," it might be contended, though I don't think it was contended, that that implies that you are to deal with Kilbowie in the same way as Boquhanran. I don't think it implies that. But there is nothing inconsistent with that declaration in taking up the question with reference to Kilbowie; and I am free to confess that if I had been left to myself, looking to what was said in the House of Lords about the reason why they would not have gone into the question about Kilbowie, my construction would have been that it was perfectly competent, right and proper for the Second Division to take up the question which they had not specially disposed of before, as to whether this estate of Kilbowie fell within the one class or the other, which is comprehended in the action, but not in the least degree touched by the judgment. If that be so, it comes to be very difficult, I think, to say that a separate action is competent to have it found and declared in terms of the conclusions of this summons, because that is taking away from the Division the question which is involved in the action before them, and which it belonged to them to decide and dispose of. If, for instance, we had come to the opposite conclusion from what your Lordships are inclined to come to, about the law with reference to Kilbowie, I do not see that we could have held that it was to a certainty in consistency with the views of the other Division. It would have been the reverse so far as I can gather; and if we could come to the one conclusion properly, we might just as well come to the other. The instances given by your Lordships and some of my brethren appear to me to refer to exhausted causes—causes no longer depending in the Court; and when there is a final judgment of this kind, a question may be raised in the shape of a declarator as to the fair legal inference to be deduced from that judgment. But this is a depending cause—a cause which involves this very question; and if it had not been to some extent overlooked, it would fall to be decided; and for anything I see, it would have been decided in the House of Lords if there had been the same full argument about it. That is the difficulty I have; and the moment you get into a question of whether it is *res judicata* or not upon that declarator, that just increases the difficulty of our interfering and dealing with it. But while I entertain that doubt, and while I must certainly say that I am not entitled to take the view that suggests itself to me with any confidence, looking to the views of your Lordships,—while I entertain that difficulty, I do not think it will be right for me, after all that has passed, and all that has been said, to withhold my opinion on the merits of that question, which I could only do on the supposition that I am undoubtedly right upon the other point. And, therefore, I think it right to say that on the question itself I have no more doubt or difficulty than your Lordships have. I think the consolidation of the two titles of the *dominium directum* and the *dominium utile* by Alexander was undoubtedly an evacuation of the destination in his brother William's deed. The question with reference to Boquhanran was obviously to my mind a much more difficult and nice question than that, because there there arose the very delicate and difficult question as to the separation of the *dominium utile* from the *dominium directum* after they had been consolidated,—the question whether, if the view taken was right with reference to the one, it should also have been applied to the other. There is no question of that kind here, because here the superiority is acquired by Alexander after his brother's death; and he consolidated the *dominium utile*, which he was perfectly entitled to take up if he chose; and, as for the destination, he was entitled to evacuate it if he chose. He consolidated it with the superiority which belonged to himself; and according to all the rules and principles of our law, the one was merged in the other. On the whole matter, though I have difficulty about the matter of form, I have no difficulty whatever in agreeing with your Lordships on the far more important questions as to the merits.

LORD BENHOLME—My opinion in this case involves the consideration of the sound construction to be put upon an interlocutor of this Court, bearing date 27th March 1865, pronounced in an action of reduction raised by the heir-at-law of the late Alexander Dunn, to set aside a settlement of his whole estate executed by Alexander, on the ground of deathbed.

I am anxious to set out distinctly my views as to the true meaning and effect of this interlocutor, because I look upon it as the hinging point of the present case.

Two different constructions have been put upon this interlocutor. If the view for which I contend be adopted as the sound one, it appears to me that all difficulty in the way of the pursuer's success in the present declarator is removed. If, on the other hand, the more rigid construction for which the defender contends were admitted and pressed as a *res judicata* against the pursuer, I cannot, as at present advised, see any satisfactory solution of the difficulties that would attach to the pursuer's case. Let me here add that, in a late important debate in the present case, the soundness of this more rigid construction of the interlocutor, and the necessary consequences to which it led in favour of the defenders, were maintained by a distinguished counsel, now a member of this Court, in one of the ablest of the many able addresses which I have heard fall from him.

In the action of reduction the fact of deathbed was admitted. As a necessary consequence, the heir's title and interest to reduce was admitted, in so far as related to such portions of Alexander's estate as had not been derived from his brother William. William had left a settlement which embraced his whole estate, in the whole of which Alexander was appointed the first disponee or institute. But the settlement contained a substitution after Alexander of various stranger substitutes to the *prima facie* exclusion of his heir-at-law. This last circumstance led to a defence on the part of those substituted heirs of provision, to the effect that the heir-at-law, being excluded from the succession by William's settlement, had no interest to reduce Alexander's deathbed deed, in so far as William's estates were concerned. The heir at-law made a reply which, had it been successful, would have opened the way to a total reduction of Alexander's settlement. This contention was founded upon certain specialties in William's deed, which, it was argued, deprived it of all feudal effect in regard to the various substitutions.

As to this plea, it is here only necessary to say that it formed the main, if not the only, subject of discussion between the parties in the debate which immediately preceded the interlocutor of 27th March

1865. That interlocutor had an important effect on the case. In the first place, the plea of the heir-at-law in favour of a total reduction of the deathbed deed in respect of the absolute inefficacy of William's deed to make any substitutions to the exclusion of the heir's interest, was repelled. And secondly, it ascertained in a distinct manner the extent to which the heir's interest, and his consequent title to reduce, was excluded.

The Court were of opinion that the following plea in law, maintained by one of the defenders, stated in its first sentence the law of the case correctly; but in copying the latter sentence of the plea they made an important alteration of one word. That was as follows:—"William Park, in whose right the pursuer sues, has no title to challenge Alexander Dunn's trust-deed and settlement, except in so far as that deed conveys away subjects to which the said William Park would have succeeded as heir-at-law of Alexander Dunn. He has no title to sue the present action as regards any lands and heritages which belonged to William Dunn, and were conveyed by his settlement." The interlocutor of the Court was this—"Sustain the objection to the title of the pursuer to sue for reduction of the trust-disposition of the deceased Alexander Dunn, in so far as the same operates as a conveyance of the heritable estate formerly belonging to the deceased William Dunn, and settled by his disposition and settlement, dated 17th April 1830. To this extent sustain the defences and assoilzie the defenders. *Quoad ultra* reduce," &c.

In a subsequent action of reduction of the deathbed deed, raised at the instance of Dunn Pattison, the discussion arose out of the fact that the whole of William Dunn's substitutions did not at Alexander's death stand unaffected by conveyances executed by Alexander in his *liege poustie*. It appeared that, in regard to the *dominium utile* of Boquhanran and also of Kilbowie, Alexander, after having vested himself feudally, both in the superiorities and the properties, had effected a consolidation of these estates by executing in his own hands an instrument of resignation *ad remanentiam*, which instrument contained a conveyance of the *dominium utile* in favour of himself and his heirs-at-law.

The discussion in Dunn Pattison's case evolved two principles—*first*, that the consolidation of the two estates did not constitute a final and indissoluable union, but that the *plenum dominium* was resoluable into its two original elements when at the death of Alexander there was a divergence in the subsisting succession of the superiority and property respectively. *Secondly*, the Court were of opinion, and pronounced an interlocutor accordingly on 20th July 1866, to the effect that the conveyances embodied in the instruments of resignation evacuated in regard to the *dominia utilia* the substitutions contained in William's deed. It was thus held that the heir-at-law whose interest as to the *dominium utile* of Boquhanran would have been excluded by William's deed—had that *dominium utile* been truly settled by that deed—was let in by the effect of the instrument of resignation to reduce the deathbed deed, and to claim that *dominium utile* to himself.

A question here occurs. Was this result in favour of the heir-at-law consistent with the interlocutor in the former action? If my interpretation of that interlocutor were adopted, the success of the heir-at-law was not only consistent with, but a necessary consequence of it. But if the more rigid view of that interlocutor were adopted, it went inevitably to exclude the heir-at-law from claiming that *dominium utile* which had been embraced by William's deed, and conveyed to certain substitutes under a residuary clause. If the word "settled" in the disputed interlocutor was synonymous with embraced—then by the said interlocutor, the interest of the heir-at-law to reduce the deathbed deed was excluded as to this *dominium utile*, and the deathbed deed must carry the subject to James Black, the disponee of the deathbed deed.

I have mentioned this difference of result as to the *dominium utile* of Boquhanran, because the head of the Court, in pronouncing the interlocutor of 1866, expressed serious misgivings whether that judgment was not inconsistent with the former. These misgivings were plainly founded on a leaning to the more rigid construction of the earlier interlocutor, against which I contend.

It was, however, suggested that on appeal the House of Lords might set all right by making such an alteration of the earlier interlocutor as would make it consistent with the latter one. And it has been contended that the House of Lords did make that alteration or correction of the former judgment. I am humbly of opinion that this is a mistake. I conceive that the declaration attached by the Court of Appeal to their affirmance was intended as a mere following out of the judgment as soundly construed. The feudal operation dictated by the declaration was in fact the proper, if not the only, way of giving effect to the judgment under the anomalous circumstances under which it had to be carried out.

A similar feudal operation had not to be performed in regard to Kilbowie, and consequently the declaration was confined exclusively to Boquhanran. But supposing I am mistaken in all this—supposing that the more rigid construction of the disputed judgment is the sound one, then as to Boquhanran the judgment was altered, the inconsistency reconciled, and the miscarriage obviated. But then as to Kilbowie, the judgment remains affirmed without alteration or declaration. And if so, what must be its effects as a *res judicata* in the present action? The result must be that, the *dominium utile* of Kilbowie being *settled* on James Black by William's deed, the interest of the heir-at-law to reduce is excluded; the deathbed deed takes full effect, and the residuary disponees in that deed are entitled to this *dominium utile*. How can it be any answer to these substitutes to allege that the *dominium utile* no longer exists, being absorbed by the consolidation in the *plenum dominium*? For the divergence of interest in the succession now supposed renders it competent and necessary (as in the case of Boquhanran), that the two estates should again be separated, in order that each may be bestowed upon the respective parties to whom by right of succession it is due.

I have thus indicated the grounds of my opinion, that if the more rigid construction of the judgment of 1865 be adopted, the pursuer of the present declarator must be unsuccessful in so far as the *dominium utile* of Kilbowie is concerned.

I shall conclude with a few words in opposition to that construction.

The argument of the able counsel, to which I have referred, in support of that construction, though eminently ingenious, occurred to me at the time to be somewhat of the boldest. He stigmatised the interlocutor of 1865, under the construction of the opposite party, as utterly in-

efficient, resolving into a mere truism. But surely if the only escape from truism is by lapse into error, and if the measure of the required efficiency is exactly the amount and extent of that error, the improvement, or rather alteration, is to be deprecated rather than desired.

Efficiency may be obtained at too high a price. If an interlocutor goes so fast as to overlook essential distinctions between the subjects with which it deals, or if it go so far as to extend an acknowledged and definite rule of law to subjects beyond its true application—if it goes so far in a wrong direction as to require the intervention of the Supreme Court of Appeal to correct its wandering—then efficiency on such terms is little to be desired. Surely that construction of a judgment is to be preferred (if its terms will all admit of it) which, based upon an indisputable, it may be self evident, legal position, applies it with discrimination to the subjects of the suit, distinguishing between such as admit of its proper application, and such other standing in a different situation, so as that to apply it to them were to prevent the rule of law itself, and defeat the justice of the case.

If to such interlocutor inefficiency or truism could be imputed, I only wish, my Lords, that all our judgments could be so characterised.

I shall sum up in two sentences the grounds of my opinion in favour of the pursuer of this declarator.

I hold that the *dominium utile* of Kilbowie was not *settled* by William's deed, under a sound construction of the interlocutor of 1865; that, consequently, the interest of the heir-at-law to reduce not being excluded, the deathbed deed as to this *dominium utile*, as well as to the *dominium directum* of Kilbowie, stands reduced by that judgment, and that the curator ought to be allowed to make up his ward's titles as to the *plenum dominium*.

Lord Neaves—I concur in the result at which your Lordship has arrived, and I quite adopt the grounds which you have assigned for your opinion. I am glad to think that I also concur in a great deal of what has been said by Lord Benholme; and as far as his Lordship appears to differ from the rest of us, it seems to me rather to have reference to what Wordsworth calls "battles long ago" than to the real question which we are now about to decide.

I think the judgment which we are now called upon to explain in this process of declarator was in itself a final and exhaustive judgment. I don't say that the subsequent proceedings in the House of Lords as far as Boquhanran is concerned may not make it our duty,—I rather differ from the Lord Justice-Clerk on that point,—to do something in that process in order to apply the judgment which was pronounced in the House of Lords as far as regards the lands of Boquhanran only, because if that judgment be not so applied with that qualification, and parties allowed an opportunity of asking anything to be done that may preserve their rights, our original judgment would go out and be extracted *simpliciter* without the limitation and explanation or alteration made by the House of Lords.

Lord Justice-Clerk—I so intended.

Lord Neaves—With reference to the lands of Kilbowie, I see no warrant and no competency in going back to that cause again. I don't say that it might not have been competent in that process to have made a more detailed interlocutor instead of reducing, or refusing to reduce, as to certain lands according to a certain description. That depended on the circumstances. The Court may pronounce a long interlocutor, or it may pronounce a short interlocutor, but it was meant to exhaust the case, and I think it did exhaust the case by using language which, I believe, was perfectly intelligible to both parties at the time, and which I suspect would never have been brought into controversy at all if the other matter of Boquhanran, which arose out of another process, had not raised some little difficulty. But if it was not a final interlocutor that was pronounced by us, it could not have been appealed. It would not have been competent to go to the House of Lords on a mere interlocutory judgment if it was required from us to define in detail all the lands that fell under the one branch and under the other. We did not mean to do so; the parties did not ask us to do so; and the House of Lords have not told us to do so. The interlocutor stands as an interlocutor reducing by description, but by description having reference to the pleadings of parties and to the state of the titles as known, and in a manner capable of being extracted. If that were a depending process, there would be a great deal in what Lord Deas has said, considering it to have been originally a final judgment intended to exhaust the cause, and doing so, and having been taken to the House of Lords as a final judgment, and no impeachment or encroachment made on it, except for the single qualification as to the lands of Boquhauran, which stood in so very special and peculiar a position. I think we cannot go back on it at all. But, then, is it competent to bring this declarator? I shall only say on this subject, that I consider it to be a general rule of the Law of Scotland that by means of a process of declarator you can get anything made clear that is obscure or is said to be obscure. I see no exception to that in this case. It might have been done otherwise. It is possible that there might have been a competition of brieves, but it seems to me perfectly competent *ab ante* to raise the general question the moment the difficulty is ascertained and the dispute arises, and that it may then be cleared up. Why should we not be able to decide in a declarator what we could decide in any other process of an executry nature in carrying out this matter, which might be more conveniently done them by discussing it in itself, and letting the parties shape their conduct accordingly.

On the merits I shall add very little. I consider that the real nature of the different properties in dispute was decided in a manner that gave room for no doubt. I look on the defence of Mr Black, the party principally concerned in this matter, as being quite explicit, and intended to be so with reference to this point. The first part of his plea unquestionably is so. The objection was,—you, the heir-at-law of Alexander Dunn, have no title, because you have no interest, to reduce the deathbed deed, except as to those subjects to which you would have succeeded as heir-at-law. That is the first part of the plea, and it is quite explicit. There is another part of the plea which says he cannot do so as to those lands that are conveyed by Mr Dunn's settlement; and Lord Benholme says that is an expression that might have gone too far. I do not think that. I do not think it would have made much difference in my view if

we had adopted that word. But there stood two classes of subjects in the person of Alexander Dunn,—the one to which, supposing the titles complete, his heir-at-law would have served as heir-at-law; the other to which, if it had come to service to him, the heir-at-law would have served as heir of provision under protection of that deed. Now the *dominium directum* was acquired by Alexander, and consolidated. I think it is not a perfectly correct view of the case to take in this matter to say that this evacuated the destination in William Dunn's deed. It seemed to me rather to annihilate the estate conveyed by William's deed. There was no substitution in place of it, and no succession substituted to it. The act of a *plenus dominus* who feus out a subject creates a subaltern estate; the act by which it is resigned *ad remanentiam* is to extinguish that subaltern estate, and place matters as they were before; and except in special circumstances, as in the case of Boquhanran, where the Court held they could not allow a party to benefit where he was not intended to be benefitted, that introduced a specialty. But here Alexander Dunn, while he was not on deathbed, but in *liege poustie*, extinguished this estate by resigning it. The titles stood alone in his person. Nobody could have served to it but his heir-at-law, and no power exists that can compel the heir-at-law again to sub-feu. That is the position in which the matter stands, as was plainly indicated by the schedule, and by the description—and we meant to find that, and must now declare it.

Lord Kinloch—I concur in the result arrived at by your Lordships generally.

I would only remark, with reference to some observations which have been made, that I find no difficulty created by the terms of the judgment of the House of Lords. I consider the *plenum dominium* of the lands of Kilbowie to have been undoubtedly comprised within the reductive clause of the former judgment of the Court. It was so, I think, in formal expression, having regard to the shape of the record and the schedules attached to it. It was unquestionably so in substance and sound construction; as the *plenum dominium* of Kilbowie had neither remained settled by William Dunn's deed at the date of Alexander's death, nor in a sound legal sense was contained in William Dunn's deed at all. The judgment so comprising Kilbowie within its reductive clause, remained untouched by the House of Lords. It was proper, as their Lordships thought, to insert a special declaration as to Boquhanran, because on that point the House were introducing either a variation on the interlocutor, or at all events a very necessary explanation of it, bringing distinctly out the intended separation between the *dominium directum* and the *dominium utile*. In regard to Kilbowie, where no such separation was to be made, the judgment remained exactly as the Court below had left it; and exactly what it then imported. The judgment as to Kilbowie did not require either to be varied or explained; and remains now for enforcement, as it did when your Lordships formerly pronounced it. But the judgment being generally expressed, and its meaning being brought into controversy, I can see no objection to the present declaratory action, as called forth by the special circumstances of the case; and in that action I think the pursuer should prevail, so far as regards the conclusions now brought before us.

Agents for Pursuer—Murray, Beith & Murray, W. S.

Agents for Defender James Black—J. & R. D. Ross, W.S.

Thursday, March 10.

FIRST DIVISION.

CRAWFORD *v.* MAGISTRATES OF PAISLEY.

(*Ante*, vi, p. 683.)

Expenses—Suspension—Corporation—Burgh Property. Circumstances in which *held* that a suspender was entitled (1) to his expenses up to the date of the passing of the note of suspension, in respect that he was justified in the circumstances in bringing the action into Court; (2) that he must bear his own expenses thereafter until an interlocutor of the Lord Ordinary refusing the note and recalling the interdict; and (3) finding him entitled to his expenses since the date of the last mentioned interlocutor.

In July 1869 Mr John Crawford brought an action of suspension and interdict against the Magistrates and Town Council of Paisley, of which the prayer was as follows:—"May it therefore please your Lordships to suspend the proceedings complained of; and to interdict, prohibit, and discharge the respondents from taking down and demolishing the Cross Steeple of Paisley, by themselves, or by others acting by or under their orders and authority; or, at all events, from proceeding to take down the said steeple in the meantime, and until it be judicially ascertained, either by the inspection and report of some skilled and impartial architect, or other competent person, or in such other manner as may be determined by the Court, that the said steeple cannot be repaired or made permanently secure and that it is absolutely necessary for the safety of life and property it should be taken down; and, accordingly, to remit to such competent inspector or inspectors, and to determine in accordance with his or their report; and, in any event, to prohibit, interdict, and discharge the respondents from taking down the said steeple until they, as representing the said community of Paisley, have come under an undertaking either to rebuild the said steeple on its present site, or to erect a new one, equally good or better, on another site, to be approved of by the inhabitants or by the Court; and further, and in any view, to find that in the circumstances of the case the present application was reasonable and proper, and that the complainer is entitled to his expenses thereanent from the respondents, as representing the said community; or to do otherwise in the premises as unto your Lordships shall seem proper." After various procedure in the Bill Chamber and the Outer-House (reported *ante*, vol. vi., p. 683), the Lord Ordinary (Barcaple), on the motion of the respondents, remitted to Mr Bryce, architect, to examine the steeple of the Cross of Paisley, and report on its state as to the safety and convenience of the public; and thereafter, on 3d December 1869, having considered the report, granted authority to the Magistrates to take down the steeple, as being in a dangerous state.

A proof of the averments of the parties was then taken before the Lord Ordinary, who on 17th December pronounced this interlocutor:—"The Lord Ordinary having heard counsel for the parties, and