Thursday, July 17.

SECOND DIVISION.

[Lord Kyllachy, Ordinary.

PRINGLE *v.* PRINGLE AND OTHERS.

Conveyance — Superiority — Dominium Utile — Precept of Sasine of Granter Divested — Exception of Disposition of Dominium Utile from Disposition of Superiority—Entail.

In 1806, P, a fee-simple proprietor of the estate of Yair, holding of the Crown, desired to split the superiority and property for political purposes. He gave of a feu-charter of the lands to his agent G, with precept of sasine, and then having resigned in the hands of the Crown, and obtained a Crown charter of resignation, he executed two dispositions in 1806 and 1811 respectively, expressed in usual course as conveyances of different portions of the lands—the Crown charter of resignation being assigned *pro tanto* to each of the disponees, who took infeftment upon the precept contained in the Crown charter. In each disposition the warrandice clause specially excepted the feu-right to G, but G without taking infeftment on the precept of sasine in his favour reconveyed to P, who also failed to take infeftment, although G assigned to him the unexecuted precept in his favour. In 1820 P executed a deed of entail of the lands of Yair, in favour of himself in liferent, and after his decease in favour of his eldest son and a series of heirs of entail, and died in 1827 without having feudalised the entail title. His eldest son registered the entail in 1830, and made up his title under it in 1834, using for that purpose the precept of sasine in G's feu-charter which had been assigned to him along with other writs by the said deed of entail. P's grandson being possessed of the whole superiority of the lands of Yair, in 1864 granted a writ of *clare* in his own favour as heir of entail under the entail of 1820, upon which he took infeftment. In 1889, however, he brought an action to have it found and declared that he held the *dominium plenum* of the lands of Yair, and that absolutely and in fee-simple, on the ground that the granter of the precept of sasine in G's favour had been divested before said precept had been executed, that the so-called dispositions of superiority conveyed right to the lands and included the *dominium utile*, that nothing remained in P to entail, and that consequently the entail with all that had followed thereon was inept.

Held that the feu-charter in G's favour having been excepted from the dispositions of the superiority, the precept of sasine contained in said charter remained effectual although G had not taken infeftment therein, that the title of 1834 was validly made up and that the *dominium utile* was held under the entail.

In 1889 Alexander Pringle, Esq. of Whytbank, in the county of Selkirk, heritable proprietor of the lands and barony of Yair, brought an action against Robert Pringle, Esq., M.D., 4 Granville Park, Lewisham, Kent, and others, being the three next heirs of entail after the pursuer under a destination contained in a disposition and deed of entail of the lands of Whytbank and barony of Yair granted by Alexander Pringle, Esq. of Whytbank, grandfather of the pursuer, in favour of Alexander Pringle, father of the pursuer, and the heirs-male of his body in fee, dated 15th November 1820, and recorded in the Register of Entails, 8th June 1830 and in the Books of Council and Session 4th August 1858, to have it found and declared that the pursuer was sole proprietor of and duly vested and seised in the *dominium plenum* of all and whole the lands and ancient barony of Yair, and "that absolutely and in fee-simple, and free from any restrictions, prohibitions, clauses irritant and resolutive, or other limitations whatsoever; and, in particular, free from the whole conditions, provisions, limitations, clauses irritant and resolutive, and declarations contained in the disposition and deed of entail above mentioned."

"Alexander Pringle *primus*, the pursuer's grandfather, was proprietor, duly vested and seised in the said lands and barony as vassal under the Crown. On 25th June 1806 he granted a feu-disposition of the lands of Yair in favour of Robert Little Gilmour, Esquire, W.S., to be held by him and his heirs and assignees for payment of a yearly feu-duty of £10. On 2nd July following Mr Gilmour executed a deed of declaration of trust acknowledging that the said disposition, though *ex facie* absolute, was really granted by Mr Pringle, 'in trust only for answering certain purposes of accommodation to himself;' that the truth was, that the said lands and others still absolutely and entirely belonging to Mr Pringle, and no part thereof to Mr Gilmour; and that the latter was bound, and bound himself, his heirs, and successors, at any time when required, whether before or after infeftment had passed on the said disposition in their favour, to redispone and reconvey the lands to Mr Pringle, his heirs or assignees. Mr Pringle's ultimate purpose in granting the disposition to Mr Gilmour was the separation of the superiority of Yair from the *dominium utile*, so that he might convey the former or part of it to a friend or friends, who would thus become qualified to vote in Parliamentary elections in the county . . . Mr Pringle resigned the lands of Yair into the hands of the Crown, and obtained a Crown charter of resignation and confirmation thereof in favour of himself, his heirs and assignees, dated 5th July, and written to the Seal and registered 14th August 1806. Mr Gilmour never took infeftment on the said disposition; and by disposition and assignation, dated 14th October 1806, he reconveyed to Mr Pringle the feu-right and disposition, and assigned to him the unexe-

cuted precept of sasine contained in the latter, but Mr Pringle took no infeftment thereon. By disposition dated 2nd September 1806 Alexander Pringle *primus* disponed to Thomas Elliot Ogilvie, Esq. of Chesters, and his heirs and assignees, certain parts of the lands of Yair, amounting to about one-third of the whole estates. Mr Ogilvie took infeftment from the Crown on the Crown charter of resignation before referred to, assigned to him by this disposition, on 23rd September 1806. . . . . Thereafter on 15th June 1811 Alexander Pringle *primus* disponed to Alexander Pringle *secundus*, his eldest son, and his heirs and assignees whatsoever, the whole of the said lands and barony of Yair, excepting certain portions thereof, including what he had previously disponed to Mr Ogilvie as above narrated. It was doubtful whether these dispositions embraced the whole or only two-thirds of the lands of Yair. On 27th June 1811 Alexander Pringle *secundus* took infeftment upon the Crown charter of resignation before referred to, and assigned to him by the said disposition."

The feu-right in favour of Little Gilmour was specially excepted from the warrandice granted in the dispositions to Ogilvie and Pringle *secundus* respectively, and these dispositions contained no assignation of rents but a third of the *cumulo* feu-duty payable under the said feu-disposition was allocated to each of them. It was specially declared that the warrandice in each of the said dispositions "is only to extend to the superiority of the said lands and nowise to the property or *dominium utile* itself."

"In the year 1820 the said Alexander Pringle *primus* instructed his then law-agents to prepare a deed of entail, including the whole lands in his possession. The disposition and deed of entail, which included in the lands to be entailed the whole lands and barony of Yair as well as the lands of Whytbank and others, was signed by the said Alexander Pringle *primus* on 15th November 1820, and bore to convey the whole lands therein contained, including the whole of Yair, to himself in liferent, and after his decease to his said eldest son and the heirs-male of his body in fee, 'whom failing, to my other heirs-male general, and of tailzie and provision, substitutes and successors after mentioned, according to the order of substitution contained in the procuratory of resignation hereinafter inserted,' but always with and under the conditions, provisions, limitations, clauses irritant and resolutive, and declarations inserted in the said procuratory of resignation, and with and under the burdens, reservations, powers and faculties specified in said disposition and deed of entail, and no otherwise."

The deed of entail provided "that the said Alexander Pringle [*secundus*], my eldest son, and the whole heirs-male general and of tailzie, succeeding to the said lands, shall be obliged" to do certain things, and "that it shall not be lawful to nor in the power of the said Alexander Pringle, my eldest son, nor of any of the said heirs-male general and of taillie, to alter, innovate, or change this present taillie, or the order of succession before prescribed . . . . that it shall not be in the power of the said Alexander Pringle, my eldest son, nor of any of the heirs-male general and of taillie and provision before written, to sell, alienate, impignorate, or dispone the said lands and barony . . . and with and under this irritancy, as it is hereby provided and declared, that in case any adjudication, apprizing, or other legal diligence shall happen to be obtained or used for or against the fee or property of the said lands, or any part thereof, upon any debts or deeds of the said Alexander Pringle, my eldest son, or of the said other heirs-male general and of taillie, or any of them, to be contracted or done, either before or after their succession to the said lands and barony, teinds and others, not only shall such adjudication, apprizing, or other legal diligence be void and null, in so far as may affect the said lands and barony, teinds and others, or any part thereof, but also the said Alexander Pringle, my eldest son, and the other heirs-male general and of tailzie, upon whose debts or deeds, done or contracted as aforesaid, such diligence hath proceeded, shall *ipso facto* forfeit his or her right to the said lands, and the same shall devolve, fall and accresce to the next heir of tailzie, in such manner as if the contracter of such debts, or the granter of such deeds were naturally dead, and that free and disburdened of such adjudication, apprizing, or other legal diligence, led and deduced thereon." Then followed certain exceptions from the whole limitations and irritances, and "it is hereby expressly provided and declared, that upon every contravention that may happen by and through the said Alexander Pringle, my eldest son, or any of the heirs-male general and of taillie, their failing to perform all and each of the conditions, or acting contrary to all or any of the restrictions before specified (excepting only as is hereinbefore excepted and allowed), it is hereby expressly provided and declared that not only the said lands and barony, teinds, and others, shall not be burthened or liable to the debts and deeds, acts, and crimes of the said heirs of entail so contravening; but also all such debts, deeds, and acts contracted, granted, done, or committed contrary to these conditions and restrictions, or to the true intent and meaning of these presents, shall be of no force, strength, or effect, and shall be unavailable against the other heirs-male general and of taillie, and who, as well as the said lands and barony, teinds, and others, shall be noways burthened therewith, but free therefrom, in the same manner as if such debts and deeds had not been contracted or granted, or such acts of omission or commission had never happened or been committed." The said deed of entail was a *mortis causa* deed. It was never recorded by Alexander Pringle *primus*, nor did he attempt in any way to make up his own title under it. He remained in possession of the whole estate of Yair down to his death in February 1827,

when he was succeeded by his eldest son, Alexander Pringle *secundus*, who served as heir in general to his father on 14th April 1830. The said deed of entail, which assigned and disponed to the entailer in liferent, Alexander Pringle *secundus* in fee, and the other heirs-male general and of taillie, "all and sundry contracts, dispositions, procuratories, and instruments of resignation, charters, services, retours, precepts, and instruments of sasine, apprisings, adjudications, and other decreets and grounds thereof, tacks of lands, and obligations to grant such tacks, and other writs, evidents, title-deeds, and securities whatever, both old and new, made, granted, and conceived, or that may be granted or interpreted, in favour of me, my predecessors and authors, or my heirs general, of and in relation to the lands, barony, teinds, and pertinents before disponed, or rents thereof," was registered in the Register of Tailzies on 8th June 1830. In the year 1834 the then law-agents of Alexander Pringle *secundus* prepared an instrument of sasine following upon the feu-disposition before mentioned in favour of Robert Little Gilmour, and precept of sasine therein contained, the disposition and assignation by him to Alexander Pringle *primus*, and the disposition and deed of entail before referred to, bearing to infeft him in the *dominium utile* of the whole of Yair, as institute of entail under the said disposition and deed of entail above set forth. On 23rd April 1834 this sasine was recorded by said law-agents in the Register of Sasines. Alexander Pringle *secundus* possessed the whole estate of Yair till his death on 2nd September 1857. He was succeeded by his eldest son Alexander Pringle *tertius*, the pursuer of this action, who on 4th February 1859 was served heir-in-general to his father. On 1st March 1860 he was duly infeft by virtue of a Crown writ of *clare constat* in that portion of the lands of Yair which had been conveyed to his father by the disposition of 1811, and in 1864 he made up his title under the Crown to that portion of the lands of Yair which had been conveyed to Ogilvie in 1806, but which had been re-conveyed to him by Ogilvie's son and successor by disposition dated 1st January 1859 and duly recorded in the Particular Register of Sasines at Melrose with Crown writ of resignation dated 1860 endorsed thereon and recorded in the same register. As a vassal of the Crown vested and seised in the whole lands of Yair, he granted in his own favour as heir of entail under the entail of 1820, a writ of *clare constat* dated and recorded 8th April 1864.

In this state of the title the pursuer brought this action. He averred that by virtue of the dispositions of 1806 and 1811, Ogilvie and his father Alexander Pringle *secundus* were vested and seised in the *dominium plenum* of the estate of Yair, and that he as in right of them was now so vested and seised, and that absolutely and in fee-simple; that in 1820 the law-agents had included in the deed of entail the whole lands and barony of Yair in ignorance of the existence of these dispositions, that said deed in so far as it bore to deal with the lands of Yair was inept and invalid in respect of the previous conveyances and infeftments; that he had in ignorance signed the writ of *clare constat* in 1864, and that said writ proceeded upon a narrative of the previous title-deeds which was *ex facie* false and was of no force or effect as a title to the *dominium utile* of the lands of Yair.

The defenders averred that the dispositions of 1806 and 1811 only conveyed the superiority of the lands of Yair, which was no doubt held in fee-simple by the pursuer but that the *dominium utile* had been well and validly entailed, that the pursuer had recognised the entail in making up his title, and had all his life until the raising of this action dealt with the estate of Yair as an entailed estate.

The pursuer pleaded—"(1) The pursuer being absolute proprietor in fee-simple of the lands and barony of Yair, is entitled to decree of declarator as concluded for. (2) The pursuer is entitled to decree as concluded for, in respect that he has possessed the *dominium plenum* of the said lands for more than the prescriptive period upon a valid fee-simple title. (3) On a just construction of the disposition and deed of entail libelled, the pursuer is not bound by the prohibitions, limitations, and others therein contained. (4) The said deed of entail does not contain the cardinal prohibitions against the alteration of the order of succession, sale, or alienation of the estates, and contraction of debt, in terms of the Act 1685, cap. 22, duly fenced with irritant and resolutive clauses, and not being valid and effectual in terms of said Act is, in terms of the Act 11th and 12th Vict. cap. 36, invalid and defective *in toto*."

The defenders pleaded—"(3) The defenders are entitled to absolvitor with expenses, in respect that the titles libelled constitute a valid entail of the estate of Yair (4) Upon a sound construction of the deed of entail the pursuer's plea-in-law relative thereto is unfounded, and ought to be repelled. (5) *Quoad ultra* the pursuer's objections to the validity of the entail and his claim to possess the estate of Yair in fee-simple are barred by the positive and the negative prescription. (6) The pursuer and his father having completed a title to the estate of Yair under the deed of entail, their possession thereof by the conditions of the entail, cannot be ascribed to any other title. (7) The pursuer is barred from prosecuting the present claim in respect of his actings. (8) The pursuer and his father having accepted and taken benefit by the said deed of entail, in so far as it referred to the estate of Whytbank, the pursuer is not entitled to object to its validity as an entail of the estate of Yair."

Upon 20th February 1890 the Lord Ordinary (KYLLACHY) assoilzied the defenders from the conclusions of the summons and found them entitled to expenses.

"*Opinion.*—The pursuer Mr Pringle is

in the position of holding two titles to the estate of Yair. The one is a fee-simple title which has hitherto been held to apply only to a mid-superiority. The other is an entail title which has hitherto been held to carry the *dominium utile* of the estate. The object of the present action is to have it declared that the first of those titles truly covers the *plenum dominium*, and that the second title is inept, as applying to a sub-feu which was never validly constituted. The conclusion, of course, is that the pursuer holds the estate in fee-simple, and that conclusion is, I should add, supported upon a subsidiary and alternative ground, viz., that the fettering clauses of the entail are defective, and moreover do not apply to the pursuer.

"The facts out of which the question arises are simple enough. The late Alexander Pringle *primus*, the pursuer's grandfather, was fee-simple proprietor *inter alia* of the estate of Yair, held of the Crown. In 1806 he desired to split the superiority and property for political purposes. With that view he first gave off a feu-charter to his agent Mr Little Gilmour, with precept of sasine, and then having resigned in the hands of the Crown and obtained a Crown Charter of Resignation, he executed two dispositions the purpose of which was to divide the superiority between a friend, Mr Ogilvie of Chesters, and his eldest son Alexander Pringle *secundus*. There is a question whether he did not keep the superiority of a part of the estate to himself, but that is in the meantime immaterial. The two dispositions were expressed in usual course as conveyances of different portions of the lands—the Crown Charter of Resignation being assigned *pro tanto* to each of the disponees, and infeftment following in favour of each disponee upon the precept contained in the Crown Charter. In each disposition the warrandice clause contained the usual exception of feu-rights, and specially excepted the foresaid feu-right to Mr Gilmour, and this warrandice clause (described as subject to exceptions) was mentioned, although not recited, in each of the two instruments of sasine. Thereafter (or rather between the date of the two dispositions) Mr Gilmour, without taking infeftment, reconveyed the *dominium utile* to Mr Pringle *primus*, who continued to possess by that title, and who never parted with the possession of any part of the estate. And so matters stood until 1820, when Mr Pringle *primus* executed the entail now in question, and until 1827, when he died, and the entail came into operation. It will be observed that with a single—though important—exception, the procedure above narrated was the ordinary procedure formerly adopted in the creation of freehold qualifications. The exception was that Mr Little Gilmour did not take infeftment on his feu-charter so as to constitute the feu before the superiority was divided. In fact, he never took infeftment at all, but reconveyed the feu-charter with the precept of sasine, to Mr Pringle *primus*, whose title at the date of the entail stood upon that conveyance.

"The entail in question, which was a *mortis causa* deed, included not only the *dominium utile* of Yair, but also the lands of Whytbank, also held by the entailer in fee-simple. In form it was a disposition of the lands in favour of Alexander Pringle *secundus* and a series of heirs-substitute, but so far as regards the lands of Yair it truly operated only as an assignation to the heirs of entail of the open precept in the feu-charter of 1806 to which the entailer acquired right as above explained. That precept, which was assumed to be still operative, was of course all that the entailer had to convey, and accordingly, when he (the entailer) died, his son Alexander Pringle *secundus* made up his title under the entail by taking infeftment on that precept, narrating in his instrument of sasine (1) the assignation by Mr Gilmour to his father; and (2) the assignation of writs in the entail. This was in 1834; and in 1857, when Alexander Pringle *secundus* died, the pursuer's title was made up on the same footing, viz., that the entail applied to and carried the *dominium utile*, and that it had been well feudalised by the due execution of the precept which it (the entail) assigned.

"In short, there is no room to doubt that until the present question arose all parties concerned acted on the assumption that the *dominium utile* of the estate of Yair was held under the entail, and under it alone. But in order to complete the narrative it is necessary to refer to the manner in which the (assumed) superiority titles possessed by Mr Ogilvie of Chesters and Alexander Pringle *secundus* have been transmitted and dealt with. With respect to Mr Ogilvie's third, it appears to have remained in his family till 1860, when it was conveyed to the present pursuer by disposition containing no reference to the sub-feu except in the warrandice clause and assignation of writs and feu-duties, and it has since been possessed by the pursuer in fee-simple. With respect again to the remaining two-thirds (or whatever else was the portion) belonging to Alexander Pringle [*secundus*], he possessed the same on his original infeftment of 1811 until his death, and on his death the present pursuer made up titles to it in fee-simple as his heir-at-law. And there can be no doubt, whatever may be the importance of the fact, that in all matters connected with the making up of titles, conveyances to railway companies, and other matters in which there was room for the question to arise, the pursuer, his father, and Mr Ogilvie have throughout acted on the footing that the titles thus made up were mere titles of superiority; in other words, on the footing that there had been a valid split of the superiority and property, and that the superiority was held in fee-simple and the property under the fetters of the entail.

Now, in these circumstances three questions appear to arise—(1) Was the entail title valid? (2) Is the pursuer entitled to challenge it? (3) If he cannot cut down the entail title, can he on any ground free himself from the fetters?

"(1) The objection to the entail title from a feudal point of view is obvious enough. It comes, as stated, to this—That the precept of sasine under which the entail title was made up, and the right to which precept constituted the entailer's sole title to the estate had at the date of the entail ceased to be operative, in respect that the grantor had by that time been divested, whereby the precept had become a precept flowing *a non domino*. That is the objection, and undoubtedly it is so far well founded that, so far as appeared on the records, the granter of the precepts had at the date of the entail been divested, he having while the precept was still unexecuted disponed the lands to other parties (Mr Ogilvie and Alexander Pringle *secundus*) without any reservation of the precept, and without any qualification which either entered the sasine or the record. Accordingly, if, for example, Mr Ogilvie of Chesters had after taking infeftment disponed to a *bona fide* purchaser, and that purchaser had claimed the lands, I do not at present see how he could have been resisted. In a question with such purchaser the entail title would, I take it, have been reduced.

"(2) But this brings up the second and real point, viz., whether, in a question with the pursuer or any of his authors in the superiority title (I call it so for convenience), the precept of 1806 was not quite good, as having, at least in a question with them, had its effect reserved. The pursuer Mr Ogilvie and Alexander Pringle *secundus* had certainly each of them full notice of the feu-right in favour of Mr Gilmour for the clause of warrandice in the disposition of the superiority excepted that feu-right in express terms, and although that exception did not enter the record it sufficiently certiorated the disponees that the *dominium utile* was not intended to be conveyed. If, therefore, Mr Ogilvie had, say on the entailer's death, sought to evict the *dominium utile* from the heirs of entail, he would have been met with the answer that, in a question with him, the precept upon which the entail infeftment proceeded had been quite good, or at least that he had no interest and no title to maintain the contrary, because the only result of doing so would be to make himself immediately liable to grant a new precept as having accepted a disposition which reserved Mr Gilmour's feu. And if this would have been the case with Mr Ogilvie, the pursuer certainly can be in no better position, because, apart from any question of prescription (and I am aware of the difficulties of that question), the pursuer not only holds the superiority by a gratuitous title, but he is also in the position of holding the lands of Whytbank by the same *mortis causa* deed which *ex hypothesi* he proposes to repudiate as an inept conveyance of the lands of Yair. I confess my opinion is, that solely upon the principle of approbate and reprobate there would have been much to say against any challenge by the pursuer of the entail title. That is not, it will be observed, the case of the entailer seeking to convey what was not his own. He at least and in any view had, at the date of the entail, a good *jus crediti* to the *dominium utile* of Yair, and the objection truly is that he did not take a habile mode of translating that *jus crediti* into a fee before he executed his entail. Now, I do not at present see how an objection of that kind can be taken by a person in the position of the pursuer, who has taken and still holds gratuitous benefits under the deed whose technical efficacy he proposes to challenge. But it is not necessary here to decide or consider the question of approbate and reprobate. The result, so far as I see, would, as regards the pursuer, be the same although the entail did not embrace the lands of Whytbank or any other lands than those of Yair. The pursuer would still hold the superiority title on which he founds his claim by gratuitous disposition from Mr Ogilvie, and by succession from his father Alexander Pringle *secundus*, and both those gentlemen were undoubtedly affected by the qualifications appearing in their respective dispositions, which qualifications made it in my opinion impossible for them to claim more than the bare superiority, or to refuse to recognise the sub-feu to Mr Gilmour as a subsisting burden on their respective titles.

"(3) I am therefore of opinion that the pursuer is barred from challenging the conveyance] of the *dominium utile* in the entail or from claiming, which he in effect does, that that *dominium utile* belonged at the date of the entail to third parties from whom he has acquired it. In a question with him the conveyance in the entail is good. *Ex facie* it is unobjectionable, as is also the infeftment following upon it, and if upon an examination of the records the conveyance appears open to objection as flowing *a non domino*, the titles sufficiently show that that is not an objection which is open to the pursuer or was open to his authors.

"It is not necessary in these circumstances to appeal to prescription. I heard some argument on that point, and of course if the negative prescription applied the objections to the entail title have been long since cut off, but where rights of property are in question it is, as I understand, the law that the negative prescription does not apply except where it concurs with the positive, and here the double titles held by the pursuer present at least serious difficulties in the way of holding, as was suggested, that the heirs of entail had obtained a title by the positive prescription as against the holders of the superiority title. Neither, for the same reason, is it necessary to consider whether the entail could be supported as including a conveyance of the *jus crediti* to the *dominium utile* which the entailer undoubtedly had. The question in that case would be whether a mere *jus crediti* could be the subject of an entail under the Act of 1685, and upon that question it is enough to say that it appears still open. The opinion of the first Lord Curriehill in the case of *Chisholm* v. *Chisholm-Batten*, 3 Macph. 202, is, so far as I know, the latest judicial deliverance on the subject.

"It remains to consider whether the pursuer—without cutting down the entail title—can in any way get rid of the fetters. Apart from the particular objections to be immediately noticed, I do not, I confess, see any ground upon which he can do so. The entail purports to be a conveyance of the lands. And the fetters are applied to the lands, and, so far as I see, quite regularly applied, unless the pursuer makes good one or other of his two special objections—the first of which is that the irritant clause is only directed against the contraction of debt, the entail being, as he suggests, constructed on the principle that as regards the other cardinal prohibitions mere resolutive clauses were enough.

"This objection appears to me to be conclusively negatived by reference to page 28 of the print, where, although in an odd enough place, there appears to be an irritant clause expressed in the widest terms, and open, so far as I can see, to no objection. The pursuer contends that this irritant clause has only reference to certain sub-exceptions to the exceptions from the fetters which form the subject of the intermediate pages 25 to 28. But I am unable to adopt this reading, or indeed to see that it is consistent with any intelligible reading of the deed.

"The other objection is this, that the pursuer and the other heirs-male of the body of the institute Alexander Pringle *secundus* were not intended to be fettered at all. This depends upon the construction of the language of the dispositive clause, as contrasted with that of the prohibitive clauses, the suggestion being that the prohibitive clause only applied to the 'other' heirs of taillie—that is to say, to the heirs other than the heirs-male of the body of the institute. It seems enough to say that this objection is in my opinion far too critical even in the construction of an entail. It is perhaps possible to read the clauses in question in the sense suggested, but it is not their natural or their correct construction, and that I think is enough.

"On the whole, I shall assoilzie the defenders from the conclusions of the summons, with expenses."

The pursuer reclaimed, and argued—1. As the title stood he was fee-simple proprietor. This was not a case of double title, for there had only been one, and that a fee-simple title throughout. The conveyances by Pringle *primus* in 1806 and 1811 were liable to convey the *plenum dominium*, and upon these infeftment had been taken. Thereafter there remained nothing in Pringle *primus* which he could entail. The entail, with all that had followed thereon, was due to a mistaken view of the title of Pringle *primus*, and was really inept. It was true that these dispositions excepted the feu disposition granted to Gilmour, but Gilmour had failed to take infeftment, and the precept of sasine in the feu disposition to him from Pringle *primus* fell upon Pringle *primus* becoming divested in favour of Ogilvie and Pringle *secundus*. It was upon that precept to his father by Gilmour, and reconveyed and assigned to him by the deed of entail that Pringle *secundus* had taken infeftment and made up his title in 1834. That precept was invalid, and therefore no infeftment had been taken on the entail. Pringle *secundus*, however, had a good fee-simple title under the disposition of 1811, and this the pursuer had taken up by service. He was also by the disposition of 1860 in right of Ogilvie's fee-simple title acquired in 1806, and so had a good fee-simple title to the whole lands of Yair. The writ of *clare* granted by himself in his own favour in 1864 was inept, because there had never been a valid split of the superiority and property. 2. If Ogilvie and Pringle *secundus*, the original disponees, were bound to allow Gilmour to feudalise his title because of the reservation in the clause of warrandice, as the Lord Ordinary seemed to think, that obligation had been cut off by the operation of the negative prescription—*Porterfield* v. *Porterfield*, M. 10,698; *Cubbison* v. *Hyslop*, 16 S. 112. 3. If the case was to be regarded as one of double title the presumption was in favour of the unlimited title—*Mackay* v. *Lord Reay*, 1 W. & S. 306; *Earl of Glasgow* v. *Boyle*, January 28, 1887, 14 R. 419. 4. The entail was bad, because (*a*) the fetters were not validly imposed upon the heirs-male of the body of Alexander Pringle *secundus*, who were to be distinguished from the "other" heirs-male, and (*b*) the irritant clause did not strike at alienating or altering the succession, and the wider irritant and resolutive clause on p. 28 only referred to the provisions on pp. 25-28—*Gibson*, 7 Macph. 791 (Lord Ordinary's opinion, quoting *Ogilvie's* case, 2 Macq. 260, and *Lumsden's* case, 2 Bell's App. 114).

Argued for the respondents—1. The entail title had been well and validly feudalised in 1834. The precept of sasine in favour of Little Gilmour was then still available to Pringle *secundus*. Such precepts no longer fell by the death of the granter or grantee—Act 1693, c. 35. But it was said the granter of the precept had become divested, and was no longer *dominus* when the precept was granted. A faculty to sell or burden could be reserved or constituted in another before divestiture—Bell's Prin. 924, 929; *Mousewald's Creditors*, 1677, M. 4102; *Anderson*, 1784, M. 4128. Even an infeftment flowing *a non domino* was valid if the true *dominus* consented—Stair, ii. 11, 7, and iii. 2, 9; *Stirling*, 1630, M. 6521; *Mounsay*, 1808, Hume, 237. Gilmour's feu disposition was specially excepted from the dispositions to Ogilvie and Alexander Pringle *secundus*, who accepted their dispositions and took infeftment thereon under burden of said feu-disposition. They were bound to consent to the feu-disposition in favour of Gilmour and reconveyed to Pringle *primus* being feudalised. The case of *Cheyne* v. *Smith*, 10 S. 622, which related to a procuratory of resignation, was directly in point. 2. The pursuer was barred from challenging the entail title. With regard to him and his authors in the superiority title, in any case the precept was good. It was not disputed that Ogilvie and Pringle *secundus* accepted their dispositions as

dispositions of superiority. They could never have succeeded in an action to have it declared that under the dispositions in their favour of 1806 and 1811 respectively they were proprietors of the *dominium plenum* of Yair. Until the raising of this action the pursuer and his authors had regarded the estate of Yair as an entailed estate. 3. The pursuer had accepted Whytbank under the deed of entail, and was not entitled to challenge the same deed so far as it applied to Yair upon principle allied to that of approbate and reprobate—*Douglas' Trustees*, 24 D. 1191. 4. The objections based upon the clauses of the deed of entail were hypercritical even as applied to an entail.

At advising—

LORD RUTHERFURD CLARK—Alexander Pringle *primus* held the estate of Yair in fee-simple as vassal of the Crown. We are told by the pursuer that in 1806 he desired to split the superiority and property in order to the creation of votes. To that end he granted on 25th June 1806 a feu-disposition of the lands in favour of R. Little Gilmour for a feu-duty of £10, and on the 2nd of July he received from him an acknowledgment that the disposition though *ex facie* absolute was only in trust.

On 2nd September 1806 Mr Pringle disponed a portion of the lands of Yair to Mr Ogilvie of Chesters. Again on 15th June 1811 he disponed another portion to his eldest son Alexander Pringle *secundus*. He assigned to them an open charter of resignation which he had obtained from the Crown on 5th July 1806. By virtue of these dispositions and of the Crown charter Mr Ogilvie and Alexander Pringle *secundus* were duly infeft as vassals of the Crown—the former on 23rd September 1806, and the latter on 27th June 1811.

The lands so conveyed to Mr Ogilvie and Alexander Pringle *secundus* are said by the pursuer to comprise the whole estate of Yair. This is denied by the defenders. There is no necessity at present of taking further notice of this point. I shall assume provisionally that the whole lands were included.

The dispositions to Mr Ogilvie and Alexander Pringle *secundus* are in the ordinary form in which a superiority is conveyed. That is to say they convey the lands themselves, but the feu-disposition in favour of Mr Gilmour is excepted from the warrandice clause. There is no assignation of rents, but an assignation only of the feu-duty payable by Mr Gilmour, of which £3, 6s. 8d. is allocated to Mr Ogilvie and the remainder to Alexander Pringle *secundus*.

Mr Gilmour never took infeftment under the disposition in his favour. On 14th October 1806 he reconveyed the lands to Mr Pringle by a disposition in common form. Mr Pringle did not expede any infeftment.

So standing the title, Mr Pringle *primus* on 15th November 1820 executed a deed of entail of the lands of Whytbank and of Yair in favour of his eldest son Alexander Pringle *secundus* and a series of other heirs. He died in 1827 and was succeeded by his eldest son above mentioned.

The entail was registered in the register of tailzies on 8th June 1830, but no title was made up under it till 1834. Dealing with the lands of Yair as a feu held of himself and Mr Ogilvie, but still unfeudalised, Alexander Pringle *secundus* made up his title in the following manner. Being assigned by the deed of entail into the feu-disposition to Gilmour and the reconveyance by Gilmour to his father, together with the whole clauses therein contained, he took infeftment by executing the precept of sasine contained in the feu-disposition to Gilmour. It is not disputed that if that precept was still in force he completed a valid title to the lands of Yair as held in feu partly under himself and partly under Mr Ogilvie.

Alexander Pringle *secundus* died in 1857 and was succeeded by his eldest son the pursuer. On 1st March 1860 the pursuer was duly infeft by virtue of a Crown writ of *clare* in that portion of the lands of Yair which had been conveyed to his father by the disposition of 1811. In 1864 he made up his title under the Crown to that portion which had been conveyed to Mr Ogilvie from whom he received a reconveyance dated 1st January 1859. He was thus vested and seised in the whole lands of Yair as a vassal of the Crown.

In that character he granted in his own favour, as heir of entail under the entail of 1820, a precept of *clare* dated 8th April 1864 embracing the whole lands of Yair, and he took infeftment by recording the precept in the particular register of sasines at Melrose.

The pursuer has raised this action for the purpose of obtaining a declarator that he is proprietor in fee-simple of the lands of Yair. His case is that there is no title to these lands other than that made up under the disposition to Mr Ogilvie and his father, of which he is now in right; that this title carries the *plenum dominium;* that no feu-right was ever constituted or now exists, and that by consequence there was no estate to entail and that no estate has been entailed. The plea on which he relies is that the precept of sasine contained in Mr Pringle's feu-disposition to Mr Gilmour was evacuated by reason of the former having been divested by the dispositions to Mr Ogilvie and to his son, and that by consequence it could not be a warrant for any infeftment.

That by virtue of these dispositions Mr Pringle was divested in the sense of being no longer infeft is certain. But I do not think this is conclusive in favour of the pursuer. It is necessary to see what right was thereby conferred on Mr Ogilvie and Mr Pringle *secundus*.

It is plain—indeed it is admitted by the pursuer—that these dispositions were not intended to convey anything beyond a bare superiority. Accordingly Mr Pringle possessed the estate during his lifetime, drawing the rents into which he had not assigned his disponees. The dispositions are, as I have said, in the ordinary form for the

conveyance of a superiority. Feu-rights are never excepted from the dispositive clause. They are excepted, as in the dispositions with which we are dealing, from the clause of warrandice. The reason is, that every superior must according to feudal form be infeft in the lands and not in the superiority. The subordinate rights depend on their own titles and infeftments. They are burdens on the estate conveyed to the superior in the same sense as if he had himself created them. It is clear that the whole estate will be vested in the superior except in so far as the subordinate rights are duly feudalised. But he may be under an obligation to complete such rights as are personal, or to permit them to be completed.

The feu-right to Mr Gilmour was excepted from the warrandice clause, and the feu-duty payable by him was allocated between the two disponees. I do not say that such an exception necessarily bars the disponee from challenging the excepted right. Every superior has a right to challenge any feu-right which is said to be held of him, and if it be not valid, his estate will be cleared of it. But could Mr Ogilvie and Mr Pringle *secundus* have successfully challenged Mr Gilmour's feu-right so as to have it declared that they held the *plenum dominium?* It is plain that they could not. The feu-right was reserved from the warrandice clause—not to prevent recourse against Mr Pringle if the feu-right was valid—but because it was intended that his disponees should hold the estate of Yair subject to that burden. They were therefore bound to respect that feu-right, and to complete it or suffer it to be completed. They were no doubt infeft in the whole lands, but after receiving a reconveyance from Gilmour, Mr Pringle *primus* had a personal title to the feu constituted by his feu-disposition.

The question then arises—How was the feu-right of Mr Gilmour or his assignees to be feudalised? and of course I am taking it at the time when Mr Ogilvie and Mr Pringle *secundus* had completed their title with the Crown. The only means by which it could be feudalised without appeal to the existing superiors, was by executing the precept of sasine contained in the feu-disposition. But the pursuer says that the precept was evacuated and had ceased to have any legal force because the granter had been divested. He maintains that inasmuch as a precept of sasine can only be granted by one who is infeft, so it falls when the granter has ceased to be infeft. The argument was presented to us on principle only, for the pursuer admitted that he was unable to cite any authority for it.

A precept of sasine is an order by which the granter directs and authorises his baillie to give delivery of the lands to his disponee. It is the writ of the disponee, and may be used by him when he pleases, without further intervention on the part of the granter. By the common law it fell by the death of the granter and grantee, because, to use the words of Erskine (iii. 3, 41), it "carried the form of mandate." But by the Act of 1693, c. 35, it was declared that precepts of sasine should subsist both after the death of the granter and of the grantee. The proposition of the pursuer seems to be at variance with the principle of the Act. For the granter of a precept ceases to be infeft when he is dead, and yet his precept is effectual. To be sure, it might be said that as the lands are in his *hæreditas jacens*, the precept on that account remains in force. But I have always understood the law to be that it subsists though the title of his heir is completed, and that it is used as the precept—not of the heir—but of the granter.

I do not see why a precept should not endure so long as no right has been created in another which is inconsistent with and exclusive of the title which the precept was intended to complete. If a person grants a feu-disposition, and thereafter dispones his lands to another, with the purpose of conveying the *plenum dominium*, there can be no doubt that the second disponee, if he has no notice of the prior feu-disposition, and if his infeftment be first in date, takes the lands unburdened of the feu-disposition and that the precept therein contained cannnot be executed. The reason is—not so much that the precept falls—but that in consequence of the law touching priority of infeftments the feu-disposition is itself extinguished and therefore the precept cannot be used to complete it.

But if the disposition by which the granter of the precept has been divested is burdened with the feu-disposition, there is no reason why the precept should fall. On such a supposition nothing has been done by which the execution of it will be to the prejudice of any existing right. On the contrary, the grantee in using it to feudalise his feu-disposition is using it for the purpose for which it has been granted, and there is no one who has any right or title to object to its being so used. The granter when he disponed his estate subject to the feu-right must be held to have reserved to himself the power of giving delivery of the feu-right, or, in other words, there was reserved to his feu-disponee the power of completing his title by means of the writs which he held.

That is exactly the case which is before us. The feu-disposition to Gilmour was a burden on the estates conveyed to Ogilvie and Pringle *secundus*. They had no right or title to object to the completion of the feu-right, nor had anyone else. They took their estates subject to the right of Gilmour to feudalise his feu-disposition, or, in other words, to expede infeftment under the precept. The precept was valid in respect that it had been granted by an owner infeft. Its validity is to be determined by reference to the date at which it was granted, its endurance by reference to the consideration whether its execution will interfere with any prior right.

If it were necessary, this use of a precept might be supported by the well-established doctrine that a precept is valid provided that it has the consent of the owner infeft—Stair, ii. 11, 7; iii. 2, 9; Bell's Prin., sec. 929. Hence a precept may be granted by

one who has reserved at the time of his divestiture a power to burden, and the same is true of one in whom such a right has been constituted—*Anderson*, M. 4128; *Mousewald*, 4102; *Mounsay*, Hume's Decisions, 237. There may be questions as to the mode in which such assent shall be signified in order to be effectual. But I should hold that it was sufficiently signified if the precept was used for the completion of a right with which, according to the form of his titles, the estate of the person infeft was burdened. He is bound to submit to the burden, and to assent to the use of such means as exist for its completion.

But it is said that if this view were to prevail the faith of the records would be shaken. I do not think so. We are not considering the case of creditors of Ogilvie and Pringle *secundus*, or of purchasers from them before the feu-disposition was feudalised. We are only dealing with the manner of completing a title to Gilmour's feu-disposition. It is seen from the record that the title is completed by using the precept of the disponer granted when he was infeft, and that by the dispositions under which he was divested the feu-right was reserved. It is true that the search would disclose that the precept was executed after the divestiture of the granter, but it would no less disclose that this was done in accordance with the titles under which the lands were held.

We have little authority on this question, and yet if the proposition of the pursuer were well founded it is difficult to suppose that all our institutional writers would have failed to notice it. They point out that before the Statute of 1693 a precept fell by the death of the granter, but it is nowhere said that it ceases to have legal force when the granter has been divested.

There is, however, one case, which to my mind is directly in point—*Cheyne* v. *Smith*, 10 S. 622. The facts were these—Moffat held a piece of ground in feu from Sir James Nicolson. He conveyed a quarter of an acre of it to Tod by disposition containing a double manner of holding, together with procuratory and precept. Tod took infeftment on the precept in 1753, and was thus base infeft, but neither he nor any of his successors entered with Sir James. On Moffat's death his heirs made up titles to the entire subject as vassals of Sir James Nicolson, and thereafter disponed it to certain disponees. The clause of warrandice was qualified by an exception "of the tacks or feu-rights granted by Andrew Moffat, our father," and there was enumerated in the exception the right granted to Tod. The disponees were entered with the superior in 1763. The titles to the several subjects were transmitted in this form down to the date of the action, which I shall immediately mention, and during that period Tod and his successors, whose infeftment continued to be base, paid their feu-duty, not to the over-superior but to the successors of Moffat, who were their superiors as the title then stood. In 1830 or thereabouts Cheyne, the successor of Moffat, brought a process of reduction-improbation against Smith, the successor of Tod, in order to compel an entry with him. Smith pleaded that in virtue of the procuratory of resignation contained in the original disposition he was entitled to enter with the over-superior, and could not be compelled to enter with Cheyne. The argument for the pursuers was stated thus (for I think it well to give the very words of the report)—"The defenders' predecessors, no doubt, might have obtained confirmation from the superior so long as this mid-superiority remained vested in Moffat, or was in *hæreditate jacente* of him. But when Moffat's heirs made up titles to the whole property, including this quarter of acre, and conveyed it with procuratory and precept to a singular successor, who obtained himself first confirmed, the prior procuratory still unexecuted was necessarily evacuated, and the fee of the whole property under the Nicolson family became thereby full, so as to preclude either a resignation on the procuratory in the original disposition by Moffat, or a confirmation of the indefinite infeftment, which was consequently fixed as base."

This is really the same case as that which the pursuer presents. The only difference is that here we are concerned with a precept of sasine, while there the Court was concerned with a procuratory of resignation. But both are writs of the same legal character. They are both mandates—the one for enabling the grantee to take infeftment, the other for enabling him to resign the lands to the superior. They possess this legal quality in common, that neither is valid unless it flows from a person who is infeft. It seems to me that both would lose their force by the divestiture of the granter or neither.

In disposing of the question so raised Lord Moncreiff observed—"And although Moffat might be stated not to be feudally divested of the character of vassal of the over-superior Sir James Nicolson, as long as the procuratory of resignation had not been executed, and no confirmation had passed on the seisin taken by Tod on the precept, there is no doubt that it was *res mercæ facultatis* to Tod or his disponee at any time to complete his title by resignation, or to apply to the over-superior for confirmation of his seisin, and under the title, as it stood in the person of Tod, it never could have been competent to Moffat or his heirs to require any heir or disponee of Tod to enter with them as mid-superiors." He then proceeded to point out that the pursuer could prevail only by showing that by the disposition from Moffat and the transmission to himself the right of the defender to execute the procuratory and to enter with the over-superior had been lost. But he held that inasmuch as the estate conveyed to Tod had been excepted from the estate vested in the pursuer by reason of the exception occurring in the clause of warrandice, the defender in proposing to execute the procuratory was acting in accordance with his right. He had no doubt that the procuratory still subsisted. The judgment of Lord Moncreiff was

affirmed by the Court, and his reasoning was approved of.

It seems to me that this is a direct decision that a procuratory or precept subsists as long as they are required for completing the right to which they relate. They do not fall by the divestiture of the granter. They may be used whenever the grantee thinks proper to do so. But if the right to which they relate has ceased to exist they fall with it. For they cannot be used to take up a right which is extinct.

For these reasons, I am of opinion that the title to the feu which was completed in 1834 was well made up. I think that I should reach the same conclusion as regards the lands conveyed by the disposition of 1811 in respect that the owner of these lands was the person who used the precept, and therefore consented to its being so used. Further, I should be inclined to hold that the title to the whole feu was well completed by virtue of the infeftment on the precept of *clare* which the pursuer granted in own favour. But I do not think it necessary to enter into these questions, as I am satisfied that the feu disposition to Mr Gilmour was well feudalised in 1834.

On the question relating to the validity of the entail, it does not appear to me to be necessary to say anything. I think that the judgment of the Lord Ordinary is right, and I am satisfied with the reasons which he gives for it.

The LORD JUSTICE-CLERK and LORD LEE concurred.

LORD YOUNG was absent.

The Court adhered.

Counsel for the Pursuer and Reclaimer—Low—C. K. Mackenzie. Agents—Murray & Falconer, W.S.

Counsel for the Defenders and Respondents—Mackay—W. Campbell. Agents—Gill & Pringle, W.S.

Wednesday, July 16.

FIRST DIVISION.

[Lord Trayner, Ordinary.

KING, BROWN, & COMPANY *v.* ANGLO-AMERICAN BRUSH ELECTRIC LIGHT CORPORATION (LIMITED).

Patent—Publication in Prior Specification—Public Use—Disconformity between Provisional and Final Specification.

Where a specification described a process in a manner clear and intelligible to men of education and technical knowledge of the subject, that was *held* to be sufficient publication to invalidate a subsequent patent for the same process.

Where an electric machine was constructed and set up in the works of general engineers, and was there used on one or two occasions to give light for operations which were being carried on in the works, that was *held* to be sufficient public use to invalidate a subsequent patent for a machine of the same type.

In his provisional specification a patentee described part of his invention to consist "in constructing commutators cylindrical with an insulating hub or body to which are attached metallic sub-segments placed in electrical connection with the general mechanism in which the commutator is employed, and metallic wearing segments detachably attached to said sub-segments." In his final specification he claimed "(2) a commutator cylinder consisting of an insulating hub or body to which are attached sub-segments placed in proper electrical connection with the general mechanism in which the commutator is employed, and wearing segments detachably attached to said sub-segments;" and "(4) the commutator having metallic insulating segments T.

Opinion (*per* Lord Trayner) that there was such disconformity between the provisional and final specification as to invalidate the patent.

Messrs King, Brown, & Company were makers of electric machinery at Rosebank Electric Works, Edinburgh. Their right to make machines known as "compound wound" dynamos having been extrajudicially challenged by the Anglo-American Brush Electric Light Corporation (Limited), carrying on business in York Place, Edinburgh, they brought the present action against the Brush Corporation for reduction of letters-patent, No. 2003, dated 18th October 1878, granted to Herbert John Hadden, of which patent the defenders were the proprietors and assignees.

The patent in question was for "improvements in apparatus for the generation and application of electricity for lighting, plating, and other purposes," the alleged invention of which "compound winding" was an essential feature being a 'communication from abroad by Charles Brush of Cleveland, Ohio, United States of America."

The pursuers attacked the validity of the patent on these grounds—(1) that Mr Brush was not the first and true inventor of "compound winding," but that the said invention had been discovered and made known by Mr Samuel Varley prior to the date of the defenders' patent; (2) that the alleged invention had been publicly used prior to the date of the defenders' patent; and (3) that the final specification was not in conformity with the provisional, but embraced alleged inventions not included or indicated in the provisional.

With regard to the objection first above mentioned, it is necessary shortly to describe in what "compound winding" consists:—

When a loop of wire is moved in a direction transverse to the length of the wire through a magnetic field, the result is that a current of electricity is set up in the