EARL OF FIFE, ET AL., ... APPELLANTS.
DUFF, ET AL., ... RESPONDENTS.

1861.
July 12*th*, 15*th*, 16*th*, 18*th*, *and* 19*th*.
1862.
June 24*th*, 26*th*, 27*th*, *July* 14*th* *and* 15*th*.
1863.
27*th March*.

Original Entail—Feudalization—Registration.—Where a disposition bears to be granted in implement of an original entail, for the purpose of feudalizing it, and repeats all its conditions,—it is not necessary that such original entail should itself enter directly into the feudal progress.

A deed of entail, executed in the form of a disposition, by a person uninfeft, and containing an assignation to a procuratory which is afterwards used by him to complete a title in fee simple, is not thereby converted into a mere obligation or executory contract, but subsists in itself as a habile and valid entail, giving right to obtain feudal investiture; and such deed of entail, though it is not of a character to enter into the feudal progress, is the proper deed to be registered as the original entail.

THE suit was instituted in 1860 by the Earl of Fife to obtain a judicial declaration that the entail of Carraldston did not restrain him from selling that estate; he having contracted to do so for the sum of 131,000*l*. The grounds on which his Lordship mainly relied were that the entail had not been duly feudalized and recorded, as required by the Act of 1685.

The subsequent heirs of entail resisted the suit, contending that all the requirements of the statute had been adequately satisfied.

The *Lord Ordinary* decerned for the Pursuer, but the Court of Session (First Division) decided on the 2nd March 1861 that the objections were groundless, that the entail was valid, and that the Earl had *no* power of sale.

The Earl appealed to the House; and the case having been heard on the 12th, 15th, 16th, 18th, and 19th July 1861, was sent back to the Court of Session

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for reconsideration, with a direction that all the Judges should give their opinions on it in writing.

Accordingly, on the 20th March 1862, twelve Judges of the Court of Session, namely, the *Lord President*, the *Lord Justice Clerk*, Lord *Ivory*, Lord *Wood*, Lord *Cowan*, Lord *Curriehill*, Lord *Deas*, Lord *Benholme*, Lord *Neaves*, Lord *Ardmillan*, Lord *Kinloch*, and Lord *Jerviswoode* (*a*), after further argument, heard before them all,—prepared and signed the following elaborate opinion, which is given without abridgment; firstly, because it is a collective judicial dissertation on a most important and difficult legal question, and, secondly, because it in truth forms the basis of the ultimate judgment pronounced by the House.

The question at issue in this case is, whether or not the title of the Pursuer, Lord Fife, to the lands of Carraldstone is so restricted by a deed of entail of that estate, which was granted by one of his ancestors in 1721, and by the title deeds which followed thereupon, as to disable him from selling the estate? A number of objections have been urged against the validity of that entail. As the disposal of these objections depends chiefly upon well-established rules of the law of Scotland, relating to the transmission of the ownership of feudal subjects, it may simplify the statement of our opinion upon the subject, to indicate generally at the outset such of these rules as appear to be applicable to the case.

One of the most elementary of these rules is,—that a voluntary transmission of the ownership of a feudal subject is effected by a *dispositive act* of the party making the transfer, followed by *tradition* of the subject to the transferee; and it is of importance to have in view in what manner these two steps of the proceeding are accomplished, and what are the legal effects of each of them.

With regard to the *dispositive act*, it is well described by Lord *Stair* (*b*) as follows:—"The question then is, by what act men may naturally exercise the "power of disposal, which can be no act of the understanding; that being "only contemplative, and nothing active or operative for constituting or transmitting of rights; but it must needs be an act of the *will*, for by it rights "are both acquired, relinquished, and alienate. There may be three acts of "the will about the disposal of rights—a *resolution* to dispone—a *paction, contract, or obligation* to dispone—and a *present will or consent* that that which "is the disponer's be the acquirer's. *Resolution* terminates within the resolver, "and may be dissolved by a contrary resolution, and so transmits no right. "*Paction* does only constitute or transmit a personal right or *obligation*, whereby "the person obliged may be compelled to transmit the real right. *It must "needs then be the present dispositive will of the owner which conveyeth the right "to any other which is expressed by such words*, de præsenti—*Titius disponeth, "alienateth, or annalzieth, giveth, granteth, selleth, &c., which cannot properly "import an obligation having its effect in the future, though there may be obliga-*

(*a*) Lord Mackenzie was absent from indisposition.
(*b*) Book 3. tit. 2. sect. 3.

" *tions consequent as to delivery*, warrandice, &c.; but these terms do express " *something presently done*, and not engaged to be done; and so can be nothing " else *but the alienation or transmission of the right itself.*"

Thus the legal effect of such a disposition, even before it is followed by tradition of the subject disponed, is twofold.

In the first place, it operates as an actual alienation of the subject to the disponee; and it vests in him most of the essential attributes of ownership. In particular, it vests in him not only a right to possess the subject and to reap its fruits, but also a power to sell it; to dispone it for either onerous or gratuitous causes; and to settle the estate by *mortis causa* dispositions, and deeds of entail. The right so created is transmissible from one person to another by voluntary disposition; and on the death of any person, in whom it is vested, it is transmissible to his heir by general service; and each person in whom it is vested successively has the powers and privileges of ownership above mentioned. This right is usually called a *personal fee*,—a denomination importing not that the subject of it is moveable, for it is truly heritable, but that it is not feudal, and indicating at the same time that, even while not followed by solemn tradition or infeftment, the right is still *sua natura* a right of fee.

Secondly, such dispositive act, although it operates as a *de præsenti* alienation, and not merely as an obligation to alienate, does farther by implication impose upon the disponer an obligation of a different kind—viz., a *consequent obligation* (as Lord *Stair* calls it)—as *to delivery or tradition* of the subject disponed. He may perform this obligation by one or other of two different modes as to such feudal subjects. 1. He may deliver to the disponee a proper warrant for obtaining himself infeft,—such warrant consisting of a procuratory of resignation addressed to his procurator when the subject is to be held *a se*, *i.e.*, to be held by the disponee of the disponer's feudal superior,—or of a precept of sasine addressed to his bailie, when the subject is to be held *de se*, *i.e.*, to be held *base* of the disponer himself. The disponer grants such warrant himself, when he is already entered and infeft in the subject; and he may do so either by including the procuratory of resignation or precept of sasine in the same writing with the disposition itself, or by granting them in writings separate from such disposition. 2. The disponer may perform such obligation in another way, without the intervention of a procurator in the one case, or of a bailie in the other, by personally, or *propriis manibus*, as it is called, making the resignation, or giving sasine. When resignation is made in this way, the evidence of the fact consists of an instrument under the hands of a notary public; and when the resignation is so made in implement of a previously-existing disposition, the instrument does not require to be signed by the resigner. This mode of proceeding is in modern times seldom adopted; but it is quite competent. Lord *Stair* says (*a*), " Though instruments of resignation " use to be by procurators, warranted by a procuratory of resignation, yet as " there may be seasins given by the superior *propriis manibus*, so there may be " resignation by the vassal himself. But in both the *instrument of resignation* " *alone* is not sufficient, as being but the assertion of a nottar; but they must " have *for their warrand a disposition or other adminicle.*" And he elsewhere (*b*) says, " Though resignation *propriis manibus* can have no procuratory, " yet the disposition whereupon it proceeds must be shown as the warrant of " the instrument of resignation."

When again the disponer himself is not infeft, but has only a personal fee, with an unexecuted precept or procuratory which has been granted by his predecessor, and is still unexecuted, his obligation, as to delivery of the lands, is sufficiently implemented by his assigning such unexecuted procuratory or precept to his disponee, who in virtue thereof can obtain himself infeft as aftermentioned.

Although the personal fee, thus vested in a disponee before he is infeft, confers

(*a*) Book 2. tit. 2. sect. 2, 3.

(*b*) Book 3. tit. 2. sect. 8.

upon him such powers and privileges of ownership, it is, while in that state, attended with some risks and disadvantages. One of them is, that the owner is not the entered vassal of the feudal superior. Another is, that as his right is not clothed with infeftment, and published in the register of sasines, it is of no effect against third parties who may attach the estate by legal execution for the debts of the disponer, or who may in *boná fide* purchase it from him, and be first infeft. And still another disadvantage (which may often be of moment in cases relating to the titles of entailed estates) is, that when the disposition is granted under conditions intended to burden or restrict the disponee's right in favour of third parties, as creditors, or as heirs of entail, these conditions cannot be rendered *real burdens* upon the estate without being embodied in the infeftment of the disponee. But a personal fee, while in these and some other respects it is not equivalent to a fully feudalised fee, still leaves the person to whom it belongs vested with the important powers and privileges of ownership formerly mentioned, and with a right, in addition, to call upon the disponer, or his heir, to grant a proper warrant for clothing the personal fee with feudal tradition.

With regard, again, to the mode of effecting such *tradition*, it is not sufficient that the disponee be put into actual possession of the subject, as would be the case if the subject were allodial. When the subject is held by feudal tenure, the tradition is by infeftment or sasine. Lord *Stair* (*a*) says, "The most "ordinary and important conveyances are of lands and annual rents which "pass by infeftment; for perfecting whereof, there must not only be a dis- "position, *but also a resignation in the hands of the superior, and new infeftment* "*granted by him to the acquirer thereupon*, or by confirmation," &c.

In cases where the subject is to be held—not *of* the granter—but *from* him of his feudal superior, and where the infeftment is to be obtained on resignation (and as this is the category under which the present case falls, it is the only one to which we shall advert), the distinguishing peculiarity of the feudal tradition is, that the infeftment is received by the disponee not directly from the disponer, but from the superior, by his granting to the disponee a new charter (called a charter by progress) with a precept of sasine upon which the infeftment proceeds. Such a charter is granted upon a resignation of the estate being made in the superior's hands either in virtue of a written procuratory of resignation, or *propriis manibus*. And it is of importance to keep in view that no party has a title to make resignation in either way, except the person who was last entered and infeft as the vassal. As already mentioned, when the disponer himself is in that position, the resignation may be, and generally is, made by himself; but when the disponer himself is not infeft, but possesses upon a disposition, containing an unexecuted procuratory, granted by the last entered vassal, he assigns that procuratory to his own disponee, who obtains a renewal of the feudal investiture in virtue of the procuratory so assigned to him. Hence, in cases of that kind, the disposition of the subjects, and the procuratory upon which feudal tradition is obtained by the disponee, are made by different parties. So also, even when the disponer himself is the entered vassal, but does not grant an available procuratory during his lifetime, his heir is bound either to grant such a procuratory, or to resign *propriis manibus*, and to qualify himself to do so, by previously obtaining himself entered with the superior and infeft in the subjects. In such a case also the disposition and the procuratory of resignation (when the resignation is made through a procurator) are separate writings, and granted by different parties.

Keeping in view these rules of the law of Scotland, as to the transmission of rights to feudal subjects, we shall now examine the deed of entail of the estate of Carraldstone, and the proceedings which followed upon it. That deed was granted by Major George Skene on 24th October 1721. The granter did thereby "*give, grant, and dispone*" that estate, "together with all right, title,

(*a*) Book 3. tit. 2. sect. 8.

" interest, claim of right, property, and possession, as well petitor as possessor, " which I have, *or any ways may have*, claim or pretend to the said lands, to " and in favors of *myself* and the heirs male procreate, or to be procreate, of " my body of my present marriage with Elizabeth Baird, my spouse; which " failing, to the heirs male to be procreate of my body of any other subsequent " marriage; *which failing, to Elizabeth Skene, my eldest lawful daughter*," whom failing, to the other substitutes therein set forth.

The disposition was granted under prohibitions *inter alia*, forbidding the heirs of entail to alienate or dispone the estate, to contract debt thereon, and to alter the order of succession; and these prohibitions were fenced with irritant and resolutive clauses. These are the only clauses of restriction which the statute 1685, c. 22, requires to be inserted in a deed of entail. Another of the conditions of the deed was, that the heirs of entail " shall enjoy, bruik, and " possess the said lands and estate *by virtue of the present tailzie and infeftments*, " *rights, and conveyances to follow hereupon, and by no other right and title* " *whatsoever*." This condition also was fenced by the irritant and resolutive clauses.

The granter assigned to the grantees all the writings, evidents, rights, and securities of and concerning the subjects. The deed contained clauses declaring that the estate should be affected with any future deeds of the granter, that the deed should be effectual although found in his own custody at his death undelivered, and that he dispensed with the delivery of it. The effect of these clauses was to leave the deed subject to the granter's power as a *mortis causa* settlement, notwithstanding the disposition being made, as every such disposition must be, *per verba de præsenti*. To use the words of Erskine (*a*),—" A " man may effectually settle his heritage in a testamentary deed, reserving to " himself the life-rent, and a power of revocation, provided he makes use, in " the *conveying* clause, of the words *give, grant, and dispone*, in place of legate " and bequeath."

Major Skene's own title had not then been feudally completed by infeftment, and his right consisted of such a personal fee as has been described. The estate had formerly belonged to Alexander Carnegie of Balnamoon, who had been duly entered with the superior, and infeft as the crown vassal therein; and it had, on 9th November 1706, been conveyed by his disposition, containing a procuratory of resignation, to George Turnbull, as trustee for his creditors. Turnbull, after having been entered and infeft in the estate, sold and conveyed it to John Stuart of Grandtully on 18th April 1707, by disposition, containing also a procuratory of resignation; and the right, as well as the procuratory, was afterwards transmitted by a regular progress of conveyances to Major Skene. But although, at the time when he made the entail of 1721, Major Skene's right to the estate was still a personal fee, he had thereby a sufficient title to grant an effectual entail in terms of the Statute 1685. The judgments of the House of Lords affirming the judgments of this Court in the two cases of *Napier* v. *Livingstone*, 11th March 1765, Craigie and Stewart's *App. Ca.* ii. 108, and *Renton* v. *Anstruther*, 18th August 1843, Bell's *App. Ca.* ii. 214, are conclusive on this point.

The entail which was thus executed was such a deed as is authorized by the statute 1685. It was not an obligation to grant an entail. It was not a trust or direction to other persons to make an entail. It was itself a substantive and *de præsenti* disposition to a certain disponee, and to a certain series of heirs of entail, with all the restrictions prescribed by that statute. It was thus itself a *habile* entail. It is true that Major Skene's right under that entail was still only such a personal fee as has been described, and that in order to render its conditions and restrictions *real burdens* upon the estate, three proceedings were still requisite. (1.) That the disposition should be followed by feudal tradition or infeftment, to be obtained through the feudal superior in the manner

(*a*) Ersk. iii. 8, 20.

formerly explained, and that the instrument of sasine (which is only the legal proof of infeftment) should be recorded in the register of sasines. (2.) That, in terms of the statute 1685, all the fettering conditions of that original deed of entail should be *verbatim* inserted in the different writings by which that feudal tradition or infeftment should be effected, viz., in the procuratory of resignation to be granted by the entailer himself, or by his heir after his death, in the charter of resignation, and precept of sasine to be granted by the superior, and in the instrument of sasine following thereon. And (3.) that in terms also of that statute, the original deed of entail itself should be recorded in the register of tailzies. It was not necessary that that deed should also be recorded or referred to in the separate register of sasines. It remains to be considered whether or not these conditions were satisfied by the future proceedings, and we shall now advert to these proceedings in their chronological order.

I. In 1723 Major Skene completed his own title by expeding resignation in the hands of his superior, in virtue of the procuratory of resignation which, as already mentioned, had been granted by Turnbull, the last entered vassal, and had been transmitted to Major Skene by a regular series of assignations. That resignation proceeded also upon the procuratory granted in favour of Turnbull by his predecessor Carnegie, a precaution which may have been superfluous, but which at all events did no harm. As, according to feudal rules, such a renewal of a feudal investiture is always made with the destination contained in the warrants upon which it proceeds, the destination in the charter was, of course, in favour of Major Skene and his heirs and assignees whomsoever; that being the destination in the conveyance in his own favour in which the procuratories were assigned to him and them.

This infeftment changed Major Skene's position, by making him the entered vassal of the feudal superior, and rendering that personal fee which had been granted by Carnegie and Turnbull, and transmitted to him as above mentioned, a feudal fee.

But this proceeding did not affect Major Skene's *mortis causa* deed of settlement, which he had executed two years before. The right which he had thereby conveyed to himself and the heirs of entail remained still a personal fee. But he did not revoke that deed. He still preserved it unrevoked in his repositories, for the purpose of regulating the succession to his estate after his death. Although this completion of Major Skene's right took place after the date of the deed of 1721, the effect was the same as if it had been of a prior date. It had a retrospective effect, and accresced to the deed of settlement. This would have been the case even if the deed had been a conveyance *inter vivos*, more especially as by the express terms of the disposition he thereby conveyed the estate, with all right, title, and interest which he then either had, *or might have, thereto*, and when he did so, he had the potentiality of feudally completing his title by obtaining himself entered and infeft at his own pleasure on the open procuratory above mentioned. In such a case *jus superveniens auctori accrescit successori*, that is, as Stair (*a*) states, "That whatever right "befalleth to the author after his disposition or assignation, it accresceth to "his successor to whom he had before disponed it, as if it had been in his "person when he disponed, and as if it had been expressly disponed by him:" and as an example of the operation of this principle, that author states his opinion, which subsequent practice has fully confirmed (*b*), "that if a party "grant infeftment before he be infeft himself, and be thereafter infeft, it "accresceth to that party whom he infeft before, if the question be betwixt "them." *A fortiori* did the completion of the disponer's title accresce to the deed which is here under consideration, for two additional reasons; first, because that deed, being a *mortis causa* one, was to take practical effect at the period of the granter's death, if it should remain till then unrevoked, and its efficacy was to depend upon the state of his title at that date; and, secondly,

(*a*) B. 3. t. 2. sect. 1. (*b*) Ib., sect. 2.

because he was himself the immediate grantee as well as the granter of this deed; and the steps which a disponee takes in order to complete his author's title very clearly accresce to the disposition granted by him to himself. Thus the deed of 1721 remained effectual as the dispositive act of the granter.

Further, his implied obligation to complete it by feudal tradition remained no less effectual; and, although that obligation could no longer be implemented by means of the procuratory of resignation which had been granted by his predecessor, and which had been exhausted by the resignation expede by himself, yet he had become enabled to implement that obligation *directly*, either by his resigning the lands *propriis manibus*, or by his granting a new procuratory for resigning them in the hands of his superior, in favour, and for new infeftment thereof to be granted to his disponees under the deed of 1721. If he had made such resignation, or granted such a procuratory, these disponees would have obtained a renewal of the feudal investiture in the same way as if a procuratory had been embodied in the deed of 1721 itself.

Thus Major Skene came to have two titles to the estate,—by one of which the full and feudal right as entered vassal was held by him with a destination to his heirs and assignees whomsoever,—and by the other, a personal fee, was held by him with a destination to himself and certain heirs of tailzie. The subsistence of these two distinct titles in one person was quite competent, according to the law and daily practice of Scotland; and such continued to be the state of matters when his death took place in the year 1724. Hence, on the occurrence of that event, his rights under both of these titles fell into his *hæreditas jacens;* his heirs-at-law, who were his two daughters, Elizabeth and Jean Skene, being entitled, as his heirs-portioners, to succeed to the feudal fee; and his heir of tailzie (who was Elizabeth Skene, the elder of these daughters) being entitled to succeed to the personal fee; the latter, however, being the prevailing title, because it was created by Major Skene himself, as the title under which exclusively the lands were to be possessed by the grantees in all future time.

II. On 6th January 1725, the deed of entail of 1721 was produced judicially in this Court, and was recorded in the register of tailzies. Thus all the requisites prescribed by the statute 1685, as to *the deed of entail itself*, were complied with; these requisites being,—first, the embodying in that deed of the prescribed clauses of restriction,—and, secondly, the registration of that deed in the record of tailzies; both of which conditions were now satisfied. It matters not although the deed so recorded did not contain a procuratory of resignation; for such a procuratory, whether it be included in the same writing with the deed of entail, or be a separate writing, is not an essential part of the deed of entail itself, but merely a step in the procedure for effecting feudal tradition in favour of the disponee. This was well exemplified by the case of *Renton* v. *Anstruther* above mentioned, where the deed of entail was granted by Sir Alexander Anstruther in 1810, while his own right consisted of only a personal fee; and in 1822 that deed was, after his death, recorded in the register of tailzies. Thereafter his eldest son and the heir of entail expede a general service as heir of tailzie to his father, and obtained himself infeft in the lands in virtue of a charter of resignation from the superior. But the procuratory of resignation upon which he thus obtained feudal tradition had been granted, not by the entailer, but by his author, Catharine Anstruther, in 1808, and had been assigned by him in the deed of entail. In that case the entail was held to be effectually completed under the statute 1685, although the procuratory of resignation, in virtue of which it was feudalised, not only was not recorded in the register of tailzies, but was not the deed of the entailer himself. Thus, then, in January 1725 there was an existing deed of entail of the estate of Carraldstone, duly framed and recorded in terms of that Statute.

III. On 2nd September 1725, Elizabeth Skene was served heir of tailzie and provision to her father, Major Skene, under the entail of 1721. The brieve under which this service was expede appears to have been directed to the

bailies of Edinburgh, but had been advocated by the Court of Session to its Macers—a mode of procedure which, according to the practice of that period, was often adopted when such a service was objected to by an opposing party, in order that the question raised by the objector might be adjudged by the Court itself. From the report of the case, dated 31st July 1725 (*a*), it appears that the service was objected to by Jean, the younger daughter, as one of the heirs of line of the major; and that the objection which she pleaded was, "that the "subsequent feudal investiture in favour of heirs whatsoever was an alteration "of the entail; for, since by the original conveyance to the Major upon his "purchase, the lands were disponed to him and his heirs whatsoever, it was "past doubt that if no subsequent deed had been done, the heirs-general would "have succeeded; and as the original destination was no otherways altered "than by this latent tailzie, which did not restrain the Major's power of "revoking or altering, his after resignation in favour of his heirs-general, and, "taking infeftment accordingly, was as formal an alteration of the entail as "the making of the entail was of the original destination; and, *de facto*, the "right of the estate was vested in the heirs-general; *for the entail which the "Major might have completed in favour of the heirs therein named could not now "be effectual, because the procuratories which stood assigned to them were "executed in favour of himself and his heirs whomsoever.*" Thus the question was directly raised for the decision of the Court, whether the efficacy of the entail of 1721 was affected by the subsequent completion in 1723 of the entailer's own title. The report states that the question thus raised was "determined on a hearing in presence" (which means that it was elaborately discussed and considered), and that the judgment was—"The Lords found that "Major George Skene, his expeding a charter and taking infeftment thereon, "after the tailzie upon the procuratory in the disposition conceived in favour "of heirs or assignees whatsoever, prior to the tailzie, *did not import a revoca-"tion or alteration of the said tailzie*, and therefore repelled the objection "proposed by Dame Jean Skene and her husband." This judgment settled one point—viz., that a personal fee to the estate not only had been vested in Major Skene by his deed of tailzie of 1721, but also, that it remained vested in him till his death, notwithstanding his being feudally entered and infeft in 1723 on the fee-simple title which he had previously acquired; and that that personal fee remained in his *hæreditas jacens* after his death, and was transmissible by general service to his heir of entail under the destination in the deed of 1721. In conformity, accordingly, with this judgment, the Jury, on 2nd September following, served and retoured Elizabeth as heir of tailzie and provision to her father under the entail.

In taking that step she acted in conformity with the rules of correct conveyancing. That it was necessary may be implied from the judgment of the Court already mentioned, repelling an objection which was made to her service, and appointing it to proceed. And since that time it has been fixed that when under such a *mortis causa* settlement, the immediate disponee *is the granter himself*, a personal fee is held to vest in him under the settlement; and that on his death the right does not transmit to the next heir without a service. This was decided both by this Court and by the House of Lords, in one branch of the case of *Napier* v. *Livingstone* (*b*), which has been already referred to for a different purpose. In that case the Countess of Callender, who held the estate of West-quarter on a charter without being infeft (or in other words, whose right in the estate was only a personal fee), granted a deed of entail thereof to *herself and her husband* (but in such terms as restricted her husband's right to a life-rent), and to James Livingstone *nominatim* and the heirs male of his body, and the other heirs of entail therein set forth in fee. The entailer died without issue, and without having completed her title, and James Livingstone sold the estate, in the belief that the personal right thereto had vested in

(*a*) Morr. 11,354. (*b*) Craigie and Stewart, App. Ca., ii. 108.

him as institute without a service. On his death the next heir challenged that sale on several grounds, one of which was, that in respect of the want of a service, no right had ever been vested in James Livingstone. And as to that ground of challenge, this Court "Find, that a general service was necessary by "James Livingstone in order to carry right to the Countess's tailzie, and there-"fore find that the feudal title he expede, and *the conveyance by him to a* "*purchaser were inept.*" This judgment was affirmed on appeal by the House of Lords on 11th March 1765.

A similar question was again decided the same way in *Gordon* v. *M'Culloch*, 23rd January 1791, Mor. p. 15,464.

The case also of *Renton* v. *Anstruther* was similar to the present, inasmuch as the entail was created by a *mortis causa* deed, granted to the entailer himself and the heirs of his body; and after his death the personal fee, left in his *hæreditas jacens*, was taken up by his eldest son expeding a general service as heir of tailzie and provision to him under the entail.

By means, therefore, of Elizabeth Skene's general service the personal fee under the deed of 1721 was taken out of the *hæreditas jacens* of Major Skene, and vested in her as heir of tailzie to him. In virtue of that title she had all the powers and privileges of ownership arising from a personal fee as formerly mentioned, excepting in so far as these powers and privileges were restricted by the entail. But, on the other hand, even that personal fee was limited and restricted by the conditions of the entail. For example, had any part of the lands been sold by her, or been adjudged for payment of her debts, her right to the whole of them would have been forfeited, in virtue of the resolutive clause in the entail; and the sale or adjudication would have been annulled, in virtue of the irritant clause. The case of Denham of Westshiel in 1733, followed by the cases of Carleton in 1753, of Chisholm in 1800, and of Sime in 1803, is conclusive as to this. No doubt, while her right under the entail remained only personal, and the conditions in favour of the heirs of entail were not made real burdens upon the lands by her being infeft in them under these burdens, the rights of these subsequent heirs of entail were exposed to the risk of being defeated, in the manner already explained; that is to say, by third parties obtaining themselves first infeft in the land, in virtue either of onerous and *bonâ fide* purchases from the heirs-at-law of the entailer, or of legal execution for payment of the onerous debts of such heirs, if these heirs should, in that character, have made up a feudal title to the lands. But, subject to that risk, the personal fee was vested in Elizabeth Skene by the deed of entail itself, and her general service as heir of entail, and a *jus crediti* was created in favour of the subsequent heirs of entail.

It may here be proper to notice more particularly two pleas which have been urged by the Pursuers—(1), That the right which was created by this entail was altogether *extinguished* by the feudal investiture which was expede in 1723; and, (2), That at all events that deed was thereby rendered unavailable as an original entail, or as anything but an obligation to grant a new deed of entail.

At the debate before us, the former of these pleas was ultimately abandoned by the Counsel for the Pursuers. But as the *Lord Ordinary's* note appears to indicate that the plea was adopted by his Lordship, it is proper that we express an opinion regarding it. Our opinion is that the plea is groundless. It is indeed the very plea which was urged as the objection to Elizabeth Skene's service in 1725, and was then repelled by the Court. And we are clearly of opinion that the judgment, if it be not *res judicata* on this point, was at all events a sound one; because, according to the elementary principles of our law already explained, a *mortis causa* settlement of an estate made by its owner, while his title is still only a personal one, not only is not extinguished, but is, on the contrary, strengthened by his afterwards completing his own prior title by feudal tradition.

The case of *Molle*, 13th December 1811, F.C., was founded upon by the Pursuers, at one stage of the argument, as an authority in support of this plea,

But it is quite inapplicable. In that case an estate was, by a *mortis causa* settlement, dated in 1766, disponed to the granter's only child, Mrs. Hunter, and a series of heirs. The deed contained neither procuratory of resignation nor precept of sasine. In 1767, on the death of the granter, the grantee, who besides being the disponee under that deed, was likewise the heir of line of the granter, made up a title, by obtaining a renewal of the former investiture in the latter character, without taking any notice of the *mortis causa* settlement. In 1779, she herself altered that destination by granting a new disposition conveying the estate to herself, and her heirs and assignees whomsoever. She was quite entitled to do so, because, even under her father's deed of entail of 1766, her right was unfetterred, and a fee-simple. This was followed by a renewal of the investiture upon and in terms of that disposition of 1779. After her death a competition for the estate arose between the person called after her by the father's settlement of 1766, and the heir under her own deed, and the latter was preferred. That case differed from the present. What was there found to supersede the destination in the deed of 1766 was,—not that Mrs. Hunter made up her title under the former investiture, as heir-at-law of her father (for in the judgment it was expressly found that that proceeding had no such effect),—but that, having right in fee-simple, as disponee under the deed of 1766, and also as heir-at-law of her father, she herself, by her own disposition, conveyed the estate to herself and her own heirs whomsoever. Accordingly Lord *Glenlee*, in his opinion stated, "The case of Skene is very different. *The* "*former deed was there the man's own*, and meant to regulate his succession "after his death; and the new investiture was not the mode in which he would "naturally have altered it, if he had meant to do so."

Further, in the subsequent case of *M'Arthur* v. *Jamieson*, a *mortis causa* disposition of an estate granted by a person while his right thereto was only personal, was sought to be set aside on the ground that it was revoked or altered by his afterwards completing his title. The case of Molle was founded on as an authority for that plea. But the Court, on 19th November 1822, repelled the plea, and sustained the settlement. And that judgment was, on appeal, affirmed by the House of Lords, W. & S., i. 59.

But the Pursuers maintain that the effect of Major Skene's having completed his own title in 1723, was at least *to render the entail of* 1721 *unavailing as a disposition*—or as anything else than *an obligation to grant a new entail.* This effect is said to have been produced by Major Skene's using, and thereby exhausting, the procuratories of resignation which had been granted by the then last-entered vassals, and assigned to him, as the warrants for obtaining himself entered and infeft. The Pursuers maintain that, in this position, the deed of 1721 was available only as an obligation upon the granter's heirs-at-law; that what they were bound to do by that obligation was to grant a new entail in the same terms as the deed of 1721, with a procuratory of resignation; that the deed of 1721, having thus been left unavailable to any effect other than that of conferring upon the grantees such a *jus crediti* or *jus actionis*, cannot be dealt with as being an original entail; that it had no more effect than if it had been a direction in a trust conveyance by the granter to trust-disponees to execute a deed of entail in certain terms; and that, as in such a case a trust-deed containing such a direction could not be dealt with as an original deed of entail, the deed of 1721 was reduced to the same predicament. But there are at least two fallacies in this reasoning.

In the first place, the deed of 1721 did not lose its character and effect as a *disposition*. Its effect as the *dispositive act* of the owner of the estate remained entire. The personal fee which it originally vested in Major Skene as the disponee in that deed, and the powers and privileges of ownership arising from such a right of fee, remained unchanged. That disposition remained as available as ever it was, as the *dispositive act of the granter*, to transmit the property; and in order to feudalise the personal fee, it only required to be followed by

the requisite feudal tradition—viz., by an infeftment on a charter from the superior.

Another fallacy in the argument of the Pursuers consists in their assuming that the implied obligation incumbent on the heirs of the granter was to grant a new deed of entail. The only implied obligation incumbent on them, was merely to do what was necessary, in order to complete the title on the disposition of 1721 by feudal tradition; that is to say, either to make such resignation *propriis manibus*, or to grant such a procuratory of resignation as would enable the grantee to obtain a renewal of the feudal investiture from the superior; and to qualify themselves to do so by previously obtaining themselves infeft on an entry from the superior. Disponees, in *mortis causa* settlements of feudal subjects, which do not contain available procuratories of resignation or precepts of sasine, can obtain themselves infeft on such conveyances only by enforcing the obligations to infeft them which are incumbent on the heirs of the granters. Prior to the end of the seventeenth century all disponees in *mortis causa* settlements, even when they contained procuratories of resignation and precepts of sasine, were in that predicament. The reason was, that as the law then stood, procuratories of resignation, and precepts of sasine, expired by the death either of the granters or of the grantees before they were executed; and as infeftments are never expede on *mortis causa* settlements during the lifetime of the granters, such settlements were necessarily left without such procuratories or precepts as were of any avail. Whether such writings were granted *by* the makers of the settlement,—or had been granted *to them* by their authors, and assigned by them in such settlement,—they were equally inept; and, in practical effect, all *mortis causa* conveyances of feudal estates, in which the granters were infeft, were in the same predicament in this respect, as Major Skene's settlement of 1721. Indeed, even conveyances *inter vivos* were in the same predicament when the disponees did not obtain themselves entered and infeft while their authors were alive. This continued to be the case until the statute 1693, c. 35. was passed, whereby such procuratories and precepts were rendered effectual, notwithstanding the death of the granters or the grantees. And until that statute was passed, the remedy of the disponees in such cases, as is stated by Lord *Stair*, in his remarks on that statute, appended to his Institute, had been that, if "either the disponer or the disponee happened to die, there "was a necessity of a process against the representatives of the disponer *to* "*enter to the fee* (*by being served heir therein, and infeft thereupon*), *and to* "*renew procuratories or precepts to the purchasers, their heirs or assignees.*" What was required from such representatives was,—not to grant a new disposition, for the deed of the defunct remained effectual as a disposition,—but merely to do what was incumbent on them, as representing the granter of that deed, to enable the disponee to complete by infeftment the right which had been disponed to him; and to qualify them to do so, by obtaining themselves entered and infeft in the property. An heir of entail, so far from being entitled to compel the heirs-at-law of the granter to grant a new deed of entail, would not be entitled or in safety to accept of, and possess under, such a deed; because, if he did so, he would thereby contravene his obligation to possess only under the original entail, and consequently would incur a forfeiture of the right created by that deed. Hence, if in such a case there should be inserted in a deed obtained from the heir of line of the entailer for completing the title of the heir of entail under the original tailzie, not only a procuratory of resignation, but also a dispositive clause, the deed would need to be so expressed as to prevent its being construed as a new and independent right, or anything else than a step in the procedure for completing the feudal title upon the original entail. It will immediately appear that this was very carefully done in the present case.

The Pursuers founded upon some expressions in the opinion of the Judges of this Court reported to the House of Lords in the case of *Renton* v. *Anstruther*,

as supporting the plea, that when a deed of entail is left by the entailer at his death without an available procuratory of resignation, or precept of sasine, the entail has no effect beyond conferring on the grantees a *jus actionis*, entitling them to obtain a new deed of entail from the entailer's legal heir. But this is a mistake. The obligation which was the subject of discussion in that case, and to which the reasoning in that opinion refers, was not an obligation to grant a new entail of the estate, but only an obligation *to infeft the grantees therein*. The object of those remarks of the Judges, upon which the Pursuers found, was to show that that obligation to infeft was equivalent to a dispositive act, if not by itself alone, at all events when taken in connexion with two procuratories of resignation which were contained in that deed, one of which had been granted in favour of the entailer, and was assigned in the deed of entail, and the other of which was granted by the entailer although he was not *in titulo* to grant it. It was unanimously held by this Court that that obligation to infeft and these assignations were equivalent to a dispositive clause; and on that ground the deed was sustained both here and in the House of Lords as being itself an effectual statutory entail. No new deed of entail in implement of it either was found to be necessary, or was granted by the maker or his heirs, and accordingly it is the only deed which is in the record of tailzies as the original entail. *A fortiori* is the deed of entail of Carraldstone effectual, as a recorded entail, as it contains the express dispositive clause before quoted, as well as an implied obligation on the granter and his heirs to do what was requisite on their part for completing by infeftment or feudal tradition the right thereby created.

That in such a case there is no necessity for a new deed of entail appears likewise from this consideration, that the disponee could obtain himself entered and infeft under the original deed, *without even a procuratory of resignation being granted*. This could be effected in different ways. For example, the heir of the entailer (after qualifying himself to perform his obligation to infeft the grantees, by obtaining himself feudally entered with the superior), might resign the lands *propriis manibus* in the superior's hands for new infeftment in favour of the grantees of the deed of entail. The evidence of that proceeding would be merely an instrument of resignation under the hands of a notary public, setting forth, as Lord *Stair* says in a passage formerly quoted, *that the disposition was shown as its warrant*. When such warrant is shown, the resigner need not sign the notarial instrument, nor grant any other writing whatever, a conclusive proof that a deed of entail, consisting of a mere disposition, can be effectually feudalised without a new deed of any kind being granted by the entailer or his heirs.

Moreover, this can be done without even resignation being made, or anything whatever being done by the granter's heir, by means of legal diligence (*i.e.*, legal execution) upon the obligation of the granter's heir to infeft and seise the grantee. The steps of such a proceeding, as the law stood until it was modified to some extent by the recent Act of 10 & 11 Vict. c. 48. s. 16, were these:— The disponee could institute in this Court an action against the heir of the disponer, concluding that he should be decerned and ordained to obtain himself entered and infeft in the estate as heir of the defunct, and, in implement of the disposition, to denude in favour of the grantee, by granting a deed with a procuratory of resignation and precept of sasine; and if no good defence were stated against that action, decree would be given in these terms. If that decree were not obeyed, the disponee, after causing a writ called letters of special charge to be executed against the disponer's heir, could institute in this Court an action of adjudication in implement, concluding that the estate should be adjudged from the heir, and decerned and declared to belong to the grantee in implement of the disposition, and that letters should be directed against the feudal superior for infefting the grantee accordingly; and unless a good defence were stated against that action, decree would be given in these terms. That

decree being a warrant to the superior to enter the adjudger, the superior, in conformity therewith, granted, and was bound to grant, a charter of adjudication in favour of the latter, who was infeft thereon. Even if the heir-at-law had obtained himself entered and infeft in the estate, with the view of resisting the claim of the disponee, the same remedy would be competent to the heir of entail; and he could in this last case have obtained his right completed by decrees of constitution and of adjudication (but without using letters of special charge) against the heir-at-law of the disponer, and by infeftment from the superior on a charter of adjudication. In such a case the decree of adjudication would not be an original entail, and could not be recorded as such. These examples of the modes in which the right created by a deed of entail, consisting, like the deed of 1721, of a mere disposition without even a procuratory of resignation or precept of sasine, illustrate the undoubted rule of the law of Scotland, that a deed of entail in that form is effectual under the statute 1685, and is not a mere obligation on the granter, or his heirs, to make a new entail.

Elizabeth Skene had no occasion to resort to such proceedings in order to obtain infeftment, because, after the judgment of the Court recognizing the validity of her right under the entail, the heirs of the entailer (who, as already stated, were Elizabeth Skene herself and her sister Jean) voluntarily performed that obligation. It was expressly for the purpose of doing so, and not for the purpose of making a new entail, that the subsequent proceedings to complete the title upon the entail took place. This appears from the terms of the writings which were expede for that purpose, as we shall now proceed to show.

IV. Elizabeth and Jean Skene obtained themselves served heirs-portioners to their father in the estate of Carraldstone under separate brieves. The retour of Elizabeth's service, which is dated 2nd September 1725, bears that she was served as the eldest heir-portioner to him in the lands, but under a declaration that her right under the entail 1721 should not be prejudiced "*et quod expediret* "*dict. suam deservitionem versus completionem et impletionem dict. dispositionis* "*et talliæ solummodo et non aliter.*" The retour of Jean's special service does not contain a similar clause, which probably arose from its having been expede on 25th June 1725, prior to the date of the before-mentioned judgment of the Court on 31st July thereafter. But the only use which she made of this special service was as a title to grant the requisite procuratory for infefting the heir of entail, as will presently appear. Both ladies, as heirs-portioners of their father, were duly entered with the superior, and infeft as such in the same year, 1725.

V. These ladies having thus become qualified to grant the requisite procuratory for infefting Elizabeth in the entailed estate, they and their husbands, on 5th and 26th June and 8th July 1728, did grant a deed to her as the heir of entail. The Pursuers maintain that this deed was granted as a new and original entail, which superseded the already recorded deed of 1721, and did itself require to be recorded as the original entail in the register of tailzies. The Defenders, on the other hand, maintain that it was only a step in the regular course of procedure for completing by infeftment the personal right already vested in Elizabeth Skene in virtue of the already recorded entail of 1721. That question must be decided by the terms of the deed of 1728 itself.

It begins by describing the granters as being the heirs-portioners of their father, but it describes Elizabeth as being also "*heir of taillie and provision* in "general, served and retoured to the deceased Major George Skene of "Carraldstone, my father;" so that the existence of the prior entail is recognised at the very outset of this deed.

It recites a decree arbitral, which had been pronounced by certain arbiters in a submission between the parties, and by which the granters and their husbands were decerned and ordained "towards *implementing and compleating the disposi-* "*tion and tailzie* granted by the said Major George Skene, to grant, subscribe, "and deliver a formal and valid irredeemable right and disposition of all and "haill the said lands and barony of Carraldstoun, comprehending," &c., with

procuratory of resignation and other clauses. Then the dispositive clause is in these terms:—"And now seeing that we are most ready and willing to "*implement the disposition and taillie above mentioned*, granted by the said "Major George Skene upon the 24th day of October 1721, registrate in the "particular register of taillies upon the 6th January 1725, and in the books of "Council and Session upon the 14th of the said month, and to obtemperate "the said decreet arbitral, *pro tanto*, by granting the disposition underwritten. "Therefore, wit ye us to have annaillied and disponed, as we by these "presents, all with one advice and consent, and as taking burden as said is "(*towards implementing and compleating the said disposition and taillie, and in "supplement of the want of a pro'ry of resignation therein, and in obedience to "the said decreet arbitral*), annallie and dispone to and in favours of me, the "said Mrs. Elizabeth Skene," and the other heirs of entail, "always with and "under the express reservations, conditions, provisions, restrictions, limitations, "burdens, powers, faculties, and clauses irritant mentioned *in the said taillie, "and repeated in the pro'ry of resignation herein contained*, all and haill," &c.

This deed might have been quite effectual had it been merely a procuratory of resignation, without a dispositive clause. But even the dispositive clause itself is so expressed as to show that the purpose for which it was granted was to implement and complete the deed of entail 1721 *by supplementing the want of a procuratory of resignation in that disposition.* Accordingly, in the dispositive clause itself the restricting clauses are not inserted, but are referred to as being those of the original tailzie, and inserted in terms of the Statute in the subjoined procuratory of resignation. That procuratory of resignation itself states thus the purpose for which it was granted:—"For the better expeding of the "said resignation, wee, by these presents, all with one advice and consent, and "taking burden as said is, make, constitute, and appoint "and ilk one of them, con'lly and se'ally, our very lawful and "undoubted pro'rs, to resign, surrender, simpliciter upgive, overgive, and "deliver, as wee by these presents *in implement of said disposition and taillie, "and in supplement of the want of a pro'ry of resignation therein*, and in "obedience to the said decreet arbitral, resign, surrender, &c. the estate for "new infeftment thereof, to be given to Elizabeth Skene and the other heirs of "entail." Thus, in the most explicit terms, this procuratory of resignation itself sets forth that it was granted *as a procuratory supplementary of the disposition of* 1721.

There is another clause in this deed which is, if possible, still more conclusive to the same effect. As formerly stated, one of the conditions expressed in the entail of 1721 was, that the estate should be possessed in virtue of that entail alone, and the infeftments, rights, and conveyances to follow *thereon*, and by no other right or title whatever. The procuratory of 1728 adopts and enforces this condition of the original entail, by providing and declaring "That the "heirs of taillie above mentioned shall enjoy, bruik, and possess the said lands "and estate *by virtue of the said taillie and infeftments, rights and conveyances "to follow thereupon, and by no other right nor title whatsoever.*" And this condition is, like the others, fenced by the irritant and resolutive clauses.

Finally, this deed of 1728 contains an assignation of the title-deeds of the estate generally, and particularly the special services of the granters, as the two heirs-portioners to their father, and the Crown precepts and instruments of seasin following thereon in their favour, "*in implement* of the said *disposition* "*and taillie*," which shows that not only the granting of this deed of 1728 itself, but likewise the preliminary proceeding on the part of the heirs of the entailer, of expeding special services as heirs of their father under the former investiture, and of obtaining a renewal of the feudal investiture in their own persons, were used only as steps of appropriate procedure for completing the entail of 1721 by feudal tradition of the subjects thereof to the grantees.

Thus, in all respects, the deed of 1728 was precisely the kind of writing which, according to the general practice at that time, was the appropriate proceeding

for enabling the grantee of an entail to complete his infeftment, in a case where the entailer had died without leaving an available procuratory of resignation for that purpose; and such being its character, it was no more necessary to record it in the register of tailzies than if it had been granted in precisely the same terms, *mutatis mutandis*, by the entailer himself. Moreover, the deed having been granted in implement of an obligation to infeft the grantees, which could have been enforced against the granters by the legal execution of adjudication, it can have no other effect in the present question than such legal execution itself would have had.

The importance of the deed of 1728 as a step in completing the feudal title is much overrated in the pleadings of the Pursuers. The duty which the disposition and tailzie of 1721 imposed on the entailer's heirs-at-law, was to resign or give authority for resigning the lands *in favorem* of the heirs of entail. This was all they were required to do, and it mattered not in what way it was done, so that the act of resignation was performed. Now in feudal law, as in the common law, what a man may do by the hands of another, he may equally well do with his own hands. Suppose, then, the heirs-at-law had appeared in presence of the superior, and there, "with due reverence, by staff and baton, as use is," resigned and surrendered the lands in the superior's hands, in favour and for new infeftment to Elizabeth Skene and the other heirs of tailzie in their order. This act would have been recorded in an instrument by a notary public, called an instrument of resignation, and his warrant for this instrument would have been the disposition and tailzie of 1721, and the act of resignation by the heirs-at-law of the granter, done in his presence. But the heirs-at-law themselves would not have granted any conveyance or deed or writing of any kind, the object being merely to give effect to the dispositive act of their ancestor. Upon this instrument of resignation the superior would have been bound to grant a charter of resignation by progress to Elizabeth Skene and the other heirs of tailzie, and on that charter Elizabeth could immediately have taken infeftment, and so the entail would have been feudalised, without anything capable of being represented as a conveyance of the estate having been superadded to the deed of 1721, except the superior's charter entering the vassal. What in the case now supposed would be the deed of entail, which it was necessary to record in the register of tailzies? It would be the deed, and the only deed, which imposed the fetters, that is, the deed of 1721. The same view must be taken where the deed of 1728 expressly disclaims *in gremio* of it any pretension to be a new or substantive deed of entail, or to be more than a step in a progress, such as might have been accomplished in various other and equivalent ways.

VI. During Elizabeth Skene's lifetime no charter was expede on that deed of 1728, and consequently her right still remained at her death a personal fee, although some of the requisite steps for feudalising it had been adopted. On that event, her eldest son, George Skene, expede a general service as heir of tailzie and provision to her, whereby that personal fee, with the procuratory of resignation in the deed of 1728, was transmitted to him. No objection to that service has been suggested, and, so far as we see, it is unobjectionable.

VII. On 23rd February 1757 George Skene accordingly, in virtue of that procuratory and his general service, resigned the estate in the hands of the Crown, and obtained a charter of resignation thereon, in virtue of which he was infeft in the estate on 31st May 1757. In that charter, and in the instrument of sasine following upon it, the restricting clauses contained in the original entail are *verbatim* recited. And thus at length the feudal title upon the entail was completed by infeftment; the dispositive act of the entailer, contained in his disposition of 1721, having been followed by the requisite feudal tradition in favour of the heir of entail, in virtue of a procuratory of resignation granted expressly for that purpose by the legal representatives of the entailer.

But three objections have been stated by the Pursuers to this feudal investiture in favour of the heirs of entail.

1. It is alleged that, as in the charter the estate is given, granted, disponed, and confirmed by the Crown to George Skene and the heirs of entail, he was the institute under that deed, and, as the restricting conditions were thereby applied only to the heirs of entail, they did not affect his right. Even if that statement were correct, it would be of no consequence in the present case; for, as George Skene is not alleged to have contravened the conditions of the entail, it would be of no consequence, although they had not been directed against him. But the conditions were applied to him as an heir of entail. The fallacy in this objection consists in assuming that the person to whom, in a feudal investiture under an entail, the superior dispones the estate, is necessarily placed in the position of an institute under the entail itself. In every case in which a feudal investiture is renewed by means of a charter, *e.g.*, where there is a propulsion of the estate by the heir in possession to the heir *alioqui successurus*, or where, in obedience to a clause of devolution in an entail, an heir in possession conveys it by voluntary deed to the next heir, the superior, by the charter, *dispones* the estate to the next heir and the remaining substitutes. This is done according to the fixed rules of feudal conveyancing. But in all such cases the grantees are still nothing else than heirs of entail; and the restrictions directed against these heirs apply to them as such. The same remark applies when the first feudal investiture following on the entail is granted to a party who is not the institute in the original entail, but one of the substituted heirs. This was exemplified by the title in the case of *Renton* v. *Anstruther*, to which we have repeatedly referred. George Skene's position, therefore, being truly that of an *heir* of entail, the fetters in the charter were applicable to him. It may further be remarked that the *quæquidem* clause in the charter of resignation here expressly sets forth that George Skene had right to the procuratory of resignation on which it proceeded, in the character of an *heir* of tailzie,—"*tanquam hæres taillie et provisionis in generali deservit dict.* "*demortuæ Elizabethæ Skene matri suæ secundum deservitionem de data* 16 "*March* 1745."

2. It is objected that, in the clause of destination describing the heirs of entail, there is an omission of the names of some of those heirs who were called by the deed of 1721. But it was admitted at the debate that no parties were so omitted except those who had then altogether failed by death, or by the impossibility of their ever existing; and in expeding feudal investitures under entails, the names and descriptions of persons who have so become extinct, or whose existence has become impossible, do not require to be inserted, and ought to be, and in practice generally are, omitted. As an example of this, reference may be made to the case of *Shaw Stewart* v. *Nicolson*, 2nd Dec. 1859.

3. It is objected that the instrument of sasine of 1757, by means of which the tailzied right was first feudalised, does not refer to the deed of entail of 1721 by date or description, so as to enable any one to trace and identify it as being the deed which imposes the fetters.

The answer to this objection is that it is entirely irrelevant. For, taking the fact to be as stated in the objection, it does not follow in law that either the tailzie or the tailzied investiture is liable to any invalidity or ground of challenge.

The law of entail does not require that the instrument of sasine which first feudalises the entail, *i.e.*, the entailed right, or any other instrument of sasine of a subsequent heir, should bear such a reference to the deed of entail as to enable any one inspecting the register of sasines thereby to discover what is the deed imposing the fetters. The statute 1685, c. 22., which prescribes and specifies all the requisites of a valid tailzie, requires that the instruments of sasine following on the entail should contain the fetters *verbatim*, that it may be seen from the register of sasines what are the conditions, prohibitions, and

irritances under which the proprietor of the lands, embraced in the infeftment, holds his title. But it requires nothing more to appear in the instruments of sasine, or, consequently, in the register of sasines. Again, the statute requires the deed of entail to be once judicially produced to the Court of Session, that their authority may be interposed thereto, and that an entry may be made in the register of tailzies, of the name of the entailer, and of the heirs of tailzie, of the general designation of the lands and baronies entailed, and of the provisions and conditions, and the irritant and resolutive clauses. This is all that the statute enacts or requires with regard either to the register of sasines or to the register of tailzies.

A reference in the register of sasines to the date of the deed of entail, or the date of recording the deed in the register of tailzies, might perhaps afford some aid in finding the deed of entail in the latter register. But the statute does not require this, and for a most excellent reason—because the names of the lands and baronies form a much better means of finding the deed in the register of tailzies, and a means much less liable to miscarriage or mistake. It is a very easy thing to misquote a date, and a slight mistake in such a reference would be very misleading. But it is by no means so easy to miswrite or misquote the whole description of the lands and baronies.

The statute, therefore, it appears to us, did wisely in preferring the latter to the former means of reference from the one register to the other. Every one who, from a recorded instrument of sasine, has learnt the names and description of the lands and baronies can, without the slightest difficulty, find these in the register of tailzies, in company with all the material parts of the deed of entail duly recorded, and will thus become possessed of all the information that the two registers were intended or are calculated to afford him.

In the present case the statute has in these respects been strictly complied with. The fetters are verbatim engrossed in the sasine of 1757, and so appear in the register of sasines. And any person going to the register of tailzies with the information afforded by the register of sasines, would, on looking for the entail of the lands of Carraldstone, find it without difficulty in the recorded deed of 1721. It is a mere mistake to suppose that he would find it more easily by knowing the date of the deed of entail; for entails are not recorded according to their date, but are given in to be recorded sometimes within a few days of thier execution, sometimes not for twenty or thirty years, or a much longer period, afterwards. A reference to the date of recording the deed would be a much better aid to finding it in the register of tailzies. But this could not be done where the recording, as may often happen, is subsequent to the first sasine. Indeed it is vain to speculate on such questions, for the statute does not require either the one mode of reference or the other.

If such reference were essential in the sasine by which the tailzied right is first feudalised, it would be equally so in all subsequent sasines. But any supposed necessity for the deed of entail being mentioned in the infeftment which may take place after the granting of intermediate deeds, or the use of intermediate diligence, could only result either from a general rule of conveyancing, or from special statutory enactment; and as neither of these things can be alleged, the objection is groundless.

Altogether, then, George Skene's title as regards the charter and sasine of 1757 is made up in conformity with the ordinary rules of conveyancing; and if it were held objectionable on the ground suggested by the Pursuers, it is impossible to say how many titles of entailed estates, framed in strict accordance with the entail statute, and with the principles of the common law regarding the transmission of heritable estates, might, on the same or similar grounds, be challenged and set aside.

The subsequent renewals of the investiture are not alleged by the Pursuers to be objectionable; and, indeed, it is under them that the Pursuer, the Earl of Fife, is enjoying the estate. And thus since the whole objections he has stated,

both to the original entail itself, and to the proceedings by which the rights of the heirs of entail were completed by infeftment, are invalid, we are of opinion that the judgment of the First Division of this Court, which is under Appeal, is well founded.

This opinion having been returned to the House, their Lordships appointed the cause for further hearing in June and July 1862, when the same learned Counsel who had appeared on behalf of the parties in 1861 again attended, namely, the *Solicitor-General* (*a*) and Mr. *Anderson* on behalf of the Appellant; and Mr. *Mure* and Mr. *Boyd Kinnear* for the Respondents.

At the close of the argument the cause was adjourned *sine die;* and final judgment was not delivered by the House till the 27th March 1863, when the following opinions were delivered by the Law Peers:—

Lord Chancellor's opinion.

The LORD CHANCELLOR (*b*):

At the time of the execution of the deed of settlement of 1721, Major Skene was possessed of a personal title only in the lands of Carraldston.

By the disposition made in his favour by Sir George Stewart in August 1721, the Major became the assignee of an unexecuted procuratory of resignation, by virtue of which he might have feudalized the disposition contained in the settlement of 1721.

He did not do so, but, on the contrary, in 1723 he exhausted this procuratory of resignation, by expeding a Crown charter of resignation of the lands and barony of Carroldson, under which he took infeftment, and made up a complete feudal title in favour of himself, his heirs and assignees whomsoever.

In this charter no mention whatever is made of the settlement of 1721.

It was contended in the year 1725, after the death

(*a*) Sir Roundell Palmer. (*b*) Lord Westbury.

Lord Chancellor's opinion.

of Major Skene, that by this proceeding he intended to exercise the power of revocation contained in the settlement of 1721, but the contrary was decided by the Court of Session, and that decision, which must be treated as final, is of great importance in the present case, as it follows from it that the deed of 1721 was still a valid disposition of the personal fee. It is true that the settlement of 1721 did not contain any procuratory or precept of sasine, or express any obligation to infeft, and that the only means of making up a feudal title which it gave was the assignation of Grandtully's procuratory of resignation, and that after that procuratory had been exhausted by Major Skene's acts in making up a feudal title in favour of himself, his heirs and assigns, the settlement of 1721 was left without any means *in græmio* of feudalization. The Appellant, therefore, contends, that at the *punctum temporis* of the registration of the deed of 1721 it was no longer a disposition or deed of tailzie, but had been reduced to the character of a mere contract or obligation, and had therefore lost the capacity of being registered under the statute, or of being made the basis of the feudal investiture. This argument is not in my opinion well founded.

At the time of the execution of the settlement of 1721 it contained the means of obtaining a feudal title, and was without doubt (for it is so settled by authority) a disposition capable of being registered in the register of tailzies under the Act of 1685, and it retained the character and quality of a present dispositive act, notwithstanding that the procuratory was used by Major Skene in making up a fee simple title.

The settlement of 1721 still remained effectual as a disposition of the personal fee, although the parties entitled under it would be obliged to resort to some other mode of obtaining a feudal tradition of the subject.

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Lord Chancellor's opinion.

It must be recollected that it is a settled point that the deed of 1721 remained unaffected by the acts done in 1723, and it is therefore clear in law that after the death of Major Skene the heir of tailzie under the deed of 1721 had a right to call upon the heirs general of the Major to complete their title by service and entry, and afterwards either to resign *propriis manibus*, or grant a procuratory in favour of the heir of tailzie under the settlement of 1721.

On the refusal of the heirs general, the heir of tailzie claiming under the settlement of 1721 would have been entitled to obtain either a personal decree for conveyance, or a judicial conveyance by means of a decree of adjudication in implement.

It is a mistake, therefore, to treat the deed of 1721 as being reduced to a contract to make a disposition.

It remained what it originally was, an actual immediate conveyance, giving the right to, and capable of receiving, feudal investment, and consequently possessing the elements of a habile entail.

But it is further contended by the Appellant, that the deed of tailzie, to be a good entail under the statute, must be the basis of the feudal investiture, and must itself enter the feudal progress.

I have been unable to find any direct authority in support of these propositions.

It is undoubtedly true that to make a good deed of entail under the statute of 1685 all the fetters and conditions of the original deed of entail, as contained in a deed of tailzie which has been duly recorded in the register of tailzies, must appear in the deeds which make up the feudal tradition or investiture; and the reason is plain, because onerous third parties, that is, creditors or purchasers, if acting *bonâ fide* and without notice, might otherwise rely upon the feudal title. This, however, is a very different thing from the proposition of the Appellant, who insists that the

registered deed of tailzie must be a deed that enters directly into the progress of the feudal titles; a proposition which cannot, I think, be maintained. The question, therefore, would seem to be reduced to the inquiry, whether it appears on the face of the deed of 1728 that this prior deed of 1721 is the original deed of tailzie, and that all the conditions of the tailzie contained in this latter deed are set forth in the deed of 1728.

Lord Chancellor's opinion.

It must be remembered that the heirs of Major Skene were his two daughters, of whom the eldest, Elizabeth, was heiress of tailzie under the settlement of 1721, and that the two daughters had been duly entered with the superior as heirs portioners, and took infeftment as such, prior to the deed of 1728, which was afterwards executed by the heirs portioners for the purpose of completing the title of the eldest heiress of tailzie to the personal fee under the settlement of 1721.

Accordingly, in the deed of 1728, Elizabeth, the eldest daughter, is described as heir of taillie to her father, and the decreet arbitral is recited, by which the heirs portioners are decerned to implement and complete the disposition and tailzie granted by their father; and the dispositive clause proceeds upon the narrative, that the heirs portioners were "willing to implement the disposition and taillie above mentioned granted by the said Major George Skene upon the 24th October 1721, registrate in the particular register of taillies upon the 6th January 1725 and in the books of council and session." The fettering clauses and conditions of the deed of 1721 are then inserted inthe procuratory of resignation, which follows in the deed of 1728, and which at the end declares that the heirs of taillie "shall enjoy the said lands and estate by virtue of the said taillie (that is

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the settlement of 1721), and infeftments, rights, and conveyances thereupon, and by no other title whatsoever."

Lord Chancellor's opinion.

The means of feudalizing the settlement of 1721 by a new procuratory of resignation were therefore supplied by the deed of 1728.

The estate of the heiress in tail, Elizabeth Skene, remained personal during her life, no use having been made of the procuratory, but on her death her son, Sir George Skene, having taken up his mother's personal fee by general service, exercised the procuratory of resignation granted by the deed of 1728, and obtained a charter of resignation, by virtue of which he was feudally infeft, and the restrictive clauses or fetters of the entail of 1721 are set forth verbatim in this charter and the following instrument of sasine, and therefore entered the feudal progress.

Some objections were made in the Court below to the sufficiency of the statement of the restrictive clauses of the deed of 1721, in the procuratory of resignation contained in the deed of 1728, and in the charter and instrument of sasine of 1757, but they were scarcely insisted on by the Appellant in the last argument at the bar of this House, and they appear to me to be fully answered in the last collective opinion of the Judges of the Court of Session.

I cannot therefore entertain any doubt as to the propriety of affirming the decision of the Court of Session, and dismissing the Appeal, with costs.

Lord Cranworth's opinion.

Lord CRANWORTH:

The Court decided, in 1725, and it must be assumed well decided, that the act of Major Skene in expeding a charter and taking infeftment thereon upon the open procuratories did not import a revocation or alteration of the tailzie.

This would not have been true if it had converted a disposition into a mere obligation.

Lord Cranworth's opinion.

Elizabeth could not have been served heir of tailzie to her father if there was not a subsisting tailzie.

If the tailzie created in 1721 by Major Skene was at his death a mere obligation, Elizabeth was a mere creditor, and not an heir of tailzie.

Suppose that Major George Skene, after he had been infeft, had registered the deed of 1721, and then had executed a disposition in the words of the deed of 1728, *mutatis mutandis*, surely there would have been no necessity for a registration of that deed, and if not, then I do not see how his death makes any difference, when his co-heiresses who succeeded him do what he, if living, might have done.

The deed of 1721 was certainly at the time when it was executed the original tailzie, and the Court of Session decided that it was not altered by the subsequent charter and infeftment in 1723.

The irritant and resolutive clauses were inserted in the procuratory of resignation, charter, precept, and instrument of sasine, whereby the tailzie was feudalized in the person of George Skene, the son of Elizabeth, and the original tailzie was produced before the Lords of Session judicially.

All the requisites of the statute have therefore been complied with, and I think that the Judges below have come to a correct conclusion, and that the Defenders were properly assoilzied.

Lord Wensleydale's opinion.

Lord WENSLEYDALE:

This case, which is very important in a pecuniary point of view, has been subject to more than ordinary discussion and consideration. It was elaborately argued in the First Division of the Court of Session, first before the *Lord Ordinary*, Lord *Mackenzie*, then

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Lord Wensleydale's opinion.

on a reclaiming note before the *Lord President* and and the remainder of the Court, afterwards, on a remit from your Lordships, by all the Judges of the whole Court of Session, with the exception of Lord *Mackenzie*, who was absent from indisposition, and the whole of these Judges, with the single exception of Lord *Mackenzie*, concurred in the opinion that the estate in question was well entailed, and all the Lords of Session (with the above exception) joined in a most able, full, clear, and learned statement of the law of Scotland on this subject. The case has since been argued at much length and with much ability for four days at your Lordships' bar, when every authority and argument bearing or supposed to bear on the question were brought under your Lordships' notice.

The duty of a Court of Appeal is not to reverse a Judgment unless it be satisfied that it is clearly wrong. Though the Appellate Court may entertain a doubt on the question raised, it is not enough. The onus lies on the Appellant to show the Court of Appeal that the judgment is erroneous.

I am clearly of opinion that this has not been done in the present case, in which the judgment impeached is brought before us, supported by so extraordinary a weight of living authority. After giving the subject all the consideration in my power, I must say that it appears to me to be a right judgment, and the doubt raised in the course of discussion ought not to have effect.

The Appellant contended :—

1st. That the deed of 24th October 1721, by Major George Skene, relating to the lands of Carraldston, was not a valid tailzie ; and

2nd. If it was, it was done away with by Major Skene in February 1723, obtaining a Crown charter of resignation and taking

infeftment thereon on the open procuratory assigned to him.

Lord Wenslcydale's opinion.

To consider this objection first, it is enough to say, that the Court on the 31st July 1725 decided that the completion of a fee simple title in the person of Major Skene did not imply a revocation of the deed of entail. They held that the deed of 1721 had not been revoked or superseded by Major Skene. It still was to have effect, and regulated the right of succession.

The first question then remains, Was that deed a valid tailzie?

It is argued for the Appellant that it was nothing more in effect than a bond or obligation to entail the lands mentioned therein, and no more. That seems to have been the impression on Lord *Mackenzie's* mind. On the other hand, the rest of the Judges, being all the other Judges of the Court of Session, were clearly of opinion that the deed of tailzie of 1721 was not a mere contract or obligation to make a tailzie in future, but was an actual disposition of the land, and if it was so originally when made, it certainly was not converted into a mere obligation or executory contract by Major Skene completing his title in the year 1723.

The reasons given by the Judges in their unanimous answer to your Lordships in the remit are quite satisfactory to my mind. The instrument of 1721 operates as a tailzie, and is properly recorded as such in the register of tailzies, pursuant to the Statute 1685, Chapter 22.

But to give the tailzie full and complete operation it required to be feudalized.

That could not be done by virtue of the unexecuted procuratory of resignation, and assignment thereof, because Major Skene made use of it to complete his own title in 1723, and it was thenceforth put an end to. But the tailzie was capable of being feudalized

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in another way, and the reasoning of the judges satisfies me that it was properly feudalized, and the feudal investiture properly completed, under the deed of 1728, after Elizabeth and Jane Skene had been infeft in 1725, which deed was expressly framed for implementing the disposition in the tailzie in 1721, and in supplement of the want of a resignation therein. Afterwards George Skene, in February 1757, at length completed the feudal title to the entailed land by infeftment.

Lord Wensleydale's opinion.

I am satisfied that George Skene thus became entitled to the estate under the tailzie of 1721 as heir in tail.

But then it was insisted, on the part of the Pursuer, as I understand, that to constitute a sufficient deed of tailzie, the instrument should contain in itself, *in gremio*, the means of feudalizing, which the tailzie of 1721 did not, after the open procuratory was done away with, by being acted upon for a different purpose, and the tailzie was therefore to be considered as deprived of all the means of making it effectual, and thus became entirely inoperative.

It is certainly more regular and usual that the deed of tailzie should itself contain the means of making itself effectual in itself, so as to form a chain in the title; but the *Lord President* on the first hearing of the case gives his opinion that no authority is to be found for such a proposition, and the united opinion of the Judges is to the same effect, and no such authority is cited before us; and therefore, however reasonable such a rule might be, I am satisfied this objection ought not to prevail.

Lord Chelmsford's opinion.

Lord CHELMSFORD:

The question to be decided in this case is as to the validity of a sale of certain lands, which depends upon

whether they were under an entail by a disposition dated 24th October 1721, registered in the register of tailzies.

The Appellants contend that no tailzie was created by the disposition of that date, as it was never perfected by feudalization, that till this was done it existed merely as an obligation to be enforced against the heirs of the disponee, and that it was superseded by a disposition executed on the 5th and 26th June and 8th July 1728, and which having been feudalized became the real and only entail.

The ground upon which it is contended that the deed of 1721 was not a complete entail is, that it did not contain within itself the means of feudalization, having no procuratory of resignation, but only an assignment of a procuratory contained in a disposition of the lands from Stewart of Grandtully to Major Skene, the disponer in the deed of 1721, and that Major Skene having in 1723 obtained a Crown charter of resignation in favour of himself and his heirs whatsoever, and taken infeftment upon it, he had exhausted the assigned procuratory of resignation, and that a new warrant was necessary in order to effect feudalization by infeftment as contemplated by the deed of 1721. On the death of Major Skene in 1724 leaving two daughters, Elizabeth, the eldest, expeded a general service as nearest and lawful heir of tailzie to her father under the deed of entail of 1721. The second daughter, Jean, expeded both a general and a special service to her father as one of the two heiresses portioner on the ground that Major Skene, by expeding the Crown charter in 1723, revoked the deed of entail of 1721. This dispute between the daughters led to the case of *Skene* v. *Skene* (*a*), in which it was decided that the act of Major Skene in expeding a charter, and taking infeftment

(*a*) Morr. Dict. 11,354.

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thereon, did not import a revocation or alteration of the tailzie.

Lord Chelmsford's opinion.

The language of this decision is only consistent with the opinion of the Judges that the deed of 1721 was an actual tailzie, and not a mere obligation to entail, for the words "revocation or alteration of the tailzie" are inapplicable to a mere obligation. There was, therefore, a good entail created and registered, but it was incomplete, and required to be implemented by infeftment. The heiress was desirous of making up the title and giving effect to the provisions of the deed of 1721, and the two sisters, with the consent of their husbands, entered into a submission to two advocates to determine the proper mode of completing the entail. That this was the object of the reference, and not to settle any dispute between a fee simple title and a tailzied title, appears to me to be shown by the recital in the deed of disposition of 1728, which states that the decreet arbitral proceeding upon a submission, decerned and ordained Elizabeth and Jean and their husbands, all with one consent, "towards implementing and completing the disposition and taillie granted by the said Major Skene," to grant, &c. a disposition of the lands in question.

The deed itself shows throughout that the daughters did not intend by it any new or original disposition, but that it was executed "towards implementing and completing the disposition and taillie of 1721, and in supplement of a want of procuratory of resignation therein, and in obedience to the decreet arbitral;" for after disponing according to the order of succession in the deed of 1721, it provides that the series of heirs are to be subject to "the express reservations, conditions, provisions, restrictions, limitations, burdens, powers, faculties, and clauses irritant and resolutive specified in the said disposition and taillie," and that

the heirs of taillie above mentioned shall enjoy, bruik, and possess the said lands and tenements by virtue of the said taillie, and infeftments, rights, and conveyances to follow thereupon, and by no other right or title whatsoever.

The procuratory of resignation in this deed was not executed by Mrs. Skene in her lifetime, but on her death her son George Skene took it up by expeding a general service as heir of tailzie and provision to his mother, and ultimately in 1757 he completed the feudal title by infeftment. It is insisted on the part of the Appellants that the deed of 1728 is the only entail, that this was what was feudalized by George Skene, and that this deed not having been recorded in the register of entail it was deprived of all efficacy by the statute of 1685. A great part of the argument for the Appellants is founded upon the deed of 1721 being not an actual entail, but merely an obligation.

It was contended that the Act of 1685, allowing an entail of lands to be available against purchasers and creditors only where the irritant and resolutive clauses are inserted in the procuratories of resignation, shows that the deed of 1721 not containing a procuratory is not a tailzie of the lands, but a mere obligation. This point, however, is disposed of by the case of *Skene* v. *Skene* (*a*), already mentioned. The register of the deed of 1721 contains all that is required to be recorded. The Act does not say that a procuratory of resignation must be contained in the deed to render it valid, but only that the irritant and resolutive clauses must be inserted in procuratories of resignation, and no authority has been cited to show that in order to constitute an entail, a procuratory must be inserted in the deed creating it. It is true that

(*a*) Morr. Dict. 11,354.

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until such an entail has been completed by sasine it is exposed to the danger of being defeated by a disposition of the lands to third persons by the heir, or by an attachment by his creditors. But until the heir divests himself or is deprived of the lands the entail may be completed, either voluntarily or by adjudication in implement. Some stress was laid in the argument upon the circumstance of Elizabeth having been a substitute in the original deed of 1721, and being made institute in the deed of 1728. It was contended that this was such a deviation from the former entail (the fetters of that entail no longer applying to her) as to show that the deed of 1728 constituted a new and original entail. But this argument appears to be unsound; and Lord *Curriehill*, who adverts to it, gives instances to show that Elizabeth, although advanced in her position in the entail, is still subject to its conditions in her original character of heir of entail. It appears to me, therefore, that the Appellants have failed to establish any satisfactory ground of objection to the Interlocutor appealed from; that the deed of 1721 was the original tailzie duly registered under the Act of 1685; that the whole object of the deed of 1728 was to complete the imperfect title under the former deed by feudalization; and that this was ultimately effected by the charter which was expede by George Skene, the heir of Elizabeth, which proceeded upon the procuratory contained in the deed of 1728. I agree therefore that the Interlocutor ought to be affirmed, and the Appeal dismissed with costs.

Interlocutor affirmed, and Appeal dismissed, with Costs.

THEODORE MARTIN—CONNELL & HOPE.