hospital, and belongs to the foundation,' and 'Finds that the hospital, at different times, received the whole legacy left by Robert Johnstone of London, amounting to £1000 sterling, to be employed by the Provost and Bailies of Dundee in the yearly maintenance of the aged and impotent people of the said town; and that the annual interest of £1000 must be held applicable to that purpose in framing a final state of accounts; and that, as to past administration, as the interest of that sum was to be strictly so appropriated, it must be held, that it was fully accounted for by the charities to which the funds generally of the foundation were applied,' be, and the same is hereby, also affirmed, with the declaration, that the ground, called Monorgan's Croft, must be deemed to have been purchased in the year 1646, with part of the legacy of £1000 bequeathed by the will of Robert Johnstone, in order that the same might thenceforth be held upon the trusts by the said will declared concerning the said legacy: And it is further ordered, that the appellants do pay, or cause to be paid, to the said respondents the costs incurred by them, in respect of so much of the said petition and appeal as stands dismissed as aforesaid, the amount thereof to be certified by the Clerk of the Parliaments: And it is further ordered, that the cause be remitted back to the Court of Session in Scotland, to do therein as shall be just and consistent with this declaration and this judgment: And it is also further ordered, that unless the costs certified as aforesaid shall be paid to the parties entitled to the same, within one calendar month from the date of the certificate thereof, the Court of Session in Scotland, or the Lord Ordinary officiating on the Bills during the vacation, shall issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary."

For Appellants, Loch and Maclaurin, Solicitors, London; Maclachlan, Ivory, and Rodger, W.S., Edinburgh.—*For Respondents*, Simson and Traill, Solicitors, London; Edmund Baxter, W.S., Edinburgh.

JULY 19, 1861.

THE EARL OF FIFE and Others, his Trustees, *Appellants*, *v.* The Honourable GEORGE SKENE DUFF and Others, *Respondents*.

Entail—Registration—Statute 1685, c. 21—Deed without Executorial Clauses—*X purchased lands, and, while holding them on a personal title, executed in* 1721 *a deed of entail, containing, with power to revoke, the usual clauses of an entail, excepting procuratory of resignation, precept of sasine, and obligation to infeft. Thereafter he made his right to the lands real, by titles containing no reference to the deed of* 1721. *He died leaving issue, two daughters, in a litigation between whom, it was determined by the Court, in* 1725, *that the deed of* 1721 *had not been revoked. The daughters thereafter made up titles, and were infeft in the lands as heiresses-portioners; and in* 1728 *they disponed the lands, in implement of the deed of* 1721, *to the oldest daughter of the entailer, as heiress of entail, and to the substitute heirs mentioned in the deed. The deed of* 1728 *contained a procuratory of resignation, in virtue of which it was feudalized, and became part of the progress of titles under which the lands were held down to* 1860; *but it was not registered in the Register of Entails. The deed of* 1721 *was registered. In an action at the instance of the heir of entail in possession against the substitutes:*

HELD, by the Court of Session, *That it was not necessary that the original deed of entail entering the register, should contain executorial clauses making it capable of feudalization; that the requirements of the Statute,* 1685, *c.* 21, *were satisfied by the deed of* 1721 *having been recorded; and that the entail of the lands was not rendered void by the deed of* 1728 *not having been recorded.*

Cause remitted by House of Lords on appeal, to be heard by the whole Judges of the Court of Session.[1]

This action of declarator was brought for the purpose of having it found, that the lands of Carraldston and others belonged to the Earl of Fife (and his trustees) in fee simple, and that a sale to Mr. Lauderdale Maitland was a valid and effectual sale. The defenders are the substitute heirs of an entail of the lands, under which they maintained, that they could not be alienated.

The lands of Carraldston were purchased in August 1721 from Mr. Stewart of Grandtully by

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[1] See previous report 23 D. 657 : 33 Sc. Jur. 321. S. C. 4 Macq. Ap. 469; 33 Sc. Jur. 714. See also sequel of this case, *post*, 27 March 1863.

Major George Skene. While standing on a personal title Major Skene executed a deed on 24th October 1721, whereby he disponed the lands, "under the express reservation, conditions, provisions, restrictions, limitations, declarations, burdens, powers, faculties, and clauses irritant after mentioned," to himself, and to the heirs male of his body, whom failing, to his oldest daughter, Elizabeth Skene, spouse of George Skene, and their heirs male; whom failing, to his second daughter, Dame Jean Skene, spouse of Sir Alexander Forbes, and their heirs male; whom failing, to certain other heirs of tailzie.

The deed contained the conditions and clauses irritant and resolutive usually inserted in entails. It also contained a clause dispensing with delivery, under reservation of power to revoke and an assignation to the writs; but it contained no procuratory of resignation, or precept of sasine, or obligation to infeft.

On 12th February 1723, Major Skene, without alluding to the deed of October 1721, executed an instrument of resignation in his own favour, which proceeded upon the procuratory of resignation in the disposition to him by Stewart of Grandtully. A Crown charter, duly registered 26th, and sealed 27th, April, and instrument of sasine, recorded 5th May 1723, followed upon the instrument of resignation.

Major Skene died on 13th August 1724 without leaving male issue.

A dispute then arose between the sisters, Mrs. Elizabeth Skene and Lady Forbes, in regard to the subsistence of the deed of October 1721, under which the former proposed to serve herself heiress of entail. The latter objected, and a litigation ensued. On 14th January 1725, Mrs. Skene judicially presented the deed of 1721 to the Court, and it was recorded in the Register of Tailzies. Before the litigation was terminated, Lady Forbes, on 25th June 1725, had herself served as heiress portioner in general to her father, and also as his heiress portioner in special of Carraldston. In the litigation between the sisters the decision of the Court was given on 31st July 1725 (*Skene* v. *Skene*, M. 11,354) finding, "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 and assignees whatsoever, prior to the tailzie, did not import a revocation or alteration of the said tailzie, and therefore repelled the objection proponed for Dame Jean Skene and her husband."

Thereafter Mrs. Skene had herself served as heiress portioner in general to her father, and also as heiress portioner in special to the lands of Carraldston, under reservation of her rights as heiress of entail. Of the same date she also served herself heiress of tailzie and provision in the lands of Carraldston. On 21st September 1725, precepts from Chancery, proceeding upon their retours as heiress portioners in special, were issued in favour of each of the sisters, and upon these they were severally infeft.

Some time after the judgment of the Court, but it did not appear whether it was before the proceedings last mentioned, or not, the two sisters entered into a submission to two gentlemen of the bar, as to their rights. There is, however, nothing now to shew what were the precise questions submitted to arbitration, but the result of the submission, according to the narrative of the deed immediately to be mentioned, was a decree arbitral, (3d June 1728,) which ordained the sisters and their respective husbands, "all with one consent (towards implementing and compleating the disposition and taillie 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 s[d] lands and barrony of Carraldstoun."

A deed was accordingly executed on 5th and 26th June and 6th July 1728, whereby the sisters —the oldest as heir of tailzie and provision in general, and both as heiresses portioners in special retoured to their father, and standing infeft each in the half of Carraldston—did, with consent of their respective husbands, "(towards implementing and compleating the said disposition and taillie, and in supplement of the want of a procuratory of resignation therein, and in obedience to the said decreet arbitral,) annaillie and dispone to and in favours of me, the said Mrs. Elizabeth Skene, and the heirs male procreate, or to be procreate, betwixt me and the said George Skene, my husband; which failing, to me the said Dame Jean Skene, and the heirs male procreate, or to be procreate, betwixt me and the said Sir Alexander Forbes; which failling, to the said Major George Skene, his other heirs of taillie, substitutes, and successors, mentioned and contained in his said disposition and taillie, and repeated and rehearsed in the prory. of resignation underwritten, 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 prory. of resignation herein contained, All and Haill" the lands of Carraldston.

The deed of 1728, which contained a procuratory of resignation, repeating the series of heirs and the restrictions, etc., of the deed of October 1721, and an obligation to infeft, was never recorded in the Register of Tailzies; and Mrs. Skene was never infeft upon it.

Mrs. Skene died in 1745, in which year her son George Skene was retoured as heir of tailzie and provision in general under the deed of October 1721, as implemented by the above deed of 1728:—and in 1757 he completed his title, in the character mentioned, by Crown charter of resignation, proceeding upon the procuratory in the deed of 1728, to which he had right by

general service to his mother. He was duly infeft on the charter of resignation from the Crown. In all of these deeds the deed of 1721 is described as the entail. The second George Skene died in 1781, and was succeeded by a son of the same name, who made up his title by special service as heir of tailzie, precept from Chancery, and sasine. The instrument of sasine in his favour, which was recorded on 15th June 1781, was alleged to be invalid, in consequence of the number of pages on which it was written not being mentioned in the notary's docquet.

It is not necessary to detail the subsequent steps of the title, beyond mentioning, that the pursuer, the present Earl of Fife, an heir substitute in the investiture, having completed a title as heir to his father before the defect in the sasine of 1781 was discovered, thereafter, and in order to cure the defect, made up another title by service as heir to George Skene, the oldest son of Elizabeth Skene. On the decree in this service the present Earl was infeft in April 1860. He subsequently disponed the lands of Carraldston to certain trustees who, after being infeft, sold them to Mr. Maitland. The present action was brought to remove a doubt which existed as to their power of selling.

The Court of Session held, that the deed of 1721 satisfied the Statute, and was not made void by the deed of 1728 not being recorded.

The *pursuers* appealed, maintaining in their *case*, that the judgment of the Court of Session should be reversed, because—1. The disposition executed by Elizabeth and Jean Skene, in 1728, was the original and only proper deed of entail of the lands of Carraldston; and as that deed had never been recorded in the Register of Entails, the entail thereby constituted was not effectual against creditors or purchasers, and the appellants were entitled to sell or otherwise deal with the lands as if they were owners in fee simple. 2. Because the deed executed by Major Skene, in 1721, did not transmit any right of property, either real or personal, in the lands of Carraldston, and was not an effectual entail of these lands, but had the force merely of an obligation to entail them. 3. Because, when Elizabeth and Jean Skene implemented the obligation to entail the lands constituted by the deed of 1721, as heiresses at law of Major Skene, they became the entailers, and the deed of 1728 was the basis of the tailzied feudal investiture. 4. Because, on the obligation being implemented, Major Skene's deed of 1721 was altogether exhausted, and formed no step in the progress of titles of the said lands. 5. Because, even if Major Skene's deed of 1721 were to be regarded as a valid deed of entail, it never was feudalized, and is not, and never was, the basis of the investiture under which the lands are held. *Renton* v. *Anstruther*, 1 Bell's Ap. 129, and 2 Bell, 214; *Syme* v. *Dewar*, M. 15,619; *Skene* v. *Skene*, M. 11,354; *Fairlie* v. *Ferguson*, 5 S. 937; *Edmonstone*, 2 Paton, Ap. 255; *Brown* v. *Macgregors*, 3 Sh. & M'L. 84.

The *respondents* in their *printed case*, supported the judgment on the following grounds:—1. Because the entailer of the lands of Carraldston was Major Skene, and not his daughters, and the original entail of the lands was the deed executed by Major Skene in 1721, and not that executed by his daughters in 1728. 2. Because the deed executed by the daughters of Major Skene was a mere ancillary and subordinate deed granted in implement of the original entail executed by their father, and in supplement of the want of the executory clauses by which a conveyance was feudalized. 3. Because the Act 1685, c. 22, required only, that the original entail should be produced before the Lords of Council and Session, for the purpose of registration, and did not require that the writs necessary for feudalizing the entail should be produced and recorded. 4. Because, at the date of the Act 1685, executory clauses necessary for feudalizing a conveyance were not in use to be annexed to the conveyance, but separate writs were granted, enabling the party in whose favour the conveyance was granted to convert his personal right into a real right by means of infeftment, and the act did not require such separate writs to be produced and recorded. 5. Because the Act 1685 did not regulate, and in no way affected, the feudalizing of entails, but regulated their registration merely, and the executory clauses of an entail were not included among the matters specified in the act as necessary to be recorded in the Register of Tailzies. 6. Because, at the date of the Act 1685, and for some years afterwards, precepts of sasine and procuratories of resignation fell by the death of the granter, and required to be renewed by the granter's heir at law; and the Act 1685 did not require such renewed precepts and procuratories, granted in implement of an entail, to be produced and recorded. 7. Because the Act 1685 did not require, that the writs necessary for feudalizing an entail should be granted by the maker of the entail, and accordingly, in practice, entails of lands are in use to be feudalized by means of precepts or procuratories granted not by the entailer, but by the party from whom the entailer may have purchased the lands, as illustrated by the case of *Renton* v. *Anstruther*, decided by your Lordships. 8. Because, where the heir at law of the entailer refuses to implement an entail executed by his ancestor, not containing the executory clauses necessary for feudalizing it, by executing an extrajudicial conveyance in implement of such entail, the same result is effected by means of an adjudication in implement, which is a judicial conveyance by the Court, and such judicial conveyance is not held to be the original entail, and is not recorded in the Register of Entails; but the deed, in implement of which the judicial conveyance is granted, is held to be the original entail, and that deed alone is recorded in the Register of Tailzies. 9.

Because the deed of entail executed by Major Skene in 1721 is in all respects in strict accordance with the requirements of the Act 1685, and was duly recorded in the Register of Tailzies in terms of that act. *Skene* v. *Skene*, M. 11,354; *Lockhart* v. *Denham*, M. 15,047; *Renton* v. *Anstruther*, 2 Bell's App. 214.

R. Palmer Q.C., and *Anderson* Q.C., for appellants.—An entail is not good unless it is feudalized and is the root of the investiture. The reason is, that there is no such thing as an entail at common law—*Hamilton* v. *Macdowall*, 3d March 1815, F.C., *per* Lord Meadowbank. Therefore entails being merely the creatures of statute, any particular deed must stand or fall according as it has within itself the materials which comply with the Statute 1685. Entails are merely fortifications against creditors, and are only effectual where the creditor can trace the feudal progress up to a properly registered deed of entail; and this progress cannot be traced unless the original deed contained the feudal clauses which enabled the fetters to be attached to the lands themselves, and which carry the investiture downwards without a break in the chain. Applying these principles, the main question is, Which of the two deeds of 1721 and 1728 is the original deed of tailzie or the root of this investiture? *Primâ facie*, it is the deed of 1728, for it contains all the feudal clauses, and that of 1721 does not.

At the date of the deed 1721, the granter had only a personal title to the lands, and though it is competent for a person having such title to make a good entail, he must not only dispone the lands, but grant a procuratory of resignation or precept of sasine, or assign an unexecuted procuratory. Such a conveyance leaves the feudal title where it was before, and only delegates the right of completing that title to the disponee. But as the deed of 1721 was a *mortis causâ* deed, and spoke only from the death of the testator, its natural effect in delegating this right of completing the title had been intercepted by something that had previously happened. The thing that had happened was the circumstance of Major Skene having, in 1723, completed his own title in fee simple under the charter of resignation, so that, by the time the deed of 1721 came into operation, this delegated power had gone and vanished. There was then nothing left but a naked disposition of the lands, for the charter of resignation had sopited and extinguished the unexecuted procuratory which was in existence in 1721—*Moll* v. *Riddell*, 13th December 1811, F.C. Though, therefore, it is not denied, that a person having only a personal right to the lands may execute an entail by assigning an open procuratory of resignation, as in *Napier* v. *Livingstone*, 5 Bro. Sup. 888, still there must be, as in that case, some warrant of infeftment granted by the entailer. And it is also true, that a formal clause of disposition by a person uninfeft implies an obligation to infeft, and can be completed by an adjudication in implement, as was shewn by *Renton* v. *Anstruther*, 2 Bell's App. 223. But these two cases have no application where the procuratory of resignation, which professed to be assigned, had utterly disappeared and become non-existent at the time the professed assignation came into play. In this deed of 1721, therefore, there was a mere naked disposition. But it is not words of mere disposition that divest the feudal title; there must also be an assignation of the procuratory of resignation—Stair, 3, 1, 16; 2 Ross's Lect. 238. Here there was in 1724 no assignation of the procuratory, for the procuratory had been previously exhausted. The procuratory of resignation is an essential step of the feudal progress, and was so assumed in *Forbes* v. *Gammell*, 20 D. 917, and was held not to be supplied by any other extraneous mode of completing the title.

Hence it follows, that the recording of the deed of 1721 was a mere nullity, for that deed did not contain the feudal clauses, and so could not enter the feudal progress or the Register of Sasines. That deed in fact amounted to nothing more than a mere contract or trust, binding on the heir to make a good entail or a new entail, but of itself it was no more a deed of entail fit to be registered under the Statute 1685 than any will or trust disposition directing trustees to execute a valid entail of the lands would be so. That deed of 1721 did not, in any way, affect the lands themselves, it merely founded an obligation or contract binding the heir at law. The distinction between a mere contract to convey, and the conveyance itself, is clear, and the Statute 1685 assumes throughout, that the proper deed to be recorded is the deed which is to form part of the feudal progress, and out of which the new investiture takes its rise. The language is otherwise unintelligible.

[LORD CHANCELLOR.—Do you say, that a deed of tailzie which is recorded before it is feudalized derives no advantage from its being so recorded, unless and until it becomes subsequently feudalized by virtue of something contained in the deed itself?]

Precisely. It must be feudalized by virtue of something to be found in the deed itself, and not by the aid of some extrinsic and independent process. A disposition without a procuratory of resignation is not a feudal conveyance at all; it is not recognized at common law. A court of equity alone deems it binding on the heir at law—Kames' Pr. Eq. 382. The process of adjudication in implement is accordingly nothing but a suit of specific performance; it is not founded on the disposition at all, but on the obligation of the heir to complete the imperfect deed of his ancestor—Ross's Lect. 36.

[LORD CHANCELLOR.—What does the Act 1685 itself say as to the feudal title being necessary as distinguished from the mere disposition?]

(*Reads statute.*) The statute regards infeftment as the main thing, and for this obvious reason, that the fetters must enter the infeftment, and the infeftment being on the register, creditors could always have access, and thereby trace by direct reference the fetters up to their fountain head, viz. the deed of entail, and thus they discovered what entail governed the lands. The statute did not deal with a mere instrument giving a cause of action against some one to complete the entail; it dealt with the principal deed itself. The fee must be tailzied before the statute operated.

All this shews, that the deed of 1721 was not, and could not be, the basis of this investiture; but it was the deed of 1728 which satisfied the statute, for it alone had these feudalizing clauses which the deed of 1721 wanted. It is quite immaterial what were the causes that led to the deed of 1728 being executed. It contained all the elements of a deed of entail, and its mere recitals are no better than a vision of the imagination. Its substantive parts are alone to be regarded; the mere history of the motives or inducements influencing the minds of the makers has no influence on the operative parts. It was enough, that it contained a disposition by persons having the feudal title, and contained also a procuratory of resignation, which enabled the fetters to be inserted in the infeftment. This deed was in every respect the proper deed to be recorded in the Register of Entails. The deed of 1721 was, at most, a mere obligation to make an entail, but the deed of 1728 was the executed entail, and, as such, was the deed to be registered. If a mere bond of tailzie were to be granted, could it be said, that the registration of this bond would be sufficient? So, in a trust to make an entail, the mere trust disposition would not be the proper deed to be registered, for that would be inconsistent with *Fairlie* v. *Ferguson*, 5 S. 937.

[LORD CHANCELLOR.—Suppose a strict entail, with a power to the heir of entail to sell a portion of the lands, and reinvest the money and resettle the land so purchased on the same terms, what would you register in such a case?]

The new deed, when executed by the heir, would be the entail to be registered as to the new lands, for by that way alone do the fetters get into the Register of Sasines. The deed of 1728 was therefore the original entail here. If Elizabeth Skene had registered the deed of 1728, can it be doubted, that that would have been a good entail? Yet, in that case, there could not have been two good entails. The parties themselves seem to have treated the deed of 1721 as not the kind of disposition to satisfy the statute. It is true, that deed might have been the ground of an action against the heir *ad factum præstandum*, *i. e.* to make a good entail, or there might have been obtained a decree of adjudication in implement. But neither of these things was done. The personal right, which might have been directly available to complete the feudal title in 1721, was lost in 1723, and, in 1728, the fee simple was acquired by the heirs portioners, who, by the retours, became clothed with the feudal title. They could at that time have sold the lands and given a good title to the purchaser.

[LORD CHANCELLOR.—At the time the daughters made up their feudal title they took the fee out of the *hæreditas jacens* of their father, and there then remained nothing but an obligation on them to make an entail, the lands, however, meanwhile remaining vested in them in fee simple.]

Yes. They were owners of the fee, and could at that time have sold the lands altogether discharged of any such obligation. Yet, according to the respondents, if the deed they then executed in 1728 had been registered, and not that of 1721, there could have been no good entail.

[LORD CHANCELLOR.—You say that, under the deed of 1721, two things might have been done. Either a decree *ad factum præstandum* might have been obtained against the heirs, in which case that decree, or what was done on it, would have been registered as the deed of entail; or a decree of adjudication in implement might have been obtained, in which case the charter following on such decree would have been the proper deed to be registered. Lord Ivory says, there may be a good registration without feudalization, and a good feudalization without registration, but that both are necessary. Now, is it competent for every deed which is registered to be afterwards feudalized?]

Yes, if the deed contain within itself the materials for doing so, viz. the feudal clauses, but not otherwise. If a deed has no such clauses, infeftment can only be got by a fresh grant of a procuratory of resignation by the person feudally invested. That was what was done here. The deed of 1728 was a fresh grant of this procuratory, which was an emanation from the then feudal owners, and that deed stands an independent and original deed. It was from that deed that the fetters came which entered the subsequent infeftment. A tailzie even before the statute must have been part of the infeftment so as to appear on the Register of Sasines—Stair, ii. 3, 43—and so as to inform creditors, and enable them to judge whether the statute has been complied with.

[LORD BROUGHAM.—The short of it is, you say the deed of 1721 was nothing but a bond of tailzie.]

Precisely. If Major Skene had, in his lifetime, executed a deed like that of 1728, nobody could doubt, that that would have been the original deed of tailzie.

The deed of 1728, therefore, being the original deed of entail, which was the foundation of the investiture, ought to have been registered,—and not being registered, the entail is bad.

At all events, the deed of 1728 was a new deed of entail, for it does not merely repeat the fetters of 1721. On the contrary, Elizabeth Skene is an heir of entail under the deed of 1721, and bound by its fetters, whereas she is the institute under the deed of 1728, and not so bound. This is a difference in substance and not in form, and the result is, that the deed of 1728 was, if anything, a new deed of tailzie, and ought to have been put in the register as well as that of 1721.

D. Mure and *Kinnear* for the respondents.—The Statute 1685 does not direct any particular mode of feudalizing the entail. It merely deals with the preliminary matter of the structure of the entail itself, and leaves the feudalization, which was a separate and distinct matter, to be dealt with as before.

[LORD CHANCELLOR.—But if the deed, after being registered, could be defeated *aliunde*, it would have been idle for the statute to enact, that such entail should be effectual. It seems to follow as a necessary corollary from the statute, either that the deed as registered should convey the estate completely or give the means of directly completing the conveyance.]

The deed of 1721 did in reality give the means of completing the title, and so reaching the lands by means of an adjudication in implement. The decree of adjudication was merely a circuitous way by which the Court did what the heir ought to have done.

[LORD CHANCELLOR.—Does the deed of 1721 give more than a cause of action against the heir? A cause of action is very different from a conveyance.]

It is not material what name is to be given to what the deed of 1721 gave. A decree of adjudication is never held to be the creation of a right, but merely the completion of the ceremonial part of the feudal title. It merely supplies a necessary form, which the granter omitted to supply himself or ought to have supplied. The deed of 1721 conveyed a personal right to call for a proper deed, and, by the general service, the heirs became bound to complete that deed.

[LORD CHANCELLOR.—You see, a contract to convey and a conveyance are very different things. Are you prepared with any authorities to shew, that a deed of entail with an obligation to infeft, but without giving the means of infefting the disponee, can be regarded as a proper entail under the Statute?]

We are not prepared with any definite authority; but *Renton* v. *Anstruther* seems to assume that. An obligation to infeft does in substance afford the means of infefting the party.

[LORD CHANCELLOR.—Still that was not carried out, and meanwhile the feudal title was acquired. Lord Ivory and Lord Deas say, that there was an implied obligation in the deed of 1721 to infeft. Well, have you any authority that, when there is an express obligation to infeft, but the means of infefting not being given by the deed, such a deed may be well recorded under the statute 1685.]

There is no precise authority at hand.

[LORD CHANCELLOR.—The Lord President says (p. 28, F.): "The fetters of the entail must appear in the feudal progress." And Lord Ivory says (p. 32, F.): "This deed satisfies all the elements of a proper conveyance, so far as regards its binding quality and its connexion with and means of reaching the estate." And at p. 33 he says: "It is true there can, without feudalization, be no entail effective against creditors." Therefore feudalization is essential, and the fetters must appear in the feudal progress. Now, how does it appear that the fetters of that deed ever did enter the feudal progress?]

The inventory of titles, at page 119, shews there was such a deed.

[LORD CHANCELLOR.—That is nothing; it is a mere private document. The creditors do not see that.]

True, the creditor does not see it; but it is a list of the titles affecting the estate.

[LORD CHANCELLOR.—You must shew, that the deed of 1721 will be found in the Register of Sasines, so that the creditors might become aware of it.]

It is only the fetters of the deed that require to appear in the Register of Sasines. Now, in the deed of 1728 there is a recital of the deed of 1721, and in this way the creditor would at once get notice of that deed. The deed of 1728 did not purport to be anything more than the implement or fulfilling of the obligation made incumbent on the heirs by the previous deed, which was the real substantial authority and warrant for that deed of 1728. The heirs profess only to do that which the father might himself have done. If the father had himself done in 1723 what the daughters did in 1728, it would not have been the deed of 1723 that would have been registered, but the deed of 1721.

[LORD BROUGHAM.—How did a creditor ever see the deed of 1721? He traces up the infeftment to the deed of 1728, which he finds a regular deed of entail. How is he referred to the prior deed of 1721?]

He must have been referred to it simply because the deed of 1728 professes to be merely an

implementing of that deed of 1721, and it referred to the fetters of the deed of 1721 as the binding fetters. The deed of 1728 merely repeated but did not impose the fetters.

[LORD CHANCELLOR.—The creditor goes to the sasine, and he finds only the fetters as they came from the deed of 1728, in which he finds all the elements of a conveyance with the feudal clauses which authorized the subsequent infeftments. He there stops, and then goes to the Register of Entails, and finds that deed is not registered there. Is he not entitled to rely on this circumstance as shewing there is no binding entail? It comes all round to this, does the deed of 1721 ever appear in the Register of Sasines?]

The practice is for the creditor to go backwards for forty years, and if he finds all the charters and infeftments regular, as these were, it is difficult to see how the objection could be raised; though no doubt ultimately there must be a proper registered deed of entail.

[LORD CHANCELLOR.—All the Judges say, that the fetters require to appear in the sasine or enter the feudal progress. Yet they say this deed of 1721 was a good deed without those feudal clauses which alone could make the fetters enter the sasine. How are these propositions to be reconciled?]

The procuratory of resignation or precept of sasine were in truth never deemed essential parts of a conveyance, and they were originally distinct instruments, Ersk. 2, 7, 17; 2, 7, 25. The statute did not profess to deal with anything but the starting point of the entail, viz. the original deed, leaving the feudal consequences to be supplied by the common law. The deed of 1721 conveyed a personal right binding on the heirs, which was not sopited by the charter of resignation in 1723, for in truth they were not inconsistent instruments—*Montgomery* v. *Eglinton*, 2 Bell, Ap. 149; *Inglis* v. *Inglis*, 14 D. 54; *Irvine* v. *E. Aberdeen*, M. App. *Taillie*, No. 1.

R. Palmer replied.—It has not been shewn, that the deed of 1721 ever entered the Register of Sasines or the feudal progress. The investiture of the Earl of Fife is entirely founded on the deed of 1728 and the procuratory of resignation it contained. That deed was the fountainhead at which the creditor stopped, and by that deed and what it contained the entail must stand or fall. It may have referred to fetters in some prior deed, but an entail by reference is not a compliance with the statute.—*Cathcart* v. *Gammell*, 1 Macq. 363, *ante*, p. 192. At all events, both the deeds should have been put on the Register of Entails, which was not done. The Statute 1685 treats the lands as effectually protected only when they were feudally vested in the heir under the deed of entail. That was the law before and after the statute; Stair, 2, 3, 43. It would be quite inconsistent with the language of the statute, as well as with Stair, and also *Renton* v. *Anstruther*, to hold, that a mere obligation to infeft, or anything on which an adjudication in implement may ultimately proceed, would, if registered, satisfy the statute.

[LORD CRANWORTH.—I want to know if the fetters of the deed of 1721 did not appear in the register in this way. The procuratory of resignation in the deed of 1728 referred to the fetters imposed as being also imposed by the deed of 1721. It bore that the fetters were repeated.]

[LORD CHANCELLOR.—But then the fetters were not the same, for in 1721 the fetters were declared to bind the heirs of entail, of whom Elizabeth Skene was one, and in 1728 the fetters are declared to be binding on the heirs, of whom Elizabeth Skene was not one, for she was the institute in the latter deed; so that the fetters were quite different.]

[*Mure.*—The fetters were the same, but the parties fettered were different.]

LORD CHANCELLOR WESTBURY.—My Lords, we have listened for a considerable time, and with the most patient attention, to the very able argument at the bar upon a subject which I may, I think, correctly describe as in itself very abstruse and difficult of determination. But whilst it is abstruse and difficult, it is, I think, satisfactorily shewn to be one of very great importance in Scotch law; and which may possibly involve doctrines of great moment as affecting the security of Scotch titles, and the practice of Scotch conveyancing. I think, therefore, I express the opinions of all your Lordships when I submit to you, that this is a case which undoubtedly deserves further consideration. It is not perhaps of very great moment, though it is a thing to be referred to as in some degree relieving us from anxiety in respect of the course which we should adopt, that the stake in question here is one of great magnitude in point of property.

Under all the circumstances, therefore, adverting to the important matters involved in the decision, with reference, not merely to the amount at stake, but also to the future practice, as the reasons for the course which, I submit to your Lordships' House, ought to be adopted, I should advise your Lordships to agree with me in the opinion, that the proper course to be taken will be that which was taken in the case which has been so frequently referred to in the argument, namely the case of *Renton* v. *Anstruther*, though I think, that that case did not present difficulties equal to the difficulties of the present case, namely, to remit the case to the Court of Session, with a request, that the Court of Session will consult all the Judges upon the question in the case.

I observe, my Lords, that in the case of *Renton* v. *Anstruther*, this course was referred to, and we all know from our experience, that it was correctly referred to as a usual course for this House to adopt, and I observe, that the LORD CHANCELLOR (who was then Lord Lyndhurst)

speaks of the House as having been satisfied in the course of the argument, that that was the only course that they could be justified in pursuing, considering the nature of the case. The order made in that case was, "That the cause be remitted back to the Second Division of the Court of Session in Scotland, to review generally the interlocutor complained of, with an instruction to the Judges of that Division to order the case to be argued by counsel before the whole of the Judges, including the Lords Ordinary, and to report their opinions thereon to the House. And this House does not think fit to pronounce any judgment upon the said appeal, until after the said interlocutor shall have been so reviewed, and the opinions thereupon shall have been reported, according to the directions of the House."

I submit to your Lordships, that it would be wise and proper to adopt that form of order on the present occasion, and I move your Lordships accordingly.

LORD BROUGHAM.—My Lords, I have no doubt whatever, that this is the right course to be taken.

LORD CRANWORTH.—We all concur in it. Of course it will be understood at the bar, that none of your Lordships express or intimate any opinion upon the case.

The following *order* was pronounced by the House of Lords:—

"*Die Veneris*, 19° *July* 1861.

"After hearing counsel," etc., "Ordered by the Lords Spiritual and Temporal in Parliament assembled, that the cause be, and is hereby, remitted back to the said First Division of the Court of Session in Scotland, to review generally the interlocutor complained of, with an instruction to the Judges of that Division to order the same to be argued *vivâ voce* before the whole Judges, including the Lords Ordinary, and to report their opinions thereon to this House; and this House does not think fit to pronounce any judgment upon the said appeal, until after the said interlocutor shall have been so reviewed, and the opinions thereupon shall have been reported according to the direction of this order."[1]

For Appellants, Theodore Martin, Solicitor, London; Inglis and Leslie, W.S., Edinburgh.—*For Respondents*, Connell and Hope, Solicitors, London; Tods, Murray, and Jamieson, W.S., Edinburgh.

JULY 29, 1861.

The Honourable Dame GRACE C. MENZIES, *Appellant*, *v.* SIR ROBERT MENZIES, Bart., *Respondent*.

Game—Fishings—Locality—Entail—Provision to Wife—*A deed of entail empowered the heirs in possession of the estate "to provide and infeft their wives, by way of locality allenarly, in competent liferent provisions, the same not exceeding a fourth part of the said lands and estate." A disposition of locality having been granted under the permissive power, with a clause of parts and pertinents:*

HELD *by the Court of Session*, 1. *That it carried in favour of the widow an exclusive right of shooting, hunting, and fishing* (*except salmon fishing*), *over the locality lands.* 2. *That the value of these shootings, &c., although they had never been let, was to be taken* in computo, *in ascertaining whether the locality exceeded one fourth part of the lands and estate.*

On appeal to the House of Lords, the parties having consented to their Lordships disposing of the case on the information before them as arbitrators, in order to save the necessity of a remit for further investigation, findings were pronounced in similar terms to those of the Court of Session.[2]

The Court of Session had remitted to a Mr. Syme, W.S., to prepare a scheme of locality, and various reports were made from time to time.

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[1] See *Fife* v. *Duff*, *post*, 27 Mar. 1863.

[2] See previous report 17 D. 1090; 24 Sc. Jur. 365; 27 Sc. Jur. 554. S.C. 33 Sc. Jur. 718.