pursuer to have inferred from that condescendence that any such question was meant to be raised as is raised by the last two issues. I think, therefore, that those issues ought to be entirely disallowed and struck out. It is merely what is called, in the Courts of Common Law, catching at a Norfolk groat; because it is not a matter that either of the parties meant to bring into discussion. The real question was the construction of the act of parliament; and on that subject I think the appellant has entirely failed.

The course I propose to pursue is, to vary the interlocutor directing the issues, by confining the issues to the first two, and, as to those issues, to affirm the interlocutor; and as to the other two, to direct them to be struck out. I should be glad to hear any suggestion from the bar, as to the way in which that could best be done.

*Dean of Faculty.*—Perhaps I may be allowed to suggest, that the first interlocutor might be separately affirmed, and probably the second interlocutor might be varied; or a remit might be made to the Court to allow the first two issues, and not the next two issues.

LORD CHANCELLOR.—The first and second issues were quite right, and therefore the interlocutor might be varied and so amended; and we might remit to the Court the issues, with a declaration that the first two ought to be tried, and the next two struck out.

*Dean of Faculty.*—The instruction of the House might be, to allow the first two issues, and disallow the third and fourth.

LORD CHANCELLOR.—I move that the first interlocutor be affirmed—that the second be varied—that of the issues directed by the second interlocutor, the first two issues be allowed, and the last two disallowed—and, with that declaration, that the second interlocutor be remitted to the Court of Session. With regard to the costs and expenses, I confess, though there is thus a little variation, that I am very much inclined to give the respondents their costs, because, in truth, it is a mere accident that there is any variation at all. No doubt the substantial question has been decided against the appellant; and therefore I am of opinion, though there is that variation, that the appellant must pay the costs, except such as are occasioned by the variation as to the last two issues.

*Interlocutors varied.*

First Division.—Connell and Hope, *Appellant's Solicitors.*—Grahame, Weems and Grahame, *Respondents' Solicitors.*

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MAY 10, 1853.

## J. C. HALKETT CRAIGIE INGLIS, &c., *Appellants*, *v.* CHARLES HALKETT CRAIGIE INGLIS, *Respondent.*

Entail—Prescription—Registration—Entail by reference—*Two entails were executed with reference to the lands of H—the one in* 1704, *and the other in* 1730. *The first deed reserved full powers of alteration in favour of the entailer, who was also the maker of the second deed. The second deed was inconsistent with the first, and was not recorded in the register of tailzies. The investiture subsequent to* 1730, *and all following titles, were based upon the second deed exclusively, unless it were held that a clause of reference which it contained to the first deed were sufficient to make that deed the basis of the title.*

HELD (affirming judgment), *that the clause was insufficient for that purpose; that the second deed must be taken as the sole basis of the investiture from* 1730 *downwards; and that the first deed having remained unfeudalized for upwards of* 40 *years, while the second was never recorded, the lands were not subject to the fetters of entail.*[1]

The defenders appealed against the interlocutor of the Court of Session of 18th Nov. 1851, maintaining that it ought to be reversed—1. Because the mutual bond of tailzie of 1704 was the original entail both of Dumbarnie and Halhill, and was duly recorded, and the respondent possessed under titles engrossing restrictions prohibiting sale, &c., *conform to* that recorded deed. 2. Because the conveyance in the marriage contract of 1730 was propulsive of the fee, and was made under conditions, the same substantially as those in the deed of 1704, and *conform to* that deed, and did not therefore require to be recorded in the register of entails. 3. Because the marriage contract of 1730, and crown charter of 1731, did not impose cross forfeitures on the two estates, and could not effectually have done so, without the running of a prescriptive period, which the sale of Dumbarnie in 1754 prevented.

The respondent supported the interlocutor on the following grounds—1. The respondent and

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[1] See previous report 14 D. 54; 24 Sc. Jur. 17. S. C. 25 Sc. Jur. 397.

his predecessors having possessed the lands of Halhill and others for a period greatly exceeding forty years, under the entail in the marriage contract of 1730, which was not recorded in the register of tailzies, and was essentially different from the previous entails, it became the basis of a new prescriptive investiture, under which he was entitled to sell the estate. 2. The disposition of tailzie of 1704 is not a valid and subsisting entail, so far as regards the lands of Halhill and others, sold to Mr. Rintoul, in respect it was never followed by infeftment or feudal investiture, or acted upon in any way.

*Lord Adv. Moncrieff* and *Turnbull*, for appellants.—The respondent has no power to sell the estate of Halhill, which he holds under the entail of 1704. The marriage contract of 1730 was not a new entail, but contained substantially the same destination and the same fettering clauses as the deed of 1704, which clauses are easily reconciled by the rule—*applicando singula singulis.* It is clear that John Craigie the elder, of Halhill, did not intend to create any new entail by the deed of 1730, for the entailing clauses of the latter deed conclude thus—"conform to the bond of mutual taillie" of 1704—which means, that the bond of 1704 was the warrant and origin of those provisions and conditions. There are, no doubt, two slight variations—one where the power of leasing is extended; but inasmuch as this was in effect only a release from fetters, it would not require to be separately recorded in the register. The other variation is, that the heirs of Halhill are required to assume the name and arms of Dumbarnie; but this cannot be relied on as an indication of intention to supersede the prior entail. It is said that the deed of 1730 was a new entail, because it contained one set of fettering clauses applicable to both estates, and thus that a forfeiture of one would be a forfeiture of both. But we contend that these fetters must be construed *applicando singula singulis*, in which case the two deeds are quite reconcileable—as was done in the *Gartmore case*, *Bontine* v. *Graham*, 13 S. D. 905; 1 Rob. App. Ca. 347. This case differs materially from the *Skermorlie case*, *E. Eglinton* v. *Montgomery*, 4 D. B. M. 425; 2 Bell's App. 149; for there, there was no reference to the previous entail, whereas here there is an express reference in the deed of 1730 to that of 1704. Then it is said, that assuming the deed of 1730 to be no alteration of that of 1704, still the latter was never recorded, while the crown charter proceeded on it alone. But, according to the true construction of the statute 1685, c. 22, "the original taillie," which requires to be recorded, is not necessarily that on which the investment proceeds—at least where there is no question of two competing investitures; and we say, therefore, that the deed of 1704 is as much within the meaning of the statute as the deed of 1730, and that it entered the investiture, being sufficiently referred to and incorporated with the charter. The cases cited on the other side do not apply in the circumstances of the present case.

*Sol.-Gen. Bethell* and *Anderson* Q.C., for respondents.—This is a question of construction of deeds of entail—as to which, and the strictness of the rules, see Sandford on Entails, p. 275; *Morehead* v. *Morehead*, 1 Sh. & M'L. 56; *Sharpe* v. *Sharpe*, *ibid.* 594. We say that the deed of 1730 is a revocation of that of 1704, because it in terms purports to be so, and it makes a new destination, and contains different powers, conditions and penalties. The plain object of the deed 1730 was to amalgamate the two estates, and therefore there is one destination, and there is only one set of prohibitory, irritant and resolutive clauses, and hence an irritancy in any single portion of the combined estate is made to cause a forfeiture of the whole. Now the entail of 1730 is in its terms and structure a perfect and complete deed in itself, not depending on any former entail, but relying on the force of its own provisions. The slight reference to the deed of 1704 is a mere historical allusion, having nothing to do with the title given by the deed of 1730 itself. It has been often decided, that a mere general reference to an old entail has no effect in keeping that entail alive—*Stewart* v. *E. Mansfield*, 6 D. 1079; 5 Bell's App. Ca. 139. Besides the general scope and structure of the deed, there are various important changes made in the conditions affecting the lands of Halhill, quite irreconcileable with the deed of 1704. Thus the heir is to bear the name and arms of Dumbarnie—he is at liberty to grant long leases—there is no reserved power of revocation—and there is a power of burdening the lands to a greater extent—also the destination is quite different. Again, the charter was expede on the procuratory in the deed of 1730, and there has been possession ever since, creating a prescriptive title. But this deed of 1730 having never been recorded, is null—*Munro* v. *Drummond*, 14 S. 453. Again, when an heir of entail completes his title on an investiture differing in important particulars from the original entail, this becomes a new entail—*Broomfield* v. *Paterson*, M. 15,618; and, when prescribed upon, becomes the governing investiture—*Paterson* v. *Purves*, 1 Sh. App. 401; *E. Eglinton* v. *Montgomery*, *supra*; *Stewart* v. *E. Mansfield*, *supra*. The deed of 1730 was not a mere deed for propelling the fee, as in *Hay Newton*, 14 S. 1031. In the *Gartmore case*, *supra*, cited on the other side, the two estates were not blended together in one entailed estate, but were disponed separately, and under different destinations. The charter in that case was a charter by progress, and it did not profess to go beyond the two procuratories of resignation in the two deeds of entail on which it proceeded; whereas the deed of 1730, on which the present procuratory of resignation proceeded, was essentially a new entail.

LORD CHANCELLOR CRANWORTH.—In this case I shall not ask your Lordships for any time

to consider, but will move your Lordships at once to confirm the interlocutor of the Court of Session. The question arises in this way. In the year 1704, two brothers, James Craigie the elder brother, and John Craigie the younger brother, were each of them seised in fee of a certain estate in Scotland. James Craigie was seised of an estate of Dumbarnie, and John Craigie was seised of an estate of Halhill. It appears that James Craigie had no children. John Craigie had a son, John Craigie, and some other children. They came to an arrangement, for family reasons, to execute a deed of mutual settlement, and they executed for that purpose a bond, whereby James Craigie settled his estate of Dumbarnie on himself, and afterwards upon his issue male, if he should have any, and I believe, in default of issue male, on issue female, and in default of any issue of his own, then to his brother John Craigie, restricting it to his heirs male—or in default of heirs male, to his heirs female. Then ultimately his estate of Dumbarnie, on failure of all this, was to revert to himself and his heirs general. Then, with regard to Halhill, John settled it exactly in the same way *mutatis mutandis*. His heirs male took in the first instance, and then his heirs female, and ultimately he reserved the estate to his own heirs general. As to each estate, therefore, these persons reserved to themselves the power of altering the limitations as they should think fit.

This deed having been thus executed and recorded, created a valid estate in tail—valid as against heirs, and valid as against creditors also, so far as Dumbarnie was concerned. Dumbarnie was duly feudalized by virtue of a charter which was granted in pursuance of a procuratory of resignation. With regard to Halhill, there was no such charter ever granted. I do not know that this is very material. However, it may possibly have some importance; therefore it is as well to advert to the fact, that the estate of Halhill was never duly feudalized.

So matters remained for a few years, when James, in pursuance of the power which was reserved to him to revoke or alter any of those dispositions, executed another deed, by which he did revoke the ultimate limitation to his own heirs, by interposing, after the estate which was to go to John and his heirs male, another estate to some collateral branch of the family, the Craigies of Kilgraston, and some other heirs, to come in after the failure of the issue of John, and before the ultimate limitation to his own heirs. That also was duly feudalized.

In that state of things, James died without issue. The consequence of that was, that John, and those who were to come after him, became entitled under this deed to the estate. In the year 1730, the eldest son of John, who would be the heir in tail in due course, married, and, upon his marriage, a marriage settlement was executed, whereby John the father, who was the settler of 1704, and John the son, who was about to be married, executed a deed in a great measure similar to the deed of 1704, but not entirely so. They settled the estate upon John the father. I think he was to be the liferenter—but that is not material; then John, who was the intended husband, was to succeed, and then the heirs male of his body, the heirs male by that marriage—and for default of such heirs male, to heirs female—and for default, then to his heirs male by any other marriage—and for default, to his heirs female;—carrying it on, in short, in the same line in which the estate would have gone under the original settlement. I point that out because, in the course of the argument, it appeared to me that there was a difference, but upon looking more attentively to it, I perceive that I was wrong, and that the line in which the estate was chalked out to go by the marriage contract of 1730, was in substance the same as that in which it would have gone under the deed of 1704. That settlement included not only the estate of Halhill, which had originally been the estate of John, but also the estate of Dumbarnie.

Now, with regard to the estate of Halhill, John, the father of the husband, had the power to make whatever disposition he pleased, because he had reserved to himself, by the deed of 1704, the absolute right to revoke and alter it just as he thought fit. Not so, however, with regard to Dumbarnie. As to Dumbarnie, he had only the rights given to him by the deed of 1704. However, he executes that deed, be it worth what it may; he makes that settlement, which was, as far as I have hitherto stated it, exactly similar to the deed of 1704; but there were some minute differences. There was this difference,—in the first place, under the deed of 1704, neither as to the lands of Dumbarnie nor as to the lands of Halhill, was there any power of leasing for more than the life of the party granting the lease. With regard to Halhill, John, the father of the husband, in 1730 had the right, if he thought fit, to alter that—to give to every person who should successively come into the inheritance, the right of leasing for 21 years, or any term that he might think fit. He had the right to do that, because he had the right to revoke the disposition altogether, and accordingly he does make that alteration with regard to the leasing. Instead of restraining the parties to lease during their own lives, he gives them the power, as to Halhill, to lease for any term they might think fit. He could not give a similar power as to Dumbarnie, because as to that he had no power of revocation. Therefore, as to that, the matter was left to stand as it stood before.

Under the deed of 1704, provision was made that every person succeeding to the estate of Dumbarnie should take and use the name and arms of Craigie of Dumbarnie, and every person succeeding to the estate of Halhill was to take the name and arms of Craigie of Halhill. What

was to happen, then, if that should occur, which in fact did occur, that both came to the same party? Why, for that purpose, I think that the principle of *applicando singula singulis* must apply. The parties could not mean to stipulate in the deed, that upon the failure of issue, the same person should take both, and yet by the same deed to stipulate that the party was to lose one of the estates if he did not take the particular name and arms. I think, therefore, that what is suggested at the bar is probably quite correct,—that that could not be meant to be a clause to apply in that particular case. But it certainly was inconsistent with the deed of 1704, that the parties succeeding to the estate of Halhill should be bound to take the name and use the arms of Dumbarnie. Now, it was one of the stipulations of the marriage contract, that the parties succeeding to the estate (I call it now *the* estate, for it was all united and clubbed together) should always take and use the name of Craigie of Dumbarnie, which was the principal family estate. That was a stipulation inconsistent with the deed of 1704. So was the stipulation as to the leasing. There is also a most important variation arising from this circumstance. In the deed of 1730, or rather in the charter which followed upon it, (for the title under that deed was duly feudalized,) the two estates were united together. That was expressly done in the charter pursuant to the procuratory of resignation which was contained in the marriage contract—"Et similiter nos univimus et annexavimus et per præsentes cum consensu prædict. unimus et annexamus terras aliaq. supra," and so on, constituted into one single barony.

Now the effect of that is very material indeed, as altering the operation of the deed of 1704, because the consequence of that is, that any act done as to any part of either estate, which would cause a forfeiture as to its own estate, so to say, now, by the union, causes a forfeiture as to the whole. The difference, therefore, effected by that, is very great indeed. Under the procuratory contained in that deed of 1730, the charter was granted, the estate feudalized, and it has now been ever since held by the parties entitled, either under one deed or under the other.

Now the material question in 1853 to consider is, whether the parties are holding under the deed of 1704, or under the deed of 1730. I did not at first perceive what the object of the parties was. But it has been argued ably at the bar, and it is plain that it is this, that the deed of 1704, creating the entail as to Halhill, the only land now in question, though it never was feudalized, was yet recorded and registered, so that the entail was binding at least against the heirs. The deed of 1730, though feudalized, was not recorded, not registered, and not having been registered, that entail was bad. Have the parties been holding under one deed or under the other? Because, if they have been holding under the deed of 1730, the entail intended to be thereby created is a nullity. What is the consequence? Why, that they are then owners in fee simple. They have now contracted to sell the estate. They can make a good title if they are holding under the deed of 1730, and they cannot make a good title if they are holding under the deed of 1704. Then it becomes important to consider under which deed they are holding.

That being the whole question, it seems to me that the judgment which was given by the learned Lord Ordinary is perfectly unanswerable. In the year 1730, two estates are united together that were formerly separate, although at one time the doctrine of *applicando singula singulis* might apply. The object of that deed was to exclude the application of that doctrine. It is expressly stipulated, that whatever was the state of those two properties before that time, from that time "*unimus et annexamus*," they shall be held together. That is an important distinction. Whatever weight is to be given to it, I think there is great weight to be attributed to the other distinction, that there is a different power of leasing from that which existed before; there is a different name and arms to be taken;—and in all those differences, the parties choose to feudalize their title under that instrument, and not under the former instrument.

That being so, it appears to me that the inference is irresistible—that that is the title which they always meant to make up—that they did then so make it up, and have held under it ever since; and having done so, they are now substantially not tenants in tail, but tenants in fee simple. Consequently, they have just the same right as any other owners in fee simple have—namely, the power of selling their estate.

I observe that there are numerous parties to this appeal. I suppose no question arises about them.

*Lord Advocate.*—Those are the heirs, my Lord, that would have been called.

LORD CHANCELLOR.—I suppose the question is brought amicably, as it were, before your Lordships, to know whether a good title can be made. Therefore I move that the interlocutor appealed from be affirmed with costs.

*Interlocutor affirmed with costs.*

Second Division.—Law, Holmes, Anton and Turnbull, *Appellants' Solicitors.*—Spottiswoode and Robertson, *Respondent's Solicitors.*