[Heard, *June* 15, 1841.— Judgment, *June* 22, 1841.]

(No. 16.) JAMES FOGO, Esq. Captain in the Royal Artillery, Appellant.

[*Lord Advocate — Kindersley.*]

DAVID MATHIE, calling himself DAVID FOGO of Row, Respondent.

[*Attorney General — Anderson.*]

2d DIVISION.

Lord Ordinary Moncreiff.

Statement.

THE judgment of the Court below in this cause is reported in 2 D. B. and M. 651.

As the judgment upon appeal does not express any opinion upon the questions appealed, farther than a desire to have them re-argued before the whole Judges of the Court below, it would be uselessly loading these pages, to do more than give the judgment of the House.

Ld. Chancellor's Speech.

LORD CHANCELLOR.—My Lords, this case was heard in the presence of my noble and learned friend, who is not now able to attend, being engaged in judicial business at the Privy Council; but I have communicated with him upon the subject of this case, and in the result we fully agree as to the course which it is expedient for your Lordships to take.

I abstain from entering at any length into the merits of the case, because it is our opinion, that, considering the nature of the question, that it is exclusively a question connected with the law of real property in Scotland, and that it is a question affecting the general rules and practice of conveyancing in Scotland. it would be expe-

dient for your Lordships to have farther information before you come to any final adjudication.

My Lords, one question is, Whether a conditional institute, becoming entitled by the death of the parties entitled before her, and therefore entitled to take up the entail, but entitled only upon proof of the predecease of the persons who claimed before her in the order of succession, has such a personal title to the property, as to enable her, without taking the usual steps to make up a feudal title, to execute a deed of entail. That is a question, with reference to which I shall shortly refer your Lordships to the proceedings in the Court below, for the purpose of shewing that it is one on which considerable doubt must necessarily prevail.

My Lords, there is another question in this case, independent of that first, namely, Whether Isobel Russell, under whom the party claimed, had or had not made out her feudal title. That point was never considered in the Court below, they having decided the case upon the first point, and therefore it became unnecessary for them to exercise any judgment upon the second.

Now, upon the first point, namely, the personal right of Isobel Russell to execute the deed of entail, being the person undoubtedly entitled, but assuming that she had done nothing to obtain feudal investiture, we find the Lord Ordinary deciding in favour of the title of the defender, and therefore assuming that she had a right to execute this deed of entail. The Lord Ordinary gives reasons for the conclusion to which he comes. But when the case came before the Inner House, they came to the same result and the same conclusions that the Lord Ordinary had come to, but entirely displaced all the reasonings upon which he had proceeded. It

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appears, that they "recall the several findings of the "Lord Ordinary's interlocutor reclaimed against, and "find, that the personal right under the deed of settle- "ment executed by Mrs Elizabeth Fogo in 1769, vested "in Isobel Russell, the entailer, as disponee and insti- "tute under that deed, in consequence of James Russell "and Agnes Russell having predeceased the said Eliza- "beth Fogo: Farther, find, that, in virtue of the per- "sonal right so vested in her, the said Isobel Russell "had full power and capacity to execute the deed of "entail now under reduction." So far, therefore, we have the opinion of the Lord Ordinary, founded upon certain conclusions of law, from which the Inner House entirely dissent. Not only they do not act upon them, but they expressly recall the findings upon which he proceeded. That of itself would create very considerable doubts as to the course which your Lordships ought to adopt.

But the case does not rest there; because your Lordships find a case decided, Peacock v. Glen, which we have not been able to reconcile with the conclusion to which the Court of Session have come, it appearing, from the report of that case, that in a contest with a party claiming the benefit of an heritable bond, the judgment was against his title, because the party who had executed that bond had not made up his titles to the estate, although he had a clear personal right to the estate. Therefore your Lordships, upon a question of pure Scotch conveyancing, have a case directly opposed to the present; and your Lordships, in the present, have the Lord Ordinary and the Inner House coming to the same conclusion, but the Inner House rejecting the grounds upon which the Lord Ordinary had come to that conclusion.

This is a question certainly very much of juris positivæ, and there is very little analogy to be drawn from the laws of other countries. But it is most essential that the rules of conveyancing should be distinctly understood, that titles to real property in Scotland may not be endangered by the parties employed in conveyancing and in making up titles to estates not having accurately the principles by which they are to be governed. In a question of this sort, this House is very reluctant to interfere, and your Lordships are very much in the habit, where there appears to be no difference of opinion among the Judges, or the authorities in Scotland, whatever your Lordships' own opinion may be as to the propriety of the rule, of adhering to the opinions at which they have arrived, derived from the practice and experience of those who are conversant with that branch of the law of Scotland. But unfortunately, in this case, your Lordships have not the means of ascertaining, from the decision to which I have referred, what has been the practice, or what are the principles upon which, in the opinion of the Court of Session, questions of this sort ought to be decided. There are contradictory decisions, and there appears to be a difficulty on the part of the learned Judges, in laying down and describing plainly to the public and to the profession, what those rules and principles are.

Under these circumstances, it appears to us, that it would not be safe for this House to proceed to an adjudication, either in favour of the one side or the other, without having the benefit of the opinion of all the learned Judges, as to what the rule is, as founded upon principle and practice, and what it ought to be for the future. I shall move your Lordships, therefore, upon this occasion, to remit the cause, for the purpose of its

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being argued before all the Judges of the Court of Session, and your Lordships will then be enabled to come to a more satisfactory conclusion than you can do under the present circumstances of the case.

Ld. Chancellor's Speech.

My Lords, there is another point to which I have alluded, which we are anxious also should be brought under the consideration of the learned Judges, namely, as to the state of the feudal title; because, although when this case comes back, we may be in a situation to decide upon it, without reference to that point, yet if there should unfortunately be a difference of opinion among the Judges as to the question of the personal right, then we should be in the situation of not having the opinion of the Court below as to the second point in the case, namely, as to the state of the feudal title, and that might occasion another remit, which would be a great hardship upon the parties, and lead to considerable delay and considerable expense. We are therefore anxious that that point should be made a subject of consideration in the Court below, in order that when the case comes back to this House, we may have materials to enable this House to come to a final decision. It is very true, there was nothing in the case, as it came on before, to require the Court below to decide upon the question of the feudal title, in consequence of the decision to which they came upon the first point. But the case must be contemplated of this House not concurring in the opinion which has been formed, and which may be formed again, upon the first point, in which case it would be necessary to enter into an investigation of the second. We shall therefore be anxious not only to have the opinion of all the learned Judges upon the first point, namely, as to the personal right, but also as to the feudal title, which may, when this case comes

back again, enable your Lordships to adjudicate finally between the parties.

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MR ANDERSON. — Will your Lordships allow me to mention the matter of costs? Your Lordships will reserve the question of costs till the case comes back?

Ld. Chancellor's Speech.

LORD CHANCELLOR. — Of course the costs are reserved.

Judgment.

Ordered and Adjudged, That the cause be remitted back to the First Division of the Court of Session in Scotland, with direction that the same be argued before the whole judges of the Court of Session, (including the Lords Ordinary,) who shall consider not only the personal right of Isobel Russell to the lands of Row mentioned in the appeal, but also the state of her feudal title thereto, and shall deliver their opinions thereupon respectively. And this House does not think fit to pronounce any judgment upon the said appeal, until the whole of the said judges shall have given their opinions upon the matters hereby referred to their consideration under this order. And it is farther ordered, that all questions as to the costs of this appeal be reserved.

GILBERT BOLDEN — GRAHAM, MONCRIEFF, and WEEMS, Agents.