the railway station in Edinburgh on the 7th of the same month; find that the machine was on the 17th of February found to be defective in the centre web of the punching sheet, and that the defender then intimated to the sellers that he declined to accept delivery thereof; find that after some negotiation, during which the pursuers offered to cancel the contract, the parties agreed on the 27th and 28th of February that the defender, on the terms mentioned in the pursuers' letter of the 27th, should accept delivery and pay the price; find that this agreement related to the whole machine; find that on the 5th of March the defender intimated to the pursuers that the shearing part of the machine was defective, and that this defect has been proved; but find that the defender is precluded by the agreement of the 27th and 28th of February from rejecting the machine, or refusing to pay the price, on the ground of defects which were then apparent; therefore repel the defences, and decern against the defender in terms of the conclusions of the summons, and find him liable in expenses (with the exception of the expenses of the proof), subject to modification, reserving the question as to the amount thereof until the account is taxed, and remit to the Auditor to tax the expenses and to report."

Counsel for the Pursuers—Balfour and Brand. Agent—A. Kirk Mackie, S.S.C.

Counsel for the Defender—Guthrie Smith and Campbell. Agents—Macnaughten & Finlay, W.S.

Thursday, March 18.

FIRST DIVISION.

[Lord Craighill, Ordinary.

COFTON *v.* COFTON.

Proof—Court of Session Act 1868, § 15—*Interlocutor Sheet.*

Held that the provisions of the 15th section of the Court of Session Act of 1868, as to proving the tenor of a summons, petition, or other original writ or pleading, does not apply to an interlocutor sheet.

Friday March 19.

FIRST DIVISION.

[Lord Mackenzie, Ordinary

KENNY *v.* TAYLOR AND OTHERS.

Entail—Revocation—Substitute—Fee.

In 1816 a proprietor disponed his estate to himself in liferent, and to Ernest and the heirs-male of his body in fee, whom failing to Andrew and other substitutes under the fetters of a strict entail. The deed contained no disposition *hæredibus nominandis*, but reserved power to the granter to alter the course of succession and gratuitously dispone, declaring that all such alterations should be understood and taken as part of the entail, and should be as effectual as if inserted therein. In 1828 the entailer executed a deed of revocation and new disposition, whereby, on the narrative of the deed of 1816, and of the reserved power therein, and that he had resolved to alter the course of succession therein contained so far as regarded Andrew and the whole other persons substituted, he disponed his estate to himself in liferent, and to Ernest in fee, whom failing to the heirs-male of his body, whom failing to the heirs-female of his body, whom failing to K—— and the heirs-male of his body, whom failing to certain other substitutes, under the conditions, provisions, &c., contained in the said deed of entail, all which clauses (the procuratory of resignation and precept of sasine, and whole other clauses of that deed of entail) he thereby confirmed and assigned to his said disponees and heirs of entail—declaring that the said Ernest and persons substituted to him should be entitled to possess the said lands "under the foresaid deed of entail, and these presents, and under no other right or title whatever." This deed of revocation did not contain any of the fetters of entail and the whole substitutes, with the exception of Ernest and the heirs of his body, were different from those mentioned in the deed of entail of 1816. *Held* (1) that the deed of entail of 1816 was revoked and superseded by the deed of 1823; and (2) that in virtue of the latter deed, Ernest became fee-simple proprietor of the said estate.

This was an action of reduction and declarator at the instance of James William Gammell Kenny, late of the Honourable East India Company's Service, against Mrs Rosa Ann Bertram Gammell or Taylor and others, her trustees.

The following narrative is taken from the note of the Lord Ordinary (MACKENZIE);—

"By the disposition and taillie of 1816 James Gammell disponed to himself in liferent, and to Ernest Gammell and the heirs-male of his body in fee, whom failing, to Andrew Gammell and the other substitutes therein mentioned, under the fetters of a strict entail, the lands of Portlethen and others. The pursuer, Mr Kenny, is not one of these substitutes, and is not mentioned in the deed. There is no substitution in that deed of entail *hæredibus nominandis*. But the entailer thereby reserved power to alter the order and course of succession contained in the deed, and to revoke or alter all or any of the conditions, provisions, and irritancies therein contained, and to revoke the deed, and also to sell, burden, or even gratuitously dispose of the said lands as he might think proper, by writing under his 'hand,' which writing he provided 'shall be understood and taken as a part of this present deed of entail, and shall be as effectual to all intents and purposes as if the same had been inserted therein.'

"By the deed of revocation and new disposition of 1828 the entailer James Gammell, on the narrative of the previous deed of entail of 1816, and of the reserved power above mentioned, and that he had resolved to alter the course and order of succession therein contained, in so far as regards Andrew Gammell and the whole other persons substituted to Ernest Gammell and the heirs male and female of his body, revoked the said

disposition and deed of entail in so far as the same is granted in favour of the said substitutes, and the heirs male and female of their bodies, and nominated and substituted the persons thereinafter named; and he gave, granted, and disponed, to and in favour of himself in liferent, and to Ernest Gammell in fee, and the heirs-male of his body, whom failing, to the heirs female of his body, whom failing, to the pursuer Mr Kenny and the heirs-male of his body, whom failing, to the other substitutes therein specified, the foresaid lands of Portlethen and others, and bound and obliged himself to infeft and seise himself and the said Ernest Gammell, whom failing, the heirs of entail thereby substituted to him as aforesaid, in the said lands, with and under the burden of the provisions, conditions, restrictions, limitations, declarations, clauses irritant and resolutive, expressed in the said deed of entail, all which clauses he thereby confirmed, and he thereby assigned to his said disponees and heirs of entail in their order the procuratory of resignation and precept of sasine, and whole other clauses of that deed of entail, 'declaring that the said Ernest Gammell, and the persons substituted to him as aforesaid, shall be entitled to possess the said lands under the foresaid deed of entail and these presents, and upon no other right or title whatever.' That deed of revocation and new disposition does not contain any of the fetters of entail, and the whole substitutes, with the exception of the heirs male and female of Ernest Gammell's body, are persons different from those mentioned in the deed of entail of 1816.

"Ernest Gammell, the institute, died without issue on 23d February 1855. On 23d December 1852 he executed the disposition of the whole foresaid lands of Portlethen and others in favour of himself and the heirs-male of his body, whom failing, his wife, the defender Mrs Gammell, now Taylor. The defender Mrs Gammell, now Taylor, entered into possession of these lands on her husband's death, and having completed her title to the same, conveyed them by trust-disposition to Mr Bertram and the other defenders, her trustees, in 1857.

"In these circumstances, the pursuer, Mr Kenny, has raised the present action against Mrs Gammell, now Taylor, and her husband, and the other defenders as trustees, in which he concludes for reduction of the said disposition executed by Ernest Gammell in 1852, and of the title following thereon, in favour of Mrs Gammell, now Taylor, and of the disposition by her to her trustees, and for decree of declarator that he, as heir of entail next entitled to succeed after Ernest Gammell under the deed of entail of 1816, and deed of revocation and disposition of 1823, has the only good and undoubted right and title to the said estate, and that the defenders have no right thereto."

The pursuer pleaded—"(1) The deeds sought to be reduced being vitiated and erased *in substantialibus*, and otherwise defective in the solemnities required by law, ought to be reduced. (2) As the late Ernest Gammell held the estate subject to the fetters of a valid and effectual entail, constituted by the said deeds of 1816 and 1823, the disposition executed by him in 1852, being the writ first called for, was executed in contravention of the entail, and the pursuer, as heir of provision to the said Ernest Gammell under the said deeds, is entitled to have the same reduced and set aside. (3) The whole titles following thereon having been executed in contravention of the said entail are inept and reducible, and the pursuer is entitled to decree of reduction, as concluded for. (4) The pursuer being the heir entitled to succeed to the estate under the entail constituted by the said deeds of 1816 and 1823, the defenders have no valid title to the possession of the estates, and are bound to cede possession to the pursuer. (5) The pursuer is entitled to exhibition and delivery of the said deeds constituting the entail of the said lands, and the whole other writs and titles of the estate in possession of the defenders. (6) The defenders are bound to account to the pursuer for the rents of the estate from and after the date of citation."

The defenders pleaded—"(1) The defender should be assoilzied, in respect that the conclusions of the summons are not supported by any relevant or sufficient averments. (2) The action is barred by the pursuer's *mora* and acquiescence. (3) The pursuer is not entitled to have the disposition executed by Ernest Gammell in 1852 reduced or set aside, in respect that Ernest Gammell did not hold the estate thereby conveyed under the fetters of a valid and effectual entail, or under any title effectually prohibiting him from executing such disposition. (4) The pursuer is not entitled to claim the estate, or to set aside the titles of the defenders in so far as these depend upon the entail of 1816—1, in respect that said deed was revoked, and the conveyance of the lands therein contained was superseded by the new disposition of the estate contained in the deed of 1823, and 2, and *separatim*, in respect that the pursuer is not called to the succession by, and that he has no *jus crediti* under, said deed of 1816. (5) The pursuer is not entitled to claim the estate, or set aside the defenders' titles in so far as these depend upon the deed of 1823, in respect that said deed was a new and substantive disposition of the entailed estate by James Gammell of Countesswells, and that it does not contain the prohibitory, irritant, or resolutive clauses in terms of the Act 1685, c. 22. *Separately*, The attempted assignation by James Gammell in the deed of 1823 of the procuratory of resignation and precept of sasine in the deed of entail of 1816 was wholly inept, and the disponees and substitutes called to the succession by the deed of 1823 could not competently use said assignation as a means of obtaining infeftment in the said estate under the fetters of the entail of 1816. (6) *Esto*, that so far as regarded Ernest Gammell the entail of 1816 remained unrevoked, and that his infeftment was a valid infeftment under that deed, the pursuer is not entitled to prevail in this action, in respect that the destination contained in that deed in favour of all the heirs called to the succession after Ernest Gammell and the heirs of his body was effectually revoked by the deed of 1823, and that, as Ernest Gammell died without issue, the estate was effectually transmitted to his wife by his disposition of 1852. (7) The pursuer having no right or title to the estate, the defenders should be assoilzied from the whole other conclusions of the action."

The Lord Ordinary (MACKENZIE) pronounced this interlocutor—

Edinburgh, 1st December 1874.—The Lord Ordinary having heard counsel, and considered the closed record, with the disposition and taillie by

James Gammell of Countesswells, dated 15th March 1816, and recorded in the Register of Entails on 9th July 1816, deed of revocation, nomination, and disposition by the said James Gammell, dated 16th April 1823, and recorded in the Register of Entails on 19th February 1828, and the deeds and writs sought to be reduced: Repels the reasons of reduction, assoilzies the defenders from the conclusions of the summons, and decerns: Finds the pursuer liable in expenses, of which allows an account to be given in, and remits the same, when lodged, to the Auditor to tax and to report."

The pursuer reclaimed.

Authorities cited:—*Mure* v. *Mure*, Feb. 16, 1837, 15 S. 581; *Farquhar* v. *Hamilton*, Feb. 3, 1842, 4 D. 600; *Gordon* v. *Gordon*, Mar. 1, 1862, 24 D. 687; *Lennie* v. *Lennie*, June 20, 1860, 22 D. 1272; *Gammell* v. *Cathcart*, Nov. 13, 1849, 12 D. 19; *Forbes* v. *Gammell*, May 14, 1858, 20 D. 917; *Paterson* v. *Leslie*, July 1, 1845, 7 D. 950; *Fowler* v. *Fowler*, Jan. 28. 1869, 7 Macph. 420; *Fraser* v. *Lord Lovat*, Feb. 28, 1842; 1 Bell, 105; Stair 4, 8, 8; Ersk. 3, 8, 32.

At advising—

Lord Deas—By deed of entail, dated 15th March 1816, and recorded in the Register of Entails 9th July same year, the late James Gammell disponed his estate of Portlethen and others to himself in life-rent, and his grandson Ernest Gammell and the heirs male of his body in fee; whom failing to his grandson Andrew Gammell and the heirs male of his body in fee; whom failing to his other grandsons named and the heirs male of their bodies in their order; "whom failing to the heirs female of the body of the said Ernest Gammell," and so on.

The deed contained procuratory of resignation and precept of sasine, and all the usual clauses of a strict entail, including an obligation to possess on the tailzied titles only. The deed contained a power to revoke and alter the course of succession, as well as the disposition generally, by any writing or writings under the entailer's hand, "which writing or writings shall be understood and taken as a part of the present deed of entail, and shall be as effectual, to all intents and purposes, as if the same had been inserted herein."

The precept of sasine directed sasine to be given to the entailer, "and to the said Ernest Gammell, whom failing to the other heirs of entail abovementioned appointed to succeed to him in the order before specified for our respective rights of liferent and fee," subject to the conditions, clauses irritant and resolutive, expressed in the deed, and held as repeated *brevitatis causa*, "but which are hereby expressly appointed, as aforesaid, to be verbatim inserted in the infeftments to follow herein."

By a subsequent deed, dated 16th April 1823, and recorded in the Register of Entails on 19th February 1828, the entailer narrated the deed of entail, and the power of alteration and revocation thereby reserved to him, and then proceeded—"And whereas I have now resolved to alter the foresaid course and order of succession in so far as regards the said Andrew Gammell, James Gammell, William Gammell, Martha Gammell, Margaret Gammell, Mary Gammell, Jessie Gammell, and the heirs male and female of their bodies, I have therefore revoked, and do hereby revoke, the foresaid disposition and deed of entail in so far as the same is granted in favour of the said Andrew, James, William, Martha, Margaret, Mary, and Jessie Gammell, and the heirs male and female of their respective bodies, and in their place I do hereby nominate and substitute the persons afternamed." At the end of the nomination of heirs there followed a description of the lands disponed verbatim, as in the original deed, together with an obligation to infeft the said Ernest Gammell, "whom failing the heirs of entail hereby substituted to him as aforesaid in the foresaid lands, in manner and in the terms specified in the foresaid deed of entail, with, and under the burden of the provisions, conditions, restrictions, limitations, declarations, clauses irritant and resolutive, expressed in the said deed of entail, all which clauses I hereby confirm, and do hereby assign to my said disponees and heirs of entail in their order, the procuratory of resignation and precept of sasine and whole other clauses in said deed of entail; declaring that the said Ernest Gammell, and the persons substituted to him as aforesaid, shall be entitled to possess the said lands under the foresaid deed of entail and these presents, and upon no other right or title whatever; and also that the said Ernest Gammell, son of the said Lieutenant-General Andrew Gammell, and the heirs of entail hereby substituted to him in the order before-mentioned, shall be obliged to record these presents in the Register of Taillies, as also in the Books of Council and Session, in case the same shall not have been done by myself." Then followed a reservation of power to revoke and alter both the original deed and this deed at the pleasure of the entailer.

The entailer died on 15th September 1825, and both deeds were thereupon duly recorded in the Register of Entails. Ernest Gammell completed a feudal title by infeftment on 17th April 1830, which was duly recorded in the Register of Sasines on 18th May, same year, and obtained a Crown charter of confirmation in the course of the same year. This infeftment bore to proceed upon both deeds, and it is enough to say in regard to it that in its form it appears to be unexceptionable as a tailzied investiture in his person, completed by confirmation, subject to the questions now raised as to the import and effect of the two deeds on which the infeftment bore to proceed.

Earnest Gammell afterwards executed a deed on the footing that he was fee-simple proprietor of the lands, and the question is whether there was any one substituted to him and the heirs of his body who would take under the fetters of the entail. If there is any such substitute it must be in virtue of the provisions of one or other of these two deeds, and it is therefore necessary to examine these deeds and to see what their effect is. There is no doubt that an entail can't be made by reference from one dispositive deed to another. That was decided in the case of *Broomfield* v. *Paterson* (March 11, 1786, M. 15,618), which was an action at the instance of creditors objecting to the validity of an entail. A second entail had been made, differing in the destination from the first, with a clause merely referring to the prohibitory, resolutive, and irritant clauses in the first deed, and it was held that this reference to the contravention clauses was not sufficient to protect the estate against creditors. The decision of the Court of Session was affirmed on appeal by the House of Lords, and the interlocutor of the Court on remit from the House of

Lords was this:—"Find that in respect the disposition 1758 differs in several articles from the entail 1743, and, in particular, that certain heirs or substitutes, called by the entail 1743, are omitted in the disposition 1758, and that this disposition was followed with charter and infeftment, therefore it is to be held a new settlement of the estate; and not having contained the clauses, prohibitive, irritant, and resolutive, and not having been recorded in the register of entails, is not an effectual entail: Find that in respect the clauses irritant and resolutive in the entail 1743 are not particularly inserted in the disposition 1758, the same, though held as a conveyance, is not effectual against creditors."

The importance of that interlocutor is that it shows on the face of it that the question of reference from one deed to another was directly decided in this case.

Then when we pass down from 1786 to 1842 we find the case of *Lindsay* v. *The Earl of Aboyne*, 2d March 1842, 4 D. p. 843, where there was a supplementary entail. Other questions were there raised, but the second head of the rubric is—"Held that an entail described as supplementary to a previous entail of other lands was ineffectual against the creditors of the institute of entail, in respect that it did not itself set forth the fetters under which the lands were conveyed, but made reference for them to the previous entail." The consulted Judges in their opinions go very fully into that point, and there can be no room for doubt now that an entail cannot be made by reference. But although the entail in one deed cannot be imported by reference into another, there is nothing to prevent an effectual nomination of heirs or alteration of succession being made in a separate deed, provided the original deed is expressed in terms which contemplate that being done. But it is a fundamental principle of our law of conveyancing that in order to convey heritable estate there must be a disposition of that estate in favour of parties who are to come in as disponees either directly or as substitutes. The way in which that is rightly done when a separate deed of nomination is intended, is, that the original deed conveys not only to the substitutes named, but also to such person or persons as the entailer may name or describe in any deed subsequently made by him. When the original deed is in these terms, there is a disposition, not only to those named in that deed, but also to those named in the deed of nomination, and it is only in that way that the law is satisfied by reference from one deed to the other. A dispositive clause in an original deed conceived in such terms is good to those named in the deed of nomination. The principle is clear. Almost every destination may fail, and disponees don't require to be existing. They may be described as heirs or heirs-male of a man who at the time has no heirs, and may never have any. But that is just as much a conveyance as if the heirs were in existence and named. On the same principle, and not a more extensive one, the conveyance is good if the disponees are named in a deed of nomination.

As respects the deed of entail here (the first deed), the fatal objection to the pursuer's claim under it is, that it is not a disposition to substitute him at all, and therefore wants what is fundamental, viz., any disposition in his favour, or any description whatever. When we come to the second deed, however, we find a disposition to the pursuer. In the first place, there is a revocation of the nomination clause in the former deed. It is said:—"I have therefore revoked, and do hereby revoke, the foresaid disposition and deed of entail in so far as the same is granted in favour of the said Andrew," &c. Then you have a disposition in favour of Earnest Gammell, and an obligation to infeft, with an assignation of the procuratory and precept of sasine. Then William Gammell Kenny comes in as a disponee under this deed. But that is a disposition in a deed which does not contain prohibitory, resolutive and irritant clauses, these clauses being attempted to be introduced by reference. The position in which Mr Kenny, stands is, that he is not a substitute under the entail at all, but holds under a disposition imposing no fetters. A title was made up by Earnest Gammell as under the entail. But that did not prevent him asserting his right of being the last party under the nomination. There is this difference between this and the *Countesswell's* case (1 M'Q. 343), that there there was no tailzied restriction at all, whereas here the disposition in the first deed stands in the second deed so far as Earnest Gammell is concerned, and I think that in regard to him and heirs-male of his body the entail is good. I do not think, however, that the distinction between the two cases makes any substantial difference, but that this case is on all fours with that of *Countesswells*.

Lord Ardmillan—In considering the somewhat novel and interesting question here raised, it is important to bear in mind the position of the pursuer in reference to the two deeds executed by the late James Gammell.

The pursuer is not named, described, or suggested in the first deed executed in 1816, which is a deed of entail. There is in that deed of 1816 no dispositive clause to the benefit of which the pursuer can make any claim. There is a reserved power to revoke or alter the order of succession, or generally to revoke the deed altogether, but there is no disposition to any who are not therein named or described. There is no substitution *hæredibus nominandis*, and no reserved power to introduce new heirs substitute of entail. Ernest Gammell is the institute under that deed of entail, and the usual fettering clauses of entail are there introduced.

In 1823 the second deed was executed by Mr James Gammell. By that deed he disponed to himself in liferent and to Ernest Gammell in fee and the heirs-male of his body, whom failing, to the heirs-female of his body, whom failing, to the pursuer now Colonel Kenny and the heirs-male of his body, whom failing, to other substitutes therein named. James Gammell, the entailer, died in September 1825, and was succeeded by Ernest Gammell, the institute under both deeds, who made up a title under both deeds, I think, in 1848, and possessed till he died without issue, in 1855. In December 1852 Ernest Gammell, in order to defeat the entail, disponed to his wife, now Mrs Taylor. That disposition was recorded in April 1855, after Ernest Gammell's death. Mrs Ernest Gammell, now Mrs Taylor, is the defender in this action, having taken under that deed and having been served heir of provision to her husband.

The question which the Court have to dispose

of is, whether Ernest Gammell held the property under the fetters of the entail, since, if he did, his disposition in favour of the defender is of no force, and must be reduced. On the other hand, if Ernest Gammell held the estate in fee simple, the pursuer cannot succeed in this action, and the defender Mrs Taylor, is entitled to absolvitor.

The Lord Ordinary has repelled the reasons of reduction and assoilzied the defenders. I am of opinion that he has rightly decided.

I concur generally in the views expressed by Lord Deas, and I have little to add.

It appears to me impossible, on any intelligible principles of legal construction, to read the two deeds, that of 1816 and that of 1823, as forming one deed of entail. I think the later deed superseded the earlier deed. It is well settled that the fettering clauses must be found within the body of a deed of entail. Of this there is no doubt in a question with creditors, and since the Rutherfurd Entail Act the same rule applies, as I think, in a question *inter hæredes*. In the very able argument for the pursuer, this point on construction of the Rutherfurd Act was not disputed. Now, there are no fettering clauses within the deed of 1823; and unless the destination in the deed of 1823 can be brought within the fettering clauses of the deed of 1816, there is no entailed destination in the deed of 1823. But it is attempted to bring the destination within the fettering clauses of the earlier deed, so as to entitle the pursuer, who is not a disponee or a substitute under the earlier deed, to plead as against Ernest Gammell the fetters imposed by that earlier deed. Under the first deed this pursuer has no right whatever. There is no disposition to him. If there had been a clause reserving a right to name heirs of entail, and disponing to the heirs to be so named, and if, in the exercise of that right, a new deed of nomination of heirs had been executed bringing the pursuer within the scope of the previous deed, his position would have been very different. But the pursuer has no other right than what is conferred by the second deed, and the second deed is not an entail. The first disponee under the second deed is Ernest, and if there be no fettering clauses there is no entail, and if there be no entail within the second deed then Ernest held in fee simple. A reserved power to alter the succession does not imply a power to bring a new substitute heir of entail within the first deed. A power to revoke the first deed may be exercised by direct revocation, or it may be exercised by the execution of a deed inconsistent with the first deed, but revocation is a very different thing from the introduction of new heirs into an entail, and indeed revocation will not answer the pursuer's purpose. If the deed of 1816 is revoked, the deed of 1823 stands alone. If the deed of 1816 had permitted the nomination of new heirs, or if, to use an expression appropriately suggested in former cases, the first deed had constructed a niche in the line of succession under the entail into which a new heir could be planted in the exercise of that reserved power to nominate, then the new heir might have been brought within the first deed and within the fetters. But plainly there is nothing of the kind here. The deed of 1823, with its new structure and its new dispositive clause, and the introduction of new heirs, has been executed under a reserved power to revoke, and not under a reserved power to nominate. As a separate and independent deed it is a disposition to Ernest and the heirs male or female of his body, whom failing, to the pursuer. But that disposition is not qualified by any fettering clauses. You cannot find the fettering clauses outside of the later deed; and you have no disposition to the pursuer in the earlier deed, so that, where the fetters are there is no disposition, and where the disposition is there are no fetters. The pursuer can only claim under a deed which gives a prior right in fee simple to Ernest. The result is, in my opinion, that the pursuer has no right whatever except under the second deed, and under that deed he is postponed to Ernest, to whom the disposition on which alone the pursuer founds is made without any fettering clauses.

It was natural and proper for the pursuer to establish, if possible, a distinction between the present case and the case of *Countesswells;* and we have had ingenious argument in support of that distinction—an argument deserving careful consideration.

I do not say that the decision in the case of *Countesswells* is in all respects exactly in point, or is altogether conclusive of the present case. (*Gammell* v. *Cathcart*, 12 D. p. 19, 13th Nov. 1849) but without holding it conclusive as a decision, I think that the judicial opinions in the case of *Countesswells* are extremely important, and that the leading points maintained by the pursuer in this action were then under consideration of the Court. In the note of Lord Wood, who was Lord Ordinary, and in the opinion of all the judges, particularly of Lord Mackenzie, there is an exposition of law very valuable, and strikingly appropriate to the deeds now before us. Without dwelling on these opinions which were pronounced in the *Countesswells* case—a case raised in regard to deeds made by the same granter as the present, and about the same time, though in reference to a different estate—Without quoting at length, I may mention that Lord Mackenzie says in the *Counteswells* case—"The deed of 1823 is not a mere revocation of part of the prior deed. It contains a grant to new parties, not a grant *heredibus nominandi* of the old deed. There was no such clause in the first deed. A power to alter does not imply a power to insert new grantees as named in the deed having the power." Lord Fullarton, concurring in the opinion, held the later deed alone to be effectual, and as entirely superseding the earlier deed. It is true that in the later deed in this case Ernest, who was the institute in the first deed, is again institute. But he is so under a new disposition, with new substitution of heirs, and without any fettering clauses. Now, I entertain no doubt that Ernest, taking under the later deed, as he was entitled to do, was free from the fetters of the entail, and consequently that his disposition in favour of the defender is not liable to reduction at the instance of the pursuer, whose only right is under the same later deed. In the deed which contains the fetters the pursuer has no right whatever.

Another view has been presented to us by the defender—proceeding on the assumption, for the sake of argument, that even if Ernest held under the entail still he held with no substitutes to follow, as he had no heirs of his body, and was the last heir previous to a destination to heirs whatsoever, and was therefore free. I do not think it necessary to deal with this plea, though there is

some force in the argument from analogy by which it has been supported. My opinion rests on the broader view which has been already explained by Lord Deas, and in which I concur.

LORD MURE concurred.

The LORD PRESIDENT—I concur that the judgment of the Lord Ordinary should be affirmed, because I cannot distinguish in principle between this case and that of *Countesswells*. There are some distinctions in point of fact, but I don't think they affect the principle. It is remarkable that in the two cases the deeds are word for word the same, except the description of the lands and the names of the disponees.

In the present case the original deed conveyed the whole estate to Earnest Gammell as institute, and the heirs male of his body and a series of substitutes. The deed contained no conveyance to heirs *nominandis*, but very full power was given to alter and revoke. It appears to me that the entailer could not by any mere deed of revocation and nomination introduce new heirs into the destination of the first deed, but by deed of revocation he had power to shut out any of the heirs in the first deed, and by the second deed he proceeded to exercise that power of revocation in these words: "And whereas I have now resolved to alter the foresaid course and order of succession in so far as regards the said Andrew Gammell, James Gammell, William Gammell, Martha Gammell, Margaret Gammell, Mary Gammell, Jessie Gammell, and the heirs-male and female of their bodies, I have therefore revoked, and do hereby revoke, the foresaid disposition and deed of entail, in so far as the same is granted in favour of 'them,' and the heirs-male and female of their respective bodies, and in their place I do hereby nominate and substitute the persons afternamed."

The effect of this was to strike out all the substitutes, and leave the institute alone and the heirs male of his body. The nomination of substitutes, in place of those struck out I think utterly useless, as there is no conveyance in the original deed to heirs *nominandis*. So if this deed had stood alone the effect would have been to leave the estate to Earnest Gammell and his heirs male. But the deed does not stop here, but conveys the estate anew. That conveyance is not limited to the new heirs called by the second deed, but is a conveyance to the granter in liferent, and to Earnest Gammell and the heirs male of his body, whom failing, to the heirs female of his body, whom failing, to the substitutes then mentioned for the first time. Now, looking to all the clauses of the deed, was this a valid attempt? There is a new conveyance of the estate, which comes in place of the original conveyance. But that is just the case of *Countesswells*, so it is not necessary to go further, for the distinction between the cases is of no materiality. In both cases the effect of the revocation was not to destroy the first deed, but to leave a portion of it standing; and it was the conveyance which followed that superseded the previous deed as a settlement of the estate. In this case the original deed would have stood if it had not been swept away by the new conveyance in the deed before us.

The Lord Ordinary has said that he has been unable to distinguish between the case of *Cathcart* and the present. That is somewhat loosely expressed, but there is no doubt that the principle is the same. We therefore adhere to the interlocutor of the Lord Ordinary.

The Court pronounced this interlocutor:—

"The Lords having heard counsel on the reclaiming note for Colonel J. W. G. Kenny against Lord Mackenzie's interlocutor of 1st December 1874; adhere to the interlocutor, and refuse the reclaiming note; find the pursuer liable in additional expenses, and remit to the auditor to tax the account thereof, and report."

Counsel for the Pursuers—Dean of Faculty (Clark), and Asher. Agents—M'Ewen & Crament W.S.

Counsel for the Defenders—Solicitor-General (Watson), and Lee. Agent—John Auld, W.S.

Saturday, March 20.

SECOND DIVISION.

RAE *v.* LINTON & THE BANK OF SCOTLAND.

(*Ante*, p. 148.)

Jury Trial—Issues—Malice.

A party was imprisoned on a conviction before the Police Court, which was afterwards quashed by the High Court of Justiciary on the ground that no crime had been libelled. In an action of damages at his instance against the Procurator-Fiscal and the party on whose information he was apprehended,—*held* that he must take an issue of malice and want of probable cause.

This case came up on a notice of motion by the pursuer to vary issues, in an action at his instance against Thomas Linton, Procurator-Fiscal of the Police-court of Edinburgh, and also against the Bank of Scotland. The pursuer was convicted in the Police-court in August last of having wickedly and feloniously obtained money under false pretences, and sentenced to 20 days' imprisonment. This conviction was subsequently quashed by the High Court of Justiciary, on the ground that no crime had been libelled. (See *Rae* v. *Linton, ante*, p. 148.) Rae now claimed damages in respect of his illegal apprehension and imprisonment. The following were the issues as adjusted by the Lord Ordinary (CRAIGHILL):—(1) Whether the defenders, the said Governor and Company of the Bank of Scotland, on or about the 7th day of August 1874, maliciously, and without probable cause, caused the pursuer to be apprehended, and thereafter to be tried in the Police-court of the city of Edinburgh, and convicted of the crime of falsehood, fraud, and wilful imposition, and subsequently to be imprisoned in the prison of Edinburgh for twenty days, to the loss, injury, and damage of the pursuer. Damages laid at £2000. (2) Whether on or about the 7th day of August 1874, the defender, the said Thomas Linton, maliciously, and without probable cause, caused the pursuer to be apprehended, and thereafter to be tried and convicted in the Police-court of the city of Edinburgh for the crime of falsehood, fraud, and wilful imposition, and subsequently to be imprisoned in the prison of Edinburgh for twenty days, to the loss, injury, and damage of the pursuer? Damages laid at £2000." The pursuer now moved the Second Division to vary the issues