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

so adjusted by deleting the words "maliciously and without probable cause" from each issue, and inserting in their stead the word "wrongously."

The defender Linton pleaded 27 and 28 Vict. c. 53, sec. 30, which provides that no Procurator-Fiscal, or other party prosecuting for the public interest, by complaint under that or any other Act, shall be liable to pay a greater sum than £5 as damages for any proceedings taken or anything done on such complaint, or on any judgment following on such complaint, "unless the person prosecuting for damages shall aver and prove that such proceedings were taken or done maliciously and without probable cause."

Authorities cited:—*Arbuckle*, 3 Dow, 160; *Hollands*, 5 D., 1352; *Strachan*, 7 D., 399; *Barclay*, 16 D. 714; *Mains*, 23 D., 1258; *Bell*, 3 Macph., 1026.

At advising—

Lord Justice-Clerk—I have no doubt in this case. We have here in the first place a private party informing the competent officer of his complaint, and then we have that officer taking the proper steps to have the complaint investigated and tried. It is ultimately found that the complaint is not relevant—not that it did not set forth what might be a crime, but that the acts averred did not amount to the crime libelled. The question now is whether the defenders are liable without an averment of malice. In my opinion this is just such a case as requires proof of malice, even independently of the Police Act. This has been found over and over again. The case of *Bell* was very different. The ratio of that judgment was that the Fiscal acted without even the slightest colour of law. It may indeed in this case turn out that the defenders knew things which we have as yet no proof they did know, but in that case it will be easy to infer malice.

The other Judges concurred.

The Court refused the motion.

Counsel for the Pursuer—Dean of Faculty (Clark) and M'Kechnie. Agent—W. S. Stuart, S.S.C.

Counsel for Thomas Linton—M'Laren. Agents—Richardson & Johnston, W.S.

Counsel for the Bank of Scotland—Macdonald. Agents—Tods, Murray, & Jamieson, W.S.

HOUSE OF LORDS.

Tuesday, February 23.

(Before Lord Chancellor Cairns, Lords Hatherley and Selborne).

ARCHIBALD T. F. FRASER OF ABERTARFF *v.* LORD LOVAT *et e contra.*

(*Ante*, vol. x. p. 353.)

Entailed Estate — Relief—Executry—Vouching of Accounts.

Circumstances in which *held* (aff. judgment of Court of Session) that an executor was entitled to relief against an entailed estate for various accounts paid by him as executor.

These were appeals and cross-appeals arising in conjoined actions in the First Division of the Court of Session. Actions of declarator were raised by the appellant against himself as heir of entail in possession of Abertarff, and also against Lord Lovat and others, the substitute heirs of entail. The first action was raised in 1855, for the purpose of declaring that certain sums, amounting to £29,741, were just debts of the deceased Hon. Archibald Fraser of Lovat, due by him at his death in 1815, and that the lands were held under the burden of payment and of relieving the executry of such debts. A supplementary action was raised in 1859, so as to bring in other claims of the same kind, amounting to £9481, and of a sum of £7293 as expenses of litigations in reference to the affairs of the late Archibald Fraser, and of the sum of £30,000 as the excess of the interest on the debts and on the relative claims, expenses, and outlays from the date of the death of Archibald Fraser, over and above the free rents of the entailed lands; also of the sum of £5000 as the alleged amount of the diminution of the said Archibald Fraser's executry by the pursuers having to borrow money, and to insure his life for the purpose of raising money to pay such debts, claims, and expenses. Defences were lodged, and then a remit was made to Mr Adam Gillies Smith, accountant, to inquire and report as to these debts. The accountant made his report, and in January 1872 Lord Jerviswoode pronounced an interlocutor, finding that certain sums, established as debts due by the deceased at his death, and paid by or on behalf of the pursuer, must be allowed, and finding that certain other sums must be disallowed. The total sums included in the remit were £39,223, and of this about £19,916 was allowed as a burden on the entailed estate, and a sum of £19,306 was disallowed. The appellant reclaimed against this interlocutor, and the First Division altered it, and allowed £17,750 as debts of the deceased Lovat, with interest, and found that other claims were not sufficiently established, and must be disallowed. The sum disallowed was £21,472. Appeals and cross-appeals were now made against these interlocutors so far as they prejudiced each of the parties. One of the main questions turned on the construction of the deed of entail executed in 1808 by the Hon. A. Fraser of Lovat, to whom the estate had come by purchase. That deed disponed the estate to the respondent Thomas Alexander Fraser of Strichen (now Lord Lovat), and his heirs male, and to other substitutes, but under burden of payment "of all my just and lawful debts due and addebted, or which may be due or addebted by me at my death, which said debts shall in no ways affect or diminish my executry or other funds, property, or effects, unless such executry shall be given and conveyed by me to the said Thomas Alexander Fraser of Strichen, and to their substitutes above-mentioned," and also under the burden of a variety of annuities and legacies. By a later deed, dated 1812, Lovat, in exercise of a power to alter the deed of 1808, appointed the appellant and the heirs-male of his body to succeed to the estate immediately after himself and the heirs of his own body. The appellant, after Lovat's death, claimed to possess the estate in fee simple, but after a long litigation the Court of Session found that he was bound to take up the estate under the fetters of a strict entail, and such an entail was executed in 1851. This deed was in favour of the appellant and his heirs-male,