

[Hear'd, 30th March, 1841. — Judgment, 28th Feb. 1842.]

ARCHIBALD THOMAS FREDERICK FRASER, Appellant.

THE RIGHT HONOURABLE THOMAS ALEXANDER LORD LOVAT,  
Respondent.

*Entail.* — Reference in one deed to another, held sufficient to authorize a decree, directing an entail of lands in terms of the deed referred to, to be executed by the party called as institute, and already in possession under a title made up in fee-simple.

*Ibid.* — Terms of deeds, under which a party was held to be called as a substitute, not an institute of entail.

*Res Judicata.* — Held, that a decision in competing actions for the fee-simple of lands, as given by different deeds, did not form *res judicata* against the unsuccessful party in these actions, subsequently seeking to establish, that the successful party must hold under the fetters of an entail created by the same deeds.

IN 1805, the Honourable Archibald Fraser executed an entail of lands lying in the parishes of Boleskin and Abertarff “in  
“ favour of myself and the heirs-male of my body ; whom failing,  
“ to such other heirs as I, or failing me, the heir-male of my  
“ body for the time, shall name and appoint under my or his  
“ hand ; whom failing, to and in favour of my heirs whatsoever.” This deed contained a recital of a previous entail executed by the maker in favour of a different series of heirs, which had been reduced at his instance.

On the 25th June, 1808, the same Archibald Fraser disposed to his grandson, “ Thomas Frederick Fraser,” son of his son Simon Fraser, “ and to the heirs to be lawfully procreated of his  
“ body ; whom failing, to Archibald Fraser M'Pherson, my  
“ nephew, and the heirs of his body ; whom failing, to  
“ Fraser, the second son of Sir William Fraser of Ledclune ;  
“ whom failing, to the heirs of his body ; whom failing, to such

FRASER v. LORD LOVAT. — 28th Feb. 1842.

“ person or persons as I shall name by writing, heritably and  
 “ irredeemably, and with and under the provisions and restric-  
 “ tions after-mentioned, all and whole,” certain subjects in the  
 towns of Inverness and Campbeltown ; “ As also, all and sundry,  
 “ and all and every other lands and heritages which belong or  
 “ may belong to me at the time of my death, and which may  
 “ not be otherwise settled and disposed by me,” and his whole  
 personal means and estate ; “ reserving always my own liferent  
 “ right and use of the hails subjects above disposed, both herit-  
 “ able and moveable, with full power and liberty to me, at any  
 “ period of my life, or even on deathbed, to alter, innovate, and  
 “ revoke these presents, in whole or in part ; to sell, alienate,  
 “ and dispose the lands and other heritages before mentioned,  
 “ or any part thereof, or to contract debt thereupon.”

On the 15th day of August, 1808, Archibald Fraser, describ-  
 ing himself as “ heritable proprietor of the lands, teinds, and  
 “ others, after described,” likewise executed another deed of  
 entail, whereby he disposed “ to and in favour of the nearest  
 “ legitimate male issue of my ancestor Hugh Lord Fraser of  
 “ Lovat, namely, Thomas Alexander Fraser of Strichen, being  
 “ the nearest lawful heir-male of the deceased Alexander Fraser  
 “ of Strichen, and his heirs-male ; whom failing, to and in favour  
 “ of the late Hugh Fraser of Struie, and the heirs-male of his  
 “ body ; whom failing, to and in favour of the nearest lawful  
 “ heir-male of the late William Fraser of Kilbockie, and his  
 “ heirs-male ; whom failing, to and in favour of Simon Fraser,  
 “ Esquire of Faraline, and his heirs-male ; whom failing, to and  
 “ in favour of the person who shall be then able to prove him-  
 “ self to be the chief of the clan Fraser, by legitimate descent  
 “ from Hugh first Lord Lovat, and his heirs-male ; whom all  
 “ failing, to and in favour of my own nearest lawful heirs and  
 “ assignees whatsoever, heritably and irredeemably, All and  
 “ Whole, the following parts and portions of the lands of Aber-  
 “ tarff, and others after-mentioned, as well the *dominium utile*,

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

“ or property, as the *dominium directum*, or superiority of the  
“ same, now standing in my person in fee-simple, through the  
“ failure of heirs of my body, namely, all and whole,” &c.  
“ and farther, all and whole the following lands and others  
“ lately acquired by me, namely, all and whole the first lot of  
“ the lands and barony of Auld Castlehill,” by their description ;  
then lots three and four, lot            and lot five of Auld Castlehill,  
each lot being particularly described, under the burden of certain  
annuities and legacies, and a condition, “ that the said Thomas  
“ Alexander Fraser, and the heirs of tailzie and provision hereby  
“ appointed,” should be obliged to bear and retain the arms and  
designation of Fraser of Abertarff. “ And with and under the  
“ condition and provision also, that the said Thomas Alexander  
“ Fraser, the nearest heir-male of the said deceased Alexander  
“ Fraser of Strichen, and the heirs of tailzie and provision hereby  
“ appointed, shall be obliged to possess and enjoy the lands and  
“ estates hereby disponed in virtue hereof, and under the pre-  
“ sent tailzie, infestments, rights, and conveyances to follow  
“ hereupon, and by no other right or title whatsoever, as also to  
“ cause engross, and *verbatim* insert, the foresaid course and  
“ order of succession, and the several conditions, burdens, provi-  
“ sions, limitations, restrictions, clauses irritant and resolute,  
“ declarations, and others herein contained; and that in the  
“ instruments of resignation, charters, and infestments, to follow  
“ thereon, and in all the subsequent procuratories and instru-  
“ ments of resignation, charters, special retours, services, instru-  
“ ments of sasine, and other transmissions and investitures of the  
“ said lands and estates, and that so long as the same remain  
“ burdens upon, and do or may affect the said lands and estates  
“ in any manner or way: And with and under this condition  
“ also, that the said Thomas Alexander Fraser, the nearest heir-  
“ male of the said deceased Alexander Fraser of Strichen, and  
“ my whole heirs of tailzie and provision, shall be obliged to  
“ make payment of the whole foresaid sums of money, annuities,

FRASER v. LORD LOVAT. — 28th Feb. 1842.

“ and others above specified, from time to time, as the same may  
 “ fall due in manner before mentioned, with any other sums of  
 “ money or annuities which I may leave or provide, and declare  
 “ a burden affecting the foresaid lands and estates ; together also  
 “ with the feu-duties, &c. reserving always to myself full power  
 “ and liberty, at any time of my life, and even in the article of  
 “ death, to revoke, alter, or innovate, these presents, in whole  
 “ or in part, and to burden and affect the same with such addi-  
 “ tional sums of money, annuities, and others, and also with such  
 “ conditions, provisions, and irritancies, as I may see proper.”

On the 26th July, 1811, Archibald Fraser executed a trust-  
 disposition, in favour of Campbell and others, of his whole lands  
 and heritages, including specifically the lands of Abertarff, as  
 described in the deed of 1805, “ now standing in my person in  
 “ fee-simple, through the failure of heirs of my body ; but  
 “ excepting always herefrom the lands and barony of Auld  
 “ Castlehill, both property and superiority, belonging to me ;  
 “ and also all other lands and heritages not therein specially dis-  
 “ posed, which may be contained in any deeds of entail, or other  
 “ settlements executed or to be executed by me, and which shall  
 “ remain uncanceled or unrevoked at the time of my death,”  
 upon trust to execute “ a deed of entail, with prohibitory, irritant,  
 “ and resolute clauses of the foresaid lands and estate of Aber-  
 “ tarff, above described, and likewise of the whole unentailed  
 “ property belonging to me, and which may remain undisposed  
 “ of, after fulfilling the different purposes of this trust, and to  
 “ settle and secure the whole of said subjects, *omni habili modo*,  
 “ by registration of the said entail, and completing such titles  
 “ thereon as shall be deemed expedient, to and upon the nearest  
 “ legitimate male issue of my ancestor, Hugh Lord Fraser of  
 “ Lovat, namely, the nearest lawful heir-male of the deceased  
 “ Alexander Fraser, late of Strichen, and his heirs-male ; whom  
 “ failing, Hugh Fraser, now of Struie, and the heirs-male of his  
 “ body ; whom failing, the nearest lawful heir-male of the late

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

“ William Fraser of Kilbockie, and his heirs-male ; whom fail-  
 “ ing, John Fraser, Esquire of Faraline, and his heirs-male ;  
 “ whom failing, Sir William Fraser of Ledclune, Baronet, and  
 “ his heirs ; whom failing, the said James Fraser of Berkley  
 “ Square, London, and his heirs-male ; whom failing, Alexander  
 “ Fraser of Lincoln’s Inn, London, and his heirs-male ; whom  
 “ failing, the person who shall be then able to prove himself to  
 “ be chief of the clan Fraser, by legitimate descent from Hugh  
 “ first Lord Lovat, and his heirs-male whatsoever. — Reserving  
 “ always to myself power and liberty, at any time of my life, and  
 “ even in the article of death, to revoke, alter, or innovate these  
 “ presents, in whole or in part, and to burden and affect the  
 “ same with such additional conditions and provisions as I may  
 “ see proper : But declaring that the same, in so far as not  
 “ altered by me, shall be effectual, albeit found lying in my  
 “ custody at my death, or in the custody of any other person to  
 “ whom I may see fit to intrust the same undelivered ; with the  
 “ not delivery whereof I hereby dispense for ever : And I  
 “ hereby revoke and recall all former dispositions, deeds of trust,  
 “ and settlements of the premises hereby conveyed, executed by  
 “ me at any time heretofore.”

On the 13th or 30th day of June, 1812, Archibald Fraser executed another deed, whereby he disposed to “ Thomas  
 “ Frederick Fraser, and the heirs-male to be lawfully procreated  
 “ of his body, in fee,” and a series of heirs, “ heritably and irre-  
 “ deemably, all and sundry lands, tenements, houses, heritages  
 “ and heritable subjects of every denomination, property and  
 “ superiority, now belonging to me, or that may belong to me,  
 “ and lying within the parish of Inverness, but without prejudice  
 “ to the disposition formerly granted by me in favour of the said  
 “ Thomas Frederick Fraser, and particularly without prejudice  
 “ to the foresaid generality, all and whole the lands and barony  
 “ of Castlehill, otherwise called Old Castlehill,” which were

described as in the deed of 15th August, 1808, and also several parcels of land not contained in that deed, and among others the sixth lot of the lands of Auld Castlehill. By a subsequent clause, the maker disposed to the said Thomas Frederick Fraser, “whom failing, to the other heirs and substitutes above mentioned,” the teinds of the lands conveyed, “And I hereby recall, alter, and revoke the said deed of settlement and entail last executed by me, and all and every deed or deeds of settlement or entail, made, granted, or executed by me preceding the date hereof, in so far as the same, or any of them, regards or relates to the lands, houses, teinds and others above and hereby disposed and conveyed, generally and particularly, excepting the said disposition granted by me in favour of the said Thomas Frederick Fraser, bearing date the day of                    one thousand eight hundred and years; which disposition last mentioned is not to be any ways hurt or prejudiced by this deed, &c. declaring that the revocation or alteration of these presents is not to be inferred from implication or construction, but to be proved by writing only,” &c,

On the 2d of July, 1812, Archibald Fraser executed another deed in these terms, — “Know all men, by these presents, me, the Honourable Archibald Fraser of Lovat, — whereas I, some years ago, executed a disposition and deed of entail or tailzie of my lands and estate of Abertarff, and comprehending, among other lands, the Old Glebe of Boleskine, in the united parishes of Boleskine and Abertarff, and shire of Inverness, and of my lands and estate in the parish of Inverness, and shire aforesaid; and of certain other lands belonging to me, which bears date the                    day of                    one thousand eight hundred and                    years: And whereas, by the said disposition and deed of tailzie or entail, there is full power and liberty reserved to me to alter the same, in whole or in part,

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

“ and even to revoke the same; and being, for just, good, and  
“ onerous causes and considerations, resolved to exercise the said  
“ faculty, in manner, and to the extent underwritten: There-  
“ fore I have nominated and appointed, as I hereby nominate  
“ and appoint, Thomas Frederick Fraser, my grandson, pre-  
“ sently residing with his tutor, Doctor Bentley, of  
“ the King’s College, Aberdeen, and the heirs-male of his body,  
“ to succeed to my said lands and estates, immediately after  
“ myself, and the heirs of my own body; whom failing, to the  
“ persons named as heirs and substitutes in the said deed of  
“ entail, in the order therein mentioned: And I hereby dispone,  
“ assign, and convey the said lands and estates, which are parti-  
“ cularly specified and described in the said deed of tailzie, and  
“ here held as repeated, for brevity’s sake, to the heirs of my  
“ own body; whom failing, to the said Thomas Frederick  
“ Fraser, and the heirs-male of his body; whom failing, to the  
“ other heirs and substitutes appointed or named by the said  
“ deed of entail: But always with and under the several pro-  
“ visions, conditions, burdens, limitations, restrictions, clauses  
“ irritant and resolute, specified and contained in the said deed  
“ of tailzie, and which are here held as repeated, for brevity’s  
“ sake; and under these additional declarations, That the said  
“ Thomas Frederick Fraser, and the heirs-male of his body  
“ succeeding to the said lands, shall take and bear the name of  
“ Archibald Fraser; and that he, the said Thomas Frederick  
“ Fraser, and his foresaids, shall be bound to disencumber the  
“ said lands, in the parish of Inverness, of the debts affecting the  
“ same, out of my executry, or by burdening the other lands  
“ above mentioned, or part of them therewith: And, in so far,  
“ I alter the said deed of entail; reserving always full power and  
“ liberty to me, not only to nominate and appoint such other  
“ person or persons as I shall think fit to succeed to my said  
“ lands and estates, failing the heirs herein named, and that by

FRASER v. LORD LOVAT. — 28th Feb. 1842.

“ a writing under my hand at any time in my life ; but also to  
 “ revoke, alter, and change the present nomination and deed at  
 “ my pleasure ; declaring, however, that if these presents be not  
 “ revoked by me, the same shall be valid and effectual, though  
 “ found in my own custody, or in the custody of any other per-  
 “ son, undelivered at the time of my death.”

Shortly after the death of Archibald Fraser, the maker of these deeds, which occurred in 1815, the appellant, Thomas Frederick Fraser, who had now assumed the name of Archibald Thomas Frederick, brought an action to have it found, “ that the said  
 “ Honourable Colonel Archibald Fraser of Lovat, by all or  
 “ either of the dispositions above recited, executed by him upon  
 “ the second day of July, 1812 years, and the 2d day of August,  
 “ 1813 years, revoked, annulled, varied, and altered the trust-  
 “ disposition and settlement above mentioned, dated the 26th  
 “ day of July, 1811 years, in the whole articles, tenor and con-  
 “ tents thereof, and that the same was rendered totally unavail-  
 “ able to the persons and societies therein mentioned, or thereby  
 “ intended to be favoured in all respects ;” and that the trustees and curators of the pursuer, “ were entitled to hold, possess, and  
 “ enjoy the whole unentailed lands, houses, heritages, and heri-  
 “ table subjects belonging to the said Honourable Colonel  
 “ Archibald Fraser at the time of his death,” and also his whole moveable estate.

At the same time the respondent, Lord Lovat, (then Thomas Alexander Fraser,) brought an action, narrating the deeds of 25th June, and 15th August, 1808 ; 2d July, 1812 ; 31st July, and 2d August, 1813 ; and concluding to have it found, that  
 “ the foresaid trust-disposition and conveyance, bearing date the  
 “ 25th day of June, 1808 years, and the aforesaid disposition  
 “ and deed of tailzie, bearing date the 15th day of August, 1808  
 “ years, both said to have been executed by the said Honourable  
 “ Colonel Archibald Fraser of Lovat, were, in terms of the

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

“ powers thereby reserved by him, revoked, and were not at  
“ that time subsisting or effectual deeds, and that the aforesaid  
“ trust-disposition and settlement executed by the said Honour-  
“ able Colonel Archibald Fraser of Lovat, on the 26th day of  
“ July, 1811 years, was a valid and subsisting deed, and that the  
“ aforesaid deed, titled disposition and nomination, and said to  
“ have been executed upon the 2d day of July, 1812 years, being  
“ incomplete, and bearing reference to a deed not in existence,  
“ was ineffectual, and of no avail, force, strength, or effect: As  
“ also, that by virtue of the said trust-deed of the 26th day of  
“ July, 1811 years, the pursuer, the said Thomas Alexander  
“ Fraser of Lovat, was entitled, as chief of the clan Fraser, and  
“ recognized as such by the said Honourable Colonel Archibald  
“ Fraser, the maker of the said deeds, to succeed to the afore-  
“ said Old Glebe of Boleskin and building thereon, and also to  
“ the aforesaid parts and portions of the lands in Abertarff and  
“ others particularly before described, or such parts thereof as  
“ might remain unsold, after the other foresaid purposes of the  
“ foresaid trust were answered, and that always under the desti-  
“ nation, and subject to the conditions specified in said trust-  
“ deed, but to the total exclusion of the said Archibald Thomas  
“ Frederick Fraser, or his successors, who should be found to  
“ have no right, title, or interest therein, and that the said  
“ defenders, or one or other of them, ought and should be  
“ decerned and ordained, by decret foresaid, to make up titles  
“ to the said property, and to grant, execute, and deliver to the  
“ pursuer, and the heirs destined to succeed to him, valid and  
“ sufficient dispositions and conveyances of the said heritable  
“ property before mentioned, to which he, the said pursuer, was  
“ entitled to succeed under the said trust-deed of 26th July, 1811  
“ years.”

On the 6th February, and 27th of June, 1818, the Court  
“ conjoined the said two processes, and in the process at the

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

“ instance of the pursuer, the said Archibald Thomas Frederick  
“ Fraser, and his curators and trustees: Find, that the deed of  
“ 25th June, 1808, was a valid and subsisting deed to the effect  
“ of conveying to the pursuer, the said Archibald Thomas  
“ Frederick Fraser, the several tenements therein mentioned,  
“ situated in the towns of Inverness and Campbeltown: Find,  
“ that the deed of 13th June, 1812, was a valid and subsisting  
“ deed, and did effectually convey to the said pursuer the lands  
“ and barony of Old Castlehill, and the other lands and heri-  
“ tages belonging to the disponent, and situated in the parish of  
“ Inverness: Find, that the deed of 2d July, 1812, did bear an  
“ intelligible and sufficient reference in the narrative thereof, to  
“ the tailzie of 15th August, 1808, for the particular subjects  
“ meant to be conveyed, viz., the lands of Abertarff, Old Glebe  
“ of Boleskine, and the disponent’s lands in the parish of Inver-  
“ ness; and that the said deed of 2d July, 1812, was therefore a  
“ sufficient and effectual conveyance to the said pursuer, of the  
“ above mentioned several lands and subjects: Find, that the  
“ deed of the 25th June, 1808, and the deed of 2d August, 1813,  
“ were valid and subsisting, and effectual conveyances of all the  
“ granter’s personal and moveable estate and effects in favour of  
“ the said pursuer and his curators and trustees: Find, that the  
“ trust-deed of 26th July, 1811, was virtually revoked and  
“ annulled by the said deeds of 2d July, 1812, and 2d of  
“ August, 1813;” and after making these findings, decerned in  
terms of the conclusions of the appellant’s summons, and in the  
respondent’s action sustained the defences, and assoilzied. The  
appellant then charged Archibald Fraser’s heir-of-line to enter,  
and thereupon raised action, and obtained decree of constitution  
against him, in implement of the decree of declarator. On the  
decree of constitution he charged the heir to enter in special, and  
then completed his title by adjudication.

The respondent now brought the action out of which this

FRASER v. LORD LOVAT. — 28th Feb. 1842.

appeal arose, and by his summons, after reciting the deeds of 15th August, 1808, of 26th June, 1811, of 2d July, 1812, and of 15th April, 1813, he concluded to have it found, “ that all and hail  
“ the foresaid parts and portions, both property and superiority,  
“ of the said lands and estate of Abertarff and Boleskine, as particularly before described, contained in the said first recited  
“ disposition and deed of tailzie, dated the 15th of August, 1808,  
“ as also the foresaid first lot of the lands of Castlehill, and  
“ parts of the fifth lot thereof, lying in the parish of Inverness,  
“ likewise particularly before described, and contained in the  
“ before recited disposition and deed of tailzie executed by the  
“ said Honourable Archibald Fraser on the 15th of April, 1813,  
“ must be taken up by the said Archibald Thomas Frederick  
“ Fraser, as institute under the foresaid deeds of tailzie, or under  
“ such other deed of tailzie as may yet be found necessary for  
“ completing titles thereto; and can only be held by him under  
“ the fetters of a strict entail, by virtue of the foresaid deeds of  
“ tailzie already executed, or by virtue of such other deeds as  
“ may be found necessary: And that, in case any new disposition  
“ or tailzie of said lands and others is necessary, the same must  
“ be conceived to and in favour of the said Archibald Thomas  
“ Frederick Fraser and his heirs-male; whom failing, to the  
“ pursuer and his heirs-male; whom failing, to such other heirs  
“ and substitutes as shall be found to have right thereto; but  
“ always with and under the burdens, conditions, provisions,  
“ restrictions, limitations, prohibitions, exceptions, clauses irritant  
“ and resolute, contained in the two deeds of entail already  
“ detailed, or such others as shall be settled by our said Lords,  
“ and deemed necessary for effectually securing the possession of  
“ the said estate to the pursuer, and whole subsequent heirs of  
“ tailzie: And it being so found and declared, the said hail  
“ defenders, or such of them whose concurrence is necessary,  
“ should be decerned and ordained, by decret foresaid, to  
“ make, grant, execute, and deliver all dispositions or other

FRASER v. LORD LOVAT. — 28th Feb. 1842.

“ deeds, if any, which may be found necessary for effectually  
 “ vesting the whole foresaid lands and other subjects in the  
 “ united parishes of Abertarff and Boleskine, and the first and  
 “ part of the fifth lot of Castlehill, in the parish of Inverness, in  
 “ the person of the said Archibald Thomas Frederick Fraser  
 “ and his heirs-male; whom failing, the pursuer, Thomas  
 “ Alexander Fraser and his heirs-male; whom failing, the other  
 “ heirs and substitutes entitled thereto under the fetters of strict  
 “ entail, and the conditions before mentioned: And the said  
 “ Archibald Thomas Frederick Fraser, and his curators or  
 “ trustees before named, ought and should be decerned and  
 “ ordained to make up and establish in his person, as the insti-  
 “ tute under the said deeds of tailzie already executed, or which  
 “ may be executed in the foresaid terms, complete, valid, and  
 “ sufficient titles to, containing the whole of the destination  
 “ before mentioned, and the whole burdens, obligations, condi-  
 “ tions, declarations, prohibitions, provisions, and clauses irritant  
 “ and resolute before mentioned and referred to.”

The appellant pleaded in defence to this action, — 1st, Want of title or interest in the pursuer; 2d, *Res judicata* in the previous actions; 3d, That an entail could not be created by reference, in the way and manner contended for; and at any rate no such entail had been made, or could be asked to be made, in the terms of the summons.

On the 24th June, 1823, the Court “sustained the defences,  
 “ and assoilzied the defenders from the whole conclusions of the  
 “ libel.”

The respondent reclaimed, and on the 14th of May, 1824, the Court altered “the interlocutor reclaimed against, in so far as  
 “ regards the lands of Abertarff, together with the Old Glebe of  
 “ Abertarff or Boleskine, and find that the defender is bound  
 “ and obliged to execute an entail of these lands, in terms of the  
 “ entail executed by the late Honourable Archibald Fraser of  
 “ Lovat, dated 15th of August, 1808, containing a destination

FRASER v. LORD LOVAT. — 28th Feb. 1842.

“ in terms of the deed executed by him on the 2d of July, 1812,  
“ and decern, and remit to the Lord Ordinary to cause the same  
“ to be prepared and executed accordingly, in common form ;  
“ and with respect to the lands of Auld Castlehill, find, that the  
“ same belong to the defender in fee-simple, and decern and  
“ declare accordingly ; and, *quoad ultra*, refuse the desire of the  
“ Petition, and adhere to the interlocutor reclaimed against.”

The Lord Ordinary then remitted to Mr Aytoun, W.S. to prepare the draft of an entail, in terms of the Interlocutor of the Court.

Mr Aytoun, under this remit, prepared the draft of a deed, whereby the appellant was to convey to himself and the heirs-male of his body, “ whom failing, to the other heirs and substitutes appointed or named by the said deed of entail, bearing date the 15th day of August, 1808, viz. the nearest legitimate issue of Hugh, Lord Fraser of Lovat, namely, the said Thomas Alexander Fraser, now of Lovat, therein designed of Strichen, being the nearest lawful heir-male of the deceased Alexander Fraser of Strichen,” (the respondent) “ and to the heirs-male of the said Thomas Alexander Fraser,” &c. “ But always with and under the several provisions,” &c. “ specified and contained in the said deed of tailzie, 15th August, 1808, and the foresaid disposition and nomination of 2d July, 1812, and herein underwritten, which are all (with the exception of the words herein inserted for extending the fetters against me, the said Archibald Thomas Frederick Fraser, and the heirs-male of my body, specially enumerated and contained in the said disposition and deed of entail, dated 15th August, 1808, namely.” \*

\* The provisions and restrictions in the deed of August, 1808, in regard to selling, contracting debt, or altering the order of succession, were not given in the papers, farther than appears in the previous part of this report.

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

Objections having been put in by both parties to the draft prepared by Mr Aytoun, cases were ordered, and on advising these papers, the Court, on 6th June, 1839, “repelled the  
“ objections of both parties to the report of Mr Aytoun, and to  
“ that extent approved thereof, and remitted to the Lord Ordinary to proceed accordingly.”

Archibald Thomas Frederick Fraser appealed against the interlocutor of 14th May, 1824, except in so far as it found that the lands of Auld Castlehill belonged to him in fee-simple, and adhered to the interlocutor of 24th June, 1823, and also against the interlocutor of 6th June, 1839.

*Lord Advocate and Sir William Follet, for appellant.* I. It is *res judicata* by the judgment of February and June, 1818, in the conjoined actions between the same parties, that the appellant is entitled to enjoy the lands of Abertarff and Old Glebe of Boleskine, as absolute proprietor, whereas the result of the interlocutors appealed from, is to find that he is bound to hold these lands under the fetters of a strict entail.

II. The finding of the Court below is, that the appellant is bound to execute an entail of the lands. This must depend upon the intention of Archibald Fraser, to be ascertained according to the strictest modes of construction. The appellant is not a trustee, nor does he hold through trustees, who, of course, would be bound to act according to the intention of the truster, to be ascertained as best could be done; but he is direct disponee for his own benefit; any limitation of that benefit by reference to another deed than the conveyance, must be ascertained according to those strict rules of interpretation applied in the law of entails, *Vere v. Hope*, 10th July, 1837.

The reference in the deed of 2d July, 1812, has been held by the Court below to be to the deed of August, 1808, but there is

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

no authority for this, for, — 1st, The reference does not mention any deed by its date, and may be applicable as well to some other deed executed, but destroyed subsequently to the deed of 1812. — 2d, The reference is to a subsisting and operative deed, which was to be only so far altered; but the conveyance in the deed of 1808, of Abertarff, was altered by the conveyance in the deed of 26th July, 1811, which moreover expressly revoked all former conveyances, and it was superseded as to Castlehill by the deed of 30th June, 1812. — 3dly, The deed of 2d July, 1812, assumes, that the entail referred to by it was in favour of Archibald Fraser and the heirs of his body in the first place, as it professes to introduce the appellant and the heirs of his body, between Archibald Fraser and the heirs of his body, and the “ heirs and substitutes in the said deed of entail;” but the deed of August, 1808, is not in favour of Archibald Fraser and the heirs of his body at all; and Thomas Alexander Fraser of Strichen, the respondent, is the institute under that deed, and in this respect is not an “ heir and substitute,” before whom the appellant could be brought in, inasmuch as the words heirs and substitutes cannot have application to an institute. — 4th, The description in the deed of 2d July, 1812, of the lands to be conveyed by it, shews that the deed of August, 1808, was not the one referred to, for, — (1st,) The deed of 1812 mentions, that by the deed referred to the granter had conveyed the Old Glebe of Boleskine, while the deed of 1808 conveys the Old Glebe of Abertarff, and makes no mention of Boleskine, the two being quite distinct subjects; (2d,) The deed of 2d July, 1812, speaks of the deed referred to by it as having conveyed the granter’s lands in the parish of Inverness, and provides that the appellant shall disencumber the lands in the parish of Inverness of debt; but the deed of 30th June, 1812, shews this to be debt affecting lands which the granter had not acquired at the date of the deed of August, 1808, but on 28th December, 1808, 14th February,

1811, and 13th and 14th March, 1812; (3d,) The deed of 2d July, 1812, speaks of the deed referred to as having conveyed “certain other lands:” the deed of 25th June, 1808, shews, that the granter had been possessed of other lands; but the deed of August, 1808, if the deed referred to, does not contain a conveyance of any lands beyond Abertarff and Castlehill. Accordingly, the Court has found that the appellant is not bound to include within the entail which he has been ordered to make, either the lands within the parish of Inverness, the parts of Castlehill acquired subsequently to the deed of August, 1808, and those parts previously acquired and specially enumerated in that deed, or the other lands embraced under the words of the deed of 1812, “certain other lands.”

III. If, then, the reference is not clear and explicit, it is not in the power of the Court to conjecture what may have been the intention of the party, and to order it to be made operative by the execution of a new deed; it was competent for the Court to declare the rights of the parties under the existing deeds, but it had no power to order the framing of a new deed to correct what was defective.

IV. But if the deed of August, 1808, be that referred to by the deed of 1812, the latter deed is to be registered as “a part of the disposition and tailzie before mentioned;” the two, then, must be taken together, without alteration, as the entail framed by the entailer, and intended to operate; and in this respect also it was not competent for the Court below to order any other deed to be framed, compounded of parts of the two deeds, omitting others.

V. The deed of 2d July, 1812, in its destination supersedes that in the deed of August, 1808, on the supposition that the

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

deed of August, 1808, is that referred to by it, and after the granter and the heirs of his body, and the appellant and the heirs-male of his body, introduces the “heirs and substitutes in the said deed of entail;” but the respondent, as before noticed, is neither an heir nor a substitute, but an institute, under the deed of August, 1808, and therefore he is no member of the destination under the deed of 1812, and has no interest to maintain the action, or enforce the interlocutor of 14th May, 1824.

VI. The effect of the deed of 1812, is in truth to make the appellant the institute. The fetters of the deed of 1808, in regard to the contraction of debt, if effectual for that purpose at all, and also in regard to altering the order of succession, are directed against “the heirs succeeding,” which will not embrace the institute. But the deed prepared by Mr Aytoun repairs this defect, and makes the fetters bind the appellant, as well as the substitutes.

The several grounds taken by the appellant are so fully met by the opinion of Lord Cottenham at delivering judgment, that it is unnecessary to repeat the arguments used by the respondent in answer to them.

LORD COTTENHAM. — My Lords, the first question upon these appeals is, whether the appellant, Fraser, is entitled to the lands of Abertarff in fee, or whether they are subject to an entail with proper fetters, under which the respondent, Lord Lovat, will be entitled to succeed to them upon the death of the appellant, Fraser, without issue male? This question, when disencumbered of all irrelevant matters, does not appear to me to be one of much difficulty.

By a deed of tailzie and disposition of 1805, these lands were settled to and in favour of Archibald Fraser, the entailer, and the

---

FRASER *v.* LORD LOVAT. — 28th Feb. 1842.

---

heirs-male of his body ; whom failing, to such other heirs as he, or failing him, the heir-male of his body for the time, should name and appoint by writing ; whom failing, to and in favour of his heirs whatsoever.

The same Archibald Fraser, by a disposition and conveyance of 25th of June, 1808, settled certain property by name, (not including the lands of Abertarff,) “ and all other lands and heritages which belonged to, or might belong to him at the time of his death, and which might not be otherwise settled and disposed of by him,” but subject to a distinct power, to revoke such settlement, and to sell, alienate, and dispone the lands as he should think fit.

This deed has been imported into the case by the appellant, who claims the property included in it, but as the power of revocation and new settlement was clearly executed, if the lands of Abertarff were included in it, it does not appear necessary farther to advert to this deed.

By a disposition and deed of entail and settlement of 15th of August, 1808, the same Archibald Fraser, describing himself as heritable proprietor of the lands after described, disposed in favour of the respondent Lord Lovat, by his then name of Thomas Alexander Fraser, and his heirs-male, the said lands of Abertarff, and others, described as standing in his person in fee-simple through the failure of heirs of his body. This settlement contained all the proper clauses and provisions of a regular entail, but it also contained a clause of revocation.

The same Archibald Fraser, by a trust-disposition and settlement, dated the 26th July, 1811, disposed to and in favour of certain trustees, all and whole the following parts and portions of lands in Abertarff, but excepting all lands and heritages not therein specifically disposed, which might be contained in any deed of entail, or other settlements executed by him, and which should remain unrevoked at the time of his death. The trusts were to raise certain sums of money, and after the performance of such

---

FRASER *v.* LORD LOVAT. — 28th Feb. 1842.

---

trusts, the Trustees were directed to make a valid disposition, and deed of entail, with proper clauses of the said estate of Abertarff, and of the whole unentailed property belonging to him, to and upon the nearest legitimate male issue of his ancestor, Hugh Lord Fraser of Lovat, namely, the nearest lawful heir-male of the deceased Alexander Fraser, and his heirs-male, which describes the respondent, Lord Lovat. This deed also contained a power of revocation, which was afterwards exercised.

The whole question turns upon the next deed, and before its provisions are considered, it is material distinctly to understand, how these lands of Abertarff stood settled by the preceding deeds. By the deed of 1805, they were settled to and in favour of Archibald Fraser, the entailer, and the heirs-male of his body; whom failing, to such other heirs as he should appoint. By the deed of 1808, he takes notice that there was a failure of heirs of his body, but as this, during the whole of his life, must, in law at least, be considered as uncertain, there was no intention, if there had been the power, of interfering with the estates and interests of such heirs-male of his body, if any such should be born; but the object was to substitute other heirs in the expected event of a failure of such heirs-male of his body; and for this purpose, the lands, that is, all such estate and interest in the lands as belonged to him, or over which he had the power of disposition, in the event of the failure of heirs-male of his body, were disposed to and in favour of the respondent, Lord Lovat, and his heirs-male, and the respondent is accordingly, in the deed of 1812, described as a substitute.

The result of these two deeds of 1805 and 1808 was, that the lands of Abertarff stood settled upon the entailer, Archibald Fraser, and the heirs-male of his body; whom failing, upon the respondent, Lord Lovat, and his heirs-male.

That this was the entailer's view of the manner in which the lands were settled, is proved by the language and provisions of the deed of the 2d of July, 1812, now to be considered, and under

which the appellant claims; for it states his object to be, that the appellant, and the heirs-male of his body, should succeed to the lands immediately after himself, and the heirs of his body. But as, by the deed of 1805, heirs-male of his body only were named, if he intended to include daughters, it was necessary to make a new disposition; and accordingly, by this deed of 1812, the disposition is to the heirs of his own body; whom failing, to the appellant, and the heirs-male of his body; whom failing, to the other heirs and substitutes appointed and named by the said deed of entail; but subject to the several clauses and provisions contained in the deed of entail, which, it is admitted, were effectual for the purpose of preventing the alienation of the property, if the deed referred to was the deed of 1808, and if the appellant was to be included in the fetters.

1805  
1812

Now, although the deed of 1812, in referring to a deed of entail or tailzie of the lands at Abertarff, executed by Archibald Fraser "some years ago," does not mention the date, but has blanks in the places appropriated for it, yet it correctly describes the property comprised in the deed of 1808. It states, that there was a power of revocation in the deed referred to, which there was in the deed of 1808. It assumes, that the appellant was not included in the deed referred to, and he was not in the deed of 1808. And above all, the deed of 1808 is the only deed of tailzie of these lands forthcoming, or of which there is any trace, and the trust-disposition of the 26th of July, 1811, proves that at that time, these lands were subject to the entail of 1808, so that if there had been any other deed of entail, it must have been executed between the 26th of July, 1811, and the 2d of July, 1812, which would be utterly inconsistent with the description, in the latter deed, of the entail referred to, as it recites that the disposition or deed of entail referred to had been executed some years ago.

I think it therefore quite clear, upon the instruments themselves, that the entail of 1808 is the deed referred to in the deed

FRASER *v.* LORD LOVAT. — 28th Feb. 1842.

of 1812, and so the appellant himself contended, and succeeded in a contest with the heir of line in obtaining a judgment of the Court, dated 5th of February, 1818, not now in question, by which it was declared, that the deed of the 2d of July, 1812, bears an intelligible and sufficient reference in the narrative thereof to the deed of tailzie of 15th August, 1808, for the particular subjects meant to be conveyed, with the lands of Abertarff, and Glebe of Boleskine, &c, and that the said deed of 1812 is therefore a sufficient and effectual conveyance to the pursuer, the appellant, of the above mentioned several lands and subjects. And it was also found, that the trust-deed of 1811 was effectually revoked and annulled by the subsequent deeds of 1812 and 1813. The appellant, indeed, now insists that this is an adjudication in his favour; but it is obvious, that the present question was not in issue, and that the judgment of 1818 only concluded the title of the heir of line, leaving open the claim of all parties under the deeds of 1808 and 1812.

If, then, the deed of 1808 was the entail referred to by the deed of 1812, can there be a doubt that the whole of the entail to be created by the latter deed is to be guarded by the provisions and fetters specified in the former? or, in other words, that the appellant is to hold the estate under the deed of 1812, to him and the heirs-male of his body, with and under the several provisions, conditions, burdens, limitations, restrictions, clauses irritant and resolute, specified and contained in the deed of tailzie referred to, which were to be held as there “repeated for brevity’s sake, and under these additional declarations that the said “Thomas Frederick Fraser,” the appellant, &c, and then follow certain restrictions applicable only to the appellant, and his heirs-male of his body, and the entailer then says, “and in so far I alter the said deed of entail.”

The deed of 1811 being revoked, the deed of 1808 was in force, and by that deed all the entail thereby created was suffi-

ciently fenced and protected. But the appellant, and the heirs-male of his body, being introduced into the entail by the deed of 1812, it was necessary to impose the fetters upon them also, which the deed of 1812 clearly does. If the appellant, and his heirs-male of his body, were not to be affected by the fetters of the deed of 1808, how are the expressions “and under these additional “restrictions” to be construed, as to which he is expressly named? The appellant would make the fetters mentioned in the deed of 1812 apply to those who were already fettered by the deed of 1808, and not to himself and the heirs-male of his body, who, but for the provisions of the deed of 1812 referring to that of 1808, would not be fettered at all. The result of which would be, that the deed of 1812 would utterly destroy the entail of 1808, although the entailer in the former deed says, that he intended to alter it “in so far” only.

The interlocutor does not impose fetters by implication, but merely puts an obvious construction upon the deed of 1812. What gave rise to the first decision in 1823 upon this point, or to the doubts afterwards suggested, is not very obvious. I entertain no doubt whatever of the propriety of the ultimate decision upon this point, which is the subject of appeal.

The appellant then objects that the interlocutor appealed from is erroneous, assuming this to be the proper construction of the deeds, because it does not treat the entail as complete by these deeds, but compels the appellant to perfect it. If there were any foundation for this objection, it would not affect the question of right, but only the means of giving effect to it. If the appellant had rightfully become possessed of an unfettered title, there might be much strength in the objection; but if the deed of 1812 did refer to the deed of 1808, and the deed of 1812 included the respondent in the destination, and the appellant in the fetters, the appellant ought not to have been possessed of an unfettered title; and if he has invested himself with one, it must be within the

---

FRASER *v.* LORD LOVAT. — 28th Feb. 1842.

---

power, as it was clearly the duty, of the Court to correct this error for the purpose of securing the right of the parties entitled.

But this, it was said, could only be done by first reducing the title so imperfectly obtained. The interlocutor appealed from effects that object by directing the appellant so to deal with the title he obtained as to secure the rights declared to belong to the respondent. The appellant has not succeeded in shewing that there was any irregularity in this mode of effecting the object. The objection does not appear to have been raised below. In the note of the judgment, on the 6th of June, 1839, there is no allusion to this point. Lord Fullerton, though he differed from the other three Judges, and thought that the fetters did not apply to the appellant, did not suggest this as one of his difficulties. I cannot think that your Lordships will, upon this question of form, have any disposition to differ from the judgment appealed from. This objection is strangely urged by the appellant, who contends, that he is entitled, under the deed of 1812, to the lands of Abertarff in fee.

The appellant again contends, that the respondent cannot be considered as included in the description in the deed of 1812, because he is an institute, and not a substitute, in the deed of 1808. I have already observed, that, taking the entail as created by the deeds of 1805 and 1808 together, he is a substitute, being called upon failure only of the heirs of the body of the entailer, and it cannot be doubted but that he is intended in the description of the parties in the deed of 1812. What, however, removes all doubt upon this subject is, that the expressions “ heirs “ and substitutes” in the deed of 1812, are precisely the same as are used in the deed of 1808, in which it is quite clear, that the respondent is included.

I am, for these reasons, of opinion, that the appellant, Archibald Thomas Frederick Fraser, has failed in establishing any error in the interlocutor appealed against and that his appeal must be dismissed.

---

FRASER v. LORD LOVAT. — 28th Feb. 1842.

---

I am always unwilling to admit exceptions to the very wholesome practice of making an unsuccessful appellant pay the costs of the appeal; but in this case, the Court of Session decided for the appellant in 1823, and for the respondent in 1824, and in 1839 the Court was not unanimous upon the construction of their own decree of 1824. Under such circumstances, it could not be expected that the appellant should acquiesce in the final judgment. The expenses of the subsequent litigation are not to be attributed to him. I think, therefore, that the original appeal must be dismissed without costs.

Ordered and Adjudged, That the interlocutors, so far as complained of in the original appeal, be affirmed. And it is farther Ordered and Adjudged, that the interlocutors of the 24th of June, 1823, so far as complained of in the cross appeal, be reversed. And it is also farther Ordered and Adjudged, that the interlocutors of the 14th of May 1824, complained of in the said cross appeal, be altered, by inserting therein, after the word "Boleskine," the following words, viz. "and so much of the lands of Auld Castle-Hill as are claimed by the summons, and described therein as the first lot of Castle-Hill," and by omitting therefrom the following words,— "and with respect to the lands of Auld Castle-Hill find, that the same belong to the said defender in fee-simple, and decern and declare accordingly, and *quoad ultra* refuse the desire of the petition, and adhere to the interlocutor reclaimed against." And it is also farther Ordered, that the cause be remitted back to the Court of Session, with directions to proceed with the farther settlement of a draft of a deed, to be executed by the said Archibald Thomas Frederick Fraser, respondent, in the said cross appeal, in conformity with the alterations herein ordered to be made, and to do otherwise in the said cause as shall be just and consistent with the judgment.

RICHARDSON and CONNELL — GEORGE WEBSTER, Agent.