1852.
30*th Nov., and* 6*th*, 10*th, and* 13*th Dec.*

SIR JOHN A. CATHCART, . . . APPELLANT.
GAMMEL, ... RESPONDENT.

The fetters of a strict entail cannot be imposed by a mere reference from one instrument to another.

But if the two instruments are capable of being regarded as *one*, they may together constitute a binding entail.

Where a party takes under an imperfect entail, he is not bound to render it perfect, however plainly the intention may appear that he should do so.

A precept of seisin cannot be assigned by the grantor, but solely by the grantee.

THIS case is very fully reported in the Court below (*a*).

Mr. *Bethell* and Mr. *Hugh Bruce*, for the Appellant. The *Solicitor-General* (Sir *F. Kelly*), and Mr. *Anderson*, for the Respondent.

The points disposed of by the House sufficiently appear from the following observations of

The LORD CHANCELLOR (*b*):

My Lords, the question stands before your Lordships upon two points. First, are the two instruments so mixed together as to form one entail? Secondly, is there such an obligation imposed as shall compel the execution now of a complete and perfect entail?

I conceive it to be quite clear that by a mere reference from one deed to another, the fetters of an entail cannot be imposed. This is quite settled in the law of Scotland. But the question in the present case is, whether the two instruments can be conjoined, united, and read together as one deed; and as that is a question purely of Scotch conveyancing, it behoves this House to be very careful not to unsettle the law, if it be settled, upon the subject.

I propose, therefore, that your Lordships consider a little how the authorities stand. The case so often referred to, that of *Stewart* v. *Porterfield* (*c*), was

(*a*) Second Series, vol. xii. p. 19. (*b*) Lord St. Leonards.
(*c*) 5 Wils. & Shaw, 515.

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one of the execution of a power simply without an attempt at any new conveyance. Therefore, it really amounted to this, that, disturbing nothing, and merely executing the power in the way of substituting other heirs,—the execution was held valid by the Court of Session, and on appeal was confirmed by your Lordships' House.

My Lords, that case clearly settled that which I apprehend is not to be disputed in the law of Scotland, that if there be a power in a deed merely to alter the destination of heirs, it may be executed by an instrument introducing the new nomination as a part of the original settlement; and in such a case, whatever fetters were imposed by that original settlement are applicable to the persons called to the succession under the new destination precisely as if the persons substituted had originally been included in the place of the persons who are so superseded. But it must be borne in mind that this case of *Stewart* v. *Porterfield* was only between heirs, not binding creditors or onerous purchasers.

Then, my Lords, there is a case which is very difficult to deal with, *Laurie* v. *Spalding* (*a*). But having regard to the remarks of Mr. Sandford (*b*) on that case, and more particularly to those of Lord *Moncreiff* (*c*), I shall take it for granted that *Laurie* v. *Spalding* is not an authority which bears upon the question now before your Lordships.

In *Broomfield* v. *Paterson* (*d*), the second deed was a new deed. What was the consequence? Of course

(*a*) Morr. 15, 612. The marginal note is "entail *implied* by a reference to another deed of entail." The date of the decision is 1764.

(*b*) On Entails, p. 155.

(*c*) See Lord Moncreiff's Commentary on *Laurie* v. *Spalding*, 4 Second Series, 859.

(*d*) Morr. 15, 618.

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that the fetters were not effectual. I cite it for the purpose only of showing that mere reference from a later deed to an earlier deed will not, under the statute, enable you to make the irritant and resolutive clauses binding upon the settlement under the later deed. That case came before your Lordships' House upon appeal, and the interlocutor was affirmed.

Next, my Lords, there was the case of *Lindsay* v. *Lord Aboyne* (*a*), decided upon the 2nd of March, 1842. I state the date for this reason, that although the case of *Fraser* v. *Lord Lovat* (*b*), which I am to notice presently, was heard before your Lordships in March, 1841, yet judgment was not given by this House until the end of February, 1842. It is apparent, therefore, to me that the judgment of your Lordships' House could not have been known in Scotland at the time the decision was pronounced by the Court below in *Lindsay* v. *Lord Aboyne*. Consequently it is clear that the rule was maintained without knowing what had been the fate of the case of *Fraser* v. *Lord Lovat*. But we must remember that this House did not establish anything new in *Fraser* v. *Lord Lovat*. The Judges themselves took a different view of that case at different periods. At one time they held that the fetters were not imposed. At a subsequent time they decided that they were imposed, and your Lordships agreed with the latter decision. This House, therefore, let it be borne in mind, did not set up a rule contrary to what had been established, but it took the rule as it found it laid down in Scotland, and simply affirmed it.

Now, my Lords, let us see what it is that *Fraser* v. *Lord Lovat* decided. It is to be lamented that the

(*a*) 4 Second Series, 843. (*b*) 1 Bell's Appeal Cases, 105.

judgment was so long delayed (*a*). Of course, it gave your Lordships a great opportunity of considering the question; but there is always a danger of some of the points escaping attention at so great a distance of time. It does not appear clear to me, after the most diligent attention, that the point which we have been agitating here, as regards the operation of the Statute of 1685, upon the second deed, was really a point in issue in *Fraser* v. *Lord Lovat;* nor do I find it even in the appeal cases delivered to the House. In point of fact, as you find, my Lords, in the advice given to this House by the noble and learned Lord who then held the Great Seal, the subject, as affected by the Statute of 1685, c. 22, was really not discussed; and it seems to me rather to have been taken for granted that if there was a sufficient reference in the subsequent deed to the prior deed, if the deed of 1812 referred properly to the deed of 1808, that deed would be embodied as part of the first.

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My Lords, in that case the only thing done by the second deed was to alter the destination, under the power which enabled the settlor to do the act; and although there were words of disposition, yet they were not followed up by any direction as to a seisin, or any direction with regard to the investiture in any way whatever. This second instrument was left, simply and only upon the nomination made by this settlor; and then it appears to me to be entirely within the authorities. In the deed of 1808 there were all the fetters. The deed of 1812 only altered the destination according to the power; so that those two deeds, united and conjoined, did contain all the fetters; and these fetters were properly imposed upon the parties by force of the settlement. That appears to me to be entirely consistent with the advice contained in the speech

(*a*) Heard 30th March, 1841. Decided 28th Feb. 1842.

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delivered in your Lordships' House by my noble and learned predecessor. My apprehension therefore is, that the deed of 1812 must have been considered not as a new deed, but as a part of the original settlement. Thus the whole is consistent.

Now, my Lords, there was the case of *Paterson* v. *Leslie* (*a*), which came before the Court below in July, 1845. The decision in *Fraser* v. *Lord Lovat* was at that time perfectly well known; and it must be remembered that it was known as a decision by this House. But how did the Court below deal with the law in *Paterson* v. *Leslie*? There it was held that the second deed was a new entail, superseding the first; and that as it did not contain within itself the necessary clauses, it was not effectual to protect the lands against creditors. Singular enough, so little was *Fraser* v. *Lord Lovat* considered to break in upon the actual rule established in Scotland, that it is positively not once, I believe, referred to in *Paterson* v. *Leslie*, where Lord *Jeffrey* lays down the law thus:—"If the entailer had made a deed, merely altering the previous destination, without a new conveyance of the lands, and put it on the record of tailzies, according to the cases of *Porterfield* and *Don*, that would have been quite competent; but he has gone further, and made an entirely new deed."

Now, my Lords, this brings me at once to the question, what is the operation of the deeds in this case? Is the second deed to which I have called your Lordships' attention, a deed which does not disturb the first deed, or is it clearly a new deed, so as to require that there should be upon the face of the deed itself a statement of the fetters intended to be imposed, and not a mere reference to another instrument in which those fetters are contained?

My Lords, after very great consideration, I have

(*a*) 7 Second Series, 950.

come to the conclusion that this was a new deed, and so intended by the settlor: and therefore I am of opinion that the fetters attempted to be imposed by reference to the first deed cannot be held to have any effect; because the statute does not admit of that mode of carrying out the intention.

Now, my Lords, if that be so, we have next to consider the remaining question, and a most important question it is; namely, whether or not the Courts have the power to remodel this settlement, so as to impose the fetters which the settlor himself has failed properly to bind the parties by?

In *Fraser* v. *Lord Lovat*, the party had made up a title to himself in fee-simple; and then the question arose, whether he was bound or not to include the fetters of the original deed? It never could be maintained that because it was necessary that he should execute a new settlement, therefore he could be made to impose fetters upon himself, if those fetters were not properly imposed by the original deed under which he had improperly made up his title. What must be the effect of any interference of the sort? Simply to repeal the statute. In every case the intention is shown. But the statute steps in, and says that it is an insufficient and imperfect mode of imposing these fetters. Then what equity is there to compel the execution of another instrument—the original entail being incomplete? Equity there is none. The doctrine of election does not apply because here the party does take strictly under and not in opposition to the instrument (*a*). The instrument has all the binding

(*a*) The doctrine of election is, that no one shall claim under an instrument, and also in opposition to it. There is a tacit condition that the person taking shall not disturb the intention of his benefactor. Sug. on Powers, vol. ii. p. 158. But under the statute of 1685, c. 22, intention unexecuted, however manifest, goes for nothing.

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force and operation which the statute gives to it, and he submits to it. If it is not effectual in law, there is no equity which can compel him to make it effectual. It stands of its own force; and if it can be executed by its own force, it is valid; otherwise it must fall to the ground.

Interlocutor affirmed, without Costs (*a*).

(*a*) There was a point argued at the bar, namely, whether the precept of seisin in the first deed could be assigned by the grantor —the maker of the entail. The House, agreeing with the Court below on this question of conveyancing, held it to be clear that the precept could not be assigned by the grantor, but solely by the party in whose favour it was granted.

RICHARDSON, LOCH, & M'LAURIN.—WILLIAMSON, HILL, & WILLIAMSON.