They do not tell you what step you are to take—they desire your Lordships to stop this proceeding, but they suggest no other—their short object is, to get rid of the investigation which is directed.

My Lords, upon these grounds, without troubling your Lordships further, I am clearly of opinion that this interlocutor was properly pronounced, and that it ought to be affirmed. At the same time, I am anxious, as I said before, to guard myself, and to guard your Lordships, against it being supposed that the decision of this House would, in any manner, allow any partner, contrary to the terms of the copartnership deed, to come, without any cause, and endeavour to break up the concern.

Then it is said, my Lords, admitting all this as true, that the interlocutor ought to be altered, because of the inconvenience which, it is suggested, would result from it, which is, that there may be certain shareholders who might obtain access to the books. Secrecy is, no doubt, by the deed of copartnership, enjoined. Secrecy, in point of honour, ought to be maintained as far as it can; but the secrecy is for the purpose of carrying on the trade. The banking trade, I take it, must be very inconsiderable. The bank of issue has gone. What the bank is, I do not know —that is not now before me; but there is no doubt, that if the business is being carried on, which I assume it is, the accounts ought to be taken in such a manner as not to interfere unnecessarily, in the slightest degree, with the carrying on of the business—and therefore I observe with satisfaction the statement of the Lord Advocate, that it was not understood that the accountant was to take away the accounts, but that he was to go to the bank and there inspect the books, and examine them;—and your Lordships would expect that should be carried strictly into execution, because, if this partnership is not at a stand *de facto*, whatever it is in point of law, (I do not mean to say how it is—your Lordships will not assume either way,) this party ought not in effect to bring it to a stand, as it is stated it would be brought to, if this order were to be improperly carried into execution—that it would have the effect, at all events, of destroying the partnership the moment that it was operated upon. That, therefore, ought not to be allowed. I see nothing in the Lord Ordinary's interlocutor which at all directs the books to be sent away from the bank—there is nothing of the sort; and as it has been stated that the intention was, and is, that the accountant should go there, I do not see any objection to the order being carried out.

Then, as to secrecy, the accountant is bound to secrecy as an officer of the court, and he is spoken of by the Judges in the Court below as a man of honour, in whom they all have confidence. I think, therefore, that the books would be very safe in his custody;—and what now falls from me in advising your Lordships, may operate more strongly as a caution to him to be very careful not to allow the accounts of the different customers of this bank, to be known to any person whatever.

Under these circumstances, my Lords, I do not see what difficulty there would be in carrying this order into execution. These accounts ought to be taken very carefully; and your Lordships are not sending it to the Master, but are directing an account to be taken by an accountant. And are you to give credit to the statement at your Lordships' bar, that such accounts may occupy years in the preparation of them? That, my Lords, can only arise from negligence. Probably there is, in reality, no such apprehension. I am unwilling to believe that it does exist —I will not believe that this account, properly taken by an accountant, would occupy more than a very short time. Accounts of this nature cannot be investigated off-hand, but the accountant ought not to consume much time in the matter; and I shall be very glad, after what has been stated in this case upon that subject, to believe that there is no real apprehension that such will be the result.

I therefore move your Lordships that these interlocutors be affirmed with costs.

Interlocutors affirmed with costs.

First Division.—Grahame, Weems and Grahame, *Appellants' Solicitors.*—Law, Holmes, Anton and Turnbull, *Respondent's Solicitors.*

DECEMBER 13, 1852.

SIR JOHN ANDREW CATHCART, *Appellant, v.* ANDREW GAMMELL, *Respondent.*

Entail—Completing Titles—Infeftment—*A proprietor executed, in* 1815, *a strict entail in favour of himself in liferent, and B and his heirs male in fee, whom failing, C and his heirs male, whom failing, D and his heirs male, &c. The deed contained a power of revocation, and warrants of infeftment applicable to the destination. In* 1823, *the granter availed himself of the reserved power to execute a new deed, whereby he recalled the destination in favour of the persons called before and after D and his heirs, and executed a new conveyance in favour of*

himself in liferent, and D in fee and his heirs, whom failing, in favour of other substitutes not called by the former deed. This new settlement bore to be subject to the fetters of the former deed, and it assigned the warrants of infeftment, for the purpose of completing a title under the new destination. D took infeftment under the assigned precept; and being advised that this infeftment was invalid, he completed his title under the second deed by adjudication in implement:

HELD (affirming judgment),—1. *That the infeftment under the assigned precept was ineffectual.* 2. *That the fetters not being contained in the deed under which D's title was completed, but being described by reference only, were ineffectual to prevent a sale.* 3. *That there was no effectual obligation on D to make a valid entail.*[1]

In 1815, James Gammell executed a settlement of the lands of Countesswells, situated in Aberdeenshire, in favour of himself in liferent, and his grandson, William Gammell, in fee; "whom failing, to the heirs male of his body; whom failing, to James Gammell, and the heirs male of his body; whom failing, to Andrew Gammell, and the heirs male of his body; whom failing, to Ernest Gammell, and the heirs male of his body; whom failing, to the heirs female of the body of the said William Gammell," &c. The deed contained the fetters of a strict entail, and a reserved power of alteration and revocation. The deed also contained a precept of sasine. In 1823, the granter of the foregoing deed, by virtue of the reserved powers it contained, executed a deed containing a revocation, and the following new destination:—"I do, by these presents, give, grant, alienate and dispone, to and in favour of myself in liferent, and to the said Andrew Gammell in fee, and the heirs male of his body; whom failing, to the heirs female of his body." The new deed bore special reference to the deed of entail of 1815, and contained the following obligation:—"And I bind and oblige me to infeft and seise myself and the said Andrew Gammell, whom failing, the heirs of entail hereby substituted to him, as aforesaid, in the foresaid lands." This deed contained no precept or procuratory.

In September 1829, Andrew Gammell took infeftment upon the precept of the deed of 1815, as it was assigned by the deed of 1823. Having been advised that this title was feudally inept, inasmuch as the warrant of infeftment was applicable to a destination altogether different from that contained in the deed under which his title was made up, Andrew Gammell, in 1844, completed his title under the deed of 1823 by adjudication in implement, which was duly followed by charter and infeftment.

Such being the state of the title, Andrew Gammell sold a part of his lands to Whyte, who presented a suspension as of a threatened charge for the price. He also raised an action to set aside the infeftment of 1829, and to have it found and declared that he possessed the lands in fee simple under the title completed by adjudication upon the deed of 1823. Sir John Andrew Cathcart, who was called as a substitute under the last deed, raised an action against Gammell to have it found and declared that he held the lands under the fetters of the deed of 1815, and was bound to execute, in favour of the heirs called by the deed of 1823, a deed containing all the clauses of a strict entail. These processes were conjoined.

The Court of Session gave judgment in favour of Andrew Gammell.

Bethell Q.C., and *H. Bruce*, for appellant.—1. The *first* question is, whether the deed of 1823 is not an integral part of the deed 1815. The intention of the settler to treat them so, is clear, for instead of creating new powers, and a new procuratory of resignation and precept of sasine, he assigns those in the former deed, and expressly states, that those persons called by the second deed are to hold the estate under the provisions of the former. When one deed is incorporated with another, so that you cannot read it without referring to that other, then it is not a substantive and distinct deed, but one merely supplementary of the other, and the two together form one single individual deed. The entail of 1815 was a *mortis causâ* settlement, without any *jus quæsitum* in any party during the granter's lifetime. Hence any subsequent alteration formed part of the deed itself—*Lord Strathmore*, 15 S. 449; 1 Robins. App. 189; *Breadalbane's Trustees*, 2 D. 731. It is clearly unexceptionable, that a tailzied settlement should consist of two deeds, one referring to the other, as setting forth the limitations and fetters. Such, at least, is sufficient in questions *inter hæredes—Don* v. *Don*, Mor. 15,591; Roberts. App. 76; *Laurie* v. *Spalding*, Mor. 15,612; *Hope Vere* v. *Hope*, 11 S. 520; *Porterfield* v. *Stewart*, 8 S. 16; 5 W. S. 515. If both are to be taken here as one deed, then the title made up in 1829 was valid, and there is now a binding entail, the fetters being clearly set forth in the former part of the deed, and the statute thus complied with. The respondent, besides, was himself one of the parties in whose favour the precept of sasine was granted; and even under the original deed, that precept was a warrant for infefting him in the fee of the estate, unless it should have been previously exhausted by William and James succeeding before him. But the second deed recalled those two heirs, and left the respondent the first nominatim fiar or institute, just as if they had both predeceased the entailer without leaving issue. Andrew was clearly a conditional institute

[1] See previous report 12 D. 19; 21 Sc. Jur. 593. S. C. 1 Macq. Ap. 362: 25 Sc. Jur. 146.

under the original destination, and if the parties preceding him had predeceased the entailer, or renounced, there was nothing to prevent him availing himself of the procuratory and precept in the entail, and making up a good title. It is of no consequence whether the failure of the preceding parties is caused by death, or by a deed revoking the nomination—*Fogo* v. *Fogo*, 4 D. 1063. If we were to follow out the principles laid down by Lord Mackenzie in *Fogo's case*, it would be found, that it was in fact quite superfluous for the deed of 1823 to contain at all an assignation to the unexecuted procuratory and precept, or to grant a new disposition, and those parts of that deed must be held mere surplusage. 2. But if the title of the respondent was not properly made up in 1829, still, even according to his own shewing, his title, as made up in 1843, was a sufficient compliance with the statute, and effectually threw round him the fetters of the entail. The charter of adjudication obtained in 1843 contained all the requisite clauses, and the instrument of sasine following thereon also bore on its face the same clauses at length, and both these deeds have been duly registered. The efficacy of an entail against third parties depends on the feudal investiture containing the conditions of tailzie; and it is quite settled, that even if the precept in the charter merely refer to the prohibitions and clauses—and these are set forth in the instrument of sasine—that is a sufficient compliance with the statute—Kilk. 543; Mor. 15,380; 5 Br. Supp. 738. The cases relied on by the respondent to shew the invalidity of the title made up in 1829, all differ from the present in this essential particular, that while here the virtue of our case lies in this, that the two deeds are incorporated together and form one settlement, in all the cases referred to, there were two separate and independent deeds, each complete in itself, and each sufficient to found a right without reference to the other. Thus it was in *Broomfield* v. *Paterson*, Mor. 15,618; *Lindsay* v. *Earl of Aboyne*, 4 D. 843; *Paterson* v. *Leslie*, 7 D. 950. 3. Even if the fetters of the entail are not binding at present as against creditors, they are binding *inter hæredes;* and the Court will order the respondent to execute all necessary deeds in order to create a valid entail, the matter being still entire—*Frazer* v. *Lord Lovat*, 1 Bell's App. C. 105. Nothing can be clearer than that the settler's intention was, that Andrew Gammell should take the estate only subject to the fetters of the deed 1815. This case comes within the principle of approbate and reprobate—*Carmichael* v. *Carmichael*, 15th Nov. 1810, F. C.

Sol.-Gen. Kelly, & Anderson Q.C., for respondent.—This entail is bad under the statute 1685. The substantive deed of entail under which the respondent holds the estate, does not contain the requisite clauses, and it is quite immaterial whether the subsequent instrument of sasine sets them out. The fact of his having made up his title in 1829, does not estop him from setting up this fatal defect. In Scotland, the making up of a title is an *ex parte* proceeding, which prejudices nobody; and if there are two modes of doing so open to a party, and he adopts one, there is nothing to prevent him afterwards from making up his title in the other mode, it being otherwise a legitimate course—and no prescription bars him—*Gardner* v. *Gardner*, 9 S. 138. This is *a fortiori* true where the former course adopted was irregular. Sasine was taken in 1829 under the precept, but it was irregular to do so, for the only party who can assign a precept of sasine, is the party who is in possession of it. The deed of 1823 destroyed the old investiture, and created a new one—the destination of 1815 being displaced by that of 1823, which gave the respondent a new estate or interest. By the former deed he was a mere heir of entail—by the latter he was institute, and stood in the position of a purchaser; and there is no precept of sasine applicable to him as a purchaser. Under the deed of 1823 he stood on a personal title, and he feudalized it by adjudication, there being no machinery in the deed for doing so otherwise. The precept of sasine could not be used as a warrant of infeftment in favour of parties not contained in it—*Blackwood*, Mor. 6902. It is said to be immaterial how the failure of the preceding heirs arose, and *Fogo's case* was referred to; but in that case the title was made up both ways, and either mode was equally good. The whole case of the appellant rests on the unity of operation and identity of structure of both deeds; but we maintain they are quite distinct and independent instruments. The deed of 1815 was registered in 1816, and complete in the settler's lifetime. *Strathmore's case* is inapplicable; for though the intention may be admitted to be everything as to a will, it is far from being so as to a deed of entail. All the cases shew, that an entail cannot be good by reference to another deed for its statutory clauses. Here the second deed was a new deed, because it was a new destination. It is said *Broomfield's case* is distinguishable from this, because sasine was there taken on the prior deed, and thus the title became feudalized; but that circumstance is quite immaterial, for taking sasine on a deed cannot make that deed more perfect than it would be without it. In *Lindsay* v. *Earl of Aboyne*, though the entail was of different lands, it was in all other respects a much weaker case than this, for the heirs there were called in the same order. So *Leslie* v. *Paterson*, *supra*, and *Garnock* v. *Garnock*, Mor. 15,596, apply. As to the cases cited by the other side:—In *Don's case*, the true question was not as here, whether the heir had power to sell, but whether he could alter the succession. The case of *Laurie* v. *Spalding* was obscure, and was remarked upon and explained by Lord Moncreiff in the *Aboyne case*. In *Fogo's case*, no alteration was made in the destination in the deed. Then it is said, whatever is the legal effect of the deed of

entail as between creditors, yet, as between heirs, the respondent must be compelled by the Court to make a sufficient and binding entail to give effect to the granter's intention. *In Montgomery* v. *Eglinton*, 2 Bell's App. C. 149, this point was considered. An entail being *strictissimi juris*, various courses have been attempted thus to force the heir to make a deed of entail—*Stewart* v. *Fullerton*, 4 W. S. 196. The rule is, that the heir can deal freely with the estate, except in so far as he is effectually prohibited—*Elibank* v. *Murray*, 1 Sh. & M'L. 1; *Morehead* v. *Morehead*, *ibid.* 29; *Sharpe* v. *Sharpe*, *ibid.* 594. The other side deal with this as a will, where intention is everything; but it must be remembered this is a deed of entail, and no such rule applies. In *Frazer* v. *Lovat*, the question for decision was simply this, whether Abertarff was entitled in fee simple, or was still bound by the deeds; and all that was ordered by the House was, that the entail should be made according to these instruments. Quite a different course was followed by Abertarff from what we followed. Besides, he was only a substitute, whereas we are an institute; and it is well settled, that an institute cannot be fettered by a general description—he must be individualized and named—*Steel* v. *Steel*, 5 Dow, 83. There were, in short, three grounds clearly distinguishing this case from *Fraser's*. 1. There was one instrument there as to the investiture and the subject; here there are two instruments distinct. 2. The lands there were imperfectly described, so as to make it doubtful which was meant; here there was no doubt whatever. 3. The title there was made up in fee simple, which was a wrong act, and that was the reason why the proceedings were commenced. It is a mistake to consider this as a mere question of equity—it is a question of strict and positive law—*Irvine* v. *Aberdeen*, 2 Paton, 419.

Bethell replied.—We admit that if the respondent had made up his title under the assignation of the precept of sasine in 1823, it might have been open to objection; but then the precept was so created as to follow the destination, and therefore accompanied all the changes in that destination made under the power reserved in the deed. The moment the power was exercised, the deed of 1823 became a component part of the deed 1815, and merely extinguished the part of that deed containing the destination. We do not, however, wish to press the first part of our case as to creditors, and will be content if the House will order the respondent to make a binding entail *inter hæredes*. We admit that the mere fact of the deed 1823 referring only to that of 1815, is not sufficient to throw round the person called by the latter, the fetters, but it puts on the person called by the latter the obligation to hold the estate under the conditions of the former; and if the latter deed is invalid as an entail by the law of Scotland, then the obligation is clear to make one that is valid. We maintain, therefore, that the donee in tail is bound to throw round himself the fetters of 1815. It is quite a common thing for a settler to convey land to trustees, charging them to execute an entail in favour of certain persons. Such a case this is. The Court below seems strangely enough to have entirely overlooked *Frazer's case*, which cannot be distinguished from this.

LORD CHANCELLOR ST. LEONARDS.—My Lords, this case, which is of great importance with reference to Scotch conveyancing, has undoubtedly occupied a great deal of your Lordships' time; but that has afforded me an opportunity, from time to time, of looking into the case, and I therefore am enabled to dispose of it, at least to my own satisfaction, without taking further time to consider. It is a case, however, of so much importance in point of the technical rules of conveyancing in Scotland, that it deserves the most serious consideration. It is an attempt, if possible, to place the law, which at present certainly is not in a very satisfactory state, upon a sure foundation. I say, not in a very satisfactory state,—not that I think there is any real doubt about the rule, but that the cases have so entangled the matter, that certainly it is impossible to say distinctly what the authorities do now uphold as the rule.

My Lords, the whole question as regards entails under the Scotch law, depends upon the Scotch statute of 1685. That statute certainly did not create entails or prohibitions; but it authorized parties who created tailzies, by inserting clauses in the instrument itself, and following that up in certain forms there prescribed, to insert in their tailzies, prohibitory, irritant and resolutive clauses, which, by their effect, should be binding as against even creditors and onerous purchasers.

The distinction is perfectly established, that there may be a good tailzie *inter hæredes*, which still will not bind either creditors or onerous purchasers; and it is undoubted, that there may be a reference by one deed creating an entail, to another which has the proper fetters, or fetters which would be binding, *inter hæredes*, and yet that might not be binding against creditors or onerous purchasers.

Now the whole of this case turns upon the question, whether the two deeds, to which I shall presently call your Lordships' attention particularly, do or do not authorize the present institute, the person who is instituted, namely, the pursuer Andrew Gammell, to make the sale which he has made; and if that be held to be valid and binding, then, on the same principle, your Lordships will have to hold that he has the same power over the remainder of the estate—and that is the simple question.

Now the Judges in Scotland, for a very considerable period, tried all that they could do to

establish the right in heirs of tailzie to have some remedy against the person who broke the fetters, supposing them not to be properly imposed according to the statute of 1685. They attempted, in the first place, by inhibition, to prevent the party from breaking the prohibitory clauses. That was ultimately overruled, and in most of these questions this House disagreed with the Courts of Scotland upon those points. It was decided, that there could be no right to interfere on the part of the Courts of Scotland—that the prohibition must work by its own force, and could not be enforced in an indirect way by interference of the Courts of Scotland.

It was then insisted, that the heir, if disappointed, would have the right of proceeding for damages. That, again, was negatived; and it is perfectly clear, that if the fetters are not properly imposed according to the statute, then, although the estate be sold, or creditors be let in contrary to the intention of the settler, yet no right to damages remains to the person who is disappointed of his rights under the instrument.

Then came the great question in these cases, which is in *Bruce* v. *Bruce*, 4 W. S. 240, and which I recollect very well because I was counsel in the case, which occupied a very considerable time at the bar of your Lordships' House; and there the question was, whether or not the party, the tenant in tail, although he might have sold so as to escape the fetters as regarded the purchaser, was not bound, upon a supposed equity or obligation, to invest the money which he received from the sale of the entailed estate, in the purchase of other estates to be settled in the like manner. Now, the points were very well discussed; and ultimately this House, reversing the orders of the Courts of Scotland, established, and I think I may say properly established, that no such right existed.

No doubt therefore remains that the law is simply this, that in all these cases, you must impose the fetters according to the statute of 1685, so as to be binding by their own force in the instrument in which they are found—or there can be no rights. That, therefore, is a satisfactory ground. It enables a party, if he chooses, to impose the fetters, and nothing can be so clear and so distinct. The statute has been considered not to be well framed, and it is not framed so clearly and distinctly, perhaps, that they who run may read, but it is impossible to mistake it as regards how the fetters should be imposed; and if, in these cases, the parties make an effectual deed by mere combination simply, and go no farther, or if they will make a new deed, and take care that that deed does contain upon the face of it every fetter that they mean to impose, no question can ever arise in the law of Scotland. And, therefore, it is only from mere want of care that this question ever can arise.

Now, my Lords, I must call your Lordships' attention, as everything depends upon the instruments, to the two instruments in this case. Having just stated what I consider the law to be, I will now proceed to consider what the settlements were in this case. And first comes the regular deed of tailzie with proper clauses. I will assume they are proper clauses—no question has been raised upon that—I will assume they are proper clauses, without giving an opinion upon that—proper, prohibitive, irritant, and resolutive clauses.

Now this disposition was, after limitation to the settler himself in liferent, then to William Gammell in fee; "whom failing, to the heirs male of his body; whom failing, to the said James Gammell, son of the said Lieutenant-General Andrew Gammell, and the heirs male of his body; whom failing, to Andrew Gammell," the gentleman now entitled to the estate, "and the heirs male of his body; whom failing, to the said Ernest Gammell, and the heirs male of his body." Then it goes on to the heirs female of the body of William Gammell, and so on. Then it goes on to other persons—which I need not read to your Lordships. Then there is an obligation to infeft himself and William Gammell, and the heirs of entail, and then there is a procuratory of resignation, and after the procuratory of resignation embodying the whole of the prohibitory, irritant, and resolutive clauses, he assigns the estate, with its titles and rents, and so on; and then there is a clause of registration and a precept of sasine.

Now he reserves to himself this power of alteration and revocation—(reads power of revocation). Then comes this clause, which has been relied upon, and very properly relied upon—"All which revocations or alterations to be made by myself, or any other person to be appointed by me as aforesaid, shall be made and done by writing under our several hands respectively, which writing or writings shall be understood and taken as a part of this present deed of taillie, and shall be as effectual to all intents and purposes as if the same had been inserted herein,"—a very proper clause, no doubt. He had, therefore settled the estate upon a certain person named as the institute, with remainder over to certain heirs substitute; and, by the law of Scotland, Andrew was a substitute heir of entail under that deed, having certain persons before him and certain persons after him.

Then, by the deed of 1823, he recites that he had "resolved to alter the foresaid course and order of succession:" "I have therefore revoked, and do hereby revoke, the foresaid nomination of the said William Gammell, James Gammell, Ernest Gammell, Martha Gammell," and so on—he goes through all of them, but not mentioning Andrew, no doubt, who was a substitute heir of entail under the first deed—(continues to read). And then he introduces for the first time the

Cathcarts as persons who are to take as substitute heirs of entail after these limitations, they taking nothing whatever under the deed of 1815. Then in a subsequent part of this instrument, he binds and obliges himself to infeft and seise himself and Andrew 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," &c., and so on.

My Lords, the question which your Lordships have now to determine is, whether the fetters—which are properly, I assume, inserted in the deed of 1815, but which are not repeated in the deed of 1823—do apply to the new limitations to Andrew in the deed of 1823, although not in terms complying with the statute of 1685—that is to say, whether the deed of 1823 will be an independent deed, those prohibitive, irritant, and resolutive clauses not being imported, as they ought to be, according to the statute of 1685.

Now, my Lords, I must first of all dispose of the question as regards the precept of sasine. I entirely agree with the Court below in the view which was taken with regard to these rights. I think, of course, he could not assign, as he attempted to do, those rights, because they were rights which he had granted. The grantee might or might not restore those rights, but the granter of the rights never could assign them to another person. And, therefore, the only question in that case was, whether or not the precept of sasine in the original instrument of 1815 could be applied to the deed of 1823, under the change of circumstances. The change of circumstances, your Lordships will observe, amounts to this, that Andrew—who was before the substitute heir of entail following other persons, and might never, therefore, have acquired any interest in the estate if that deed had remained unrevoked—became institute heir of entail by the removal by the deed of 1823 of those persons who preceded him. But, then, other persons were introduced as succeeding to him; and with the exception of leaving Andrew—not that that makes, properly speaking, any essential difference, because I agree, that however you may remove a man out of an entail, the others will succeed in their regular limitation,—whether he is removed by deed or otherwise, no doubt it is laid down that the substitute heirs will take; but here is a question of a different nature: Can you take in the precept of sasine which was intended to give effect to the deed of 1815, and transfer that to the deed of 1823? I think, for the reasons stated by the Court below, that that cannot be done.

Therefore the question stands now before your Lordships, as I understand it, upon two points. First of all, are the two deeds so mixed together as to form one deed, and, therefore, that the want of the prohibitive and the other clauses which are found in the deed of 1815, is supplied by reference in the deed of 1823, and the clause relied upon at the end of the deed of 1815?—Are those fetters supplied by the way in which that deed of 1823 is framed, and do the two deeds together form one instrument? That will be the question upon the first point.

Now I must observe, in the *first* place, that the deed of 1815 was registered in 1816, in the lifetime of the settler; and, therefore, though it was not done at the time, it was certainly rendered a perfect instrument in the lifetime of the settler; and it was admitted in the able argument which your Lordships heard upon the part of the appellant, that if the deed of 1815 had been neutralized, there must have been a new infeftment to give effect to the deed of 1823. It was not attempted to be argued, that, if no effect had been given to the deed of 1815, the deed of 1823 would not have been operative.

My Lords, the *second* point is, supposing the two deeds do, if taken together, amount to a strict entail under the statute of 1685, then is there such an obligation imposed upon the heir of entail, according to the *Abertarff case*, decided in this House, as shall compel him, by the direction of this House, or of the Courts below, to execute a regular deed of tailzie binding himself by the fetters in the deed of 1815?

Now the *first* question—namely, whether these two deeds can be conjoined, united, and read together as one deed—is a simple question of Scotch conveyancing—it is neither more nor less; but it is a very important question, and it behoves this House, with reference to titles in Scotland depending upon that question, to be very careful not to unsettle the law, if it be settled, upon that subject.

Now, my Lords, I propose, with that view, that your Lordships should consider a little how the cases stand upon that subject. The case of *Porterfield*, which was so often referred to, amounted to nothing more than this, that there was a settlement with a power of revocation and substitution *hæredibus nominandis*. Now that power was executed without an attempt at any new conveyance; therefore it really amounted simply to this, that, disturbing nothing, and merely executing that power in the way of substituting other heirs, it was held by the Court of Session, and, on appeal, confirmed by your Lordships' House, "that the deed of nomination was a valid exercise of the faculty to name heirs—that an heir called by it was preferable to an heir called by a posterior substitution—and that prescription had not taken place so as to exclude the former." My Lords, that clearly settled that which I apprehend is not to be disputed in the law of Scotland on this point, that if there be a power of revocation in a deed, and that power of revocation, particularly where there are heirs, merely to alter the destination of heirs, is authorized

to be executed, and can be executed, and is executed by a mere instrument introducing the alteration, that then a new nomination takes place as a part of the original instrument—and whatever fetters were imposed by that original instrument, are imposed upon the settlement as it stands by alteration. To that I see no objection. In the law of England the thing is done, though standing upon wholly different grounds. We requiring no seising of investiture—we have a mode of operating upon a supposed seisin which exists, not in fact, but in law, by which you do that which is done by sasine, and obtain the effects flowing from that sasine, without the slightest difficulty.

In the law of Scotland, if you want an absolute deed, or a deed efficiently divided, you must do it by a new instrument; but where you have a power as in that case, and that power is exercised by simple nomination, and warranted by the power, without any disturbance of the estate itself, there it is perfectly settled and not now to be disputed, that you may alter the destination, and that the original deed will ultimately stand and have effect with all the fetters in that deed, precisely as if the person substituted by the nomination had originally been introduced in the place of the person who is so superseded. So far there can be no difficulty at all. But it must be borne in mind, that this case of Porterfield was only between heirs, and was not a question of binding creditors or onerous purchasers.

Then, my Lords, there is a case, which I have no doubt is very difficult to deal with—that of *Laurie* v. *Spalding*. Now, as I understand that case, one would have supposed it was not open to the slightest doubt, for there being a settlement with general prohibitory and other clauses, the party bought another estate, and of that estate he took a conveyance, and that conveyance simply referred to the former settlement. Now, if anything be well settled by the law of Scotland, it is an abstract question, that you cannot in that way impose fresh fetters under the statute of 1685—and here there was a purchaser with an actual purchase: I mean a purchase, not for the mere sake of trying the title, but the estate was sold. But all the fetters were held to be well imposed, and that was simply done, as I understand it, by a mere reference to the preceding settlement, or the fetters. Now, if that were the law, it would be very difficult to say how it would stand. But your Lordships will find it is not treated as law; and it has been explained in a way which perhaps may account for the decision there by the Judges. The observation I allude to (in 4 D. 889) by the Court—that is, in effect, by seven of the learned Judges—is this—"The case of *Laurie* v. *Spalding* is, however, materially different, as I read that case; it certainly did come to be a question between an heir substitute of entail and a purchaser; and one general plea maintained for the purchaser was distinctly, that the entail of the lands of Ervies, by mere reference from one deed to another, could not be effectual against creditors and purchasers, as not being duly recorded in the terms of the act 1685. The case was perplexed in its circumstances; and there was a specialty strongly urged, which almost certainly affected the decision, that the purchaser had dealt with the heir in possession at a time when he had only a personal right to the property; in which case the general rule is, that the purchaser is affected by all the qualities of his author's title. Accordingly I find, that the case having been appealed, this was the point mainly relied on in the respondent's appeal case. Nevertheless, if there were no authority against it, I should find it difficult to extricate that case from the peculiarities of the titles which had been constituted in the vendor before the question came to be tried." Mr. Sandford, in his Book upon Entails, p. 157, says he thinks the case is not defensible as an authority, if it proceeded upon the ground that the fetters were properly imposed as against the purchaser. I take it, that if it had been determined upon that ground, it would be overruled by the other cases, and that it is impossible to maintain the ground upon which it is supposed to have been determined. But if it turned upon that question which Mr. Sandford suggests as to the title, it stands as an authority upon a very different point, and not touching, therefore, that point which your Lordships have heard discussed. It is a case, therefore, upon which your Lordships are not called on to express any opinion, and which I shall take for granted is not an authority bearing upon the question now before your Lordships.

Now, my Lords, there is nothing more clear, therefore—I should consider it quite clear, and that it is not necessary to refer to authorities to shew it—that a mere reference by one deed to another, as regards prohibitory, irritant, and resolutive clauses, is directly and in terms struck at by the statute of 1685. Reference has been made to the case of *Broomfield* v. *Paterson*. That was a question by creditors against heirs, and, therefore, it introduces a question about creditors; but there is no doubt whatever, as I understand that case, that the second deed was a new deed—it was held to be, and it clearly was, a new deed. But what was the consequence? If it was once established to be a new deed, of course the fetters were not binding. That that deed was a mere limitation—he had released his power of revocation under the original settlement, but still he executed a new settlement, "with and under the conditions, provisions, irritant and resolutive clauses, as contained in the original bond of tailzie, and in the charter of infeftment following thereon." That first charter had been neutralized, and then came this new deed—and that new deed refers simply to the former one—that was held clearly to be—there is no doubt it was—a separate deed. I do not think it open to any point merely because the deed was executed

subsequently by the settler, with the concurrence and consent of his grandson, entitled as institute in the former entail. It therefore was a new settlement by persons claiming under the former entail, and was a seisin of persons claiming under the former deed. I cite it for the purpose only of shewing, that that, as one of the leading authorities, has established 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 appeal was dismissed, and the interlocutor affirmed.

Now, my Lords, there was the case of *Lindsay* v. *Lord Aboyne*, which has been quoted. That was upon the 2nd of March 1842. Now, in that case, the original settlement having contained fetters, a supplementary settlement was executed, and, as here, it referred to fetters; but that was held not to be good, because, although the settler meant to attach it to the other, and to make a supplemental settlement—he terms it in so many words a "supplemental settlement,"—the intention therefore was clear—there is no question about the intention—yet the law is too strong for the intention, because the statute has prescribed the mode to which you shall have recourse if you mean it to be binding—and not having satisfied that, the statute prevails against it. My Lords, I have stated the date of that case for this reason, that although the case of *Frazer* v. *Lord Lovat*, which has been so much referred to, and properly referred to, was heard in March 1841, 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 that judgment was given in *Lord Aboyne's case*. Consequently, it is clear that that rule was maintained without knowing what had been the fate of *Frazer's case*. But we must bear this in mind, that this House did not establish anything new of itself in *Frazer's case*, whatever may be the weight, or whatever may be the true interpretation, of that case; but the House affirmed that which was settled by the Court in Scotland. In the Court in Scotland, 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 held that they were imposed,—and this House affirmed the later decision. This House, therefore, let it be borne in mind, did not, as it has done in many cases argued before your Lordships, set up a rule contrary to what had been established in Scotland, but it took the rule as it found it laid down in Scotland in that case, and simply affirmed what the Court of Scotland itself had done in reversing its own former decision.

Now, my Lords, let us see exactly, for everything depends upon this, what it is that *Frazer* v. *Lord Lovat* decided, for, in point of fact, it bears upon the two questions which become united in some sense. If this case could be shewn to be similar to the case now before your Lordships as regards the union of two deeds, or, if not, if it could be shewn that your Lordships should now decide that Andrew Gammell is compelled to execute a regular deed with all the fetters, that case, in either view, would be an authority on which the appellant could rest.

Now, my Lords, in that case, I think it is to be lamented that the judgment was so long delayed. Of course it gave your Lordships a great opportunity of considering the case; 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 I have given to the case, 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 there; nor do I find it even in the appeal cases delivered to the House—for the appellant, in his second reason, says, "The interlocutor of the Court appealed from, dated the 14th of May 1824, by which it is found that the appellant is bound to execute an entail of the lands of Abertarff, together with the old glebe of Abertarff or Boleskine, in terms of the entail executed by the late Hon. Archibald Frazer of Lovat, dated 15th August 1808, and containing a destination in terms of the deed executed by him on the 2nd of July 1812, is erroneous, in respect, *first*, that such an obligation to entail is not to be raised up by anything short of the clearest and most explicit declaration, especially where such obligation is inferred by a reference from one deed to another. *Secondly*, Because there is no such distinct connection, by way of reference, between the deed of 1812 and the entail of 1808, as to justify the interlocutor appealed from; on the contrary, the deed of 1812, whilst it does not refer to the entail of 1808 by specifying the date of its execution, does not otherwise make reference to it, either by stating correctly the lands comprehended within it," and so on: "The judgment of the Court assumes, that there subsists a close and necessary connection between these two deeds, which cannot be discovered or established by an examination of the deeds themselves. *Thirdly*, Supposing those deeds were held to be connected by a reference of the one to the other, they must be considered as in themselves constituting the entail which the testator intended to establish, and are not to be superseded, altered or amended, by any new entail such as that which the Court have ordered."

Then, in the reasons for appeal given by the other side, they say that the deed referred to in the deed of 1812 was the tailzie of 1808; and it having been held once to be fixed and "established, either by a consideration of the different deeds executed by the late Lord Lovat, or by the judgment in the declarators, that the tailzie 15th August 1808 is the tailzie referred to in the

deed 2d July 1812, and that tailzie being thereby identified as the tailzie referred to, it must be taken to be the tailzie referred to in all questions upon the legal effect of the deed 2d July 1812 as combined with the deed referred to, whether as regards the matter of conveyance, or the nature of the title under which the appellant may have right to enjoy any lands which he claimed or claims as conveyed to him by the deed 2d July 1812, there being no ground in law for contending, that the reference, although it may be sufficiently clear and certain for the purposes of conveyance, is too vague and indefinite to be acted upon in a question as to the imposition of fetters, or, in other words, in a question of whether the party who takes the lands in respect of the instrument referred to being held to be the tailzie 15th August 1808, shall hold these lands, not in fee simple, but under the limited and fettered title upon which, assuming that tailzie to be the instrument referred to, he would be bound to possess them." 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 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, there being a blank, and having to examine and to imply, or to ascertain by construction, which deed really was referred to, it seems to have been taken for granted, that in form there that second deed would be embodied as part of the first.

Now, my Lords, we must look a little at the observation which has been made at the bar that the reasons given in the Court below, why the *case of Abertarff* did not apply to this case, are not satisfactory, because, although there was a complication of deeds, yet there was no complication if the case was well understood. As soon as you had found that the deed of 1812 referred to the particular deed of 1808, there was no question at all of complication, because it was a simple deed of tailzie of 1808, with an alteration introduced by the deed of 1812.

My Lords, in that case, you will find that the deed of 1812 is in this form:—The party having a full power to revoke under the deed of 1808—(I pass over the previous fetters, they are not material, they do not bear upon the question)—he says, that he had executed a disposition and deed of entail of the estate of Abertarff, and so on—and he puts the date of that in blank, and that blank has been supplied by referring it to the deed of 1808; then he says he had power to make an alteration in the estates—"Therefore I have nominated and appointed, as I hereby nominate and appoint, Thomas Frederick Frazer, my grandson, presently 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 particularly 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 Frazer, and the heirs male of his body; whom failing, to the other heirs and substitutes appointed or named in the said deed of entail," and so on; "and in so far," he says, "I alter the 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 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." Then he declares, "that if these presents be not revoked by me, the same shall be valid and effectual although found in my own custody, or in the custody of any other person, undelivered at the time of my death." Now, your Lordships will observe the frame of that instrument—that although there are words no doubt following the nomination, "I hereby dispone, assign and convey, the said lands and estates which are particularly specified and described in the said deed," it amounts to a nomination under the power of revocation. The only thing done by this deed is to alter the destination under the power which enabled the settler to do the act; and although there are the words of disposition which I have read to your Lordships, yet those are not followed up by any direction as to a sasine, or any direction with regard to the investiture, in any way whatever; but this second instrument is left simply and only upon the nomination made by this settler—and then it appears to me to be entirely governed by the cases. In the deed of 1808, there were all the fetters;—then, if the deed of 1812 simply did adopt the deed of 1808, and only altered the destination according to the power which the settler had, then those two deeds united and conjoined did contain all the fetters, and the fetters were properly imposed upon the parties in the second deed, not only by the first deed, but also by force of the settlement. That appears to me to be entirely consistent with the speech, and the advice contained in that speech, delivered in your Lordships' House by my noble and learned predecessor. I can see nothing which is contrary to that view, which appears to me to be assumed now in this particular passage. But, then, after discussing the question, of whether the reference by the one deed to the other was sufficiently clear, the noble and learned Lord said this—"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 resolutive, 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 Frazer,' the appellant, &c.—and then follow certain restrictions applicable only to the appellant and the heirs male of his body, and the entailer then says, 'and in so far I alter the said deed of entail?'" My apprehension therefore is, that this House had no intention whatever to alter the law of Scotland, but that that deed of 1812 must have been considered as not being, in the sense in which we have been now considering the question, a new deed removing wholly or in part the old deed—altering the destination undoubtedly, but in that case to be held as forming part of the original deed; and, in that view, the whole is consistent.

Now, my Lords, the same doctrine has again come before the Courts of Scotland in a case to which I will refer. I have already drawn your Lordships' attention to this important fact, that the question in *Frazer's case* did not, according to the view of the parties, turn upon the statute of 1685, and therefore they must have considered the nomination not to disturb that deed, but to form a support to it, or an addition to it, as part of the original instrument.

Now, my Lords, there was the case which came before the Court below, of *Paterson* v. *Leslie*, that was heard in July 1845. The decision in *Frazer's case* was at that time perfectly well known, and it must be remembered, that it was known as a decision by this House. It was not as if this House had disturbed the doctrine in Scotland, but it affirmed that doctrine, and it left the Scotch Judges therefore at perfect liberty to go on deciding according to their own view of the law, with that affirmation before them of their decision in *Frazer's case*. But how did they deal with the law in that case? There, there was a regular tailzie, with the power of revocation; and a new deed was executed under that power, but, by way of convenience, it referred to the irritant and resolutive clauses in the first settlement, though not incorporating them; but the parties meant to bind themselves by the conditions in that respect contained in the first deed—yet it was held, that the second deed was a new entail superseding the first, and that as it did not contain within itself the foresaid clauses, it was not effectual to protect the lands against creditors. Why? because, notwithstanding the reference to the first deed, the second deed was held to be a new deed, and there being no sufficient reference to the fetters of the first deed, the old doctrine, and I may say the settled doctrine, of the Courts of Scotland, was adhered to. And singularly enough, so little was *Frazer's case* considered to break in upon the actual rule established in Scotland, that it is positively not once, I believe, referred to in this later case—*Paterson's case*. Be it observed also, with reference to the technicalities, which are to be lamented, that the law must be upheld, whether technical or not, and you will find it there laid down expressly as it is stated all along. Lord Jeffrey lays it down thus, and I believe it is confirmed by the Lord President and the Lord Ordinary—"With regard to the analogy attempted to be made out with the *Porterfield case*, I think it fails at once. There the investiture has been made up on the old title, while here the whole of the investiture under the tailzie 1692 has been abandoned and swept away by the new one under the deed of 1700. 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, of 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 within the view really to be inferred from the decisions of the Courts of Scotland, a new deed, so as to require that there should have been 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 were contained?

Having already disposed, my Lords, of the question which I advise your Lordships not to regard as a point with reference to the instrument of sasine, it comes now to be a question with reference to the construction of the instrument, and of the intention of the parties. This gentleman had a right, under the first instrument, to revoke and alter the destination of his estate. He does so, although he leaves Andrew no doubt untouched; but he leaves him under his second settlement in a very different position from that in which he stood in the first, for, as I have already said, in the first he was second substitute heir of entail, and might never have come into the estate, whereas, under the new deed, he becomes the institute. The appointment is accordingly again to him in so many different terms; because in terms it is to him in fee, and the heirs male of his body. In the original destination, it is to him and to the heirs male of his body. The gift to Andrew is for life simply upon the first deed; but he is introduced here as the institute, and becomes the first taker. Then follows the introduction of an entirely new class of persons, the Cathcarts, the appellants at your Lordships' bar, who, no doubt, were intended

to take this estate according to the intention expressed by the settler; and if the settler's intention is defeated, it will be, without doubt, by a technicality, and by the rules of conveyancing which prevail in Scotland, and which certainly your Lordships would not be disposed, and ought not to disturb. Now, by this instrument, after he has reappointed the estate to Andrew in a different way, having revoked the other settlement, he then introduces those several persons as heirs substitute of entail, altering altogether the former disposition of his property. He substitutes an entirely different class of persons to take by way of substitutes, also making the person who was a substitute, the institute, no doubt. Then, my Lords, comes this clause—after describing the order in which they are to take, he says they are to take "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 they "shall be entitled to possess the said lands under the foresaid deed of entail and these presents, and on no other right or title whatever;" and that they shall "record these presents in the register of taillies, as also in the books of Council," and so forth: And then he declares, that if the deed be undelivered at his death, it shall be as good and sufficient "as if the same had been completed by infeftment, and formally delivered to the said Andrew Gammell, or any other of the heirs of entail, or to any other person for their behoof." And then he grants powers to his procurators, or to "Andrew Gammell," or any of the foresaid heirs of entail, jointly and severally, to cause present this deed before the Lords of Council and Session judicially, and to procure the same recorded in the register of entails, and to expede charters and infeftments on the said deed of entail, and these presents, agreeably to and in terms of the act of parliament concerning taillies;" and he consents to registration.

Now, is this a simple nomination which, under the authorities, would not disturb the first deed, or is it in effect a new deed? My Lords, after very great consideration, I have reluctantly come to the opinion, that this is a new deed, and was so intended by the settler—that he meant this deed to operate without disturbing the title of Andrew; but that he also meant it to operate so as to introduce a new settlement, and to operate in some respects conjointly with the former deed, not by its own force. But it would be only evading the question to say, that because the testator intended the former deed to operate with the later deed, therefore you ought to take them as one deed;—that would be to deny all the authorities, for I have shewn to your Lordships, that taking the case in which a man buys one estate, and he settles that one estate with proper clauses, and then settles another estate,—although he called that a supplemental deed, and meant to add it so that it should form part of his first settlement, and referred expressly to the different powers contained in the first deed, yet the statute steps in, (the statute is too strong, too powerful, too clear for the case,) and says, that the party has not adopted the only mode pointed out by the law to give effect to the second deed by fetters, and therefore it must stand upon its own force, and cannot avail itself of the fetters under the former deed. So that really it amounts to nothing to say that such was the intention. But you are to look further. Is there an intention, as I think is expressed here, that effect shall be given to the second deed as if it had taken place by infeftment? No doubt it was intended it should operate with the first deed,—but that it should operate by its own force as far as it would; and therefore the fetters referred to as in 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 true upon the first point—if that be maintained—then the remaining question, and a most important question it is, is, whether or not it is possible to maintain, that the Courts have the power, if there be an informal imperfect settlement, to remodel that settlement in the Courts of Scotland, so as to impose the fetters which the settler himself has failed properly to bind the parties by?

Now, my Lords, no such thing has ever been done in Scotland—no such attempt has ever been made. In the *Abertarff case*, as the party had in fact made up a title to himself in fee, whatever was the construction, it was necessary that he should execute a regular deed of tailzie. There is no question about that, that he was bound to execute a new deed of tailzie; and then, of course, the question was, whether he was bound or not to include the fetters in the original deed. That could not be maintained; and I was rather surprised at the argument which was advanced at your Lordships' bar—it never could be maintained, that because it was necessary he should execute a new settlement, inasmuch as he had made up a title upon a separate deed, therefore he could be made to impose fetters upon himself, if those fetters were not properly imposed by the deed under which he had improperly made up his title. All you could possibly do, whether he had made up his title one way or the other, was to compel him to make up his title according to the binding nature and operation of the deeds under which he claimed—you could do no more. What would be the effect of any interference of this sort? Simply to repeal the statute of 1685. In every case the intention is shewn. In every case there is a sufficient obligation in the words of the instrument, "I give you this estate: but I give you this estate subject to the fetters which are in my original instrument." The statute steps in and says, that

is an insufficient and imperfect mode of imposing those fetters—he has not imposed the fetters according to the act of parliament. What equity is there? There never was a greater mistake than supposing, that what we call election here, which is called by the name of approbate and reprobate in Scotland, touches a case of this sort. In the case where there were three estates in a settlement, and it turned out that one of the estates belonged to the person, but the other two came under the settlement, it was held in Scotland, as held here, that the party taking under the deed could not take against him;—if you take the two estates which belonged to the settler, you must bring into the settlement the third estate which belongs to yourself. There is no difficulty about that. But what has that to do with the case in which he is to take under a deed? Observe, that in that case you attempt to take under and in opposition to the deed at the same time. You cannot be permitted to do that in a Court of Justice; but it is a totally different question here, because here the party does take strictly under, and only under, and not in opposition to, the instrument. The instrument has all the binding force and operation which the law gives to it, and to that he submits. What can be done more? There is no such law in England as would enable you to confirm an imperfect settlement of this sort without something more than we have here. If you do not effectually make your settlement, the party taking under it may be unable to maintain it; but there is no equity, because the thing might have been done—there is no equity which can compel the party to do it. It stands simply upon its own force, and if it can be executed by its own force, that is valid, otherwise it must fall to the ground. That is all the former decisions do.

Now, my Lords, there is no authority whatever in the law of Scotland to do that which is contended for here—and there is no such authority in the law of England. Your Lordships are aware, as I am, having had the honour of appearing in these Scotch appeals, that I have done as my predecessors always have done—strictly confined myself to the Scotch law, and have not attempted, and never shall attempt, to import into the doctrines of Scotch law the doctrines of the English law;—but taking the Scotch law as I find it, there is no such doctrine as is contended for. In the *Abertarff case*, it was introduced necessarily and inevitably, because there was a settlement executed, and it extended the fetters to the second instrument, because it evidently was considered to have been a part of the original instrument, and to indicate that the two together formed one instrument.

Therefore I recommend to your Lordships to affirm the interlocutor of the Court below, and to dismiss the appeal.

My Lords, though I think that nothing can be more wise than that the costs should follow and abide the event, yet in this case it is impossible not to see that the authorities have left the question in a state of great uncertainty and confusion; and I think this would be a very proper case to depart from the general rule of compelling the appellants to pay the costs, having failed in the appeal. I shall therefore move your Lordships to affirm the interlocutor complained of, but without costs.

Interlocutor affirmed without costs.

First Division.—Richardson, Loch, and Maclaurin, *Appellant's Solicitors.*—Williamson, Hill, and Williamson, *Respondent's Solicitors.*

MARCH 2, 1853.

THE SCOTTISH MARINE INSURANCE COMPANY, *Appellants*, *v.* JAMES TURNER and ALEXANDER RANKINE JOHNSTONE, *Respondents.*

Maritime—Ship—Insurance—Freight—Total Loss—Expenses—*The owners of a ship effected an insurance with an insurance company on freight, and with the same and other companies on the vessel itself. In the course of the homeward voyage, and before entering the dock, the vessel suffered great damage, but discharged her cargo and earned freight, which was paid to the owners. Thereafter the owners having abandoned the ship, the company, which had also insured on freight, accepted the abandonment, but the others having refused to do so, an action was raised as for total loss, in which a verdict was returned finding that the vessel was properly abandoned, and not worth repairing, and that she was a total loss. Under this verdict, it was held that the insurers on the ship were entitled, in settling as for a total loss, to have placed to their credit their due proportion of the freight, subject to such deduction as might be found properly to affect their interest therein. Thereafter the owners having raised an action against the company who had insured both on vessel and freight, for payment of the sum insured on the freight,*

HELD (reversing judgment), *that the company were not liable in payment, in respect that the*