

HON. MARIANNE MACKAY HAMILTON FULLARTON, Appellant.

No. 49.

—*Gifford—Forsyth.*

SIR HEW DALRYMPLE HAMILTON, Respondent.—*Thomson—Jameson.*

Et è contra.

Res Judicata—Prescription—Tailzie.—An heir of entail having brought an action of reduction of certain deeds as in contravention of the entail, and concluding for forfeiture of the heir in possession, and to find her entitled to the estate; and the defender having been assoilzied; and she having thereafter brought another action founding on the deeds as valid, and as to giving to her a right to the estate in preference to a succeeding heir—Held, (affirming the judgment of the Court of Session,) that the decree of absolvitor did not form a *res judicata* to bar the second action; but the Court of Session having assoilzied on the merits, the House of Lords remitted for review, and for the opinions of all the Judges.

JOHN LORD BARGANY had two sons, John Master of Bargany and William,—and a daughter Nicolas. On the 19th of June 1688, and upon the marriage of John Master of Bargany with Miss Sinclair, eldest daughter of Sir Robert Sinclair, a contract of marriage was executed, by which the said ‘ Lord Bargany, in ‘ contemplation of the said marriage, and for the tocher after ‘ mentioned, by the tenor hereof binds and obliges him and his ‘ heirs and successors, always with and under the burden of the ‘ liferent provision above mentioned, hereby contracted and pro- ‘ vided to the said Mrs. Jean Sinclair, in manner above written, ‘ and also with and under the express reservations, burdens, re- ‘ strictions, provisions, declarations, and clauses irritant under ‘ written, allenary, and no otherwise; whilks are hereby appointed ‘ to be contained in the procuratories and instruments of resigna- ‘ tion, charters, precepts, sasines, and infeftments to follow hereup- ‘ on; with all possible and convenient diligence, duly and validly ‘ to infeft and seise, by charter and sasine, titulo oneroso, in com- ‘ petent form, the said John Master of Bargany, and the heirs- ‘ male to be procreate of the said marriage betwixt him and the ‘ said Mrs. Jean Sinclair, his future spouse; whilks failing, the ‘ heir-male to be procreated of the body of the said John Master ‘ of Bargany in any other marriage; whilks failing, William Ha- ‘ milton, his brother-german, second son to the said John Lord ‘ Bargany, and the heirs-male to be procreated of the body of ‘ the said William Hamilton; whilks failing, the heirs-male to be ‘ procreated of the body of the said John Lord Bargany; whilks ‘ failing, the eldest heir-female of the body of the said John Lord ‘ Bargany, and the descendants of her body, without division; ‘ whilks failing, the next heir-female to be procreated of the body

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2^D DIVISION.
Lord Reston.

July 26, 1822. ‘ of the said John Lord Bargany, and the descendants of the
 ‘ body of the said next heir-female, the eldest heir-female, and the
 ‘ descendants of her body, always excluding other heirs-portioners,
 ‘ and succeeding without division; whilks failing, John
 ‘ Houston, younger of that ilk, sister’s son to the said John Lord
 ‘ Bargany, and the heirs-male of the body of the said John Houston,
 ‘ &c. This deed also contained a procuratory of resignation, with all
 ‘ clauses necessary for constituting a strict and effectual entail. In
 ‘ particular it required, ‘ That the hail heirs of tailzie, as well
 ‘ male as female, and the descendants of their bodies, who shall
 ‘ happen to succeed to the said lands, baronies, and others foresaid,
 ‘ according to the foresaid destination, or by virtue of the said writ
 ‘ apart sua to be granted by the said John Lord Bargany, shall be
 ‘ obliged to assume, use, and bear the surname, arms, and designation
 ‘ of Hamilton of Bargany, as their proper surname, arms, and designation
 ‘ in all time thereafter. And if any of the said heirs of tailzie, male
 ‘ or female, and the descendants of their bodies, who shall happen at
 ‘ any time hereafter to succeed to the said lands and others foresaid,
 ‘ shall do in the contrair hereof, then and in that case the said heirs
 ‘ of tailzie, male or female, and the descendants of his or her bodies
 ‘ sua contravening, shall ipso facto amit, lose, and tyne their right,
 ‘ title, and succession above specified to the said lands and others
 ‘ above mentioned, and the samen in the case foresaid shall ipso
 ‘ facto fall, accresce, and pertain to the next heir of tailzie-who
 ‘ would succeed if the contravener and the descendants of his or her
 ‘ body were naturally dead; and it shall be leisome to the said next
 ‘ heir of tailzie to establish the right thereof in his or her person,
 ‘ either by adjudication, declarator, or serving heir to the person
 ‘ who died last vest and seised therein preceding the contravener,
 ‘ (and that without being liable to the contravener his or her debts
 ‘ or deeds,) or by any other manner of way consisting with the laws
 ‘ of this kingdom; and the persons sua succeeding upon the
 ‘ contravention, and the descendants of their bodies, shall be obliged
 ‘ to assume, bear, and wear the said surname, arms, and designation,
 ‘ under the like irritancy to which the said hail heirs of tailzie,
 ‘ and the descendants of their bodies, who shall happen to succeed to
 ‘ the said lands and others foresaid, are to be subject and liable,
 ‘ through all the succession, in all time coming; and also providing,
 ‘ likeas it is hereby specially provided and declared, that such of
 ‘ the said heirs of tailzie succeeding to the said lands and others
 ‘ foresaid, who shall not have right to the honours, titles, and
 ‘ dignities of Lord Bargany, by virtue of the patent of honour
 ‘ granted to the said John Lord

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‘ Bargany his father, shall be bound and obliged, under the irri-
 ‘ tancy above written, to do their utmost to obtain and procure
 ‘ from his Majesty and his royal successors, a new patent, con-
 ‘ ferring upon them and the heirs of tailzie above specified the
 ‘ honour, title, and dignity of the Lord and Lady Bargany; and
 ‘ also providing alwise, likeas it is hereby specially provided and
 ‘ declared, and appointed to be contained in and declared by the
 ‘ instruments of resignation, charters, precepts, infestments, and
 ‘ others to follow hereupon, that it shall not be leisome nor law-
 ‘ ful to the said John Master of Bargany, or the heirs-male of
 ‘ his body, or any others the members of tailzie above mentioned,
 ‘ to alter, innovate, or change the foresaid tailzie and order of suc-
 ‘ cession above mentioned, or to do any other deed, directly or in-
 ‘ directly, in any sort, whereby the same may be any ways altered,
 ‘ innovated, or changed.’

John Master of Bargany predeceased his father, without hav-
 ing been infest; and thereafter his father having died, William,
 the second son, (and who was now Lord Bargany,) made up
 titles, without regard to the entail, by service and retour, as near-
 est lawful heir-male of his father. The entail, however, was after-
 wards, on the 27th of July 1694, recorded in the register of tail-
 zies; and he thereupon obtained himself served heir of tailzie
 and provision in general to John Master of Bargany, his brother,
 in virtue of the deed 1688; but he was never infest.

John Master of Bargany had, by his marriage with Miss Sin-
 clair, an only daughter, Joanna Hamilton, who in 1707 married
 Sir Robert Dalrymple, eldest son of Lord President Dalrymple,
 proprietor of the estate of North Berwick. By their contract of
 marriage, the Lord President entailed his estate of North Ber-
 wick, reserving his own liferent, in favour of Sir Robert and
 his heirs in a certain order:—‘ Declaring, that in case there
 ‘ should be more sons than one of the foresaid marriage, and
 ‘ that the succession of the estate of Bargany shall fall and de-
 ‘ volve upon the heirs-male thereof, then and in that case, the
 ‘ said heir accepting of the said estate of Bargany, and the
 ‘ descendants of his body, shall ipso facto amit and lose all right
 ‘ and interest he had or could pretend to the lands, &c. of North
 ‘ Berwick and others hereby disponed, and the succession thereof
 ‘ shall immediately devolve to the next son of the said marriage.’
 The Lord President, however, reserved a power to discharge and
 qualify any of the provisions of this deed, and to renew the same
 at pleasure.

Sir Robert, and his wife Joanna Hamilton, died before the
 Lord President, leaving three sons and two daughters, viz. Sir

July 26. 1822. Hew Dalrymple, (grandfather of the respondent,)—John, who afterwards assumed the name of Hamilton,—Robert, who was a doctor of medicine, and died without issue,—Marianne, the mother of the appellant Mrs. Fullarton,—and another daughter, whom it is unnecessary to notice.

In the mean while William Lord Bargany died, leaving a son James, and a daughter Grizzel. James (who now became Lord Bargany), was then served heir of tailzie and provision in general to his father William, and thereupon took possession of the estate, but was never infeft. His sister Grizzel married a Mr. Buchan, by whom she had an only daughter, Mary Buchan.

James having died without issue, a competition arose for the estate,—the claimants being first, Sir Hew Dalrymple, the son of Joanna Hamilton, and grandson of John Master of Bargany; second, Mary Buchan, daughter of Grizzel, and grand-daughter of William Lord Bargany; and, third, Sir Alexander Hope, who was the son of Nicolas, daughter of John Lord Bargany, the entail, and consequently his grandson.

An obstacle, however, arose against the claim of Sir Hew,—at least to the effect of taking both Bargany and North Berwick,—in consequence of the prohibition which Lord President Dalrymple had inserted in his entail. His Lordship, however, in virtue of his reserved power, executed a deed proceeding on this narrative:—‘ Considering that I have full power and faculty reserved to me to discharge that quality and condition contained in the contract of marriage last mentioned, disabling the heir-male of the marriage, called to the succession of the tailzied estate of North Berwick, under an irritancy, to accept the estate of Bargany, and to discharge the said irritancy, and so to enable Hew Dalrymple, the eldest son of the marriage, to become heir of tailzie to James Lord Bargany, last deceased, and at the same time to enable and capacitate him to bruik and enjoy the tailzied estate of North Berwick; and also considering that there is nothing in the tailzie contained in the contract of marriage of the Master of Bargany to hinder the same person to be heir to the estate of Bargany, and of any other estate, providing that the heir of Bargany do assume, and always bear and retain the name and arms of Hamilton of Bargany as their proper name and arms; neither is there any thing in the tailzie of the estate of North Berwick to hinder the heir of North Berwick to enjoy and possess the estate of Bargany, and to use and always retain the name of Dalrymple of North Berwick jointly with that of Hamilton of Bargany, except the clause above specified, which I have power to discharge; and upon all these considerations, at

‘ present I am fully satisfied that it is the interest of both fami- July 26. 1822.
 ‘ lies that the said Hew Dalrymple be enabled so far to accept of
 ‘ the succession to the estate of Bargany, as to be served and re-
 ‘ toured heir of tailzie to that estate, and thereby be in a condi-
 ‘ tion to denude himself thereof in favour of the next person after
 ‘ him called to the succession by the tailzie of the said estate of
 ‘ Bargany, which is the most regular and effectual manner of con-
 ‘ veying the said estate in favour of the next person in the line of
 ‘ succession by the tailzie of the said estate of Bargany.’

On this narrative he stated, that ‘ I am therefore resolved so
 ‘ far to exercise the powers and faculties reserved to me to alter,
 ‘ innovate, qualify, revoke, or discharge the clauses and provisions
 ‘ contained in the contract of marriage last mentioned, as to en-
 ‘ able the said Hew Dalrymple to accept of the succession to the
 ‘ estate of Bargany, and to obtain himself served and retoured
 ‘ heir of tailzie to the said estate. Therefore I do hereby alter,
 ‘ revoke, and recal the foresaid provision in the said contract of
 ‘ marriage, whereby he is disabled to accept of the succession of
 ‘ the estate of Bargany, without incurring the irritancy above
 ‘ mentioned relating to the estate of North Berwick, and where-
 ‘ by in the present case both estates are not allowed to be estab-
 ‘ lished or subsist in one person for any time longer or shorter ;
 ‘ and in consequence thereof I do hereby discharge the irritancy
 ‘ subjoined to the said prohibitory clause, whereby it is provided
 ‘ that the heir of North Berwick, and the descendants of his body,
 ‘ shall forfeit his right and title to the estate of North Berwick,
 ‘ in case of his accepting of the succession to the estate of Bar-
 ‘ gany ; and I do hereby authorize and allow him to be served
 ‘ and retoured heir of the tailzied estate of Bargany, according to
 ‘ the provisions and conditions contained in the tailzie of the said
 ‘ estate of Bargany. Accordingly I do, by virtue of the said fa-
 ‘ culty reserved to me, authorize and allow him to take upon him,
 ‘ use, and retain the name and arms of Hamilton of Bargany, as
 ‘ his proper name, arms, title, and designation, so long as he is
 ‘ and shall be allowed to continue in the right of both estates of
 ‘ Bargany and North Berwick, and no longer ; provided always,
 ‘ that he do also use and retain the name of Dalrymple of North
 ‘ Berwick, with such addition to the proper arms of Bargany as
 ‘ is allowed and consistent with the tailzie of Bargany ; reserving
 ‘ always full power and liberty to me to revoke, alter, or innovate
 ‘ what I have hereby granted and allowed to the said Hew Dal-
 ‘ rymple, and to oblige him to denude himself of the estate of
 ‘ Bargany at such a time and in such manner as he shall be or-
 ‘ dained and appointed to do, by a writing under my hand, at

July 26. 1822. ‘ any time in my lifetime, etiam in articulo mortis, and with power
 ‘ and faculty to me to renew and redintegrate the said provision
 ‘ that was contained in the foresaid contract of marriage.’

His Lordship also at the same time executed another deed, in which he stated—‘ After full and deliberate reflection and ma-
 ‘ ture consideration in what manner it is just and reasonable for
 ‘ me to exercise the powers and faculties lodged in me by the
 ‘ foresaid contract of marriage, and still reserved to me by the
 ‘ exercise of it in the writ above mentioned in favour of the said
 ‘ Hew Dalrymple, allowing him to be served and retoured heir
 ‘ of tailzie to the deceased James Lord Bargany and his prede-
 ‘ cessors, notwithstanding that he is now fiar of the estate of
 ‘ North Berwick, and to enjoy the fruits and emoluments of the
 ‘ estate of Bargany without incurring any irritancy or penalty,
 ‘ so long as he shall be allowed to continue in the right of the
 ‘ said estate of Bargany, I, the said Sir Hew Dalrymple, do here-
 ‘ by, in virtue of the said power and faculty reserved to me,
 ‘ allow the said Hew Dalrymple to continue in the possession of
 ‘ the estate of Bargany during all the days of my life, and to con-
 ‘ tinue to use and bear the name, title, and arms of Hamilton of
 ‘ Bargany, as his own proper name, title, and arms, during the
 ‘ space aforesaid, with such additions with respect to my name,
 ‘ title, and arms, as may be consistent with the said tailzie of the
 ‘ estate of Bargany, and no longer; and I appoint and ordain the
 ‘ said Hew Dalrymple, fiar of the estate of North Berwick, and
 ‘ his heirs, to divest and denude himself omni habili modo of his
 ‘ right and title to the estate of Bargany in favour of John Dal-
 ‘ rymple, his second brother, and the heirs of his body; which
 ‘ failzieing, to Robert Dalrymple, now his third brother, and the
 ‘ heirs of his body; which failzieing, to the other heirs appoint-
 ‘ ed to succeed to the estate of Bargany by the tailzie thereof,
 ‘ and that within the space of six months after my decease, in
 ‘ ample form.’—‘ Reserving to the said Hew Dalrymple the hail
 ‘ fruits and emoluments of the estate of Bargany from the de-
 ‘ cease of the said James Lord Bargany to the period at which
 ‘ he is hereby appointed to divest and denude himself of the same;
 ‘ declaring that his refusing or delaying to denude himself of the
 ‘ foresaid estate of Bargany, after the term and period hereby
 ‘ appointed for that effect, or his continuing to possess and intro-
 ‘ mit with the rents and emoluments of the said estate of Bargany
 ‘ after the foresaid term and period appointed for denuding him-
 ‘ self, shall import an irritancy of his right and title to the estate
 ‘ of North Berwick, which estate of North Berwick shall ipso
 ‘ facto fall and accresce to the said John Dalrymple and the heirs.

‘ male of his body, and failzieing of him, to the said Robert Dal- July 26. 1822.
 ‘ rymple and the heirs-male of his body, and to the other heirs
 ‘ appointed to succeed to the estate of North Berwick by the said
 ‘ contract of marriage.’

In consequence of the permission contained in these deeds, Sir Hew, pending the competition, took possession, on his apparen- cy, of the estate of Bargany, granted factories, and assigned the rents.

After a great deal of litigation between the competing parties, the House of Lords, on the 27th March 1739, ‘ ordered and ad-
 ‘ judged, that the said estate of Bargany doth descend to the said
 ‘ Sir Hew Dalrymple, the eldest son of the daughter, and only
 ‘ child of John Master of Bargany, and that he ought to be served
 ‘ heir of tailzie and provision to the said James Lord Bargany.’*

In the mean while the Lord President died ; and after the above decision, Sir Hew Dalrymple, on the 13th of August 1740, executed a deed proceeding on a narrative of the entail of the estate of North Berwick, and of the result of the competition, in these terms :
 ‘ And now I, the said Sir Hew Dalrymple, having duly considered
 ‘ the foresaid tailzie of the estate of North Berwick, contained in
 ‘ the foresaid contract of marriage, and also the tailzie of the
 ‘ estate of Bargany above mentioned, dated the 19th day of
 ‘ June 1688 years, and that it appears to have been intended
 ‘ by the parties to the contract of marriage betwixt the said Sir
 ‘ Robert Dalrymple and Mrs. Joanna Hamilton, my father and
 ‘ mother, that the said two estates of North Berwick and Bar-
 ‘ gany should be separately taken and possessed by the heirs of
 ‘ the marriage betwixt the said Sir Robert Dalrymple and Mrs.
 ‘ Joanna Hamilton, except in the cases therein excepted ; and
 ‘ that in case I should now take the succession of the estate of
 ‘ Bargany, I would thereby forfeit the right to the estate of
 ‘ North Berwick, for myself and my descendants, in favour of
 ‘ John Dalrymple, counsellor at law, my brother-german ; and I
 ‘ being fully resolved to take and hold the estate of North Ber-
 ‘ wick, and to allow the estate of Bargany to descend to and be
 ‘ taken by the said John Dalrymple in the terms of the entail of
 ‘ the estate of Bargany ; therefore, and for the love and respect
 ‘ which I have and bear to the said John Dalrymple, and in con-
 ‘ sideration of the settlements of the estates of North Berwick
 ‘ and Bargany above recited, wit ye me, with and under the pro-
 ‘ visions after mentioned, to have repudiated, likeas I by these
 ‘ presents do repudiate and refuse to accept the succession of the
 ‘ said estate of Bargany, and that to and in favour of the said John

* See 1. Craigie and Stewart's Appeal Cases, No. 47.

July 26. 1822. ‘ Dalrymple, the next heir of tailzie in the said estate of Bargany :
 ‘ And I consent that the said John Dalrymple shall, in respect
 ‘ of my repudiation as aforesaid, serve himself heir of tailzie and
 ‘ provision to the said James Lord Bargany, and otherwise make
 ‘ up titles in his person to the said estate of Bargany, in such
 ‘ manner as is competent of the law, and as he shall be advised ;
 ‘ and that the said John Dalrymple do instantly take possession
 ‘ of the said estate of Bargany, and uplift the rents thereof in the
 ‘ tenants’ hands, fallen due since the death of the said James
 ‘ Lord Bargany, and in time coming: Providing always, that
 ‘ these presents shall noways prejudice my own or my descend-
 ‘ ants’ right to take the succession of the said estate of Bar-
 ‘ gany upon failure of the said John Dalrymple and Dr. Robert
 ‘ Dalrymple, my third brother, and their descendants, or in case
 ‘ any event shall exist, in which I or my descendants can take
 ‘ the said succession consistent with the foresaid tailzie of the
 ‘ estate of North Berwick ; with which express provision these
 ‘ presents are granted by me, and accepted by the said John
 ‘ Dalrymple.’ No notice was taken in this deed of those which
 had been executed by the Lord President, with a view to the
 competition, and it was not inserted in any record.

On obtaining this deed of repudiation, John Dalrymple, under the name and designation of John Hamilton, second son of the deceased Sir Robert Dalrymple, raised an action of declarator against Sir Hew and the other substitutes under the entail of Bargany, in which, after narrating that entail, and the deed of repudiation executed by Sir Hew, he concluded, ‘ that it ought
 ‘ and should be found and declared, by decret of the Lords of
 ‘ Council and Session, that the said John Hamilton, pursuer, hath
 ‘ the only right and title to the succession to the said estate of
 ‘ Bargany, and that he ought to be served heir of tailzie and pro-
 ‘ vision to the said James Lord Bargany in the said lands and
 ‘ estate of Bargany, comprehending the several lands, baronies,
 ‘ and others contained in the tailzie made by John Lord Bargany
 ‘ in the contract of marriage betwixt the said John Master of Bar-
 ‘ gany and Mrs. Jean Sinclair, after the form and tenor of the
 ‘ writs before narrated, and laws and practice of this realm, used
 ‘ and observed in the like cases.’ Decree in absence was pro-
 nounced on the 26th of February 1741, and by which the Court
 ‘ found and decerned and declared conform to the conclusions of
 ‘ the libel.’ John Hamilton then obtained a general service, the
 retour of which stated, ~~that~~ ‘ quod quondam Jacobus Dominus
 ‘ Barganie, unicus filius demortui Gulielmi Domini Barganie, fra-
 ‘ tris quondam Joannis Magistri de Barganie, et qui Gulielmus

‘ erat pro-avunculus Joannis Hamilton de Barganie, Armigeri, July 26. 1822.
 ‘ juris consulti, filii secundi demortui Domini Roberti Dalrymple
 ‘ de Castletown, procreat. inter illum et demortuam Dominam
 ‘ Joannam Hamilton, unicam filiam et prolem dicti demortui Jo-
 ‘ annis Magistri de Barganie, latoris præsentium, obiit ad fidem
 ‘ et pacem S. D. N. Regis, et quod dictus Joannes Hamilton est
 ‘ legitimus et propinquior hæres talliæ et provisionis dicto demor-
 ‘ tuo Jacobo Domino Barganie, suo consanguineo, secundum con-
 ‘ tractum matrimonialem init. et perfect. inter dictum Joannem
 ‘ Magistrum de Barganie, cum avisamento et consensu demortui
 ‘ Joannis Domini Barganie, sui patris, ex una parte, et Magistram
 ‘ Jeannam Sinclair, natu maximam filiam demortui Domini Ro-
 ‘ berti Sinclair,’ &c. The retour also stated that he was nearest
 heir of tailzie and provision, according to the judgment of the
 House of Lords, to the deed of repudiation of Sir Hew, and the
 decret of declarator.

By virtue of this general service, John Hamilton acquired
 right to the procuratory of resignation in the entail 1688, (which
 had never been executed,) and on the 26th of July 1742 he re-
 signed those parts of the estate of Bargany which held of the
 Prince, and obtained a charter of resignation under the Great
 Seal, the dispositive clause of which was thus expressed:—‘ Di-
 ‘ lecto nostro Joanni Hamilton de Barganie, juris consulto, filio
 ‘ secundo demortui Domini Roberti Dalrymple de Castleton, pro-
 ‘ creat. inter illum et demortuam Dominam Joannam Hamilton,
 ‘ unicam filiam demortui Joannis Magistri de Barganie, et sic
 ‘ hæredem fæmellam demortui Joannis Domini Barganie ejus avi,
 ‘ et hæredibus quibuscunque ex corpore dict. Joannis Hamilton,
 ‘ quibus deficient. aliis hæredibus quibuscunque ex corpore dict.
 ‘ Dominæ Joannæ Hamilton procreat. inter illam et dict. Domi-
 ‘ num Robertum Dalrymple, absque divisione; quibus deficient.,
 ‘ aliis hæredibus fæmellis ex corpore dict. demortui Joannis Do-
 ‘ mini Barganie absque divisione, hæres fæmella natu maxima, et
 ‘ descendentes ex ejus corpore omnes alias hæredes portionarias,
 ‘ semperexcluden., et absque divisione succeden.; quibus deficient.,
 ‘ hæredibus masculis ex corpore nunc demortui Domini Joannis
 ‘ Houston,’ &c. Then follow the other substitutions in the ori-
 ginal entail of Bargany as already recited, together with the pro-
 hibitory, irritant, resolute, and other clauses and limitations
 contained in this deed.

The quæquidem clause, after deducing the titles from the
 deed of entail, and mentioning the procuratory of resignation
 therein contained, stated, that ‘ et ad quam procuratoriam resig-
 ‘ nationis, terras aliaque inibi content. dict. Joannes Hamilton de

July 26. 1822. ‘ Barganie nunc jus habet tanquam hæres talliæ et provisionis in
 ‘ generali servit. et retornat. dict. demortuo Jacobo Domino Bar-
 ‘ ganie, secundum ejus generale servitium coram Balivis Vici Ca-
 ‘ nonicorum de data 12. Septembris 1741, ad Cancellariam debite
 ‘ retornat.’ And it then recited that this was fortified by the
 judgment of the House of Lords, by the deed of Sir Hew, and
 the decree of declarator.

In like manner, John Hamilton, by executing the procuratory
 of resignation in the entail 1688, obtained charters of those parts
 of the lands which held of subjects superiors; and on these re-
 spective deeds he was duly infeft in August and September 1742.

Under these titles he thenceforth possessed the estate of Bar-
 gany; but when he had arrived at an age at which he had scarcely
 any prospect of issue, and his elder brother, Sir Hew, being still
 alive, he executed a deed, on the 21st of June 1780, in these
 terms:—‘ Be it known to all men by these presents, me, John
 ‘ Hamilton of Bargany, Esq. for certain causes and considera-
 ‘ tions me moving, and in order to give effect to the entail exe-
 ‘ cuted by John Lord Bargany in his son’s contract of marriage,
 ‘ of date the 19th day of June 1688 years, and to the condi-
 ‘ tions upon which my own right and title to the lands under men-
 ‘ tioned was founded, to have given, granted, and disponed, likeas
 ‘ I hereby give, grant, and dispone to and in favour of myself,
 ‘ and the heirs of my body, without division; whom failing, to
 ‘ Sir Hew Dalrymple, Bart. my brother, and the heirs of his
 ‘ body, without division; whom failing, to the next heirs of the
 ‘ body of John Lord Bargany aforesaid, and the other heirs of
 ‘ tailzie contained in the foresaid deed of entail, in the order
 ‘ therein expressed, and which heirs of entail are herein after in-
 ‘ sert, word for word, as in the said deed of entail.’ On this deed
 infeftment was taken on the 25th of October 1780.

In the mean while, Dr. Robert Hamilton, the immediate
 younger brother of John, had died without issue; and as John
 himself had no children, the party who was next entitled to suc-
 ceed to the estate (on the supposition that Sir Hew and his heirs
 had no right) was the appellant Mrs. Fullarton, the heir and re-
 presentative of their eldest sister, who was daughter of Joanna
 Hamilton.

Sir Hew died in 1790, leaving a son, Sir Hew, (the second;) and in 1793 Mrs. Fullarton raised an action of reduction against John Hamilton, and against Sir Hew, (the second,) calling for production of the deed of repudiation of 13th August 1740, the decret of declarator obtained by John Hamilton in 1741, his general service, and charter and sasine, together with the disposi-

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tion executed by him in June 1780, and the sasine thereon ; and concluding that they should be reduced, as being contrary to the entail, and that, being so reduced, it ought to be declared that the late Sir Hew Dalrymple, ‘ by his assuming and bearing the ‘ name and arms of Hamilton of Bargany, upon obtaining the ‘ judgment of the House of Peers in his favour, and afterwards ‘ laying down and ceasing to bear and wear the said name and ‘ arms, &c., had forfeited the estate, or at least had lost and forfeited it by the deed of repudiation ; and that John Hamilton, ‘ by the manner in which he made up his titles, or by executing ‘ the deed of 1780, or by the one or other of these acts and deeds, ‘ the said John Hamilton, defender, has contravened the said ‘ deed of tailzie, incurred an irritancy of, and amitted, lost, and ‘ forfeited his right and title and interest to the whole entailed ‘ lands and estate of Bargany, &c., for himself and the descendants of his body ;’—‘ and that the said pursuer ought to be ‘ served heir of tailzie and provision to the said James Lord Bargany in the said lands and estate of Bargany.’

In defence against this action John Hamilton founded on his charter and sasine in 1742, with forty years possession, as a sufficient title to exclude, and therefore opposed great avizandum being made. On the other hand, Mrs. Fullarton contended that she had been in minority during the greater part of that period, and therefore prescription had not run. To this it was answered by John Hamilton, that the exception of minority did not apply in the case of entails, because any one of the substitutes was entitled to have objected to the deeds ; and if such a plea were sustained, prescription could never run against an entail. Lord Justice-Clerk Macqueen found, ‘ That, in computing the period ‘ of prescription, the years of the pursuer’s minority are not to be ‘ deducted ; and in respect that the charter and sasine 1742 are ‘ ex facie unexceptionable, and that no nullity or objection does ‘ from thence appear to lie against them, and that it is averred ‘ by the defender, and not denied by the pursuers, that the defender has, in virtue of that investiture, possessed the estate of ‘ Bargany from the date thereof to the commencement of the present action, without any challenge or interruption, finds that the ‘ defender’s right to the estate is secured to him by the positive ‘ prescription, and that he is entitled to hold and possess the ‘ estate under the foresaid investiture in time coming, and that ‘ the same is sufficient to exclude the title of the pursuers in this ‘ reduction ; and therefore alters the former interlocutor, and ‘ assoilzies from the reduction ; reserving to the pursuers to insist in the declaratory conclusions of their libel, and particularly,

July 26. 1822. ‘ how far the tailzie 1688 is affected by the investiture 1742, and
 ‘ whether or not the defender has incurred any irritancy under
 ‘ that entail.’ Against this judgment Mrs. Fullarton having re-
 claimed, the Court found, ‘ That in this case, in computing the
 ‘ period of prescription, the years of the pursuer’s minority are to
 ‘ be deducted ; and therefore that the defender has not produced
 ‘ a sufficient title to exclude.’

Immediately after this judgment, John Hamilton having died without issue, and Sir Hew the second being also dead, appearance was made by the present respondent, his eldest son, who reclaimed ; but the Court, on the 6th of December 1796, adhered.* He then appealed to the House of Lords, by whom it was ordered, on the 18th December 1797, ‘ That the cause be remitted
 ‘ back to the Court of Session in Scotland to review the interlocu-
 ‘ tors appealed from, and to consider how far the validity of the
 ‘ title to exclude, set up by the defender (Sir Hew,) is in this case
 ‘ involved with the title set up by the pursuer to sustain the ac-
 ‘ tion of reduction and declarator, as having become the nearest
 ‘ substitute under the deed of entail, in the manner alleged in her
 ‘ behalf ; and if the Court shall hold these questions to be in this
 ‘ case involved with each other, that they do pronounce an inter-
 ‘ locutor for or against that title, and also on the effect which such

* See Mor. *voce* Prescription, p. 1117i. In the Respondent’s Case, p. 7. the following explanation of the judgment is given :—‘ The Judges were unanimously of
 ‘ opinion in favour of the interlocutor of the Lord Ordinary, and held it to be clearly
 ‘ established in law, that the character of a substitute, under which the appellant
 ‘ claimed, did not entitle her to have her minority deducted from the years of pre-
 ‘ scription. But when judgment was about to be given, it was for the first time sug-
 ‘ gested, on the part of the appellant, that a distinction might be traced between her
 ‘ situation and legal character under the entail of Bargany. and that of a substitute,
 ‘ as to which character it had been found by many adjudged cases that minority
 ‘ could not be pleaded. She asserted that in *this preliminary stage of the cause*, in
 ‘ arguing her objection to the exclusive title, she was at liberty to assume as true,
 ‘ not only all the facts alleged in her summons, but all the conclusions in law which
 ‘ were there deduced from them ; in other words, that she was entitled *hoc statu* to
 ‘ hold that Mr. Hamilton and his brother, the late Sir Hew Dalrymple, had incur-
 ‘ red fatal irritancies and contraventions, and had forfeited for themselves and their
 ‘ descendants, by which, in terms of the tailzie, and without the necessity of any
 ‘ declarator, she had become *ipso facto* the next heir of entail, and the estate had
 ‘ fallen and accresced to her as next heir, in the same manner as if the persons con-
 ‘ travening, and their descendants, were naturally dead. From the moment of these
 ‘ contraventions, she maintained that she acquired a right of eviction, not contin-
 ‘ gent, but immediate ; and therefore, although certain legal forms of declarator and
 ‘ service were requisite to establish her title and put her in possession, she had all
 ‘ along been the owner (*vera domina*) of the property, and as such entitled to plead
 ‘ her minority in bar of the prescription running against her. Instead of proving
 ‘ her allegations of contravention and irritancy, she maintained that she was entitled
 ‘ to assume them. because she had set them forth in her summons.’

‘ judgment may have upon the interlocutor directed to be re-
 ‘ viewed.’* July 26. 1822.

In consequence of this remit, the Court, on the 23d of November 1798, ‘ altered their former interlocutor, sustained the title
 ‘ produced by the defender as sufficient to exclude the pursuer’s
 ‘ title, and assoilzied the defender from the conclusions of the re-
 ‘ duction.’ In reference, however, to a separate action of reduc-
 tion, of a supplementary nature, and the conclusions of declarator, they found, on the 8th December 1798, ‘ That it is still en-
 ‘ tire to the petitioner (Mrs. Fullarton) to insist in the separate
 ‘ action of reduction and declarator, and remitted to Lord Arma-
 ‘ dale, in absence of Lord Justice-Clerk, to hear the counsel of
 ‘ the parties,’ &c. Lord Armadale thereafter found, ‘ That the
 ‘ defender had, in this and the previous action, to which the pre-
 ‘ sent has reference, produced and referred to preferable and ex-
 ‘ clusive titles to the lands claimed by the pursuer ;’ and therefore
 assoilzied the defender.

Against these judgments Mrs. Fullarton appealed, and on the 3d of June 1801 the House of Lords ordered and adjudged ‘ that
 ‘ the said interlocutors complained of in the said appeals be, and
 ‘ the same are hereby reversed ; and it is declared and found,
 ‘ that the matters in the appellant’s summonses complained of are

* In the Respondent’s Case, p. 8. it is stated, that, in proposing the above remit, Lord Thurlow expressed himself to this effect, and that the Lord Chancellor Loughborough concurred in his observations :—‘ In the singular way in which this cause
 ‘ has been taken up in the Court below, what can this House do ? What has Mrs. Ful-
 ‘ larton to complain of ? Whether Sir Hew Dalrymple and his family, or Mr. Ha-
 ‘ milton, took first or last, seems jus tertii to her. Sir Hew, she says, forfeited. It
 ‘ is necessary that this should be judicially declared. Can it be declared now that
 ‘ he is dead ? Professes to have great doubt if it could. Entertains much doubt if
 ‘ the repudiation can infer a forfeiture. Mrs. Fullarton calls it a disposition to
 ‘ John Hamilton, an extraneous person ; and next, when she wants to be rid of him,
 ‘ she says he forfeited, because he was an heir who accepted of the repudiation.
 ‘ Her plea must be referred to her summons. The decree finds her entitled to de-
 ‘ duct her minority, because she became next substitute. How did the Judges who
 ‘ were for this decree find out that she was next substitute ? They assume it, it is
 ‘ said. If she had stated facts from whence that necessarily followed, he would
 ‘ have understood them ; but as it is not a necessary inference from the facts alleged
 ‘—as that is a point yet to be discussed—a point of law not decided by the Court
 ‘ below—his Lordship said he was not prepared to pronounce, nor did he think this
 ‘ House could pronounce, or hold her to be the nearest substitute. Before doing
 ‘ so, their Lordships must be satisfied that she has stated enough to prove it ; and
 ‘ as this has not been decided upon yet by the Court below, the appellate jurisdic-
 ‘ tion cannot interfere. Every thing in law has been waived or assumed by the
 ‘ Judges who were for Mrs. Fullarton, where they ought to have assumed nothing
 ‘ but facts. He therefore concluded by proposing that the cause should be remitted,
 ‘ in order that the Judges might boldly and plainly state the legal principles appli-
 ‘ cable to the facts stated, on which the decision of it should be ultimately rested.’

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 ‘ any of the said conclusions ; and therefore assoilzied the de-
 ‘ fender.’*

* In moving this judgment, it is stated in the Respondent’s Case, p. 9. that, according to a note taken at the time by the Appellant’s solicitor, the Lord Chancellor made the following observations in reference to the form of requiring a title to exclude to be exhibited, where no sufficient title was shown on the face of the summons :—
 ‘ If the title set out by the pursuer were in fact no title, it did not occur to me then,
 ‘ nor does it now, that there would be any inconvenience in going into a discussion
 ‘ of that title. If it appears that the pursuer has a title, then you may go into the
 ‘ defender’s exclusive title ; but why is the defender to be obliged to argue a plea
 ‘ in bar for ten long years, as in this case, if the pursuer has not stated a title to
 ‘ enable her to maintain the action ? It often happens in this country that the
 ‘ plaintiff states facts, (which may, however, be untrue,) and the law founded neces-
 ‘ sarily on these may be such, that the defendant can only perhaps with propriety
 ‘ rest his defence on a plea in bar. In the Court of Chancery here, what is termed
 ‘ a fishing bill is often filed, where the plaintiff, stating himself to be an heir at law,
 ‘ claims to see the title-deeds by which the defendant holds the property which
 ‘ belonged to the plaintiff’s ancestor. The Court must take this title to be good in
 ‘ the first instance ; and if an exclusive title or deed, for instance, with sixty years
 ‘ possession, be set up, the Court will then go into that exclusive title ; but if the
 ‘ defendant say to the plaintiff, Your facts form no title against me the defendant,
 ‘ nor anybody else, the defendant has a right to demur to the action ; and if there
 ‘ be nothing in the plaintiff’s case, of course the Court never comes to the defend-
 ‘ ant’s. It becomes me to say, that such a practice is founded in reason, and was
 ‘ in your Lordships’ view when you sent back the former appeal to the Court of
 ‘ Session.

‘ The remit was in these words’—[Here his Lordship read the same.]

‘ The meaning of this was, that the Court should consider how far the title to
 ‘ pursue, set out by the pursuer, was involved with the title to exclude, set out by
 ‘ the defender. If the pursuer’s title was invalid, of course they were not involved ;
 ‘ if there was a valid title in the pursuer, then they were involved : in that case it
 ‘ was necessary to inquire into the pursuer’s title, whether she was the nearest or a
 ‘ more remote substitute, and whether she had a right to deduct her minority or
 ‘ not ; and if a contravention had been committed by the defender’s authors, the
 ‘ Court was to consider what was the title of the pursuer by such contravention at
 ‘ this day. It was thus your Lordships’ intention that the Court should first consi-
 ‘ der if the pursuer had a title, and afterwards, if necessary, consider the exclusive
 ‘ title under the prescription.

‘ In this shape the cause went back to the Court ; and I can scarcely find words
 ‘ to do justice to the elaborate consideration given to it in the Court below. Every
 ‘ question arising on this point has been searched to the bottom, and decided upon
 ‘ in fact ; but the cause has been returned here with an interlocutor, saying no more
 ‘ than that the exclusive title is good, which seems to admit that the pursuer had a
 ‘ title of some kind or other.

‘ But this is no answer to your Lordships’ remit—no answer to the question,
 ‘ whether or not the pursuer has a title. You cannot imply from this answer whe-
 ‘ ther a contravention has been committed or not—whether or not that contraven-
 ‘ tion be purgeable—whether it can now be declared or not against the heirs of the
 ‘ alleged contraveners—whether the repudiation was a disposition or not—whether
 ‘ it was a contravention or not, and to be followed by forfeiture ; nor whether any
 ‘ one of the acts and deeds of Sir Hew, or of John Hamilton, were contraventions
 ‘ or not.

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No further steps were taken by Mrs. Fullarton in relation to this matter till 1814, when the respondent Sir Hew having applied for an act of Parliament to sell part of the estate of Bargany, she appeared and made objections; in consequence of which it was declared, that nothing contained in the act should affect her claim, or that of any other heir of entail, to the estate of Bargany, if they any had. She then, with the view of trying the question of right to the estate, granted to Mr. Thomas Martin, writer in Edinburgh, a trust-bond for one million sterling, on which he raised an action of adjudication, and obtained decree from Lord Pitmilley; but his judgment was brought under review, and the proceedings were afterwards superseded till the issue of a reduction which she raised, calling for exhibition of the deed executed by John Hamilton in 1780, and of the titles made up by Sir Hew, founding on that deed, and concluding for reduction of them. Her main reason of reduction was, that in consequence of the deed of repudiation executed in 1740, with the charter and sasine of 1742, and the death of John Hamilton and Dr. Robert Dalrymple without issue, she had right to the estate by virtue of the original entail 1688, and it was ultra vires of John Hamilton to execute the deed of 1780. She therefore concluded to have it found, ‘ that the said John Hamilton, by claiming, acquiring, and accepting of the said estate of Bargany, and entering into and holding possession of it under the settlements and titles foresaid, was personally under a legal obligation to implement and perform all the conditions and provisions, and was subject to all the clauses, prohibitory, irritant, and resolute, contained in the said entail of 1688, and which had been recognised and repeated, at his own instance, as obligatory by the charter 1742, and infeftment thereon, and by the charters granted as aforesaid by John Earl of Cassillis

‘The Court were all of opinion, either that there had been no contravention—that such contravention was purgeable, or that no declarator could be brought at this time of day; and that the change of situation between the two prior heirs was no injury to the appellant, who stands precisely in the same situation as if no such change had taken place. They seem unanimous, with the exception of one Judge, who says nothing on the subject, that the pursuer had no title.

‘ After the most painful attention to this cause, and to the authority of the dead as well as of the living, I cannot represent the pursuer to your Lordships as having a title. It has thus appeared to me to be my duty to detail the circumstances of the case, to show, in my opinion, how the Court has failed in giving a proper answer to the remit. As, after the most anxious attention, I cannot be induced to think that Mrs. Fullarton has set out a sufficient title, I conceive that it will be necessary that your Lordships should make some declaration upon this subject. I therefore submit to your Lordships, that the interlocutors complained of ought to be reversed, and a declaration made, that the premises set out in Mrs. Fullarton’s summonses do not sustain the conclusions of these summonses.’

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‘ and Sir John Whitefoord, and infeftments thereon; and more
 ‘ particularly the said John Hamilton was under a legal obliga-
 ‘ tion to and in favour of all and each of the substitutes in the
 ‘ said contract of marriage 1688, charter 1742, and other titles
 ‘ aforesaid, to suffer the succession of the said estate of Bargany
 ‘ to descend to the several substitutes, and their heirs successively,
 ‘ in the order therein pointed out, and to do no act, and grant no
 ‘ deed, whereby the same might be altered or innovated; which
 ‘ obligation every substitute has at common law a right to en-
 ‘ force. But, by the said disposition and new deed of tailzie of
 ‘ 21st June 1780, the said John Hamilton most improperly and
 ‘ fraudulently, to the prejudice of the pursuer, as next substitute
 ‘ heir of tailzie, and with a view to defeat her legal right, altered
 ‘ or attempted to alter the order of succession as fixed by the
 ‘ titles under which he himself held the estate of Bargany;’ that
 being a gratuitous deed, granted in fraudem of her rights under
 the entail, it was liable to reduction at her instance; and also
 under the act 1621, cap. 18, as a deed executed in favour of con-
 junct and confident persons, to the prejudice of her jus crediti
 under the entail; and, lastly, ‘ The said deed 1780 having been
 ‘ granted by the said John Hamilton, contrary to and in violation
 ‘ of the conditions, &c. of the tailzie of Bargany, inasmuch as
 ‘ it imports an alteration, innovation, and change of the course
 ‘ and order of the succession thereby established, is null and
 ‘ void, in terms of the act of Parliament concerning tailzies in
 ‘ 1685, cap. 22.’

The declaratory conclusion as to her right was, ‘ That by the
 ‘ terms of the foresaid contract of marriage and deed of entail 1688,
 ‘ charter 1742, and infeftment thereon, expedite by the said John
 ‘ Hamilton of Bargany, charters from John Earl of Cassillis and Sir
 ‘ John Whitefoord aforesaid, and infeftments thereon, the said
 ‘ Marianne Mackay Hamilton, pursuer, is next in the order of suc-
 ‘ cession, failing the said John Hamilton and the heirs of his body,
 ‘ and the said Robert Dalrymple and the heirs of his body; and
 ‘ they having accordingly failed, she has the only good and un-
 ‘ doubted right and title to be served heir of tailzie, under the
 ‘ said investiture, to the said John Hamilton of Bargany, to the
 ‘ exclusion of the descendants of the late Sir Hew Dalrymple,
 ‘ the eldest brother of the said John Hamilton; and that the
 ‘ said pursuer ought to be served heir of tailzie and provision to,
 ‘ the said John Hamilton of Bargany in the said lands and
 ‘ estate of Bargany and others foresaid, after the form and tenor
 ‘ of the said deed of tailzie 1688,’ &c.

In defence against this action, the respondent Sir Hew con-
 tended that the judgment of the House of Lords in 1801 formed

a res judicata, and that the claim was not well-founded on the merits. July 26. 1822.

On the other hand, Mrs. Fullarton maintained,—

1. That the two actions were essentially different; that the former action proceeded on the assumption that John Hamilton and his brother Sir Hew, by the deeds of repudiation, and the charter of 1742, and the disposition of 1780, had contravened the conditions of the original entail, and thereby forfeited their right to the estate, so that she was entitled to succeed to it, and to be served to James Lord Bargany; whereas, in her present action, and conformably to the judgments which had been pronounced, finding that she had not shown sufficient grounds for setting aside these deeds, and that they were therefore to be held valid, she claimed the succession to the estate by virtue of these deeds, and as being the next heir-substitute after John Hamilton, in terms of the entail 1688, and to be served heir to him, and not to James Lord Bargany.

2. That her claim was well-founded on the merits;

First, Because, by the repudiation of Sir Hew in 1740, and the proceedings which followed, the succession had opened in favour of John Hamilton, and the heirs called posterior to him by the entail 1688; that such being the case, the succession could not revert to the prior class of heirs, of which the respondent Sir Hew was a member, but belonged to her, as the next heir of tailzie after John; and that the condition in the deed of repudiation in favour of Sir Hew and his descendants could not burden the succession, as it was not engrossed in the titles of the estate, and had never appeared on record.

Second, Because the devolution to the posterior heirs was fortified, both by the vicennial prescription of John Hamilton's retour, and by a prescriptive possession by him for more than 40 years on the charter 1742, by which he, and the heirs of his body, were called prior to Sir Hew, and thereby establishing, by prescription, the right of the posterior heirs to the exclusion of the prior branch; and,—

Third, Because she was the heir called under the charter 1742, in which the destination was 'aliis hæredibus quibuscunque' of the body of Joanna Hamilton, which necessarily meant the other heirs of her body of the same character as John Hamilton,—that is, heirs posterior to that class to which Sir Hew belonged.

By Sir Hew it was maintained,—

1. That the matters contained in the present summons were identically the same as those contained in the former one, seeing that, in both cases, Mrs. Fullarton maintained that Sir Hew, the brother of John, and his descendants, had forfeited their right to

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the estate; and her object in both actions was to have it found that she had right in preference to them, in consequence of that forfeiture; but that the House of Lords had found, that the matters so stated in her original summons were not sufficient to entitle her to attain that object, and therefore decree of absolver was pronounced.

2. That on the merits Mrs. Fullarton was not entitled to prevail;

First, Because, as there was no declarator of forfeiture against his grandfather, Sir Hew, who had never made up titles under the entail, the rights of his descendants (who were heirs of entail, and did not represent him) could not be affected by his deed of repudiation; that, besides, as that deed contained an express reservation of their rights, and formed the ground of the decree of declarator—of the retour—and of the charter 1742, in which it was specially referred to, these deeds must be held to have been qualified by that reservation; and that although John Hamilton, a posterior heir, was allowed to possess the estate, yet it necessarily reverted on his death to the prior class, in the same way as in the case of the existence of a nearer heir, after a remoter heir has made up titles.

Second, Because John Hamilton's retour, describing him as second son of Joanna Hamilton, and as such nearest heir of entail, while his elder brother was alive, was thereby *ex facie* null, and so incapable of being prescribed; that, besides, the vicennial prescription of retours was merely personal to the party served, and therefore could not avail Mrs. Fullarton; and that, supposing the destination of the charter 1742 called her preferably, still it was not fortified by prescription prior to the deed 1780, as thirty-eight years only had intervened, while, in consequence of intervening minorities, Sir Hew's right to reduce it, and the deeds on which it proceeded, had not been cut off by the negative prescription; and,—

Third, Because the 'other heirs whatsoever' of the body of Joanna Hamilton, mentioned in the charter 1742, meant all the heirs of her body, other than John Hamilton, and that of these Sir Hew was the eldest, and so entitled to succeed.

Lord Reston, 'in respect that the present process contains
' different conclusions, and is founded on different grounds from
' the former action, repelled the defence of *res judicata*; but on
' the merits, in respect of the terms of the charter and infestment
' in 1742, with reference to the deed of repudiation therein con-
' tained, and the reservation in the said deed of repudiation, found
' that the defender is the heir entitled to possession of the lands in
' question under the said charter and infestment and subsequent

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‘ titles, and therefore sustained the defences, and assoilzied the de-
 ‘ fender from the ‘ conclusions of the libel.’ Both parties having
 represented, his Lordship adhered to his judgment, as to the de-
 fence of *res judicata*, ‘ but on the merits, found that the defender
 ‘ is the person now alive who would have been entitled to posses-
 ‘ sion, had the right rested on the entail 1688 alone; that it is
 ‘ not, and cannot now be competently pretended that he has in-
 ‘ curred any forfeiture, in consequence of the temporary repudia-
 ‘ tion granted in favour of John Hamilton; that the defender
 ‘ is the heir entitled to possession, under the appropriate and
 ‘ technical meaning of the investiture 1742, taken *per se*; and that
 ‘ his predecessor is *nominatim* called in the investiture 1780;’ and
 therefore on these grounds adhered to his interlocutor, assoilzieing
 Sir Hew. Both parties reclaimed, but the Court, on the 21st
 May 1818, refused both petitions.*

Separate appeals were then entered to the House of Lords by
 Sir Hew as to his defence of *res judicata*, and by Mrs. Fullarton
 on the merits.

After hearing parties, the House of Lords found, ‘ That the
 ‘ judgment of this House, on the 3d of June 1801, in the matter
 ‘ of the petition of appeal then before the House, in which the pre-
 ‘ sent appellant, then the wife of Colonel William Fullarton, and
 ‘ the said William Fullarton, were appellants, and Sir Hew Dal-
 ‘ rymple Hamilton, Bart. was respondent, whereby it was declared
 ‘ and found, that the matters in the then appellants’ summonses
 ‘ were not sufficient to sustain the conclusions in those summonses,
 ‘ or any of them, and therefore this House assoilzied the defend-
 ‘ ers, appears to have proceeded only on the insufficiency of the mat-
 ‘ ters in those summonses to sustain the conclusions therein; and
 ‘ find, that such judgment therefore did not affect the rights of the
 ‘ appellant in any future action, founded on other grounds of
 ‘ action; and the Lords further find, that the action of the appel-
 ‘ lant, which is the subject of the petition of appeal now before the
 ‘ House, is founded on the decret of declarator of the 25th of
 ‘ February 1741, the retour of service, in pursuance of such de-
 ‘ creet, finding John Hamilton, second son of Robert Dalrymple,
 ‘ procreate of the body of Joanna Hamilton, the lawful and nearest
 ‘ heir of tailzie and provision to James Lord Bargany, deceased,
 ‘ according to the matrimonial contract of 19th June 1688, and
 ‘ under the charters of resignation obtained by the said John
 ‘ Hamilton, by virtue of the procuratory of resignation contained

* Not reported.

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‘ in the said matrimonial contract, by which charters the lands
‘ and barony of Bargany, and other lands therein mentioned,
‘ were granted to the said John Hamilton, by the description of
‘ second son of Robert Dalrymple, procreate between him and
‘ Joanna Hamilton, and so heir-female of John Lord Bargany,
‘ and the heirs whatsoever of the said Joanna Hamilton’s body ;
‘ whom failing, to the other heirs whatsoever of the body of the
‘ said Joanna Hamilton, procreated between her and the said
‘ Robert Dalrymple, without division ; and the appellant, by her
‘ summons, now insisting that the said John Hamilton was, at
‘ the time of his death, seised of the lands in question, to hold to
‘ him and the heirs of his body, according to the limitations in
‘ the said marriage-contract of the 19th June 1688, and the sub-
‘ sequent heirs of entail called to the succession after him, and
‘ the heirs of his body, by the terms of such marriage-contract,
‘ in exclusion of Sir Hew Dalrymple, deceased, the eldest son of
‘ the said Robert Dalrymple and Joanna Hamilton, and the heirs
‘ of his body ; and that, according to the true construction of the
‘ said charter of resignation and investiture of the 23d August
‘ 1742, and by virtue of the limitation therein contained, on fail-
‘ ure of the said John Hamilton, and the heirs of his body what-
‘ soever, to the other heirs whatsoever of the body of the said
‘ Joanna Hamilton, procreated between her and the said Robert
‘ Dalrymple, the succession under the said charters devolved to
‘ such a person as, under the said marriage-contract of the 19th of
‘ June 1688, was entitled to succeed to the said John Hamilton,
‘ and the heirs of his body, according to the order of succession
‘ prescribed by the said marriage-contract:—That is to say, the said
‘ Robert Dalrymple, the third son of the said Robert Dalrymple,
‘ the father, and Joanna Hamilton, and the heirs of the body of
‘ the said Robert Dalrymple, the son, whom failing, the said ap-
‘ pellant, as the next in succession to the said John Hamilton, and
‘ the heirs of his body, the said Robert Dalrymple, his brother,
‘ having died without issue in his lifetime ; and that the appellant
‘ had the only right to be served heir of entail to the said John
‘ Hamilton, the last person seised of the said lands, under the
‘ said marriage-contract of the 19th of June 1688, and according
‘ to the true construction of the said charter of the 26th of July
‘ 1742, and other charters from subjects superiors, libelled on in
‘ this case ; therefore the Lords find, that the judgment of the
‘ House, on the petition of appeal depending before the House
‘ on the 3d of June 1801, does not preclude or affect the question,
‘ whether the appellant is now entitled to claim the said lands
‘ according to the title insisted on by her summons in the action,

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‘ which is the subject of her present petition of appeal; without pre-
 ‘ judice, however, to the right, if the respondent hath any, under
 ‘ the deed of repudiation of the 13th of August 1740, or the right,
 ‘ if any he now hath, to reduce the said decret of the 25th of Fe-
 ‘ bruary 1741, or the retour of service in pursuance of such decret,
 ‘ or the said charter of the 26th of July 1742, or the right, if any
 ‘ he hath, under the limitations contained in the said charter of
 ‘ 1742, or under the deed of the 21st day of June 1780, or the
 ‘ infestment of the 24th and 25th of October 1780, or under the
 ‘ other charters from subjects superiors, libelled on in this case;
 ‘ and it is ordered, that, with this finding, the cause be remitted
 ‘ back to the Court of Session in Scotland, and that the Judges
 ‘ of the Division to which this cause is remitted do require the
 ‘ opinions of the Judges of the other Division of the said Court
 ‘ in the matters or questions in this cause; and it is further ordered
 ‘ and adjudged, that the said cross appeal be, and the same is
 ‘ hereby dismissed this House.’

LORD CHANCELLOR.— My Lords, your Lordships’ attention was lately called to a case of very great consequence—I mean the case of the Honourable Marianne Mackay Hamilton Fullarton, widow of the late Colonel William Fullarton of Fullarton, appellant, Sir Hew Dalrymple Hamilton of North Berwick, Baronet, respondent. There were in this case an appeal and a cross appeal.

My Lords, the matter to be decided under the original appeal is the right of succession to the entailed estate of Bargany in Scotland—Mrs. Fullarton claiming that estate in the manner in which I shall have occasion to state to your Lordships presently,—Sir Hew Dalrymple Hamilton insisting that he is entitled; and the case before your Lordships is a case of very great importance, both with respect to the value of the property, and the doctrine which must be applied for the decision of the question between the parties.

My Lords, there was a contract of marriage and entail of the 19th of June 1688, and the parties to that contract were John Master of Bargany, and his father, John Lord Bargany, of the one part, and Mrs. Jean Sinclair of the other part.—[His Lordship then read the terms of the deed, see p. 265.]

The contract of marriage contains a procuratory authorizing resignation of the lands into the hands of the superiors, for new infestment in favour of John Master of Bargany, and the heirs of tailzie substituted to him; and it also contains all the provisos, conditions, restrictions, and clauses irritant and resolute, necessary for constituting in Scotland a strict and effectual entail. Those clauses it will be hardly necessary I should detail to your Lordships.

John Master of Bargany died before his father, leaving an only daughter, Joanna, who, in the year 1707, intermarried with Robert Dalrymple of Castleton, and from that marriage both these parties are stated to be

July 26. 1822. descended. John Lord Bargany was succeeded by his second son, William. He made up titles to the estate, by service and retour, as nearest and lawful heir-male of John Lord Bargany, his father. Upon the 27th of July 1694 the entail was registered; William Lord Bargany was served heir of entail in 1709; he was succeeded by his son James, who was the fourth Lord Bargany; he was served heir of tailzie on the 12th of July 1712; and at his death there was a competition for the estate, the particulars of which are stated very much at length in the papers which have been laid upon your Lordships' table, but which was finally decided in favour of the descendants of Joanna Hamilton. My Lords, these papers proceed afterwards to state the entail that was made, in a contract of marriage between Robert Dalrymple and Joanna Hamilton, of an estate which, your Lordships will recollect, has been designated throughout this case by the name of the North Berwick estate. Joanna Hamilton married in 1707 with Robert Dalrymple, who was the eldest son of the Lord President of the Court of Session of that day. It appears, by the instruments which are before your Lordships, that it was apprehended that the heir of that marriage might succeed to the estate of Bargany, while, at the same time, he would be the heir of line of the Lord President, Sir Hew Dalrymple, and thereby heir to the estate of North Berwick. If this event should occur, the name and family of Dalrymple of North Berwick would, in terms of the entail of Bargany, that is, by virtue of those clauses, merge and be lost in that of Hamilton of Bargany, because the heir of Bargany was bound by the entail of that estate to bear the name and arms of Hamilton of Bargany. My Lord President seems to have been anxious to prevent this, and therefore, as it is stated in the contract of marriage, bearing date the 20th of March 1707, entered into between his eldest son Robert Dalrymple and Joanna Hamilton, to which the Lord President Dalrymple was a party, the lands of North Berwick were settled on Robert Dalrymple, and the children of the marriage, and divers other substitutes, by strict entail, (reserving the liferent to the Lord President); but, at the same time, to prevent the name and family of the Lord President, Sir Hew Dalrymple, from being sunk in that of his daughter-in-law, the marriage-contract bears this recital,—
 ' That it was expressly designed, communed, and agreed upon, that my
 ' said estate, name, and arms, shall be preserved distinct and separate
 ' from the family of Bargany.' It likewise contains this express proviso—
 [His Lordship then read the clause against the union of the two estates, and the reserved power by the Lord President, see p. 267.]

Sir Robert Dalrymple, the institute in this entail, is stated to have survived his wife Joanna Hamilton, and died in 1734; but he predeceased his father, the Lord President. In respect of the descendants of this marriage, it is stated that there were issue three sons and two daughters; first, the late Sir Hew Dalrymple of North Berwick, and who died in December 1790, leaving an only son, the father of Sir Hew, party in the present appeals; secondly, John Dalrymple, who came to possess the estate of Bargany in the way I shall mention to your Lordships presently,

and assumed the surname of Hamilton of Bargany, but had no issue ; July 26. 1822.
 thirdly, Robert Dalrymple, doctor of medicine, who died many years ago without issue ; fourthly, Marion Dalrymple, who was married to Donald Master of Reay, by whom he had two sons, the eldest of whom, George, became Lord Reay. This nobleman died without male issue, but left two daughters, of whom the Honourable Marianne Mackay Hamilton Fullarton, party in the present appeals, is the eldest. Fifthly, Elizabeth Dalrymple, who married Mr. Duff of Crombie, by whom she had two daughters, the youngest of whom was married to Sir Hew Dalrymple, the father of the present Sir Hew, party in these causes, and the grandson of Sir Robert Dalrymple of Castleton.

After the death of his eldest son, the Lord President, in virtue of the reserved powers in the last-mentioned marriage-contract, executed a deed in 1734, permitting his grandson, Hew Dalrymple, to serve himself heir of tailzie to his father in the lands of North Berwick, without inserting in his service the clauses in the said contract concerning the succession to the estate of Bargany. At this time the grandson was presumptive heir to the estate of Bargany ; and in two years afterwards the succession opened to him, as already mentioned, by the death of James last Lord Bargany without issue.

My Lords, in the year 1736, the Lord President, in further exercise of his reserved powers, executed two deeds, which are stated in the proceedings. The first is dated the 8th of April 1736, the second the 9th of April 1736. The first recites the parts of the two entails of North Berwick and Bargany which it was necessary to recite.—[His Lordship then read the clause permitting Sir Hew to serve himself heir to the estate of Bargany, see p. 269.]—I beg your Lordships' attention to the following words ; and although it may seem in some respect loss of time to read these instruments of the Lord President, it appears to me it really is not so, and that a good deal of argument may be derived from the manner in which the Lord President thought the estates were to be dealt with, in case they were held together : He says, ' That in order that ' the said Hew Dalrymple be enabled so far to accept of the succession ' to the estate of Bargany, as to be served and retoured heir of tailzie to ' that estate, and thereby be in a condition to denude himself thereof in ' favour of the next person after him called to the succession by the tail- ' zie of the said estate of Bargany, which is the most regular and effectual ' manner of conveying the said estate in favour of the next person in the ' line of succession by the tailzie of the said estate of Bargany.'—Your Lordships see, that that which is laid down is, that Hew should be served and retoured heir of tailzie to that estate, and then denude himself, not by a deed of repudiation, but quite in a different way.—' I am therefore ' resolved so far to exercise the powers and faculties reserved to me to ' alter, innovate, qualify, revoke, or discharge the clauses and provisions ' contained in the contract of marriage last mentioned, as to enable the ' said Hew Dalrymple to accept of the succession to the estate of Bar-

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Upon the 9th of April 1736, that is, the day after he had executed this deed, he says, noticing the entail to which I have referred your Lordships—[His Lordship then read the clause quoted ante, p. 270.]—I observe, as I pass on, that here the other heirs, the 'aliis hæredibus quibus-
'cunque' in this deed,—at least the deed which speaks of Hew denuding himself of the estate,—must be heirs, not in the strict sense of the word, but those other heirs who were to succeed according to the limitations of the tailzie, the conditions of which are no further material than what I have now stated. The object of those deeds was to enable Hew Dalrymple, the eldest grandson of the Lord President, to make up titles to the estate of Bargany, and to retain possession of it during his grandfather's lifetime; but, at the same time, to impose upon the same eldest grandson an obligation to relinquish it in favour of the next heir of tailzie upon his grandfather's death.

My Lords, it appears that the grandson, in consequence of the permission granted by his grandfather, entered to the possession of the estate of Bargany as heir of tailzie to James last Lord Bargany. On the 9th of April 1736 he assigned the rents for certain purposes to James Craig, and, on the 13th of the same April, he granted a factory to John Kennedy, who was removed, and another factor appointed about three years thereafter. At the period now alluded to the litigation was going on, which has been already mentioned, concerning the right of succession to the estate of Bargany. That was at last terminated in the manner stated in these papers by the judgment of this House. It does not appear to be necessary to state to your Lordships the proceedings;—it is enough to say, that it ended in favour of Sir Hew Dalrymple.

My Lords, the estate of North Berwick was probably the most valuable of the two, and Sir Hew resolved to take that estate, and to reject the estate of Bargany; and the next question was, In what way John Dalrymple, who now assumed the name of John Hamilton of Bargany, should make up titles to that estate so as effectually to vest himself, and to divest his elder brother? They did not follow the mode prescribed by the Lord President in the deed I have stated, but, on the 13th of August 1740, a deed (which is known in these proceedings by the title of the Deed of Repudiation) was executed; and whatever the disposition in the other instruments may be, it is not at all material to be considered in this case. With respect to this deed, known by the name of the Deed of Repudiation, one material question arises upon what is the effect of it. It recites the entail of the estate of North Berwick, and the clauses contained in it relative to the estate of Bargany. It next mentions the competition which had occurred upon the death of James Lord Bargany; it refers to the judgment which I have last mentioned, and then it goes on in this way—[His Lordship then read the clause quoted at p. 271.]

The recital, your Lordships observe, speaks of what would be the consequence if he had now taken the succession; it speaks also of his mo-

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tive, that he would forfeit to John Dalrymple, and it speaks of his intention to permit the estate to be taken by John Dalrymple; but when he comes to state what is to be the effect of this repudiation, he expresses himself thus:—‘ And I consent that the said John Dalrymple shall, in respect of my repudiation as aforesaid, serve himself heir of tailzie and provision to the said James Lord Bargany, and otherwise make up titles in his person to the said estate of Bargany in such manner as is competent of the law, and as he shall be advised; and that the said John Dalrymple do instantly take possession of the said estate of Bargany, and uplift the rents thereof in the tenants’ hands fallen due since the death of the said James Lord Bargany, and in time coming; providing always’—He has spoken of nobody to take, your Lordships observe, except John;—he has not spoken of the heirs of the body of John in any thing I have yet read;—he has not spoken of Robert in any thing I have yet read;—nor has he spoken of the heirs of Robert in any thing I have yet read; but he adds,—‘ providing always, that these presents shall not wise prejudice my own or my descendants’ our right to take the succession of the said estate of Bargany upon failure of the said John Dalrymple, and Dr. Robert Dalrymple, my third brother, and their descendants.’ There he includes the descendants of John, whom he had not before mentioned, and Robert, and the descendants of Robert, whom he had not before mentioned. Here are two events in which he provides that his right and the right of his descendants shall not be prejudged, namely, on the decease of John and failure of the heirs of his body, and Robert and failure of the heirs of his body; but there is a third case in which he also reserves to himself this right: ‘ Or in case any event shall exist in which I or my descendants can take the said succession, consistent with the foresaid tailzie of the estate of North Berwick, with which express provision thir presents are granted by me, and accepted by the said John Dalrymple.’ Whatever the effect of this deed taken strictly may be, the meaning of it (whether it can be established is another question) is, that he should have the estate again if John died without issue; but not then if Robert was living or his issue, unless some event had happened in virtue of which he was entitled to hold both estates together; as, for instance, if the fetters on the North Berwick estate were worn off, or by any act he had done, and prescription following on that act, those fetters had been in any way destroyed, that then he might have said that that would be the effect of carrying this with the consequences he meditated; that he might have said to John if alive, You will be so good as to quit the estate; or to the heirs of his body, You will be so good as to quit the estate; and that he meant to reserve to himself the power of using that language to John and his issue, and to Robert and his issue. My Lords, for the sake of repeating what I myself stated in 1801, it wanted more of principle or authority than I have yet seen for saying that this is not such an alteration and innovation of the tailzie of the estate, as to make it at least extremely questionable whether it is right.

My Lords, this deed does not take any notice of the deeds executed

July 26. 1822. by the Lord President ; and it appears that this deed of repudiation was not registered, nor does any instrument that I see record this proviso.

My Lords, this deed of repudiation having been obtained, the next proceeding which it is material to attend to is a process in the Court of Session, and a decret of declarator obtained upon it in 1741 by John Hamilton against his elder brother, who is made a party to it, and some of the other substitutes in the entail of Bargany of 1688. My Lords, I shall not detail to your Lordships the very terms of that process of declarator, but they must be very carefully attended to. My Lords, no appearance was made for any of the defenders, and the decree, which was made in absence, was upon a prayer ‘ that it ought and should be found
‘ and declared, by decret of the Lords of Council and Session, that the
‘ said John Hamilton, pursuer, hath the only right and title to the suc-
‘ cession to the said estate of Bargany, and that he ought to be served
‘ heir of tailzie and provision to the said James Lord Bargany ;’ and the decree bears, that the Court found the points and articles of the summons relevant and proven by the writs produced, and found, and decerned, and declared, conform to the conclusions of the libel. My Lords, after that he expeded in 1741 a general service as nearest heir of tailzie and provision to James Lord Bargany. The retour of that service is stated at length in the papers before your Lordships, which retour must be also carefully borne in mind.

My Lords, this entail of Bargany stood, as I understand, upon a personal title, until John Hamilton caused the procuratory of resignation to be executed, and the lands were resigned into the hands of the superior in favour of John Hamilton, and he obtained a charter under the Great Seal of the Prince of Scotland of that part of the estate of Bargany which is freehold. This charter bears date the 26th of July 1742 ; the dispositive clause of the charter is thus expressed :—‘ *Dilecto nostro Joanni
‘ Hamilton de Barganie, jurisconsulto, filio secundo demortui Domini
‘ Roberti Dalrymple de Castleton, procreat. inter illum et demortuam
‘ Dominam Joannam Hamilton, unicam filiam demortui Joannis Magistri
‘ de Barganie, et sic ;*—that is, it styles him expressly to be second son, ‘ *et sic,*’ and so the heir-female of the deceased John Lord Bargany,—‘ *et
‘ hæredibus quibuscunque ex corpore dict. Joannis Hamilton ; quibus de-
‘ ficientibus,*’ (and those are the most important words, as it appears to me, that can be stated in the whole of the controversy), ‘ *quibus deficien.,
‘ aliis hæredibus quibuscunque ex corpore dict. Dominæ Joannæ Hamil-
‘ ton, procreat. inter illam et dict. Dominum Robertum Dalrymple, absque
‘ divisione.*’ Then he goes on to speak of the other heirs of tailzie ; and concludes, ‘ *Quibus deficientibus, hæredibus masculis ex corpore nunc de-
‘ mortui Domini Joannis Houston,*’ who was the person to whom the limitation was made in the entail at the period of 1688,—that part of the entail at which I stopped in my recital to your Lordships.

My Lords, you will see in the printed papers what is called the *Quæquidem* of the charter, and which calls for careful attention. This charter contained all the prohibitory, irritant and resolute clauses and conditions

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contained in the original tailzie of 1688; and in virtue of this charter John Hamilton took infeftment on the 23d of August 1742, and his sasine was registered on the 20th of September afterwards. There were other charters which he took of other lands containing the same description of destination from subjects superiors.

My Lords, this charter of 1742 having been executed, in which these words occur which I have stated to be words of so much importance, ‘*Quibus deficientibus, aliis hæredibus quibuscunque ex corpore dict. Dominæ Joannæ Hamilton, procreat. inter illam et dict. Dominum Robertum Dalrymple, absque divisione,*’—it is insisted before your Lordships, on the one side, that is, on the part of Sir Hew, that the ‘*aliis hæredibus quibuscunque,*’ who were to succeed on the failure of heirs of the body of John, mean Sir Hew. On the contrary, it is insisted, that as John, who was not himself an heir in the strict sense of the word, who is stated in this instrument to be the second son, and therefore it acknowledges the existence of a first son,—as John, therefore, was an heir of a particular species, and as John’s sons might be heirs likewise of a particular species, so the ‘*aliis hæredibus quibuscunque*’ were such *aliis hæredibus* as John and his son were; and that Mrs. Fullarton, therefore, is the person to succeed upon the effect of those words, ‘*Quibus deficientibus,*’ &c.; that they were not meant to restore Hew and his descendants into that situation in the tailzie in which they stood under the settlement of 1688; but that—whether Hew himself, or any of his descendants, could or could not have reduced the charters, retours, &c.—whether this charter of 1742 was liable to challenge, or not liable to challenge—these words, ‘*Quibus deficientibus, aliis hæredibus quibuscunque ex corpore dict. Dominæ Joannæ Hamilton, procreat. inter illam et dict. Dominum Robertum Dalrymple, absque divisione,*’ were meant to create, as far as this charter could effectually create it, a destination to those who, subsequent to John, were to take under the entail of 1688, and not for the purpose of introducing anybody, who, under the entail of 1688, would not have taken after John. I repeat, the question proposed is, Whether it was the meaning of those words, as contained in this charter, to create a destination that would give to Mrs. Fullarton as the substitute, instead of reintroducing Hew or his descendants?

My Lords, John Dalrymple appears not to have liked to have trusted to that construction of the words, which supposes that these words would re-vest the estate in Sir Hew and his descendants; for having had possession from 1742, and having a service aided by twenty years prescription, in the year 1780 he executes a deed under which Sir Hew has made title; in which he says, ‘*Be it known to all men by these presents, me, John Hamilton of Bargany, Esquire, for certain causes and considerations me moving, and in order to give effect to the entail executed by John Lord Bargany in his son’s contract of marriage, of date the 18th November 1691, and to the conditions upon which my own right and title to the lands under mentioned was founded, to have given, granted, and dispoed, likeas I hereby give, grant, and dispoed to and*

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 ‘ failing, to Sir Hew Dalrymple, Bart. my brother, and the heirs of his
 ‘ body, without division ; whom failing, to the next heirs of the body of
 ‘ John Lord Bargany aforesaid.’ Whatever John’s pretence might be,
 this was not the way of giving effect to the contract 1688, since, accord-
 ing to the contract of 1688, Sir Hew Dalrymple ought to have taken before
 him, and before the sons of his body ;—‘ whom failing, to Sir Hew Dal-
 ‘ rymple, Bart. my brother, and the heirs of his body, without division ;
 ‘ whom failing, to the next heirs of the body of John Lord Bargany
 ‘ aforesaid, and the other heirs of tailzie contained in the foresaid deed
 ‘ of entail, in the order therein expressed.’ Now, my Lords, without
 entering at this moment into a discussion, whether the words ‘ Quibus
 ‘ deficientibus, aliis hæredibus quibuscunque,’ do or do not mean the
 persons who, under the deed of 1688, were to take next to John, if
 Robert died, as he did die in the mean time without heirs of his body ;
 but, taking it for granted without discussion for the moment, that the
 meaning of that deed of 1742 was to limit to such heirs of entail as
 would have taken after John under the deed of 1688, according to the
 succession therein limited, the consequence of that would be, that the
 deed of 1780 would be in contradiction or contravention,—a word which
 I use now studiously, for the purpose of explaining what the former
 judgment of this House was when it spoke of contravention—this deed
 of 1780 would be a deed in contravention of the deed of 1742, for the
 deed of 1742 contained all the clauses prohibitory, irritant, and resolute,
 to protect the deed of 1688 ; and if the words, ‘ Quibus deficientibus, aliis
 ‘ hæredibus quibuscunque,’ did not mean Sir Hew, but did mean Mrs.
 Fullarton, the consequence would be, that a deed, which attempted to
 introduce Sir Hew and his issue before Mrs. Fullarton, would be a con-
 travention of that deed of 1742.

My Lords, this deed, it is stated, was not recorded in the Register of
 Entails. After this, in the year 1793, Mrs. Fullarton brought an action,
 and the proceedings in that action are stated at length in the papers, to-
 gether with her summons. There was a second summons in the same
 year, which it is not important to mention ; and after a great deal of pro-
 ceeding in the Court of Session, the Lord Ordinary in that action pronoun-
 ced, in 1794, this interlocutor—[His Lordship then read it, see p. 275.]
 —Your Lordships will permit me to call your attention to this reserva-
 tion, ‘ Reserving to the pursuers to insist in the declaratory conclusions of
 ‘ their libel, and particularly how far the tailzie 1688 is affected by the
 ‘ investiture 1742, and whether or not the defender has incurred any irri-
 ‘ tancy under that entail.’ What this interlocutor states, therefore, is
 this : With respect to all the grounds of complaint founded on any thing
 which was done before 1742, that the deed of 1742, with the possession
 under it, gave the defenders an exclusive title ; that whether Mrs. Ful-
 larton had in that action, or had not in that action, a title to sue, it was
 quite unnecessary to agitate, because that deed of 1742, and possession
 under it, unless it could be made out to be a contravention in the man-

ner I will state by and by, had given the exclusive title to John Hamilton; and if it had given the exclusive title to John Hamilton as against Mrs. Fullarton, it was quite unnecessary in that action to consider what effect it had upon Hew; but there was the above reservation in respect of the deed of 1742, and you will see how that was rendered useless in consequence of what happened in this House.

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My Lords, this interlocutor was brought under the review of the Court, and the Court afterwards proceeded to find, 'that, in computing the period of prescription, the years of the pursuer's minority are to be deducted.'

This came before the House of Lords in the year 1797, when your Lordships will recollect that though Lord Loughborough was then Chancellor, yet my Lord Thurlow was in the constant habit of attending the House on appeals; and it seems to have struck those two noble Lords,—and perhaps one ought to say struck them acting rather under the influence of ideas which prevailed in the English Courts of Justice, than under the influence of the practice of the Court of Session,—that it was a very strange course of proceeding to call on a defender in an action to prove that he had a title to exclude, which might be a discussion which would last for ten years; and if it was found at last he had not a title to exclude, they might then have to begin to see whether what we call the plaintiff, and which they would call the pursuer, had a right to bring the action at all; and therefore they thought it right to send it back to the Court of Session, 'to review the interlocutors that were appealed from, and to consider how far the validity of the title to exclude, set up by the defender, is in this case involved with the title set up by the pursuer to sustain the action of reduction and declarator, as having become'—that is, the character in which she brought the action—'the nearest substitute under the deed of entail in the manner alleged on her behalf; and if the Court shall hold these questions to be involved with each other, that they do pronounce an interlocutor for or against that title,'—that is, the title to pursue,—'and also on the effect which such judgment may have upon the interlocutors directed to be reviewed.' My Lord Thurlow, as this Case represents, said, and it seems likely enough did say, that he was not at all prepared to pronounce that the then respondent was first substitute, without pronouncing that the matter of her libel made her so, and that the consideration of that point had been altogether waived.

My Lords, it went back to the Court of Session, and the Court of Session were to apply the judgment, as it is expressed, and on the 9th of March 1799 they pronounced this interlocutor, which was observed upon afterwards in this House, in the manner I shall mention: 'The Lord Ordinary having heard parties upon the conclusions of this action, finds, that the defenders have in this and the previous action, to which the present has reference, produced and referred to preferable and exclusive titles to the lands claimed by the pursuer; and therefore assoilzies the defenders from the conclusions of this action, and decerns, superseding extract till the 3d sederunt day in May next.'

My Lords, when it came back to this House, whether the Lords who

July 26. 1822. had sent it to the Court of Session had done right or wrong in sending it to the Court of Session, with a direction calling upon them to review that interlocutor, they were at least of opinion they had acted right; and as this second interlocutor talked of nothing but an exclusive title, without saying, as the Lords here understood it, any thing about the title to pursue, the House at that time, or my Lord Thurlow, thought he was in precisely the same situation in 1801 as he had been in the year 1797; and your Lordships know enough of his great judicial character to know that he did not like that; and accordingly the House gave the judgment which the Lords of Session observe upon as a new mode of proceeding,—that is, a judgment which did not merely reverse the judgment of the Court of Session, but pronounced a new judgment. In truth, it was intended to reverse the judgment of the Court of Session, but in fact for the purpose of saying, that this House was of opinion that no title to pursue had been shown in that summons on the part of Mrs. Fullarton; and therefore they reversed the interlocutor, and assoilzied the defenders, because Mrs. Fullarton had not shown a title to pursue. I happened at that time to sit upon the Woolsack, and I speak without any sort of affectation when I say, that it was my duty to bend my judgment, as far as I could, to the opinions of those who had been so much more conversant with matters of Scotch law than I had been; and I mention this, because it is an historical fact in this case not immaterial. I did myself move that judgment which I will state to your Lordships presently. My Lords, the judgment is this, not that Mrs. Fullarton had no cause of action, but that she had stated no cause of action. The judgment is, ‘It is declared ‘and found that the matters in the appellant’s summonses complained of ‘are not sufficient to sustain the conclusions in those summonses, or any ‘of the said conclusions, and therefore assoilzie the defenders.’ It became therefore necessary, my Lords, for a reason which I wish most respectfully to the Judges of the Court of Session to state, to examine, first, whether there was any *res judicata*; and, secondly, whether it was the meaning of this House, that their judgment should affect any other action that Mrs. Fullarton might think proper to bring, which was not an action conformable to her former summons, nor aiding any of the conclusions stated in her former summons; and I state it the more particularly, because your Lordships will remember that this judgment was penned, I believe, by my Lord Thurlow, but it was penned expressly for the purpose of being confined to the causes of action mentioned in that summons, and the conclusions which are stated in that summons; and as an historical fact one may mention, that, very shortly after this, an act of Parliament passed to enable an exchange of lands, and that when that act passed, it never could be that this House could reserve to her and the other heirs of tailzie any rights of action they had, if the House had immediately before gone the length of deciding that they had no right of action whatever. My Lords, I will here also state to your Lordships, that there being not one single word, as I read that summons, upon the effect of that deed of 1742, considered otherwise than as a contravention and a

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cause of forfeiture of the estate, and the deed of 1780 as another contravention, and therefore a cause of forfeiture of the estate, it was quite impossible for her to turn round in the same action and say, Well, but if the deed of 1742 is not an act of contravention—if that deed of 1742 has given you, John Hamilton, a prescriptive title against me, because you have had possession so long,—then, failing you and your issue, if I am under the ‘*aliis hæredibus quibuscunque*,’ the person next to succeed, I shall be entitled, under your own way of putting it, to say, If you have a title under that deed of 1742; I have a title under that deed of 1742,—not a title to turn you out of possession, but to succeed to you. When the case came up by appeal in the printed Cases, she insisted upon that right. Let us see what Sir Hew Hamilton says in answer to that: He says, that from the necessity of the case, as well as in consonance with her own summons, she was debarred from going into that question; that the distinct and primary object of that suit was to establish that there had been a contravention, and in consequence a forfeiture. Under the limitations of that investiture of 1742, if there was no contravention, she was not entitled to succeed to the estate when the interlocutor was pronounced in the Court of Session, because John lived for a few days after that interlocutor was pronounced by the Court of Session; but when she came to this House, if the deed of 1742 was no contravention—if that deed of 1742 created a new title, and she was entitled under that as to the ‘*aliis hæredibus quibuscunque*,’ yet, as Sir Hew argued, that argument was quite foreign to the question in issue; and so it was foreign to the question in issue. And how was it possible for this House, on a summons which treated that deed of 1742 as a contravention, and therefore sought to forfeit Hew, and likewise to forfeit John,—how was it possible upon such a summons to permit her in that action, and with such a summons, to turn round and say, Now John is dead, I will not treat that as a contravention, but I will treat it as a ground of claim under this same summons, which abuses it as a contravention and a cause of forfeiture? I beg of the House of Lords to consider that as a ground of legitimate title. The House could do no such thing; and it could only give its judgment on the matters in the appellant’s summonses, as not being sufficient to sustain the conclusions in those summonses, or any of them. The present action, as your Lordships will see, when I come to state the summons,—the present is an action which does not at all seek to disturb the late judgment of the House of Lords, or of the Court of Session; but it says, if that was not in issue in the former action, I put it in issue in this action, and I say this, after stating the title of 1688, and deducing the whole history of the thing from the beginning to the end, I must now admit John under the charter, and the effect of the proceeding in 1742 and time, had got a title as against me with respect to all the causes of quarrelling with it, which I stated in my summons in that former action; but when John set up that title against me, which by aid of prescription was good for him against me, then this question arises, if it was a good title for him against me, it must be a good title for me also if I am the person

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Now, my Lords, when this came to be discussed before the learned Judges in the Court of Session, it does appear to me, I confess, that in a case of this great importance, of this great value, the thing has been almost entirely misunderstood, as to the meaning of this House. I do not mean to say what is the effect of it; but there is such a persuasion as to this in the mind of every learned Judge, not founded in fact, as may have influenced the judgment they have given. I mean to say that most respectfully. If that be so, we ought not to permit that to remain in their minds, and the effect of it to be felt by the parties. To show that this is the case, I will read to your Lordships, very shortly, the judgments those learned Judges have given.

My Lord Craigie says he is of opinion—and I need not trouble your Lordships with stating that, for all the learned Judges state that they are of opinion—there is no proper *res judicata* to exclude the action; and no person can read this paper, I think, without being of that opinion—he says, 'Although there may be a good deal in the determination of the House of Lords upon a great many of the matters now agitated, and although I have a good deal of unwillingness to consider the matter still open, and although the case was so argued in the former proceeding, that the last finding in the House of Lords may go far to anticipate the result of the present plea, at the same time I say, if the case be still

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‘ open, I should be of opinion that the Lord Ordinary’s opinion upon the merits is not well founded.’—His judgment, therefore, as far as it goes, is for the pursuer. ‘ The charter of 1742, taken in connexion with the facts of the case.’—Very important words those are, because there may be a very great difference between the charter of 1742, taken per se, and taken in connexion with all to which that charter expressly refers; I do not mean taken in connexion with any thing dehors the charter, but taken in connexion with all to which it expressly refers. ‘ The charter’ (his Lordship says) ‘ is to be considered as a charter following out the procuratory of resignation to which it refers. Sir Hew Dalrymple gave up his natural situation in the succession, and left room for those called after him in the entail.’ Perhaps I may say, that probably there was a little haste in the expression I used so long ago as the year 1801, but which I cannot entirely get rid of now, that the proceeding in 1742 was a proceeding that might be considered as going upon the assumption of the fact, that Sir Hew and all his descendants were in their grave. His Lordship goes on to say, he ‘ gave up his natural situation in the succession, and left room for those called after him in the entail. The second son was entitled to succeed, upon Sir Hew declining to take the estate. The charter has reference to the decree of declarator, and it refers to the deed of repudiation. It is clear that Sir Hew had done that which deprived him of his situation in the succession. With regard to the reservation in the deed of repudiation, it reserved that right which was in him at the time, which was nothing at all; he had no right to do any thing which was inconsistent with his enjoying Bargany; the reservation could not preserve that which was actually given up. As to the deed 1780, it is of the nature of an alteration of the charter 1742. It is not yet recorded in the Register of Tailzies, so that this great estate is liable to be carried off for the debts of the defender. I think the lady is still entitled to succeed in preference to Sir Hew and his descendants; and, under all the circumstances of the case, I think the interlocutor of the Lord Ordinary upon the merits should be altered.’

My Lord Glenlee, after first stating his opinion that the interlocutor of the Lord Ordinary repelling the plea of *res judicata* is right, says, ‘ On the other hand, it is equally plain to me, that the defender in this process is entitled to found upon any judgment given by the House of Lords, to the effect of showing that the plea now maintained by the pursuer cannot be substantiated, and that there is no foundation for her claim, without taking for granted that the former judgment was wrong.’ With humble deference to a Judge of great experience, and entitled to very great respect, it appears to me—at this moment I will not say whether the judgment was right or wrong—but it appears to me, with great deference to him, that the judgment in favour of Mrs. Fullarton, or against Mrs. Fullarton, might be right or wrong, without the least reference whatever to the former judgment in this House, which decides nothing upon the question raised by this summons. His Lordship then observes, ‘ Though there be no *res judicata* to bar the pursuer from being heard, yet if the pursuer’s case, for its foundation, assumes that Sir Hew Dal-

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 ‘the descendants of his body, if that be a necessary ground of the
 ‘pursuer’s arguments, then the defender is entitled to found upon the
 ‘decree of the House of Lords, which has explicitly found that there
 ‘was no forfeiture.’ What says Mrs. Fullarton? She does not say
 now there was any forfeiture, but that if John acquired in 1742, and
 by subsequent enjoyment, a title against her, he also might or might
 not—she does not pronounce that he did or did not, but that he might or
 might not—acquire also a title against Sir Hew; but she says, without im-
 puting forfeiture to anybody, I am ready to maintain that, under the
 charter 1742, I am entitled to the estate. I do not consider that as a con-
 travention or a forfeiture; and therefore, putting forfeiture altogether out
 of the question, what I call upon you to argue with me is, What are the
 meaning and effect of the charter of 1742, taking the judgment of the
 House of Lords to be quite right, and which has determined nothing about
 the charter 1742, except that it is not a contravention—for *that* it has de-
 termined—and taking into consideration how far my claim is affected by
 the deed of 1780? Now, the deed of 1780 she did in her former sum-
 mons state to be a contravention; she wanted to turn round in that action
 and say, that it is now my ground of title; to which Lord Thurlow says, I
 cannot allow you to say that; I am to decide according to the cause
 of action you have stated in your summons. I do not exclude your
 bringing a new summons; if you have erred, and fatally erred, so as
 never to be able to bring another action, those who have advised you are
 to blame; but we say, you have not sustained your case upon the grounds
 of conclusion you have prayed, and this course certainly cannot possibly
 in my judgment be admitted. Then Lord Glenlee goes on to say, ‘For I
 ‘cannot put another interpretation upon the judgment of the House of
 ‘Lords, which reverses the interlocutors of the Court of Session, and
 ‘finds that the matters in the appellant’s summonses complained of are
 ‘not sufficient to sustain the conclusions in those summonses, or any of
 ‘the said conclusions, and therefore assoilzies the defenders.’ Now,
 whether that is accurately pronounced in judgment or not, depends upon
 this: Your Lordships will look to see what are the matters complained
 of in the summons, and whether they are sufficient—not as grounds of
 complaint,—but are sufficient to sustain the conclusions in those sum-
 monses, or any of them, hoc intuitu, to the purpose of having a judgment
 establishing those conclusions. Then his Lordship says, ‘The leading
 ‘conclusion in that summons was, that the execution of the deed of 1740
 ‘necessarily inferred a forfeiture, not only of the right of Sir Hew, but of
 ‘his descendants.’ The House was of opinion that it did not operate a
 forfeiture. I do not now enter into the question, whether that opinion
 was right or wrong; but if it was not a forfeiture, after the pronounciation
 of a judgment by this House that the deed of 1742 was not a forfeiture,
 how can you preclude anybody from claiming under the deed of 1742,
 who now says, You have told me this is not a forfeiture, and I now tell
 you that, if that is so, I claim under that deed; I have a title under it, and
 I must beg you—not to give me the benefit of that action and that sum-

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mons, which contended that it was a forfeiture ; but I beg you to give me now, under the new summons, what I before claimed under that former summons—to tell me whether I have not a title under this deed of 1742 ; and if so, grant me the benefit of it, unless you are of opinion that the deed of 1780 bars me. I have said before, that the deed of 1780 was treated as a contravention in the former summons. She could not be permitted in the former summons to say that the deed of 1742 was to be considered as a contravention of the deed 1688, and that the deed 1780 was a contravention of the deed of 1688 ; and then, under a summons stating those grounds of complaint, and praying those conclusions, that they might be all reduced as forfeitures, and as contraventions—she could not, I say, be permitted in that action to turn round and say, This is all very well—I beg now to say, the deed of 1742 is no contravention—I beg to have, under that summons, the benefit of the deed 1742. So far from this judgment being a judgment precluding a fair decision upon that, one reason why the House did not come to a conclusion upon that was, that she might have a title under that deed which she had not alleged in that summons ; and accordingly they do not go the length to say that the defenders are to be assoilzied from a summons stating other causes, or stating any other conclusions as the cause of that new summons.

This learned Judge then undoubtedly goes on to insist upon the circumstance of Sir Hew having forfeited for himself and his descendants, and then he takes notice certainly of the important point in this cause. He says, he decides that the nearest heirs of Joanna Hamilton are the persons who are to take, although Sir Hew Hamilton himself declined taking the estate. Then he says, as to the reduction of the deed of 1780, he need not say any thing about it ; because, unless the pursuer is entitled to take the estate under the deed of 1742, she cannot set aside the other deed, which is entirely consistent with that charter, according to the interpretation put upon it. Then he proceeds to observe upon the act of 1621.

My Lord Bannatyne speaks of the *res judicata* in the way the learned Judges before him had done. Then he says, ‘ But when we come to the merits of the question, I agree with Lord Glenlee, that under the deed of 1742 this pursuer is not nearest heir, except on the supposition that Sir Hew and the heirs of his body were forfeited of their right under the entail by incurring an irritancy.’ Now, my Lords, I beg leave very humbly again to observe upon this part, that the principle which is insisted upon in this action is, not that she has any title under forfeiture, but that previous to the year 1780, or previous to his death, John Hamilton had acquired under the deed of 1742 a title that could not be affected by the deed of 1780. By the effect of that deed of 1742, and by the effect of prescription in aid of that deed, there was a new title created by that deed of 1742, which barred Sir Hew, not on the ground of contravention or any act of forfeiture, but on the ground of a new title, and enjoyment under that new title, so as to give a right by the effect of that charter, and by the aid of prescription. My Lord Bannatyne ob-

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serves, that this being so, and the House of Lords having declared there was no forfeiture, there was an end of all other questions; and he observes, 'That was a very singular proceeding, I think, because they reversed the judgment of this Court, and then they proceeded to give a judgment of their own. It was a proceeding extremely new; but, notwithstanding that, I am afraid we must give effect to it.'

My Lord Robertson states that he also concurs with Lord Glenlee on the point of *res judicata*, but states that they are not to lose sight of the judgment of the House of Lords; and then, after proceeding on the question of forfeiture as deeply affecting the present case, he gives an opinion, entitled certainly to very great respect, that the words 'heirs whatsoever' will entitle Sir Hew, and not this lady. Now, is it not remarkable that they are all giving construction to this deed with reference to the fact of a forfeiture on the part of Sir Hew, not determining at all that Sir Hew was to have any title under the deed of 1780, because they say that the deed 1742 is sufficient to entitle him?

My Lord Justice-Clerk, of whom I shall always speak with that great respect which I know personally to be due to him, seems to be of opinion that this judgment of the House of Lords that there was no forfeiture, had a considerable effect on the disposal of the present action, though he certainly does give an opinion that the words 'hæredibus quibuscunque' ought to be construed in the way that some of the other Judges had thought those words ought to be construed; and then he says, 'It is unnecessary to consider the deed of 1780;'—and to be sure so it is, because if he was called to the succession by the deed of 1742, not on the ground of any forfeiture by Sir Hew or any of his descendants, or by John in that transaction of 1742, but on the ground that John had acquired a title under that charter, and under all the circumstances this charter had been taken,—he says, 'it is unnecessary to consider the effect of the deed of 1780,' (as it would be); 'for the deed of 1780, calling Hew *nominatim*, would not make him worse than he was, if entitled under the general expression of the deed of 1742.'

My Lords, I believe I may venture to say, that I have most carefully examined the summons I have now in my hand in the first action of Mrs. Fullarton, and the summons in the present action; and it appears to me at this day, that the case stands in a very different situation from that in which it stood in the year 1801. The question which is made by the present summons is upon the title made by the transactions in 1742, not considered as a forfeiture upon the authority of this House, nor to be considered as a forfeiture; but whether the deed of 1742, if rightly construed, gives her a right to the succession upon the death of John without heirs of his body, Robert being at that time gone out of the world without heirs of his body,—and whether the deed of 1780, if it was to be any bar to her title, ought to be removed out of the way, not upon the grounds of contravention, such as was stated in the summons on which the judgment of this House proceeded in 1801, but as a deed not to be tolerated, regard being had to the title to be made by her under the deed of 1742.

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Now, my Lords, in a case of this great value, and of this great importance, (for I understand it to be of great value and of great importance,) I should be extremely sorry to have the presumption to say, that I very confidently think that that instrument of 1742 has been construed, not according to its true legal effect and meaning; but I have no difficulty in saying, that if I were bound, under the sanction under which I act as a Judge, to give my opinion at this moment, and without further information, whether Mrs. Fullarton was not the person called under that deed of 1742, next to John, provided Robert was out of the way, and the heirs of his body out of the way, I should say, that I did think she was the person intended to be next called. I am to look here to what was intended to be done. If the law must give effect to the intention, that is another matter. Take into consideration all the acts of John:—he is served heir,—and he is served heir in a service that takes notice that he is the second son, and yet heir, ‘et sic’ heir. The word ‘heir,’ therefore, with respect to him, is a word that could not be used with propriety, unless it had a special sense. How could he be stated in those pleadings to be heir, if the elder brother, or descendants from him, were alive, and noticed to be alive, unless the word heir has a flexible sense? He is stated not only to be the heir, but he is stated to be the second son in that instrument, and so (et sic) heir.

Your Lordships will recollect that this deed of 1742 was a deed which proceeded on a desire expressed by Sir Hew himself. I will not say that it would therefore bind the descendants of Sir Hew from quarrelling with the deeds and instruments, or any thing else that they have a right, according to the law of Scotland, to reduce, as to which no steps whatever have been taken; but, if your Lordships recollect, the very instrument of repudiation states that he is to be at liberty to take the property again upon the decease of John and of Robert—of both—without issue. Now I desire to know who would have taken under that deed of 1742, if John had died in the year 1742, Robert then still living. Could Sir Hew have said then, upon the ground of actual intention, ‘I intend, by suffering my brother to be served heir, and under the charter, to make use of the procuratory of resignation, but to come in nevertheless against my brother, and the heirs of his body?’—Surely that would not have carried into effect his own purposes, seeing that he was not to take next to John, and the heirs of his body, if Robert and the heirs of his body were to take next; and he must have again repudiated for himself, not only the entail of 1688, but the charter of 1742.

If John had died in 1743 without issue living, would not Robert, at least according to intention, have been the person to take under the ‘*aliis hæredibus quibuscunque*,’ as John was the second son, et sic (and so) heir, would not Robert, in such circumstances, according to intention at least, have been the third son, and so heir?

My Lords, if your Lordships look at the whole of these proceedings,—the decret, the service, and the charter of resignation, the whole tenor and series of those acts, and all the other acts,—I think you will put a

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Then we are told there is the proviso which has been referred to. There is reference in all the transactions to the deed of repudiation; but, even in John's deeds, none of the public acts in which he was engaged takes any notice of that proviso. No record takes notice of that proviso—none;—and that being so, it seems to me there is a very considerable question, whether that proviso ought to have any weight—and I incline to think it ought to have no weight—in the decision of this question.

My Lords, it may be owing to my ignorance of the law of Scotland, (which no man can be more sensible of than I have been very long, and I am afraid I shall have reason to be till the last moment I attend to any business of this sort,) that I should have liked to have seen it stated in what way Hew was to make out his title under the deed of 1688. To whom was he to serve heir? Was he to serve heir to John and his issue, or Robert and his issue, if he had any? If he was to serve heir under the deed of 1742, and to make out that he was the person meant by the *aliis hæredibus quibuscunque* in the deed of 1742, then I can understand how he was to make himself out heir to John; but how is he to make himself out heir to John under the limitations of the deed 1688? I do not find that question touched.

My Lords, when this decision was made in the year 1801, it was a decision which your Lordships made upon the judgment given by the whole Court of Session; for the Court was not at that period in two Divisions. It is naturally enough to be expected, that between the year 1801 and the year 1821, there may have been such a change in the persons sitting on the Bench, that, without any blame anywhere, the effect of a judgment in this House may, under those circumstances, be misunderstood; and I state that with all humility, but at the same time with a good deal of

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confidence, because I am quite sure that, in the discussion of this very business, my noble and learned friend, who was not here at that period, has had more difficulty in understanding the proceeding than I had, who was then present, and had continued to exist from 1801 to 1821. I know that your Lordships are not to take from me, but from the record, what was the nature of that former action, and what was the intention in giving that judgment. I could state my full conviction that the judgment never was meant to prejudice the question brought forward in the present action; but the dictate of my memory must go for nothing. You must find in the summons, and in the conclusions of the summons, that which I state, and not take it upon any assertion of mine that I believe it to be so. My noble and learned friend has had the opportunity of looking into those summonses and this judgment, and he is perhaps better qualified, from the research he has made, and from having more time, and especially in as much as he was not here in the year 1801, to judge of their effect. Upon the great question in the present action, namely the effect of the limitation *aliis hæredibus quibuscunque*, and the effect of the deed of 1780, it is impossible for me to say, upon any thing I have seen, that the strong impression which my mind had received, that that construction of the *hæredibus quibuscunque*, which is against Mrs. Fullarton, is not a right construction according to intention, has been removed; and in the notes there is not discussion enough to destroy my impression as to the intention, or to enable me to determine that what I believe to be the intention cannot be legally effectuated. At the same time I know, that without our most thoroughly understanding the effect of Scotch law, and the effect of Scotch instruments, we may be running great risk indeed of endangering property very considerably, if we do not seek for the best information we can get, before we finally conclude upon the effect of the deed of 1742. As it is reasoned upon in the papers before the House, I see what are the objections which are made to it. I cannot say that those objections affect my mind, but I have not the benefit of the reasons of the learned Judges upon all points. I agree that if the deed of 1742 means Sir Hew, it does not signify what is the meaning of the deed of 1780. The consequence of all is, that unless your Lordships should appear to be of a different opinion, it would be right again to remit this cause to the Court of Session, calling upon the Division of the Court of Session to submit also the whole to the opinion of the other Division of the Court of Session, that we may know what the opinion of the whole of the Judges is upon the deed of 1780; and to remit it with a declaration, that this House has pronounced no judgment heretofore to affect the decision of the Court, and that it is wished the Judges should particularly apply themselves to the determination of the points, what is the legal meaning of the words in the deed of 1742, and what would be the effect of the deed of 1780, if the legal interpretation of the deed of 1742 were favourable to Mrs. Fullarton. I have only to say again, (which is perhaps going further than I ought to do,) that under the highest sanction under which I can give my present opinion, I should say, that, looking at intention, those

July 26. 1822. words ought not to be construed as the Judges have construed them; but I state that with the reserve with which a Judge ought to state his opinion, who wishes that other Judges should further consider the intention and legal effect of those instruments. If my noble and learned friend concurs with me, it appears to me that the proper way will be, to remit the cause to the Court of Session, with some such declaration as this.

LORD REDESDALE.—My Lords, after attending, with all the diligence I have been able, to what has passed upon this occasion, it does appear to me that the judgment in 1801 does not in any degree affect the question now before your Lordships—that that proceeded upon the form of the summons in the action then under the consideration of the House, and that it was upon that ground only the House disposed of that appeal. The question now before your Lordships appears to me to be a different question, namely, Whether, under the charter of 1742, Mrs. Fullarton is now entitled to receive this property, claiming, under the words of that charter, the property on failure of certain other heirs of Joanna Hamilton? In looking to that question, it seems to me important to consider, in order to give construction to that charter, under what authority it proceeded. It proceeded first of all upon the decret of 1741, in which the judgment of the Court was pronounced against Sir Hew Dalrymple, that John Hamilton was the heir of entail then entitled to succeed by virtue of the settlement of 1688; and that the whole title of John Hamilton was further founded upon his being the true heir of entail entitled to enjoy the property under the settlement of 1688. This decret, therefore, concludes the title (so far as it is in its nature conclusive) of John Hamilton. It finds him to be the person entitled, in the order of succession created by the settlement of 1688, immediately to take the estate. According to that decret the retour proceeded, and that retour found him the heir also, under the entail of 1688, entitled to succeed to this property, to the exclusion of Sir Hew. Upon that, he became entitled to use the procuratory of resignation contained in the original settlement of 1688. He had no right to use that procuratory of resignation in the manner in which he did use it; the superior had no right to grant him the title which the superior did grant him, except under the authority of that instrument of 1688, and upon the ground that he was the person then called to the succession by the force of that instrument of 1688; and it appears to me, that the whole construction of all the proceedings of the decret, of the retour, and of the charter,—the construction of all these instruments is to be taken to be, that, in conformity to the succession created by the instrument of 1688, John Hamilton was the person entitled to enjoy the estate to him and the heirs of his body—that he was so entitled, as the heir of Joanna Hamilton, according to the entail of 1688, not as being the heir of her body procreate by Robert Dalrymple, but that he was that qualified heir of the body which the entail of 1688 meant should enjoy the property in the order of succession created by that deed. It seems to me, therefore, that the settlement of 1688, as interpreted by the decret

of 1741, by the retour, and by the charter of 1742, giving the estate to John Hamilton, must govern the construction of the words contained in that charter, because the charter professes to be in obedience to the decret, and in pursuance of the retour. The decret and the retour constituted John Hamilton the person in the order of succession under the deed of 1688, the person entitled to that property. July 26. 1822.

Then, my Lords, under the deed of 1688, who were the heirs to succeed to John Hamilton according to the course of succession regulated by that deed? The next person was Robert, and the heirs of his body. The next person was the present appellant, and the heirs of her body. To admit Sir Hew Dalrymple and the heirs of his body into the succession was to violate the order of succession created by the settlement of 1688, if that course of succession had not been violated by the introduction of John Hamilton. Therefore, to give consistency to the title under the decret and service,—to give consistency to the title under the retour,—and to give consistency to the title under the charter of 1742, the construction of that charter must be, according to the view I entertain, (subject to any construction which that might have by a further argument upon it, and by a more intimate knowledge of the Scotch law than I can pretend to have;) but, according to the view I have at present upon that subject, it is impossible to say that the just construction of the charter of 1742 can substitute, after John Hamilton and the heirs of his body, any other persons than those who were entitled to succeed to John Hamilton and the heirs of his body by the settlement of 1688. The charter professes to be according to that settlement; it professes to act under the authority of that settlement, and therefore, I should think, cannot be construed to be intended to violate the order of succession intended to be established by that settlement. Under this impression, therefore, I can give, as at present advised, no other construction to the words ‘*aliis hæredibus quibuscunque*,’ than those heirs who were of the same nature and description as John Hamilton himself—that is, the persons called to succeed, to the exclusion of Sir Hew Dalrymple and the heirs of his body.

My Lords, when I come to consider the manner in which I apprehend the title is to be made up on the death of John Dalrymple, who was undoubtedly seised to him, and the heirs of his body under that charter, and was therefore the last person who had the actual sasine of the estate, according to the settlement of 1688, I apprehend that, according to the law of Scotland, the person to be retoured heir under the settlement of 1688 must be the person who, according to the terms of that settlement in the order of succession created by it, could be served as heir of John Hamilton. That, I apprehend, can only be the present appellant. Sir Hew Dalrymple cannot serve himself heir of provision to John Hamilton under the settlement of 1688. If he is to come in in any manner as heir of John Hamilton, it must not be under the settlement of 1688, but under a different title. I do not enter into the discussion now, whether, under the instrument of 1780, he could or could not claim according to the

July 26. 1822. terms of that instrument, that deed having been executed by John Hamilton, and its validity depending upon the power John Hamilton had to execute that deed. I therefore perfectly agree with the noble Lord who has already addressed your Lordships, that the species of qualified finding he has proposed is that which ought to be framed by your Lordships, that your Lordships may not preclude the discussion of any question which ought to be discussed, and which it appears has not been fully discussed in the Court below; that it is necessary, in the first place, to find (which appears to me perfectly clear) that what passed in 1801 has not precluded any of the questions raised in the present appeal. If I were to give it any construction, it would be of this description,—that the House were then of opinion that the charter of 1742, and the limitations contained in that charter, were limitations according to the settlement of 1688, and therefore according to the claim now made by Mrs. Fullarton; but I apprehend the House did not mean to make any decision upon that subject, but to leave the question wholly open, and to proceed entirely upon the insufficiency of the summons, which they had then to consider as the foundation of their decision, to warrant any decision of that kind in favour of Mrs. Fullarton.

My Lords, this being the state of the case, the action which is now pending, and which has come by appeal before your Lordships, appears to me to be of a totally different description, founded on a different ground, and a ground even contradictory to the ground on which the original proceeding was framed; for now it is to the advantage of Mrs. Fullarton to claim under the charter of 1742, and to insist that she, according to the true construction of that charter, is the person entitled to succeed to John Hamilton in this property. John Hamilton remained in possession of the property under the charter until the time of his death. No actual sasine of the property was in any other person but John Hamilton, under the charter of 1742, at the time of his death; and the question then is, What was the title which, on the death of John Hamilton, accrued either to Mrs. Fullarton or to Sir Hew Dalrymple? Mrs. Fullarton claims upon the construction of the charter of 1742; that, I must confess, does appear to me to be the true construction of that charter. Sir Hew Dalrymple insists upon the title under the deed of 1780; that title does not appear to me to have been investigated in the Court below, because they proceeded upon a ground which did not make it necessary for them to investigate that title at all. The repudiation by Sir Hew Dalrymple undoubtedly was qualified by the terms of it; but that qualification, I apprehend, as far as I am informed upon the subject, can have no effect whatsoever, because it does not in any manner appear upon the subsequent proceeding—it forms no part of the title appearing upon the record—it is not expressed either in the retour of service, or in the charter of 1742;—they have both proceeded upon a simple repudiation unqualified.

My Lords, if the question were put to me, informed as I now am, whether Sir Hew Dalrymple could qualify his repudiation, I should

July 26. 1822.

say, that I apprehend he could not; and that any qualification of that repudiation, contained in the instrument of repudiation, would, according to the law of Scotland, as far as I am informed of it, (but I certainly must speak ignorantly upon the subject,) be void and of no effect; and I am strongly impressed with the idea, that that is the law of Scotland, because the retour of service, and the charter in 1742, take no notice whatsoever of that qualification. My Lords, Sir Hew Dalrymple repudiated the succession. I apprehend that he could only affect his own rights, unless his doing so amounted to an irritancy, which might have been taken advantage of for the purpose of avoiding the title of the heirs of his body. ¹ No such proceeding has been had; and therefore, whether or not the present Sir Hew Dalrymple, claiming as heir of his body, can affect the proceedings on the decret of service, the retour founded upon it, or the charter 1742, in that distinct character, is a question upon which I can venture to say nothing at all; and I conceive that that ought to be left perfectly open by your Lordships, unless your Lordships were much better informed upon that subject than I can pretend to be. I therefore think that your Lordships, leaving open the question, what may be the true construction of the charter 1742—what may be the rights of Sir Hew Dalrymple under the deed of 1780—what may be his rights to reduce either the service, the retour founded upon it or the charter of 1742, if he can have any such rights—leaving out all these questions, that your Lordships will most properly refer this cause back again to the Court of Session, for them to review and consider the whole subject, without any effect upon their minds of the preceding judgment of this House in 1801, which seems to me to have operated upon them in a manner in which, according to my view of it, it ought not to have done. I wish the case, therefore, to go back again wholly unprejudiced by any thing which may be pronounced by your Lordships in judgment, whatever opinion I may individually have formed upon the true construction of the charter of 1742, that being the opinion of an individual, and in no manner acted upon by the House. My Lords, I therefore concur in thinking, that what has been proposed by the noble Lord on the Wool-sack is the proper manner in which your Lordships should dispose of this question, which is not only a question of great importance in point of value, but, it appears to me, is a question of great importance in respect of the law of Scotland. It is very evident that the law of Scotland, so far as concerns entails, is a law which does tend to create a variety of very important and extremely difficult questions; and with the partiality which an Englishman naturally feels for the law of his country, I confess to your Lordships I do extremely congratulate myself that the titles of estates in this country do not depend upon the law of tailzie which prevails in Scotland.

Appellant's Authorities.—(1.)—Kames's Elucid. art. 28; Kinlochs, Dec. 27. 1792, (12233); 4. Stair, 20. 12; 4. Stair, 40. 16; Ibid. 3. 3; Graham, May 20. 1814; Dow's Reports, p. 314.—(2.)—3. Ersk. 8. 47; Earl of Dalhousie, Jan. 13. 1712, (14014); M'Lauchlan, Jan. 12. 1757, (2312); 2. Stair, 5. 25; 2. Stair, 3. 51;

July 26. 1822. Creditors of Broughton, June 20. 1739, (10247); Munro, May 19. 1812, (Mor. Supp. Vol. I. No. 10. *voce* Prescrip.)

Respondents' Authority.—Grieve, Dec. 7. 1760, (3022.)

SPOTTISWOODE and ROBERTSON,—J. CHALMER,—Solicitors.

(*Ap. Ca. No. 40.*)

No. 50. WILLIAM MILLER, Esq. and Others, Appellants.—*Warren—Jeffrey—Skene.*

PATRICK MILLER, Esq. Respondent.—*Greenshields—Thomson.*

Clause—Provisions to Children.—A father having made certain mortis causâ provisions in favour of his younger children, and disposed, mortis causâ, his whole estates, real and moveable, to his eldest son, subject to these burdens; and having thereafter bound himself in his eldest son's contract of marriage to leave his whole estates to him, under burden of the provisions 'made by him for his 'younger children;' and having thereafter advanced to them large sums during his life, and granted to them additional provisions, partly of a permanent nature, and partly payable at his death; and the Court of Session having held, that as the provisions made prior to the contract of marriage were fit and proper, it was not competent for the father thereafter to increase them, and that sums paid to the children during his life, must be imputed in extinction of the original provisions;—the House of Lords found, That the question was to be decided by the sound construction of the above clause; and that as the exception in the contract of marriage referred to provisions payable mortis causâ, he was not barred from advancing sums to the younger children during his life; but that all provisions of a permanent nature, or payable after his death, were in fraudem of the contract, and were to be imputed in extinction of the original provisions, and, quoad ultra, ineffectual.

July 30. 1822.

1ST DIVISION.
Lord Alloway.

THE late Patrick Miller, Esq. of Dalswinton, had three sons, Patrick, William, and Thomas-Hamilton,—and two daughters, Janet, afterwards Mrs. Erskine, and Jean, afterwards Mrs. Jones. In the month of May 1790 he executed a trust-deed of settlement, by which he conveyed his estate and whole effects to his eldest son Patrick and the heirs of his body, but subject to the burden of the following provisions:—'To William Miller, my second son, 'and his foresaids, of the sum of £7000 sterling, and that over 'and above the sum of £1920 already paid by me for his com- 'mission—to Thomas-Hamilton Miller, my third son, and his 'foresaids, of the sum of £7000 sterling—to Janet Miller, now 'Mrs. Erskine, my eldest daughter, and her foresaids, of the 'sum of £7000 sterling—and to Jean Miller, now Mrs. Jones, 'my youngest daughter, and her foresaids, of the sum of £7000 'sterling.' On the 6th of January 1803 he executed a deed of alteration, by which he declared, 'The said provision of £7000 'sterling to the said William Miller, my second son, is hereby