No. 42.

Honourable MARIANNE M'KAY FULLARTON, Appellant.

Sir HEW DALRYMPLE HAMILTON, Bart. Respondent.

Taillie—Service of Heirs—Prescription.—A party, who was entitled to succeed to two estates as heir of entail, but the investiture of one of them preventing him (as was understood) from holding both, having repudiated one of the estates in favour of the next substitute, with a reservation of his own and his descendants' rights to take the succession of the estate on the failure of this and the next substitute and their descendants, or in the event that the repudiator and his descendants could take the succession consistent with the entail of the other estate; and the next substitute having obtained decree of declarator that he was the next heir entitled to succeed under the original entail, in consequence of the decree of repudiation; and having been served heir of taillie and provision in virtue of these proceedings, and expede a charter and infeftment; but no contravention, irritancy, or forfeiture, having been declared against the repudiator;—Found, (affirming, with a variation, the judgment of the Court of Session), 1. That the descendants of the repudiator were not deprived of their rights under the original entail by the deed of repudiation, the decreet of declarator, or retour of the service, it being now competent for them to hold both estates. 2. That under the destination in the charter to the next substitute, and the heirs-male of his body, 'quibus deficien. aliis hæredi-'bus quibuscunque ex corpore dict. J. H.' (the common ancestor of the repudiator and next substitute), the descendants of the repudiator were, in legal construction, called prior to the heirs who, in the original entail, were subsequent to the next substitute in whose favour the repudiation was made; and that, at all events, the descendants of the repudiator were entitled to reduce the titles made up by the next substitute as contrary to the entail,—the right of the substitute and posterior heirs not having been secured by the positive prescription, and that of the descendants of the repudiator to reduce having been saved from the negative prescription, in consequence of the heir in whose favour the repudiation was made having, within the years of prescription, executed a disposition, in terms of the original entail, to himself and the heirs of his body, whom failing, to the repudiator nominatim, and his descendants, on which infeftment followed. 3. That, in order to defend against a challenge of such disposition, it was not necessary for the descendants of the repudiator to reduce the deed of repudiation, decreet of declarator, service, and charter following thereon in favour of the next substitute; but that, in order to complete his title, it was competent for him to serve heir of taillie and provision under the original entail to such heir-substitute, as the person last infeft in the estate. And, 4. That the vicennial prescription of retours could not, in such a case, exclude the descendants of the repudiator.

June 20. 1825.

2D DIVISION.
Lord Reston.

ON the 19th June 1688, Lord Bargany, in contemplation of the marriage of his son John, Master of Bargany, with Jean Sinclair, daughter of Sir Robert Sinclair of Longformacus, bound and obliged himself, as a party to their marriage-contract, to infeft and seize the Master, and the heirs-male of the marriage; whom failing, the heirs of the body of the Master in any other marriage; whom failing, William the Master's brother, and the heirs-male of his body; whom failing, the

heirs-male to be procreated of Lord Bargany's body; whom failing, the eldest heirs-female of the body of Lord Bargany, and the descendants of her body, without division; whom failing, the next heir-female of Lord Bargany's body, and the descendants of her body, excluding heirs-portioners; whom failing, John Houston, of Houston, &c.; whom failing, John Lord Bargany, his heirs-male whatsoever; whom also failing, to the said John Lord Bargany, his heirs and assignees whatsoever; the eldest heir-female, and the descendants of her body, excluding all other heirs-portioners, and succeeding always without division. The deed was in the form of a strict entail; and the whole heirs of taillie, male and female, were inter alia taken bound, on succeeding to the lands and baronies, to assume and bear the surname, arms, and designation of Hamilton of Bargany, as their proper surname, arms, and designation, in all time thereafter; and the doing the 'contrair hereof' was declared a contravention, whereby the contravener should amit, lose, and tyne his right, title, and succession to the lands, &c. which were ipso facto to fall and accresce to the next heir of taillie, as if the contraveners or their descendants were naturally dead. The Master predeceased his father, without having been infeft, leaving issue of the marriage, Joanna, an only child. Lord Bargany died, leaving his son William, (afterwards Lord Bargany), and a daughter, Nicolas. William was served heir of taillie and provision in general to the Master, in virtue of the deed 1688, but was not infeft. June 20. 1825.

Joanna married Sir Robert Dalrymple, eldest son of Lord President Dalrymple, of North-Berwick. By contract of marriage in March 1707, the President entailed North-Berwick (reserving his own liferent) upon Sir Robert, and the heirs-male of the marriage; whom failing, the heir-male of the body of Sir Robert by any other marriage; whom failing, upon such person or persons, or such other heirs descending of them, as the President should nominate and appoint, by a writ under his hand, at any time during his lifetime; and failing such nomination, or persons so nominated, and the heirs to be then mentioned, upon Hugh, second son of the President, and the heirs-male of his body, and so forth, upon the President's five sons; whom failing, to the heirs-male procreated or to be procreated of the body of the President; whom failing, to the nearest heir to the last fiar of the lands and estates, and their heirs, the heir succeeding being always descended of the body of the President; whom failing, &c. The entail also bore, that in case it should

June 20. 1825. happen that the succession to the estate of Bargany should devolve on Joanna, and the heirs-male of her body, whereby both the estates of Bargany and North-Berwick might happen to descend to the heirs-male of this marriage, and thereby the North-Berwick estate might be confounded with the estate of Bargany, and the name and memory of the President and his family might become extinct and sopite, 'which in no way is intended, 'but expressly designed, communed, and agreed, that the said 'Sir Hugh (the President) his proper estate, name and arms, 'should be preserved distinct and separate from the family of 'Bargany;' therefore it was provided, that in case there should be more sons than one of the present marriage, and that the succession of the estate of Bargany should fall and devolve upon the heirs-male thereof, then the heir accepting the succession of the estate of Bargany, and the descendants of his body, should ipso facto amit and lose all right and interest they had or could pretend to the North-Berwick estate; and the succession thereof should immediately devolve to the next son of the present marriage, who should have access to serve himself heir to his predecessor who died last vest and seized in the lands, as if the heir so accepting the succession to the estate of Bargany, and the heirs of his body, had never existed. A similar provision was introduced, to meet the event of the succession to and accepting of the taillied estate of Bargany by the heirs of this marriage, after their succession to the North-Berwick estate, declaring their right to the North-Berwick estate ipso facto to cease and become void, ('except in the case of only one son descending of the present marriage'); and the right of succession should immediately devolve upon the next heir, not descending of the body of the contravener, accepting of the succession to the Bargany estate, in the same manner as if the person so contravening, and the heirs of his body, had never existed; and it should be lawful to the said next heir to establish the right thereof in his person, either by adjudication, declarator, or serving heir to the person who died last vest and seized therein preceding the contravener. But in case it should happen that there be but one heir-male of the present marriage, then he was permitted to accept of the succession to the Bargany estate, and should also have right to succeed to the North-Berwick estate; providing always he made such additions to the arms of the family of Bargany, and otherwise keep up the remembrance of Sir Hew his name and family, in as far as the provisions and conditions of the Bargany entail could admit of. Should, however, such only son happen to have

more sons than one, then the estates were to be separately bruiked and possessed; and the heir descending of the said only heir-male having right to the succession to North-Berwick, should not accept of the succession to the estate of Bargany, under the like irritancies; so that the two estates should be always separately enjoyed, except when and so oft as it happened that there was but one heir-male descending of the present marriage, which only heir-male should, in any degree of succession, and in all cases and events, have right to the succession of both the estates, under the conditions, provisions, and irritancies specified. The contract also contained a power, at any time during the President's lifetime, to discharge and qualify all or any of the prohibitory and irritant clauses contained in the said contract and taillie, and to renew the same at his pleasure; or to empower Sir Robert, or any of the heirs of taillie above-mentioned, to discharge or qualify, and also to renew the same, if they should think fit.

Sir Robert and Joanna predeceased the President, and left three sons—Hew, John, Robert (afterwards Dr Robert); and two daughters—Marion and Elizabeth. Thereupon the President executed a deed (1734), permitting his grandson, Sir Hew, to serve himself heir of taillie to his father (Sir Robert) in the lands of North-Berwick, without inserting in his service the clauses concerning the succession to the estate of Bargany, who made up titles accordingly.

William, Lord Bargany, had been survived by a son James, (afterwards Lord Bargany), and a daughter Grizzel, (married to Thomas Buchan). James died in 1736, without issue; and thus the line of male succession under the entail came to an end. He, as well as William, had possessed merely on the personal titles contained in the marriage-contract 1698.

On the death of James the question arose, to what heir-female the succession opened? For this character the claimants were, Sir John Hope, the eldest son of Nicolas, only daughter of the entailer; Mary Buchan, daughter of Grizzel, only daughter of William; and Sir Hew Dalrymple, son of Sir Robert Dalrymple and Joanna the only daughter of John Master of Bargany, the institute of entail. The President immediately executed a deed (8th April 1736), stating, that at present being fully satisfied that it is for the interest of both families 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 taillie 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 of the taillie of Bargany,

June 20. 1825. 'which is the most regular and effectual manner of conveying 'the said estate in favours of the next person in the line of suc- 'cession by the taillie of the said estate of Bargany;' therefore he authorized and allowed Sir Hew to be served and retoured heir of the taillied estate of Bargany, according to the provisions and conditions of that entail, and to retain the name and arms of Hamilton of Bargany, as his proper name and arms, as long as he was and should be allowed to continue in the right of both estates of Bargany and North-Berwick, and no longer; the President reserving power and faculty to renew and redintegrate the provision in the marriage-contract, disabling the heir of North-Berwick to enjoy both estates, and under the penalties and irritancies therein mentioned, or in any other such manner as the President should think proper to appoint; and declaring, that the heir contravening such directions should forfeit his title to the estate of North-Berwick, for himself and his descendants, and the right of succession should fall to the next heir of taillie. Next day the President executed another deed, referring to the powers and faculties in the marriage-contract of 1707, the exercise of them by the deed of 8th April 1736, and allowing his grandson, Sir Hew, to continue in the estate of Bargany all his (the President's) life, and to continue to use and bear the name and arms of Hamilton of Bargany, with such additions as might be consistent with the Bargany entail, and no longer; and appointed and ordained Sir Hew, 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 Dalrymple, his second brother, and the heirs of his body; whom failing, to Robert Dalrymple, now his third brother, and the heirs of his body; whom failing, to the other heirs appointed to succeed to the estate of Bargany by the taillie thereof, and that within the space of six months after the President's decease, in ample form; reserving to Sir Hew the fruits and emoluments of the estate of Bargany, from the decease of Lord James to the period when Sir Hew was thus appointed to divest and denude himself; declaring the refusing or delaying to denude himself, or continuing to possess and intromit with the rents and emoluments after the time appointed for denuding, should import an irritancy of his right and title to the estate of North-Berwick; which estate should fall and accresce to John Dalrymple, 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, who should be entitled to pursue and declare their right to the

same, and obtain the same established in their persons according to law, with other reservations and provisions. June 20. 1825.

Sir Hew, on the same day, granted assignation of the rents of the Bargany estates to a trustee, for certain purposes, proceeding specially on the narrative of the above deed, 'that in case the 'succession to the estate of Bargany shall happen to devolve to 'the said Dame Joanna Hamilton, or any of the heirs-male of 'that marriage, that both the estates of Bargany and North-'Berwick should not be possessed and enjoyed by one and the 'same person;' and that the President 'had appointed and 'ordained me, (Sir Hew, the grandson), who am fiar of the 'estate of North-Berwick, and my heirs, to divest and denude 'ourselves omni habili modo of our right and title to the estate 'of Bargany in favour of John Dalrymple, my second brother, 'and the heirs of his body; which failing, to Robert Dalrymple, 'my third brother, and the heirs of his body; which failing, to 'the other heirs appointed to succeed to the estate of Bargany 'by the taillie thereof, and that within six months after the 'decease of the said Sir Hew Dalrymple (the President), in ample 'form.' This was followed by factories, in the character of 'apparent heir of taillie to the deceased James Lord Bargany,' the accounts of which proved, that the rents of that estate were uplifted and paid either to Sir Hew (the grandson), or to his assignees in trust.

In the competition, which in the mean time was proceeding, the Court of Session preferred Sir Hew Dalrymple (the grandson) to Mary Buchan; but Sir Alexander Hope to both Mary Buchan and Sir Hew. The case was appealed, and the House of Lords (27th March 1739) preferred Sir Hew Dalrymple to both.*

During the dependence of this litigation, the President had died. Sir Hew (the grandson) had already been retoured heir in the North-Berwick estates; but the Bargany estates he merely possessed (through his assignee) upon his title of apparency; and the period now arrived when he was bound to denude himself of the latter, or expose himself to the penalty of contravention in the marriage-contract and deed of 9th April 1736. He resolved to retain North-Berwick (the most valuable), and to reject Bargany. Accordingly he executed, on the 13th August 1740, a deed of repudiation of the estates of Bargany, proceeding on a general mention of the entail of North-Berwick; the

* See 1. Craigie and Stewart, No. 47. p. 237.

June 20. 1825.

competition which had ensued for Bargany, with the final result; a narrative, that it appearing to have been intended by the parties to the contract of marriage 1707, that the two estates of North-Berwick and Bargany should be separately taken and possessed by the heir of the marriage, (except in the cases excepted); and were he now to take the succession to the estate of Bargany, he should thereby forfeit the right to the estate of North-Berwick for himself and his descendants in favour of John Dalrymple his brother-german; and being fully resolved to take and hold the estate of North-Berwick, and to allow the estate of Bargany to descend to and be taken by John Dalrymple in the terms of the Bargany entail; therefore, for the love and respect which he bore to John Dalrymple, and in consideration of the settlements of the estates of North-Berwick and Bargany, (with and under provision after-mentioned), he, Sir Hew, repudiated and refused to accept of the succession of the estate of Bargany, and that to and in favour of John Dalrymple, the next heir of entail to the estate of Bargany; and consented that John Dalrymple should, in respect of the repudiation, serve himself heir of taillie and provision to James Lord Bargany, and otherwise make up titles in his person to the estate of Bargany, in such manner as was competent of the law, and as he should be advised; and that he instantly take possession of the estates, and uplift the rents in the tenants' hands, fallen due since the death of James Lord Bargany, and in time coming; providing always, that 'these presents shall nowise prejudge my 'own or my descendants' right to take the succession of the 'said estate of Bargany, upon failure of the said John Dalrym-'ple, 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 taillie of the estate of North-Berwick, with which ex-'press provision these presents are granted by me, and accepted 'by the said John Dalrymple.'

Thereafter, 25th February 1741, John Dalrymple raised a process of declarator in the Court of Session. It set forth the entail of Bargany, the competition for the succession, the judgment of the House of Lords; recited the deed of repudiation, (thus engrossing the clause of reservation); and concluded that it should be found and declared that he had the only right and title to the succession to the said estate of Bargany, and that he ought to be served heir of taillie and provision to James Lord Bargany in the estate of Bargany, 'after the form and tenor of

June 20. 1825.

'the writs before narrated.' The summons was recorded in the books of Council and Session. The action was raised against Sir Hew and some of the posterior substitutes; but they made no appearance. The Court found 'the points and articles of 'the foresaid summons relevant and proven by the writs foresaid 'produced, and found and decerned and declared conform to the 'conclusions of the libel.' The decree (according to the usual form of decrees in absence) recited the summons, and the documents produced, ad longum. John Dalrymple then, in September 1741, expede a general service as nearest heir of taillie and provision to James Lord Bargany. The verdict of the jury returned him lawful and nearest heir-male of taillie and provision to James Lord Bargany, described him as second son of the deceased Sir Robert Dalrymple and Joanna Hamilton, and stated that his eldest brother was alive. The retour, besides setting forth the same facts, quoted the marriage-contract 1688, the judgment of the House of Lords in 1739, and then proceeded thus:—'Et secundum quoddam scriptum lie deed per 'dict. Dominum Hugonem Dalrymple, signat. et conces. de 'data 13mo. Augusti, et registrat. in libris Concilii et Sessionis '11mo. Novembris 1740, per quod repudiavit et recusavit ac-'cipere successionem dict. status de Barganie; et hoc ad et 'in favorem dict. Johannis Hamilton proximi hæredis talliæ 'in dict. statu de Barganie et concordavit quod dict. Johannis 'Hamilton (in respectu ejus repudiationis prædict.) seipsum 'hæredem talliæ et provisionis dicto Jacobo Domino Barganie 'inserviret et titulos in ejus persona ad dictum statum de Barga-'nie conficiret eo modo quo de lege competit et secundum decre-'tum declaratorium,' &c. By this service John Hamilton took up the unexecuted procuratory of resignation in the marriage-contract of 1688. He forthwith executed it, and in common form the lands were resigned in the hands of the superiors in his own favour, and a charter of resignation from the Prince, in 1742, followed. 'Dilecto nostro Joanni Hamilton de Barganie juris-'consulto 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 hæredem femellam demortui Joannis Domini Barganie ejus 'avi et hæredibus quibuscunque ex corpore dict. Joannis Hamil-'ton quibus deficien. aliis hæredibus quibuscunque ex corpore 'dict. dominæ Joannæ Hamilton procreat inter illam et dict. do-'minum Robertum Dalrymple absque divisione.' The legal title of John Hamilton was fully described in the quæquidem clause,

June 20. 1825.

which contained a repetition of the progress already described. The charter embraced all the prohibitory, irritant, and resolutive clauses and conditions in the contract of marriage or entail 1688. John Hamilton took infeftment in August 1742, and registration followed in September, being the first feudalization of the entail. In certain portions of the Bargany estates, held of subjects-superiors, John Hamilton completed his title in the same terms, and under the same conditions and fetters, by obtaining charters from the respective superiors.

Dr Robert Hamilton died unmarried, and John Hamilton had no children. In this situation, John, in 1780, 'for certain 'causes and considerations me moving, and in order to give 'effect to the entail executed by John Lord Bargany, and to the 'conditions upon which my own right and title to the lands 'under-mentioned was founded,' disponed 'to and in favour of 'myself, and the heirs of my body without division; whom fail-'ing, 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 taillie contained in the foresaid deed of entail, in the 'order therein expressed; and which heirs of entail are herein 'after insert, word for word, as in the said deed of entail.' Infeftment immediately followed, and was recorded.

It has been mentioned, that Joanna Hamilton had two daughters. Marion, the eldest, had married Donald Master of Reay, and had two sons; the eldest of whom, George Lord Reay, had two daughters, Marianne and Georgina. Marianne married Fullarton of Fullarton. These daughters, on their father's death, had been left without guardians; their only paternal uncle was insane; and they were stated as having been in infancy when these steps were taken by John Hamilton, their maternal grand-uncle.

Mrs Fullarton, considering herself aggrieved by these proceedings, raised, in 1793, a process of reduction and declarator against John Hamilton, and his nephew Sir Hew, (Sir Hew, the father, having died), calling for production of the deed of repudiation 1740, process of declarator 1741, the general service, the charter from the Prince 1742, with sasine thereon, and John Hamilton's deed of 1780, with sasine, all to be reduced (in so far as they were contrary to the entail of Bargany) in consequence of the defenders having forfeited their right to the succession; and that it ought to be found and 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 Lords 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 for- 'feited 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 taillie, incurred an irritancy of, and annulled, lost, 'and forfeited his right, title, and interest to the whole entailed 'lands and estate of Bargany, for himself and the descendants of 'his body; and that the pursuer ought to be served heir of taillie 'and provision to the said James Lord Bargany in the said 'lands and estate.' And afterwards, in consequence of a sale and purchase of part of these lands by John Hamilton, to pay off some debt affecting them, she raised a supplementary action of reduction, calling for production of the deeds relative to the transactions, and concluding for reduction and declarator of irritancy. June 20. 1825.

John Hamilton produced his charter of 1742 and sasine, which, with forty years' possession, he contended formed a title to exclude. To this Mrs Fullarton answered, that she was entitled to deduct the years of her minority. 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 unexcep- 'tionable, and that no nullity or objection does from thence ap- 'pear to lie against them; and that it is averred by the defender, 'and not denied by the pursuer, 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, with- 'out 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 suffi- 'cient to exclude the title of the pursuers in this reduction; and 'therefore assoilzies from the reduction, reserving to the pursuers 'to insist in the declaratory conclusions of their libel, and par- 'ticularly how far the taillie 1688 is affected by the investiture '1742, and whether or not the defender has incurred any irri- 'tancy under that entail.' Mrs Fullarton having reclaimed, the Court (Jan. 13. Feb. 9. and Dec. 6. 1796) found, 'that in com- 'puting the period of prescription, the years of the pursuer's

June 20. 1825.

'minority are to be deducted,' and therefore that the defender 'had not produced a sufficient title to exclude.' *

John Hamilton died, but Sir Hew Dalrymple, his nephew, and who, under the deed of 1780, succeeded to John Hamilton, appealed. The House of Lords (Dec. 18. 1797) remitted back the cause, 'to review the interlocutors 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 the nearest substitute under the deed of entail in the manner alleged on his 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, and also on the effect which such judgment may have upon the interlocutors directed to be reviewed.'†

Under this remit, the parties entered into the merits of the declaratory conclusions of the summons, as to the alleged contravention and irritancies by Sir Hew and John. The Court, on the 23d November 1798 and 1st March 1799, being of opinion that Mrs Fullarton's claim was ill founded, altered their former interlocutor, sustained the defender's title as sufficient to exclude the pursuer's title, and assoilzied.‡ Mrs Fullarton appealed, and the House of Lords (June 3. 1801) reversed the interlocutors complained of; but 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 assoilzied the defenders.§

No further steps were taken by Mrs Fullarton in relation to this matter until 1814, when Sir Hew Hamilton having applied for an Act of Parliament to exchange part of the estate of Bargany for some of his unentailed lands, she made appearance for her interest, and obtained the insertion of a clause, declaring that nothing contained in the Act should affect her claim, or that of any other heir of entail to the estate of Bargany, if any they had. Thereafter, for the purpose of trying the question, she granted to Thomas Martin a trust-bond for one million sterling, on which he raised an action of adjudication: she also raised an action

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* The Speeches of the Judges of the Court of Session are printed in the Appendix to this Volume, No. I. p. 1. to p. 25.

† In the Appendix, No. I. p. 25. to p. 33. will be found notes of the opinions said to have been delivered on this occasion in the House of Lords.

‡ See the Speeches in the Appendix, No. II. p. 1. to p. 33.; and Mackay *v.* Fullarton, Nov. 23. 1798, (11,171.)

§ See App. No. II. p. 33. to p. 39.

calling for exhibition of the deed of 1780, and the titles made up by Sir Hew founded upon that deed; and concluded, 'that they 'should be reduced, and that it should be declared, that, by the 'terms of the foresaid contract of marriage and deed of entail '1688, charter 1742, and infeftment thereon expede by the said 'John Hamilton of Bargany, charters from "subjects-superiors," 'and infeftment thereon, the said Marianne Mackay Hamilton, 'pursuer, is next in the order of succession failing the said John 'Hamilton and the heirs of his body, and the said Robert Dal-'rymple and the heirs of his body; and they having accordingly 'failed, she has the only good and undoubted right and title to 'be served heir of taillie, 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 taillie and provision to the said John Hamilton of Bar-'gany, in the said lands and estate of Bargany, after the form 'and tenor of the said deed of taillie 1688.' Sir Hew objected, that the judgment of the House of Lords in 1801 formed a 'res 'judicata;' and that, on the merits, her claim was not well founded. The Lord Ordinary repelled the defence of 'res judicata,' but on the merits assoilzied the defender, and the Court, on the 21st May 1818, adhered. June 20. 1825.

Both parties having appealed, the House of Lords,* on the 26th July 1822, found, '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 ques-'tion, whether the appellant is now entitled to claim the said 'lands, according to the title insisted on by her summons in 'the action, which is the subject of her present petition of 'appeal; without prejudice, however, to the right, if the res-'pondent hath any, under the deed of repudiation of the 13th 'August 1740, or the right, if any he now hath, to reduce 'the said decreet of the 25th of February 1741, or the retour 'of service in pursuance of such decreet, or the said charter 'of the 26th 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 June 1780, or the infeftment of the 24th and '25th 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

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* See 1. Shaw's Appeal Cases, No. 49. page 265. where a full report is given.

June 20. 1825.

'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.'

The Court of Session (Second Division) appointed memorials, which having been laid before the other Judges,—

Lords President, Hermand, Succoth, Balgray, Gillies, Alloway, Cringletie, Meadowbank, Mackenzie, and *Eldin,* gave this opinion:—We have attentively perused the memorials in this cause, and have considered the different points of law which occur therein; and after having had several conferences on the subject, we have come unanimously to the following opinion:—

1mo, We hold it to be now a fixed and unalterable point, that neither by the transactions assumed as the grounds of the charter 1742, nor by that charter, was there a contravention committed by Sir Hew Dalrymple against the entail 1688.

2do, As Sir Hew did not forfeit, he and his descendants still continued the nearest and true heirs under the entail 1688; though by the charter 1742 they lay under a temporary and defeasible exclusion, of which afterwards.

3tio, The deed of repudiation by Sir Hew did not deprive him or his descendants of their character as heirs of entail.

For, in point of fact, Sir Hew did repudiate only for himself personally, and not for his descendants, the right of whom, under the entail 1688, was expressly reserved.

Sir Hew's repudiation for himself personally was further qualified by a reservation of his own right under the entail 1688, and of his power to assert it whenever he thought proper, of which afterwards.

In point of law, Sir Hew could not renounce for his descendants by the deed of repudiation. We are of opinion, that by the law of Scotland, if Sir Hew had taken it upon him expressly to repudiate or renounce the right of succession for his descendants, the deed would have been totally ineffectual, because he was not in titulo to grant it, or any other deed which could affect the estate, or their right of succession to the estate. For Sir Hew never was infeft in it, and had not even a personal right to it. He had only the privileges of an apparent heir, by means of which he was entitled to a beneficial possession of the lands under some restrictions; but without entering himself as heir, he had no right to the lands, either real or personal, and had no power over the titles or investitures. Sir Hew, therefore, had no power, by any deed, to affect the entail, or the condition of

the other heirs, even those heirs, his descendants, who might have been forfeited if he had contravened. June 20. 1825.

Therefore, the present Sir Hew, who was not included in, nor affected by the deed of repudiation by his grandfather, remains the true heir under the taillie 1688.

4to, We are also clearly of opinion, that Sir Hew is the true heir under the charter 1742.

That charter carries the estate to John Hamilton, and the heirs whatsoever of his body, whom failing, 'to the other heirs what-'somever of the body of the said Dame Joanna Hamilton.'

At that moment Sir Hew not only was one of those heirs, but he was the first and nearest of those other heirs called by the charter.

If A is the eldest son, and B the second son of their father C, and B makes a settlement on himself, and the heirs of his body, whom failing, on the 'other' heirs of the body of his father C, this, on failure of B and his heirs, would carry the estate to A and his descendants; and if so, the charter 1742 in like manner carries the estate to the descendants of Sir Hew. This would have been unquestionable if it had been an original charter, and so it is admitted by the pursuer. But we are of opinion, that it makes no difference whether this be taken as an original charter or not, because the meaning of a feudal investiture cannot be changed or affected by extraneous deeds or circumstances. Its meaning, and the import of the words used in it, must be gathered from those words, as used in that deed; and therefore, unless by some other clause in the charter 1742 it can be shewn that the words 'other 'heirs of the body' were intended not to include Sir Hew, they must be taken to include him. The only persons called antecedently to the substitution of the other heirs are, John Hamilton and the heirs of his body. Therefore the 'other' heirs must mean, all the heirs other than John Hamilton and his descendants. If Sir Hew on any other branch is to be excluded, it can only be by implication and surmise; for by grammatical construction they are not excluded; and by the technical construction they are expressly included.

But even in the case of an ambiguity in the expression of an investiture upon an entail, we hold it to be quite clear that a deviation from the original entail is never to be presumed.

It is argued by the pursuer, that succession cannot revert or ascend.

But the succession never descended to John Hamilton, and could not be said to ascend by the succession of Sir Hew; for John Hamilton was a mere intruder, who could not succeed as

June 20. 1825.

heir to the estate without the forfeiture of Sir Hew. John's service was a mere nullity in every point of view, and so was the charter 1742. The descendants of old Sir Hew are therefore entitled to the succession, not as heirs of John, but in their own places as heirs prior to him, without any ascent in the right of succession, though, de facto, an intruder had for a number of years been in possession of the estate upon erroneous titles.

They are evidently in the same situation with all other heirs of entail, whose right for a time has been usurped; and we hold it to be clear, that though an heir of entail, who is prior in the destination, and entitled to succeed, should, from absence or ignorance of his own right, want of means, or incapacity to enforce it, negligence of his agents, and various other circumstances, give an opportunity to another heir who is called after him in the destination, to take possession of the entailed estate, and infeft himself in it, this would not operate as a legal exclusion of the prior heir and his descendants. In such a case, the rightful heirs cannot lose their right of succession but by prescription. And as it would be competent to them, or any of them, to challenge the title of the intruder, so by the entail they would have right in their order to succeed to him after his death; and when they are called by the intruder's own investiture in their proper places according to the entail, there is an exact conformity between the investiture and the entail, as to their right of succeeding to him, the intruder, if they should not in his own lifetime insist on their right. This applies not only to John Hamilton, but to the heirs of his body called by the investiture 1742, who were in no better situation than John Hamilton himself; and as John Hamilton died without heirs of his body, the succession opens to Sir Hew, not as an heir of John, but as a prior heir, who does not take by ascending or going back in the destination, but by a lawful assumption of his own prior right. As a convenient mode of making up his titles, and to save time, and the expense of reducing the charter 1742, Sir Hew may, as has been frequently done in similar cases, serve himself as heir under it; but this is mere matter of form, as his substantial right and title to the estate is as heir under the entail 1688.

5to, So far as regards the actual intention of parties, we are of opinion, that Sir Hew and his descendants are plainly intended by the words 'other heirs.'

If it were competent to have recourse to extraneous deeds and circumstances to interpret the meaning of these words in the charter 1742, and thereby to ascertain the actual intention of the parties, it is evident that the charter must be considered not by

itself, but along with such circumstances. In this view, certainly, the deed of repudiation by Sir Hew, and the decree of this Court reciting it at length, and appointing John Hamilton to be served heir in terms thereof, must be principally looked to; and in that deed of repudiation the right of Sir Hew and his descendants is expressly reserved. June 20. 1825.

As to the intention of John Hamilton, it was evidently to prefer Sir Hew and his descendants to all the other heirs of entail, excepting the heirs of his own body, who are called first after himself; for in the charter 1742, no notice is taken of Robert and his heirs, though referred to in the deed of repudiation. And his intention to prefer Sir Hew and his descendants to all the other heirs of entail, is farther proved by his summons of declarator, which expressly sets forth the deed of repudiation, which was recorded in the books of Council and Session, and which also engrosses verbatim the clause of reservation. Now as this was his only shadow of title, and by which he was bound not only in gratitude but in strict law, since he accepted of and founded on it as his only title, it is impossible to doubt that his intention in framing the charter 1742 was to give effect to the reservation, and that he used the appropriate and technical words, 'other heirs 'of the body,' purposely as including Sir Hew and his descendants, which is the true and correct import of the words.

The terms of the North-Berwick entail, and the different alterations of it made, or intended, have been introduced into the argument, but we think without any immediate connexion with the points in this cause. But the fact appearing from the North-Berwick entail, that if only one heir-male of the marriage existed, he should be entitled to hold both estates, is material in considering the question as to the actual intention of parties in framing the charter 1742.

By the law of Scotland, an heir of entail cannot be deprived of his right to succeed to the entailed estate, except in one of two ways: Either, 1st, By an irritancy and forfeiture declared against himself, or against his ancestor, and directed against that ancestor and his descendants; or, 2dly, By prescription, as a foundation for which the law requires, that the estate should be possessed for forty years continually, and without interruption, under titles and an investiture by which the heir is excluded from the succession. In this way, and in no other, can prescription operate against the heir.

These propositions are in our opinion indisputable; and if so, they are decisive of the present case, whatever views may be taken, either of the object and intention of parties, or of the

June 20. 1825.

construction and import of those deeds, as to the effect of which parties are at variance, or which afford room for any dispute:—

First, Sir Hew Hamilton is the heir now entitled to succeed, in terms of the entail 1688.

Second, His right is not affected by any of the conditions of the entail, and has not been lost or destroyed by any declarator of irritancy or forfeiture.

Third, His right is not excluded by prescription.

For the only investiture under which it can be said that his right is excluded, is that which followed on the charter 1742.

But under the above-mentioned investiture 1742, the estate was not possessed for forty years, the period of prescription; for in 1780 there was a new investiture made up in the person of John Hamilton, who then and afterwards possessed the estate; and by the new investiture the right of Sir Hew, the heir of entail, to succeed to the estate, was not excluded, but was expressly recognized. Thus the estate was possessed not for forty but only for thirty-eight years, under an investiture by which Sir Hew's right of succession can, even constructively, be held as excluded. It is therefore impossible that his right should be extinguished or lost by prescription.

Neither of the parties have disputed the validity of the charter 1742; but we think it necessary to make some observations on that subject.

It is evident that the charter 1742 could have been set aside as erroneous by any one of the heirs of entail, including the repudiator, or any of his descendants. We conceive, that the deed of repudiation, and the service and decree of declarator 1740, which were the foundation of the charter 1742, were all deeds so erroneous, that the charter could not have been supported by them, or any of them; for the Court could never have passed that decree, if any opposition had been made to it; and besides, the charter would have been reducible, as being disconform to the warrants on which it proceeded. But the charter 1742 was altered by the investiture 1780; and we think that, whether the deed 1780, and infeftment upon it, were or were not reducible, they were titles of possession sufficient to stop the course of prescription, in so far as it may be supposed to have been running against the heirs who were not called by the investiture 1742; and, subsequently to the investiture 1780, prescription could no longer run upon the investiture 1742 in favour of Mrs Fullarton. From these considerations we are of opinion, that no prescription has run upon the charter 1742, either against or in favour of any of the heirs of entail, unless it be on the supposi-

tion, which we think is correct, that Sir Hew and his descendants were called by the charter; in which case we are of opinion, that prescription run in their favour, and therefore in favour of the defender in this action, against the pursuer and the substitutes after her. We are therefore of opinion, that Sir Hew, the defender, has a sufficient title and interest to reduce the charter 1742, if he was not called by that charter, or if the deed 1780 shall be reduced, though none of the other heirs of entail has such a title, excepting the descendants of Sir Hew, who granted the deed of repudiation.

Whether it is necessary for Sir Hew to bring an action for reducing the deed 1742, as a defence against the pursuer in the present action, is another question; and we think it is not necessary; for whether prescription has run upon the deed 1742 or not, the case seems to be equally unfavourable to the pursuer. If prescription has not run upon it, we are of opinion, that it could be opened up and reduced, whereby the destination of the entail of 1688 would be restored, and Sir Hew's right would be preferable to that of the pursuer. If prescription has run in favour of Sir Hew, it must necessarily have been upon the charter 1742, and deed 1780, which supposes the deed 1780 to be effectual, and not reducible at the instance of the pursuer. At all events, we are of opinion, that if there should be any difficulty in the construction of the charter 1742, as it stands, the defender could immediately get quit of that difficulty by a reduction of that charter.

7mo, We are very clearly of opinion, that no difficulty arises from the retour of John Hamilton, as being fortified by the vicennial prescription, under the Act 1617.

We are of opinion, that the vicennial prescription could not run upon that retour, because it appears, upon the face of the retour itself, that the party who was served heir was not, and could not be, the heir of the person who died last vested in the right. John Hamilton was only the second son of Joanna Hamilton, whereas the right to the estate descended to his eldest brother, Sir Hew, by the terms of the Bargany entail. All this appears from the retour itself, which was therefore a mere nullity. We think, that no prescription could run upon such a retour, as it is a general rule of law, that prescription does not cover defects that appear upon the face of the writing upon which prescription is pleaded; and as it appears, upon the face of the retour, that John was not heir, it proves that fact, but cannot prove the contrary fact, that he was the heir of James Lord Bargany, the person last in the right. The retour refers to the judgment of the House of Lords affirming the judgment of the

June 20. 1825. Court of Session, 'per quam compertum fuit quod status de Bar-'gany descendit ad Dominum Hugonem Dalrymple de Castle-'ton filium natu maximum,' &c. 'et quod ille debit inserviri 'hæres talliæ,' &c. The retour then refers to the deed of repudiation, as, 'quoddam scriptum,' &c. 'per quod repudiavit,' &c. 'in favorem dict. Joannis Hamilton proximi hæredis talliæ,' &c. We are of opinion, that the retour of John Hamilton could not have protected himself against a reduction, or other challenge of it;—but we are farther of opinion, that a retour, though correct and unexceptionable ex facie, and therefore sufficient to protect the person served as heir, after the vicennial prescription, is only of a personal nature; and though it may protect himself personally, cannot, after his death, affect the right of the true heir, for such was not the meaning of the statute. And it is worthy of remark, that if the vicennial prescription had been available to the heirs of the prescriber, so as to exclude the true heirs of the investiture, the forty years' prescription of land rights would by necessary consequence have been done away, and in every case of titles made up by service and retour a shorter prescription of twenty years would have been established, while, in the case of titles made up by precept of clare constat, adjudication in implement, or any other mode, the full prescription of forty years would have been required. It is evident, that a vicennial prescription of sasines, proceeding upon retours, is utterly inconsistent with the Act establishing the forty years' prescription in its very terms, by which it is provided, that, where there is no charter extant, the party must shew and produce instruments of sasine, one or more, standing together for the said space of forty years, either proceeding upon retours, or upon precepts of clare constat. We think, therefore, that it would be a total misconstruction of these two Acts, as they must be taken together, to hold that the vicennial prescription is of the smallest consequence in this case.

Lastly, As to making up Sir Hew's title, it does not appear to us that there is any difficulty.

1mo, The disposition 1780 is a good title, if Mrs Fullarton cannot set it aside, which she cannot, because we hold it to be clear that Sir Hew can reduce the charter 1742, which is Mrs Fullarton's only title, if it shall be held to exclude him, and revert to the original entail,—of consequence she has no interest to reduce the deed 1780, even if she were called in preference to Sir Hew by the charter 1742; and we are clearly of opinion, that Sir Hew was called before her by that charter.

2do, He may be served heir of provision under the deed 1742.

We have no doubt, as already mentioned, that it is competent to the true heir to make use of the feudal title erroneously made up by an usurper, as a convenient mode of making up his own title; or,

3tio, Reducing that investiture, and disregarding it altogether, he may be served heir to James Lord Bargany, under the entail 1688.

On the cause coming to be advised by the Second Division,—

Lord Robertson observed,—In forming an opinion on this difficult and important case, we have had the assistance of the opinions of all the other Judges of this Court, whom we were directed to consult, and also the benefit of the full and able opinions delivered in the House of Lords, which have thrown great light on this case.

There are two main questions before us; first, What is the sound legal interpretation of the charter of the estate of Bargany granted to John Hamilton in 1742? whether the pursuer, Mrs Fullarton, is now called to the succession of this estate, under the destination to the 'other heirs whatsoever of the body of Joanna 'Hamilton;' or whether the defender, Sir Hew Dalrymple, has under it the preferable right? Secondly, What is the effect of the deed 1780, if the legal interpretation of the destination in the charter 1742 is in favour of Mrs Fullarton? In order to arrive at the solution of these questions, it is necessary to attend to the very particular circumstances in which the charter 1742 was obtained.

By the entail of the estate of Bargany in 1688, the destination is to certain heirs-male, 'whilk failing, to the eldest heir-female 'of the body of the said John Lord Bargany, and the descen-'dants of her body, without division.' Upon the death of James, fourth Lord Bargany, in 1736, without issue, the male line failed, and the question arose, who was entitled to the estate under the entail 1688? This question was finally settled by the House of Lords in favour of the late Sir Hew Dalrymple, the grandfather of the defender. He immediately entered into possession of the estate, granted assignation of the rents in favour of Mr Craig, and then granted a factory, first to a person of the name of Kennedy, and then to another person; and they successively accounted for the rents. He also assumed the name and arms of Hamilton of Bargany. All this was done without making up any title to the estate, Sir Hew possessing merely under his apparency.

On the death of the Lord President, his grandson (who was already in possession of Bargany under his apparency) became

June 20. 1825.

entitled to the estate of North-Berwick; but by the entail of that estate, he could not hold the estate of Bargany along with the estate of North-Berwick, at least he could not hold it under the existing circumstances of the family. He was, therefore, under the necessity of making a choice between the two estates; and he preferred North-Berwick. The natural and legal consequence of his doing so was, that the right to the estate of Bargany fell to the heir next in the order of succession under the entail 1688, and that was Sir Hew's immediate younger brother John Dalrymple, afterwards John Hamilton of Bargany. It was necessary that Sir Hew should, by some authentic deed or instrument, declare that he took the one estate in preference to the other; and accordingly he executed the deed of repudiation on 13th August 1740, on the legal meaning and effect of which the merits of this question mainly depend. I shall afterwards call your Lordships' attention to the different clauses of this deed, and to what I humbly conceive to be the effect of the whole on the rights of the parties. But in the mean time I may observe, that it was important for Sir Hew that his refusal to take the estate of Bargany should be clearly and unequivocally ascertained, in order to avoid a forfeiture of North-Berwick for himself and his descendants.

John Dalrymple very soon after brought an action of declarator before the Court of Session, the summons in which recites the various titles of the estates of Bargany and North-Berwick: it then recites the deed of repudiation ad longum; and concludes, that, in virtue of these titles, and of the deed of repudiation inter alia, 'the said John Hamilton, pursuer, hath the only right and 'title to the succession of the said estate of Bargany; and that 'he ought to be served heir of taillie and provision to the said 'James Lord Bargany in the said lands and estate of Bargany.' The decree found, that Sir Hew Dalrymple had repudiated and refused to accept of the succession of the estate of Bargany, and that, in consequence thereof, his immediate younger brother John became truly the heir entitled to succeed to the estate of Bargany under the entail; and he was accordingly soon after served and retoured 'legitimus et propinquior hæres talliæ et 'provisionis.'

Having thus vested himself with the character of heir of taillie of the estate of Bargany, he completed his title in the usual and known forms of law. He executed the procuratory of resignation on the entail 1688, to which he had acquired right by his service; and he obtained charters from the subjects-superiors of certain parts of the estate. The charter from the Prince of

Scotland is dated 26th July 1742; and sasine was taken thereon 23d August, and registered 23d September 1742. June 20. 1825.

What was the situation of John Hamilton at this time? He had been served heir of taillie and provision under the entail 1688. It was in that character, and in that alone, that he used the procuratory of resignation, and it was in that character alone that he got the charter 1742. It is of great importance to observe, that the deed of repudiation was not engrossed in the charter and sasine 1742, and was not made a real burden on the lands by being entered on the records; and it is impossible to suppose that Sir Hew Dalrymple was not aware of that circumstance. I am satisfied that, by the whole of the titles, John Hamilton had, in the existing circumstances, become the true heir of entail of the estate of Bargany, entitled to hold it under the entail 1688, and under no other fetters or limitations whatever.

I shall now consider how far his title could be modified or affected by the deed of repudiation. I shall first consider that deed as containing an authentic declaration of Sir Hew's determination to repudiate, and to refuse to accept of the succession of the estate of Bargany; and then I shall consider the nature and effect of the conditions and reservations in that deed. 1st, It proceeds on the recital of the various deeds and titles regarding the succession to the estates of Bargany and North-Berwick, and then it proceeds in these words: 'And now I, the 'said Sir Hew Dalrymple, having duly considered the foresaid 'taillie of the estate of North-Berwick contained in the foresaid 'contract of marriage, and also the taillie 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 con-'tract 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 Bargany should be separ-'ately taken and possessed by the heirs of the marriage betwixt 'the said Sir Robert Dalrymple and Mrs Joanna Hamilton, 'excepting 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 favours of John Dalrymple, 'counsellor at law, my brother-german; and I being fully re-'solved to take and hold the estate of North-Berwick, 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 consideration of

June 20. 1825.

'the settlements of the estates of North-Berwick and Bargany 'above recited; wit ye me, with and under the provisions after-'mentioned, to have repudiated, likeas I, by these presents, do 'repudiate and refuse to accept of the succession of the said estate 'of Bargany, and that to and in favours of the said John Dal-'rymple, the next heir of taillie in the said estate of Bargany: 'and I consent that the said John Dalrymple shall, in respect 'of my repudiation aforesaid, serve himself heir of taillie 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.'

At the time of executing this deed, Sir Hew had been in possession of the estate of Bargany about four years, and had assumed the name and arms of Hamilton of Bargany. He was perfectly aware of the various deeds as to the succession to the estates of North-Berwick and Bargany, and he chose, sciens et prudens, to repudiate the succession to the estate of Bargany. There can be no question as to his power to do so. It is impossible to hold that he could be compelled to take the estate of Bargany, and thereby forfeit the estate of North-Berwick. There can be no question, therefore, as to his power; and there can be as little that he exercised that power in the clearest manner, with a full knowledge of all the circumstances. I apprehend the consequence of this was just to open the way to the next heir under the entail in the same way as if Sir Hew had been naturally dead, and that the right of the next heir emerged independent of the will or intention of Sir Hew. It is true that he repudiated and refused the estate in favour of his immediate younger brother John; and that he consented that he should serve himself heir of taillie and provision. But I consider these words as altogether without meaning; for the moment he repudiated the estate, he was under the necessity of doing so in favour of John Hamilton the next heir: he could not repudiate in favour of his third brother Robert, or any more remote substitute, no more than he could do so in favour of a stranger to the taillied succession. John's right was good by the mere act of repudiation of his elder brother, and could not be made better by any declaration that it was a repudiation in his favour.

The right which John Hamilton acquired to the character of the heir of entail, in consequence of the deed of repudiation,

could not be made effectual without a decree of declarator, so that it might be put in a technical form: but it was necessary merely for that purpose, so far as John Hamilton's right was concerned, in order that the fact that Sir Hew had repudiated the succession, and that John had thereby become the true heir, might be ascertained in an unquestionable manner; and perhaps it was as necessary for Sir Hew's security, to shew publicly and openly that he had repudiated the estate of Bargany, and consequently had not forfeited for himself and his descendants the more valuable estate of North-Berwick. June 20. 1825.

It is indeed said, that all these proceedings were a mere nullity, of no legal effect. But if that were the case, I would ask, who was the heir entitled to take the estate after the deed of repudiation? Was Sir Hew the heir after he had renounced the succession? Could the estate be in abeyance (if I may use the expression) till Sir Hew or some of his descendants, perhaps at some remote period, chose to accept of it, or could do so with safety? Could the fee of Bargany be in pendente, contrary to the known rules of our law? The legal and natural consequence of the repudiation, I apprehend, was, that John, the next substitute, thereby became the rightful heir, and was entitled to vest himself in the estate of Bargany, according to the usual forms.

The deed of repudiation contains certain conditions and reservations, in the following terms:—'Providing always, that these 'presents shall noways prejudge 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; or in case any event 'shall exist, in which I, or my descendants, can take the said 'succession, consistent with the foresaid taillie of the estate of 'North-Berwick, with which express provision thir presents are 'granted by me, and accepted by the said John Dalrymple.' Let us consider, then, whether Sir Hew had power to make any such conditions or reservations at the time when they were made. The effect of them was to disturb the order of the taillied succession; and, after the estate had been possessed for years by John Hamilton and his descendants, and by Robert and his descendants, to bring it back to Sir Hew and his descendants: And this alteration of the order of succession was attempted to be done after Sir Hew had repudiated the succession, and consented that it should be taken up by another, and had thus rendered himself a stranger to the entail; so that at the very moment that he renounces the character of heir of entail, and deliberately

June 20. 1825.

and advisedly consents that John Hamilton should get that character, he attempts to exercise a right to controul the succession of that estate. But where are the words of the entail of Bargany which gave him any such power? And if such power is not conferred by the entail, I do not see on what grounds it can be maintained that he had any such power. It appears to me, that, by the mere act of repudiation, all his power over the succession was at an end: it must be abandoned, not under a condition, but out and out; because, to allow him to repudiate an estate for a time, and under conditions and reservations, and to take it again at some future and perhaps remote period, and on the occurrence of some contingent event, is just saying that he may controul the will of the entailer, and disturb the taillied order of succession, according to his pleasure.

Upon all these grounds, I think that, in consequence of the deed of repudiation, and the retour of John Hamilton, he became the true heir of the entail 1688, in the same way as if Sir Hew had been naturally dead; that the titles were made up under that entail; and that he possessed the estate under no other limitations or conditions than those imposed by that entail.

Keeping these things in view, let us consider what is the true meaning and legal interpretation of the destination in the charter 1742. The estate is disponed 'Joanni Hamilton de Bar-'ganie, jurisconsulto, filio secundo demortui Domini Roberti 'Dalrymple de Castleton, procreat. inter illum et demortuam 'Joannam Hamilton, unicam filiam demortui Joannis Magistri 'de Barganie et sic hæredem femellam demortui Joannis Domini 'Barganie ejus avi, et hæredibus quibuscunque ex corpore dict. 'Joannis Hamilton, quibus deficien. aliis hæredibus quibuscun-'que ex corpore dict. Dominæ Joannæ Hamilton.' When you see it is a charter granted filio secundo, how can it include the elder brother, when it is plain, from the circumstance of the charter being granted to the second son, that the eldest son was entirely removed out of the succession? John Hamilton, the second son, was an heir of a particular description, who took the estate as heir of entail, in consequence of the failure of Sir Hew; and when the destination is to the heirs of John's body 'quibus deficien. aliis hæredibus quibuscunque' of the body of Joanna Hamilton, can these words be interpreted so as to bring in an heir who was preferable to John Hamilton himself? or must they not mean such heirs as John Hamilton was, and who are to take the succession after him? It may be farther observed, that the charter 1742 must be interpreted according to the

entail. Now, there is not one word in the entail of Bargany to sanction the strange anomaly of the estate, failing the second son and the heirs of his body, ascending to the eldest son.

The defender has anxiously argued, that, in the case of a taillied estate, the succession may revert and go back to a former heir: and in support of this, he founds on the cases of Lord Mountstewart against Lady Mackenzie, and of M'Kinnon against M'Kinnon. But it does not appear to me that these cases apply to the present question. They go no farther than to find, that the nearest heir existing at the time the succession opens is entitled to serve, though he may afterwards be obliged to denude on a nearer heir existing. In the case of Lord Mountstewart, the estate was settled on the second son of Lady Mackenzie of Langton's body, whom failing, on Lord Mountstewart. When the succession opened, Lady Mackenzie had no second son, and Lord Mountstewart took out a brieve for serving himself heir; and this was opposed by Lady Mackenzie, on the ground that though she had then no second son, there was a probability of her having one. But the Court held, that Lord Mountstewart was entitled to be served, though he might be obliged afterwards to denude. This was precisely the case, too, in the case of M'Kinnon. The estate was settled on the heirs-male of the body of John M'Kinnon elder, whom failing, on John M'Kinnon, tacksman of Messinish. There being at the time the succession opened no heirs-male of John M'Kinnon the elder, the tacksman of Messinish was served heir; but on John M'Kinnon the elder having a son, Messinish was found obliged to denude. The case here, however, is widely different. At the time of executing the deed of repudiation, Sir Hew was the nearest heir, and undoubtedly the preferable heir; and after assuming the name and arms of Hamilton of Bargany, and possessing the estate for four years, he voluntarily and advisedly repudiated that character altogether, and consented to his brother serving himself heir of entail and possessing the estate: Therefore I think these two cases are not at all applicable.

A case has been put, which I think throws a great light on the interpretation to be put on the words 'aliis hæredibus quibuscunque ex corpore dict. Dominæ Jannæ Hamilton.' Suppose John Hamilton had died without issue immediately after the sasine on the charter 1742, what would have become of the taillied succession of Bargany? According to the plea of the defender, the succession must have reverted to Sir Hew; that is, it must have reverted to a person who had advisedly repudiated and refused to take

June 20. 1825.

the succession, for the very good reason that he could not have taken Bargany, without forfeiting for himself and his descendants the more valuable estate of North-Berwick; but as the difficulty that stood in Sir Hew's way to taking both estates still remained, he must have again repudiated the succession, and allowed Robert Dalrymple to serve heir and to take Bargany. It just leads to this, that the succession might be bandied backwards and forwards as it suited the inclination of Sir Hew, without any warrant from the words of the entail. But I cannot adopt an interpretation which leads to such a result.

But suppose that Sir Hew had the power to make a temporary repudiation of the estate, and to annex conditions and reservations which would make the order of succession depend on his interest or inclination, he has not exercised that power in such a manner as to render the deed a real burden on the estate. I have already noticed, that neither the deed of repudiation, nor the conditions and reservations, are engrossed in the charter and sasine; and although the deed of repudiation is no doubt referred to in general terms in the quæquidem in the charter, it is a perfectly settled point, that such general reference is insufficient to create a real burden.

On the whole, I am humbly of opinion, that, according to the legal meaning of the words in the charter 1742, the pursuer Mrs Fullarton is called to the succession of the estate, John Hamilton and his descendants, and Robert Dalrymple and his descendants, having failed.

I now come to the second question for our consideration, which is, What would be the effect of the deed 1780, supposing that the destination in the charter 1742 should be considered in favour of the pursuer? According to the view which I have taken of the charter 1742, and of the legal meaning of the words 'aliis hæredibus quibuscunque,' this question admits of a short discussion. If John Hamilton had purchased the estate of Bargany with his own money, or if he had succeeded to it in fee-simple, and had then executed a deed of entail in terms of the deed 1742, with a reserved power to alter, and had afterwards, in virtue of that reserved power, executed the deed 1780, that deed would have regulated the succession to the estate. But that is not the case which has occurred here: for John Hamilton did not possess the estate in fee-simple, but as heir of entail under the entail 1688; and he possessed no powers over the estate but such as were conferred by the entail itself. He had no right to alter the succession specified in the deed 1742; and if the pursuer is called

to the succession after John himself, under the words 'aliis hæredibus quibuscunque,' he could not execute a new deed to exclude her. I consider the charter 1742 as the only valid and effectual title under which John Hamilton held, or could hold, the entailed estate; that he had no power to execute the deed 1780; and that, therefore, that deed can have no effect whatever on the rights of parties: And as John Hamilton possessed the estate under the charter and sasine 1742, peaceably, and without interruption, for more than forty years, every person having a right and interest under that charter and sasine has acquired a valid prescriptive title, which cannot now be challenged.

Lord Glenlee.—I certainly was of opinion with the judgment we formerly pronounced; and I have found nothing in these papers to induce me to alter my opinion; and it is confirmed by the opinions of the other Judges who have been consulted in this case.

It is very material to attend to the precise state of the question as it comes before us. I do not think that any person could for a moment suppose, that, by assoilzieing Sir Hew Dalrymple from the former action, which concluded for reduction of the charter 1742 as an irritancy and contravention of the entail, could stand in the way of our now finding that the pursuer is heir under that charter. But at the same time it is clear, that the grounds which she has now taken must be naturally very different from what they would have been, if the ultimate judgment of the House of Lords had been different. Your Lordships will recollect, that, in the original action, the prescriptive title founded on by Sir Hew was repelled by this Court, on the ground of the prescription being interrupted by minorities. The case was then appealed to the House of Lords; and it was sent back to us, to consider whether the title to pursue was not involved with the title to exclude; and there is no doubt that both the title to exclude, and the merits of the reduction, were fully discussed and considered by us; and opinions were given by your Lordships on both points. As to the merits, whether there were grounds for finding a contravention, the Court unanimously expressed their opinion, which was exactly the same with the ultimate judgment of the House of Lords: for we unanimously thought no irritancy had been incurred. We were unanimous on every point, except in so far as concerned the deed of repudiation. There was one Judge, and one only, who differed from us; but it turned out, that, happening to be also of opinion that the title to exclude was sufficient, it became impossible to put into the

June 20. 1825. interlocutor any finding as to this other point; because, if the prescriptive title was once sustained, it was impossible to pronounce a judgment in the reduction; for the Act 1617 does not merely say, that a person is entitled to be preferred on a prescriptive title, but that he must not be disquieted or pursued; therefore, when once a prescriptive title is founded on, there never can be any question on the merits. But when the case went to the House of Lords, they did not think themselves barred by the Act 1617, but held it competent to entertain the merits of the question; but at the same time it would have been inconsistent to do so, if they had allowed the judgment on the exclusive title to stand. They therefore recalled your interlocutor, and pronounced a judgment, finding that the matters in the summons were insufficient to support the conclusions. It is plain, if the matter had stood on our judgment, it would have been not only absurd, but quite wild, in the pursuer to have immediately raised a process, concluding that she was the heir, by Sir Hew having incurred an irritancy for the heirs of his body, and that he could have no place in the entail. After the judgment by the House of Lords, she not only had the opinion of this Court, but she had the judgment of the House of Lords against her, finding that the grounds of irritancy were not sufficient to support the conclusions of her summons. In the present summons, accordingly, there is no conclusion for finding that old Sir Hew had forfeited, and that the present defender had no place in the succession; but it is founded on these grounds,—that, taking the whole circumstances into view, and on a just interpretation of the charter 1742, she is entitled to succeed to the estate,—and that is just the question we are now to consider; so that all idea deducible from old Sir Hew having done any thing to forfeit his heirs from claiming under the entail, is entirely out of the question. That is implied in the remit from the House of Lords, and indeed from the pursuer's own summons, as she does not conclude that he had forfeited for his heirs. It appears to me that we have really nothing to do with that, and are not called to give our opinion on it: It has been already fixed and settled.

It is certainly very true, as stated by Lord Robertson, that it is a material point to consider what was really and truly the situation of the parties at the time of this transaction; and I own it is on a consideration of what was their true situation, that my opinion is founded. It as clear as the light of day, that Sir Hew did not forfeit for his descendants; and that although matters were in that situation, that by legal proceedings Sir Hew might

have been excluded, there were no proceedings known in our system of law to exclude his descendants. There is an idea very much founded on by the pursuer, that where an estate has once descended to, and been vested in a particular person, no person who was in existence at the time, who could have excluded him, can afterwards exclude him. I really do not think this doctrine sound. It is very true, that in the case where it can be shewn, that the right of the person calling on the other to denude, or claiming to succeed on his death, has been forfeited, he cannot exclude him. But if that cannot be shewn, the rule of law is just the contrary of what the pursuer wishes to make it. The rule always is, that the nearest heir at the time takes the estate, if something has not forfeited his right; but if a nearer heir afterwards exists, he cuts out and excludes the other altogether. He can either force the person who has got into possession to denude, or he may claim to succeed to him at his death. This is stated in the opinion of our brethren, who have been consulted, in very proper terms. I cannot conceive that it can be stated in stronger language. The cases of Lord Mountstewart, and of M'Kinnon, are important in this respect, as shewing that there is nothing unnatural in the succession reverting. Suppose that old Sir Hew, at the time of Lord Bargany's death, had happened to be abroad, and supposed to be dead, then John Hamilton would have been the nearest heir of taillie at the time, and the estate must have vested in him, and any powers exercised by him, which were consistent with the entail, would have been valid. But if Sir Hew had returned, would the mere circumstance of the estate having once vested in John Hamilton, his brother, have prevented Sir Hew claiming it, or, if he chose to wait, from taking it after John's death? Or, suppose an heir of Sir Hew, whose existence might not have been known at the time, had appeared, would John Hamilton have excluded him, or prevented him from calling on him, John, to denude, or serving in case of John's death? I apprehend he would not; or if he could, my brethren have gone very far wrong in the case of Mountstewart. And yet, in this case, so far as concerns the mere going back of the estate to a nearer heir, when once vested in another, the rule would have been as strong. I am not saying that there may not be cases interfering with this rule, (and we must consider if there is such a case here), but I am only speaking of the general unfitness of an heir who has been excluded, being entitled to call on the remoter heir to denude, or claiming to succeed to him. Now, in 1741, it is perfectly plain that old Sir Hew had committed no irritancy—

June 20. 1825.

he had done nothing contrary to the entail—he had taken the name and arms, as he was bound to do, in the same way as the present parties have done. Perhaps old Sir Hew could not have attacked John Hamilton's title; but suppose Sir Hew had left issue, and suppose John Hamilton had brought an action for having it found, that Sir Hew had de facto given up the estate of Bargany, and that he, John, was now entitled to be served as nearest heir, would not Sir Hew's descendant, if he had appeared at the instant, have been entitled to say, 'No, it is not you, but I, who 'am the nearest heir, unless you can qualify that my father had 'done something to forfeit the estate both for himself and his 'descendants?' Now that is out of the question here, as it is plain no such forfeiture has taken place. I have no occasion to consider the case of a person to whom an estate is destined, and to the heirs of his body, and who declines to take the estate: there, all the persons are called as being the descendants of his body; but here they are called by the entail, merely as being descendants of the body of Joanna Hamilton; and it is as heirs to her that they succeed. They must have had a father, no doubt; but it is not in respect of their father, but of their mother, that they are called; and if their father does not chuse to interfere with the estate, he has no more power over their right, unless he incurred an irritancy, than over the right of any other substitute or any body else. In short, I see no more right he had to interfere with their succession, than the midwife who, to be sure, interfered in her way in bringing them into the world. If John Hamilton had convened Sir Hew in a process for finding, that, in consequence of the situation of the two estates, he was entitled to take up the succession, Sir Hew would have made an appearance for his descendants, as was made by Lady Langton in Lord Mountstewart's case. It could not have stopped the service, and probably there would have been no reservation in favour of his isssue more than in the case of Mountstewart; but it is not improbable that Sir Hew would have taken some step or other; he would have given in a minute that it was not to interfere with the right of his descendants, and it might have happened that some of the Judges would have told him, that the judgment would not affect his issue.

That being the real state of the rights of the parties, it would be very extraordinary if any thing in the amicable arrangement, for carrying through the transactions, should interfere with the rights of the children; at least that the children, who did not exist at the time, should be affected, or that they should be affected at

any time within the years of prescription, by any deed executed by their father, other than by doing something contrary to the entail, by incurring an irritancy, or the like. June 20. 1825.

In considering what the parties have done, we must attend to the different deeds. I find a very nice philological discussion by the pursuer, as to the effect of reserving a right which did not exist; but when I came to the deed, there is not a word in it about reservation from beginning to end. To be sure, in our forensic dialect, it may be said that there was a reservation; but taking the deed as it stands, it is just a deed granted under certain provisions and conditions. And what is of very great importance, it is not only granted by Sir Hew, but accepted by John Hamilton, under all the conditions and qualifications therein contained, and under them alone. These conditions just amount to this, that if any occasion should occur in which Sir Hew or his heirs could take the succession of the estate of Bargany, this deed was not to stand in their way, and they were to be in the same place as if it had never been granted. The pursuer talks very lightly of this deed being referred to in the decree of declarator. But it is the crowning article in the libel; and decree is pronounced, conform to the tenor of the writs produced. I call it the crowning article of the libel, because it could not otherwise have stood for a moment; for the other deeds showed that the lands were destined to the eldest son, and that John Hamilton was the second son. There were no termini habiles for the decree without this deed. Suppose John Hamilton had just rested on the deed of repudiation and the decree of declarator, and entered to the possession of the estate, and thought no more of the matter, and that he had made up no title to the estate—for people often don't think of making up their titles, unless for a marriage or an election—how would matters have stood in a competition between Mrs Fullarton and the present Sir Hew, a descendant of old Sir Hew? Could she have come forward with the deed in her hand, and founded on it, saying, 'You, Sir Hew, are excluded by this deed?' He would have said, that, 'if you found on the deed at all, you must 'take it with that provision in the deed, that it is not to stand in 'the way of any claim of the descendants of old Sir Hew.' It is no matter whether the reservation and stipulations were lawful or not. A party who can only found on that deed, must take it as it is. If she had said, 'I have no occasion to found on that 'deed,' the case might be different: and I think she might have said with some effect to old Sir Hew, 'It is enough for me to

June 20. 1825. ‘found on the fact, that you rebus ipsis et factis did abandon the ‘estate.’ But how could she hold that language to the descendants of Sir Hew? His acts can have no effect as to them. But she had, in fact, nothing to go on but the deed of repudiation.

Then comes another step of the progress, viz. the retour. It is always founded on as if John Hamilton was the heir under the entail. But he was clearly not so. He is the heir only secundum tenorem of the different deeds. The retour itself of his service is secundum tenorem of the entail, and then secundum tenorem of the deed of repudiation, and secundum tenorem of the decreet of declarator. In the same way as a person taking a retour, in terms of the taillie, would be bound by all the conditions of the taillie itself, so is he bound by the terms of the repudiation and of the decreet, by which alone he was entitled to be served. He is not retoured simply as heir of taillie and provision, but secundum tenorem of all the deeds; and it was absolutely necessary to put into the retour secundum tenorem of the decree, because, without the decree, neither the repudiation nor any of the other deeds could have authorized the retour. It is quite clear, that the mere renunciation of the nearest heir does not entitle another heir to go to a jury and get himself served. There must be a decree declaring his right. It is plain, therefore, to me, that this retour could not have been founded on to any effect, without admitting the conditions of the decree on which it proceeded, more than it could be founded on as exclusive of the conditions of the entail itself. But, whatever might have been the case with old Sir Hew, (and I think even he would have had a good pull for it too), nothing could have been said against his descendants. But, at any rate, the present Sir Hew may say, ‘I am entitled, by my own inherent right, to set aside ‘the whole of these deeds, and to assert my own rights;’ and then the retour flies off.

The vicennial prescription has nothing earthly to do with a question of this kind; that is only a prescription of a retour of a person as a proper heir, and that no one else, if the prescription has run, is entitled to say the contrary to him. But if the retour is as heir of taillie and provision, then, if the entail is set aside, the whole flies off. Suppose a person settles an estate on the heirs of a marriage, many things may occur to make him wish to change this: he gets discontented with the heir of the marriage, and he makes an entail on another person, and then dies, and the heir of the marriage is out of the way, and the other person gets served. It is not the lapse of twenty years that would sustain his

right; the heir of the marriage would set aside the entail, and then the retour would fall away, not because it was erroneous, but because the whole foundation of it has vanished. So, if matters had just rested on the retour, I think that Sir Hew's issue, at least, were entitled to claim the estate preferably to the pursuer. June 20. 1825.

It is very difficult to see what difference the charter 1742 makes, if it is true that the same persons are called as by the original entail. For if the fact be, that if no new investiture had been taken, Sir Hew's issue would have taken the estate; certainly, if the investiture is taken in the same terms, they cannot be the worse of it, and it even makes their right surer. For what is to prevent Sir Hew serving heir to John Hamilton, and saying to the jury, 'I am the eldest son of Sir Hew Dalrymple, 'who was the eldest son of another Sir Hew, who was the eldest 'son of Joanna Hamilton, and therefore I am the heir of entail 'next to John Hamilton?' Is not the propinquity in terms of the taillie justified? Not that he is heir simply to John Hamilton, but that he is heir of taillie and provision to him. But Mrs Fullarton does not limit the flexibility of the terms 'heirs what-'soever' to a reasonable extent, but wishes you to think that John Hamilton meant something equivalent to an express exclusion of Sir Hew and his issue. She says, that he could not mean to bring him in again, if they had once been excluded. But really I don't think that John Hamilton had any idea that they were excluded. He was aware of the terms of the deed of repudiation, and the qualification contained in it. He durst not have taken the investiture in other terms than he did, so as to have excluded them; because he was explicitly, by his own acceptance of that deed, barred from doing any thing which would have had that effect; and if he had done so, it would have been reduced.

I therefore cannot go into the idea, that, in a competition of brieves, it would be found that the destination in the charter 1742 was exclusive of a service by Sir Hew. But suppose it were exclusive of Sir Hew, what is all that to the purpose? And here comes in prescription, so far as regards Sir Hew's right to reduce the charter 1742. With respect to those rights competent to all the substitutes under an entail, the minority of one of them will not operate to stop prescription: we found the contrary in this case, but it was altered by the House of Lords. But it has no application to this case, as it applies only to those rights which are competent to all the substitutes. It has nothing to do with the individual rights of one substitute or class of substitutes. The plea there is founded on the allegation, that the

June 20. 1825.

whole proceedings are contrary to 'my' rights to the estate, that being an individual claim. It is quite different from cutting down contravention, which is competent to the whole substitutes. Unless prescription, therefore, has run against the defender as an individual, he must be heard. I take it for granted that old Sir Hew had no children at the time of the decree, as they are not called. Now, take away twenty-one years from the interval between 1742 and 1796, when John Hamilton died, and there is no prescription; and after that prescription could not run, as the present Sir Hew got into possession by the deed 1780. He had thus two rights; the one under the entail 1688 to reduce the investiture 1742, and the other as the true heir-apparent to John Lord Bargany, out of whose hæreditas jacens the procuratory of resignation had unwarrantably been taken. When a man has two titles, he cannot prescribe on the one against the other, except where there are limitations of entail in the one and not in the other. Now, Sir Hew had nothing to gain by reducing the investiture 1742, as he had possession of the estate, unless you are to hold that a man must bring an action though he is to gain nothing by the decree. If your Lordships find that the investiture 1742 gives the estate to this lady, then the deed 1780 was certainly ultra vires. But I agree with our brethren who have been consulted, that the defender would be entitled to serve in preference to Mrs Fullarton, and that he has a title to reduce the title 1742, but that there is no necessity for his doing so, as he is already in possession.

Lord Craigie.—It is with regret that I differ in opinion from so great a majority of my brethren; and I wish that what I am now to state should be considered rather in the light of an apology for myself, than expressing or indicating an expectation that it can have any weight in the determination of the important cause now depending.

The entail of the estate of Bargany, prepared a few years only after the enactment in 1685, contains all the forms required to render it complete, so far as relates to sales, and encumbrances, and alterations of the succession.

Besides those clauses which were particularly in the view of the Legislature, it contains a declaration, or condition, out of which the present question has arisen.

It is in these words:—'That the haill heirs of taillie above-'mentioned, 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

June 20. 1825.

'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 sirname, arms, and designation of Hamilton of Barganie, 'as their proper arms, sirname, and designation, in all time there-'after.'

This condition might have been enforced by an obligation to denude, or by an ordinary clause of devolution, directing that, in the case of the heirs succeeding to an estate or title, requiring them to assume the name and arms of a family different from those of Bargany, these lands should fall to the next heir or substitute; or that, where the right to two or more of the family estates would otherwise belong to the same heir or member of the family, a similar devolution should take place.

But instead of this, and in proof of the enixa voluntas of the entailer on this head, the sanctions of the enactment in 1685 are applied; it being provided, 'That if any of the said 'heirs of taillie, male or female, or the descendants of their bo-'dies, 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 heir of taillie, 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, ac-'cresce, and pertain to the next heir of taillie who would suc-'ceed if the contravener and the descendants of his or her body 'were naturally dead.

'And it shall be leisome to the next heir of taillie 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 'seizedt herein 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 then the heirs so succeeding are obliged to bear the name and arms under a similar irritancy.

In this manner, where the heir entitled to the succession refuses or abstains from using the name and arms, the next heir of entail may proceed in four different ways or forms, all of them authorized by the entailer, who in this respect had the most unlimited power, his heirs of entail not being his heirs of line:— 1*st*, By obtaining a decree of adjudication, whereby, on evidence of the fact of refusal or abstaining, the estate should be declared to belong to the next heir. 2*d*, By a simple decree, without a

June 20. 1825.

conclusion for adjudging, the right of the contravener might be taken out of the way, so as to open the succession to the next heir, though it might not vest the estate in him. *3d*, By a service as heir of taillie and provision, rested upon the provision of the entail as to using the name and arms, and proof of the fact of refusal, the next heir, whether the second brother of the contravener, or any other individual not descending of the contravener's body, might come in. And *lastly*, and generally, The same thing may be accomplished by any form or legal proceeding, authorized by the common law and practice of Scotland in the case of conditional grants of lands; or, in other words, by an ordinary action ascertaining the fact of refusal, and the consequence of it in favour of the next heir.

In all these different ways the next heir became the *stirps* or root of a new order of succession, leaving out the contravener and his descendants, it having been provided, in this case, that the contravener should forfeit for them as well as for himself.

Besides the clause already quoted in reference to the condition of using the name and arms, there is a general irritant and resolutive clause which applies to all the conditions of the entail.

As to the remoter heirs or substitutes, there seems to be no doubt that they might in this, as well as in all similar cases, take the same measures for the purpose of putting forward the succession, and so promoting their own interests. Indeed it was for some time thought, that, without a special clause, the descendants of the contravener's body were excluded ipso facto, in virtue of their ancestor's forfeiture. Fount. 6th January 1697, Simpson. But where such exclusion is directed by the entail, there cannot be a doubt that, wherever an heir has contravened, his descendants must be liable to, and involved in the same forfeiture.

It is by this entail only that both the parties to this litigation must claim a right to the lands of Bargany. The heir-at-law of the entailer was different from either of them. If the limitations had not been enforced against William Lord Bargany in the end of the seventeenth century, when the entail was duly recorded, the estate would have gone to his daughters, or might have been attached by his creditors.

There is here no question with the creditors of the heirs of entail. It is entirely between the heirs themselves, where the will of the entailer is the sole and governing rule, and to be followed out in the same manner as in a testamentary settlement

or latter will, according to the entailer's purpose and determination, wherever it can be discovered with sufficient certainty.

It is in this view that the later decisions in the cases of Roxburghe and Queensberry appear to be of great importance. But there is one of a more early date, (20th of January 1790), Henderson, affirmed in the House of Lords, in which the distinction here pointed out was acted upon in the most correct and perspicuous manner. There the clause of devolution was unconnected with the prohibitory, irritant, and resolutive clauses of the deed; and the case provided for was that of the heir of entail for the time in possession of the lesser estate succeeding to the larger one, whereas the species facti was the reverse; and it was contended, that, according to the strict interpretation of entails, there was no room for a devolution, or the operation of an obligation to denude: But the answer was, that where the question was merely which of two heirs should succeed, 'the testator's 'will was to be judged of according to the same rules that are 'employed in the interpretation of any other deed or contract, 'upon a complex view of the whole, and consideration of the 'object in view.'

It is also to be observed here, that in the case of conditional grants in the form of entails, there is, properly speaking, no persona prædilecta. From priority of birth, or other circumstances, one heir is preferred to another. But where that heir does not perform the conditions of the grant, it is as clearly meant that he and his descendants shall lose the estate, as it is that he and they should have it while he observes the conditions. And if, in any instance, a Court of law were to interpose by relaxing the conditions of the settlement, they would not only disregard the will of the testator, but make a will for him different from that which he has made.

It would be a fatiguing task to analyze the different deeds, and to detail the various proceedings. I shall only offer two observations in regard to them:—

The first is as to the explanation of the supposed views of John Hamilton and his elder brother, the late Sir Hew Dalrymple, as appearing from their various transactions. It was most natural for John Hamilton to use every precaution for the benefit of his elder brother's family that was not injurious to his own interest; but it clearly enough appears, and is to be presumed, that he meant to do nothing that could endanger his own right to the estate, or the rights of his children, if he had any. Holding this to be a just view of the intentions of the parties, and not

June 20. 1825. imputing to them any fraudulent combination or concert to injure the other heirs of entail, it seems not difficult to explain the tenor of their proceedings.

The second observation applies to the defender's proceedings since the late remit by the House of Lords. He was thereby authorized to bring any action he might think fit, for reducing the decree in 1741, the retour of service in pursuance of that decree, and the charter and infeftment in 1742. This, however, the defender has not done: Neither has he attempted to make any new title or investiture. He stands upon his defence, resting upon the titles made by John Hamilton, and upon the conveyance from him in 1780, and upon the infeftments following upon that conveyance. And upon the titles and investitures so approved of and ratified by him, his defence, as it appears to me, must, and ought to be judged of.

I shall now proceed to state what has occurred to me with regard to the law of the case, beginning with what is certainly a preliminary point, and, if decided in one way, exclusive of and foreclosing every other; which is, that in consequence of the proceedings in the former litigation, the pursuer has no right to maintain any of the pleas or arguments now suggested. Upon this point my opinion humbly is, that the plea is not well founded.

The pursuer's grounds of action and reduction now insisted in are not, as in the former litigation, that the deed of repudiation, as it is called, was an alteration of the course of succession prescribed by the entail: The pursuer now contends, that whatever the motives and purposes of the parties, as to the deed of repudiation, were, it did not effect an alteration of the succession, but enabled the pursuer, in due time, and in her proper place, to claim the succession as she now does.

Again, the pursuer's plea is not, that John Hamilton, by making use of the deed of repudiation, without declaring an irritancy against his elder brother Sir Hew, committed an act of contravention against the entail.

Her plea is, that the deed already mentioned, along with those which followed, when duly and attentively considered, was not an act of contravention of the entail, but, on the contrary, might be of some use, although it was not necessary for enabling the pursuer to enter her claim agreeably to the entail; John Hamilton's elder brother and his descendants being thereby excluded, and the estate transferred to John Hamilton, as the next heir of

entail, in consequence of the failure upon the part of Sir Hew to comply with the conditions of the entail. June 20. 1825.

Neither does the pursuer now contend, that the charter and sasine obtained by John Hamilton in 1742 were null and void, by bringing back the estate, on the death of John Hamilton failing issue of his body, to his elder brother Sir Hew, and his descendants. In direct opposition to this, the pursuer being more correctly informed as to the nature of her rights and claims, maintains, that the charter and infeftment in 1742 are complete and operative deeds, not restoring to Sir Hew and his children the estate from which they had been excluded, but conveying it, in the existing circumstances, to the pursuer, as the party truly entitled to it, in the same manner as if Sir Hew and his descendants were no longer in existence, or had never existed.

In short, the question formerly tried was, whether the pursuer could obtain a decree of irritancy against John Hamilton, in consequence of the proceedings which have been so fully detailed.

The question now is, as to the true meaning and effect of these proceedings; and whether the late Sir Hew Dalrymple, and the defender, as his descendant, were thereby excluded from the place originally assigned to them by the entail of Bargany? and if so, whether the pursuer is not entitled, of necessary consequence, to set aside the deed in 1780, and all that followed upon it?

It would, indeed, have been singular, if the noble and learned Lords who concurred in the judgment pronounced in July 1822, (and one of whom had also concurred in pronouncing the judgment in the House of Lords in the action formerly depending), had required the Court of Session to try points which, by the former judgment, had been finally and irreversibly determined.

At all events, it appears to be highly becoming, that, from respect to the judgment and remit from the House of Lords, we should give our deliberate opinion on all and each of the questions therein suggested.

Dismissing, therefore, this preliminary plea, and proceeding to the merits of the action now depending, the first object of inquiry is the effect of the law of prescription on the rights of the parties.

If the present discussion respected the right of property vested in John Hamilton, in virtue of the charter and infeftment in 1742, in a question with third parties not interested in the succession, it humbly appears to me, that the right of John Hamilton would be held complete and impregnable.

June 20. 1825.

If John Hamilton, until his death, had continued to possess the estate upon the charter and infeftment in 1742, this does not appear to be seriously disputed. But the deed in 1780, it will be remembered, made no alteration in the fee and property of the estate, as held by John Hamilton upon the charter and infeftment in 1742. By that deed, if John Hamilton had left issue, the defender and his family might have remained for ever excluded from the succession. Until John Hamilton died, the defender had no immediate or tangible right in the property of the estate; he had only a hope or chance of succession, not opening to him at all until John Hamilton died, and not even then, if John Hamilton left children.

It would be most injurious to the land rights of Scotland, if the mere destination of an estate by a party, in favour of his apparent or presumptive heir, or of any one who, in any possible event, might succeed, could interrupt a prescriptive title begun and nearly completed.

A separate and quite different question arises, as to the effect of prescription applied to destinations of succession in lands limited by entail. If such destinations be agreeable to the entail, they can be of no use. If they are contrary to it, they can have no effect until they have been acted upon, in consequence of the succession opening to the individuals favoured by the new destination. More especially, they cannot, at any previous period, create any right to the lands by the positive prescription. They give no immediate title to the property, which remains in the heir for the time; and they cannot be followed with actual possession, without which the law of the positive prescription cannot in any case be applied with effect. Again, as to the negative prescription, a destination in entailed property, if contrary to the entail, must depend upon the will of the maker of it; and so, while he lives, it must remain a revocable and precarious deed, which no party is called upon to challenge.

In regard to the general law of the positive prescription, it may in this place be proper to add, that a title of prescription, otherwise complete and unexceptionable, cannot be affected or injured by resorting to what are called the grounds and warrants of such title. It is not law, and it would be most unfortunate if it were, that after a possession of forty years, upon a right ex facie correct, and followed with infeftment, the property might be carried off, because the import of the conveyance appeared to be contrary to the intention of one of the parties, or both of them, or to some deed or writing in full force when the prescription began to run.

An erroneous adjudication of the estate of Bargany, valuable as it is, would not occasion the hundredth part of the mischief that would arise from the recognition of such a plea. It would be in the very face of the Act 1617, chap. 12., which provides, that a party producing a charter and infeftment of lands granted to him or his predecessors, with forty years' possession, without any lawful interruption, shall not be troubled by any person pretending right to the lands, 'by virtue of prior infeftments, 'upon any ground, reason, or argument, competent of law, 'except of falsehood.' By this exception, it is hardly necessary to say, is not meant a false statement, but the use of forged documents.

Supposing, therefore, that the tenor of the retour and decree of declarator and deed of repudiation had been erroneously recited, or that such writings had never existed, or were in themselves void and null, still, under the Act 1617, so highly valued in giving security to real estates in Scotland, any party having right to the charter and infeftment, accompanied with uninterrupted possession for forty years, would be secured against challenge.

It has been suggested, that, in the circumstances of this case, the parties against whom the plea of prescription is now stated, were non valentes agere cum effectu. But this plea is not good, in general, against the positive prescription. The exception which is made as to minority, proves the existence of the general rule.

In this case, the individuals immediately interested not only did not urge an objection to the title when they had an opportunity, but pleaded upon the writings in question, or at least upon the charter and infeftment in 1742, as establishing in their favour a right by the positive prescription. And this plea, it will be remembered, was in terminis sustained by a final judgment of this Court; and although, in the after proceedings, the discussion went upon other points, and chiefly upon matters of form, there was nothing to shake the authority of the general finding as to the effect of the positive prescription, founded upon the charter and infeftment in 1742.

Besides, there was here no room to plead non valentia agendi. Sir Hew Dalrymple, as well as his grandson the defender, had, according to the arguments now maintained by the defender, an immediate and important interest to challenge these titles, if they could do so upon relevant grounds. If the former only meant a temporary and gratuitous possession of the lands to his younger brother, he might have at any time put an end to it. In the

June 20. 1825.

same manner, if the defender could have shewn that the decree of declarator did not affect his right, but that of his grandfather only, there being, as it has been since alleged, no decree directed against him as the descendant of the contravener, he might thus have obtained an advantage over his uncle and grandfather, and so might have assumed immediate possession of the estate. Instead of this, he concurred in the defence pleaded by John Hamilton, and, after John Hamilton's death, made up a title upon the conveyance from him in 1780; and such is the title of his possession at this hour. But, indeed, not only Sir Hew and his descendants, but the whole other heirs of entail, (with the exception of John Hamilton and his children, if he had any), might have challenged the feudal titles, and the whole proceedings, if not agreeable to the entail.

Upon this charter and infeftment I have farther to observe, that none of the parties interested could, at any time, by any action, and least of all by way of exception, set it aside, unless so far as it was inconsistent with its grounds and warrants. This appears to be the true import of the decision in the case of Drummond, 17th May 1793. In the renewal of an investiture, there had been a mistake in reciting the destination, by leaving out the words 'of the body;' and the heir first called, not being affected by the mistake, expede a service, in which the error was repeated. But, greatly within the forty years, an action of declarator of reduction was brought by the party who, unless for the mistake, was entitled to the succession, insisting that the mistake should not affect his right, and that a warrant should be given to the proper officer to alter the record, or otherwise that the later investiture should be set aside in toto. The Court, however, did not reduce the investiture, but found it erroneous so far as it wanted the words 'of the body,' and also that the pursuer was entitled to serve herself as heir of provision, in the same manner as if the investiture had been correctly framed; thus in effect finding, that the investiture was only liable to challenge where it was contrary to its grounds and warrants.

It has been farther argued, that John Hamilton could not be held to have acquired by prescription what would be injurious to his own right; and the principle of the decision in the case of Smith *v.* Bogle, and of some later cases, has been appealed to. But by the titles and possession held by John Hamilton, he did not diminish, but create and extend the limits of his right. If he were to be held as an intruder, the result of the positive prescription would have been, not only to establish a title to himself

and his children, if he had any, to a valuable estate, but to enable him, so far as onerous creditors or purchasers could be concerned, to burden and dispone the lands, as if there had been no entail. What was said in another place on this subject appears to be perfectly correct, that if John Hamilton was not entitled to come in as heir of entail, his right was not affected by the registration of the entail in the proper register. The estate, therefore, would have been withdrawn long before his death from the protection of the Act 1685, although the entail might still remain effectual against him with regard to the other heirs of entail. June 20. 1825.

On the other hand, if, when John Hamilton was entitled to take up the estate, in consequence of his elder brother refusing to bear the name and arms of Bargany, he had omitted some of the necessary forms,—*e. g.* by not obtaining an express decree of contravention against his brother's descendants, supposing that to be necessary,—it is obvious, that so far as these objections in point of form were obviated by possession for more than the statutory period, under the titles so often recited, John Hamilton certainly lost nothing, but, on the contrary, gained a great deal by the operation of prescription; and if he had left issue, it humbly appears to me, that, in a question with the present defender or his descendants, they would have been altogether secure.

But another argument has been used. Supposing that John Hamilton had acquired a prescriptive right to the estate, it is said that he, and in his right the defender, might depart from the right so acquired; and reference is again made to the cases of Smith *v.* Bogle, &c. where a party having separate titles to the same estate, (some of them limited, and others not), was permitted, in a question of prescription, to ascribe his possession to that which was most favourable to him. But this argument appears to me to have no foundation in law or justice.

It is not permitted to a party in any case, after having acquired a prescriptive right, as appearing from the records and possession, to alter as to third parties the nature and qualities of his right. This would indeed overthrow the most useful purpose of prescription, and would occasion great and endless uncertainty. Particularly, it would not be permitted to John Hamilton, after pleading and obtaining a judgment protecting his right on the ground of prescription, to authorize, by any personal declaration of his, an opposite argument, even although he had in his person at the time a separate title. And it appears to be equally incompetent to the defender, coming in John Hamilton's right, and standing upon the same titles, to maintain such an argument.

June 20. 1825.

But John Hamilton had no election between two sets of titles; his right was bottomed upon the charter and infeftment in 1742, as connected with and supported by the entail of Bargany, the retour in 1741, and the previous decree in 1740—all of them specially referred to in the investiture.

Farther, the disconformity in this case between the charter in 1742, and the writings referred to in it, consists merely (as far as I can discover) in the words of the destination introduced in the charter, upon which so much has been said. Whether this disconformity can be objected to by the defender with prudence, the Court may have some doubt. It would certainly relieve the pursuer altogether from the argument chiefly maintained in the former pleadings, by sending back the parties to the import and effect of the previous retour and decree, in which, it will be remembered, nothing is said as to the heirs of entail who are to succeed to John Hamilton, the whole being left, as is usual in such cases, to the original entail and the subsequent investitures, combined with the changes which had been previously made by failure of heirs, or by decrees of contravention, or by prescription. If I were to argue the case as a lawyer for the pursuer, I should be inclined to join issue with the defender on this point, as relieving me from a discussion which appears to have been considered as at least doubtful, if not unfavourable to her. Our duty, however, as Judges, is to decide upon the rights, rather than upon the pleadings of the parties. It is, therefore, necessary for me to consider the question in both points of view; and deeming it respectful to my brethren to begin with that which seems to have met with their approbation, I will now proceed to consider, in the first place, what the rights of the parties would be, taking out of view altogether the charter and infeftment.

As to the retour, it was thereby found, that John Hamilton was the lawful and nearest heir of taillie and provision to James Lord Bargany; and reference is made to the entail of Bargany—the judgment of the House of Lords in the competition between Sir Hew and the heirs of line—the deed of repudiation, as it is called, by Sir Hew Dalrymple in 1740—and the decree of declarator in 1741; by which, upon a reference to the same documents, it was found, that he had the only right and title to the succession of the estate of Bargany, and that he ought to be served heir of taillie and provision to James, the last Lord Bargany, who had made up a title by general service under the entail, but had not completed his title by infeftment.

June 20. 1825.

It was upon these titles that the charter and infeftment in favour of John Hamilton were completed, he having for that purpose resigned upon the unexecuted procuratory.

It has been objected to this retour, that it was merely a personal deed; but this, as it with great deference appears to me, is altogether erroneous. It is only a personal deed, so far as it affords no immediate warrant of infeftment. But while unreduced, and connected with the unexecuted procuratory in the entail of Bargany, and not superseded by a retour in favour of a person having a better right, nor objected to by a person so situated, it forms an essential link or *mid-couple* in all the subsequent rights, whether of property or succession. No subsequent heir of entail could take up the succession without serving heir of taillie to John Hamilton; and no creditor could attach the estate as held by the entail, unless upon a charge to enter heir to John Hamilton. A service to James, the last Lord Bargany, or a charge against any of the heirs of entail to enter heir to James Lord Bargany, passing by John Hamilton, would be of no avail.

It has been farther said, that the retour was null, and might be disregarded, being in favour of John Hamilton, as the second son of his mother Joanna Hamilton, the presumptive heiress of Bargany, although the right of succession was clearly in Sir Hew Dalrymple the elder brother; and for this the case of Lambe, and those of Mountstewart and M'Kinnon have been mentioned; but, as it appears to me, without any relevancy or foundation in law.

It will readily be admitted, that even after the retour of a person in a particular character, or in a certain degree of inheritable relation, there is always room for a retour in favour of another party connecting himself with the investiture in a preferable character, or connected with the ancestor in a nearer degree of relation. In all such cases, the insufficiency of the first retour may be pleaded by way of exception, so as to take away the whole effect of it, if standing by itself, and not followed with a feudal title and possession for forty years. In this way, therefore, if John Hamilton had served simply as second son, it would have been competent to Sir Hew, or any of his descendants, to serve as eldest son, or as coming in the place of the eldest son, and so to acquire right to all property left to the destination of the law, or falling under the settlement to which the retour related. But this doctrine admits of two limitations, both of which apply to the present case; for, first, If upon the retour a charter and infeftment had followed, with forty years' uninter-

June 20. 1825.

rupted possession, although the retour might be liable to be set aside, or might be rendered ineffectual by a retour in favour of a nearer heir, still the estate would, by the force of prescription, be taken out of the hæreditas jacens, and would be transferred to the party having right to the charter and infeftment; and, secondly, In such a case as this, it would not be enough, in order to set aside a retour in favour of a party, as second son of the ancestor, to produce merely a retour in favour of a party designed as eldest son. It would be necessary farther to shew, that the documents referred to in the retour were not sufficient to transfer the right of succession from the eldest to the second son. This, however, the defender, in the present instance, cannot pretend to do. And although he could, it would not be enough, if he was not at the same time enabled to set aside the charter and infeftment following upon the retour; which he has not done, nor attempted to do.

In the case of Lambe, a service had been fraudulently obtained by a second brother, in the absence of the first-born. In the case of Mountstewart, a party had been served as the nearest heir at the time, although it was objected that there might be a nearer; but this was done under a reservation in favour of the nearer heir, if he should exist. In the case of M'Kinnon, where the circumstances were similar, the service appears to have been taken out without notice; but the nearer heir existed, and was most justly preferred. But in none of these cases had a prescriptive title been formed by a charter, infeftment, and uninterrupted possession for more than forty years; and they differ most essentially from the present one in this, that unless the proceedings previous to the retour, as well as those after it, are to be disregarded and held to be void and null, John Hamilton, though younger than Sir Hew Dalrymple, must be considered as the nearest and lawful heir of taillie and provision in the estate of Bargany.

But, supposing the retour in favour of John Hamilton to have been originally liable to challenge, this has been removed, not only by what is called the vicennial prescription of 1617, but by the general enactment of the same year, in which, besides introducing the positive prescription, it is provided, 'That all actions 'competent of the law upon heritable bonds, reversions, contracts, 'or others whatsoever, shall be pursued within the space of forty 'years after the date of the same.' There follows, no doubt, an exception as to reversions contained in the body of the infeftments to which they relate, and recorded in the proper register, and also

as to actions of warrandice, which only prescribe from the date of eviction; and, in practice, the latter exception has been extended to all cases where the party having a right could not pursue with any beneficial effect. But here it has been already shewn, that if the decree upon which the retour proceeds was not warranted by the circumstances of the case, not only Sir Hew Dalrymple, but his descendants, (as well as the remoter heirs of entail), might have with effect, and great present advantage, claimed and regained possession of the estate.

It has been said, however, as to the vicennial limitation, that it does not apply to the case of a challenge brought by the party retoured; and in proof of this reference has been made to the case of Lady Edinglassie, 11th July 1701,—and it seems to be inferred, that if such challenge was competent to John Hamilton, it must also be competent to the defender as coming in his right. But this statement has arisen from a mistake, in omitting the final determination on 11th July 1702. After stating the determination then given, Lord Fountainhall gives the species facti, being that of an infant served heir only to convey a right of superiority, and having no benefit by it, and never having heard of it until a claim was brought for a large sum against the party served upon the passive titles, which were only proved by the retour. In what manner this determination could be of importance in the present case, it is not easy to see. John Hamilton was not a minor, but of full age, and a lawyer by profession. He took benefit from the retour, so far as by it, joined with the relative writings, he attained and enjoyed, while he lived, the rents and privileges of the estate of Bargany. Moreover, he made the retour a part of the investiture, under which he enjoyed the rents for more than half a century. In such a case, therefore, it cannot be imagined that John Hamilton could be allowed to challenge the retour. And if he could not do so during his life, it appears to me, with great deference, that, especially after the lapse of more than twice forty years, it cannot be set aside or challenged by any other party, however injurious or prejudicial to his right it may be.

But supposing, for a moment, that the retour of John Hamilton were liable to challenge, or that it were already set aside, it would still remain to be considered, whether, under the decree of declarator in 1741, independently of the retour and charter and infeftment, the pursuer would not be entitled to establish in herself a proper title to the estate, in the same manner as John Hamilton could have done. It will not be said that the decree

June 20. 1825.

has been lost by the negative prescription, because it was mentioned in all the proceedings, and in the investitures, down to 1780; and if the retour of John Hamilton, and the charter and infeftment in 1742, were to be set aside, or held as null and void, without any reductory action, the decree would be considered as the title, and the only title, upon which John Hamilton, until his death, possessed, or could possess, the whole rents and advantages of the estate.

That the pursuer is entitled to the benefit of the decree in 1740, if she is now truly heir under it, does not appear to be at all doubtful. In the important case of Maule *v.* Maule of Panmure, a service secundum decretum arbitrale was advised by eminent Counsel, and recognized as a good title (until it was set aside) for taking up the contents of a bond granted as a surrogatum for entailed property, and destined to the heirs of entail, although eventually the decree-arbitral was set aside or disregarded; and, consequently, the sums mentioned in it could not be demanded.

To the efficacy, however, of this decree, two objections have been stated: first, As to its containing no proper decree of contravention; and, second, As having been neutralized, and rendered of no effect, by the deed of repudiation therein recited. In this manner, a considerable detail becomes necessary, the result of which, if I am not greatly mistaken, ought to go far to remove these objections.

At this period, it will be remembered, Sir Hew Dalrymple, the defender's grandfather, could not hold the two estates of North-Berwick and Bargany for one hour without opening the succession of one or other of them to the next substitute, to the entire exclusion of Sir Hew and his descendants, so far as John Hamilton and the heirs substituted to him were interested. He could not subscribe a receipt for the rents of North-Berwick, nor grant a lease, nor remove a tenant, without using the name of Dalrymple by itself, and omitting that of Hamilton. And if, after being called in an action by the next or any other heir of entail, he did not formally and judicially in his defence assume the name and designation of Hamilton of Bargany, a decree must have passed in effect declaring, that not only he, but his descendants, had lost their place in the succession to that estate, and that it had devolved to the next heir of entail. And after such a decree had been pronounced, and had become final, it could not have been set aside on any change of circumstances.

At this conjuncture, it is to be farther observed, that Sir Hew

Dalrymple, the defender's grandfather, had made up no titles to the estate of Bargany, although by the judgment of the House of Lords, in a competition with the heir-at-law, he had been found to have right to it. At the same time, he had performed no act immediately relating to the estate which it was necessary to challenge or set aside. He had neither sold, nor burdened the lands with debt, nor altered the course of succession,—he had merely failed to comply with the condition of using the name and arms. And it is one of the important points on which I have the misfortune to differ from my brethren, that I must think that, in such a case, the manner of enforcing the will of the entailer, instead of being rendered more difficult, was by these circumstances rendered more easy than it would otherwise have been,—it being, as it appears to me, in virtue of the provision in the Bargany entail, just the ordinary case of a conditional grant of lands, where it is only necessary for one or other of the parties having an actionable interest, to obtain a decree, finding that the condition had not been complied with, and therefore that a devolution had taken place. June 20. 1825.

It appears to me, with the greatest deference, that from the terms of the entail of Bargany, which have been already recited, such a decree was quite enough, without any acknowledgment or repudiation on the part of Sir Hew, to exclude him and his descendants on the one hand, and to admit John Hamilton and the heirs substituted to him on the other.

In this case, there could be no decree of irritancy, properly so called, that is, a decree voiding and annulling the act which had been done in contravention of the entail. It was not in the power of the Courts of law to prevent Sir Hew from using the name and arms of North-Berwick. In the same manner, there could be no proper decree resolving the right of the contravener, if by this were meant a feudal right to the estate. Sir Hew, though declared the rightful heir in the Court of last resort, in a competition with the heir of line, had not proceeded, and could not with safety to himself proceed, to vest in himself the lands in the ordinary way, by service and retour, or otherwise. In such a case, all that was necessary was to have it ascertained in a declarator, upon a full narrative of the circumstances, that Sir Hew had failed to comply, and could not comply with the conditions of the entail, and that the right of succession had therefore devolved upon the next heir. When these proceedings, with the retour already mentioned, are compared with the authority given by the entail, for transmitting the estate from a

June 20. 1825.

contravening heir and his descendants to the next heir who was willing to submit to these conditions, I am quite at a loss to see what more could be required or done than appears to have been done.

Let it be supposed that, immediately after, Sir Hew had offered a bill of suspension of the decree, which had been obtained in absence, or that he had brought an action of reduction, what would have been the consequence? If he had said that there was no forfeiture, would it not have been under a designation proving that he had forfeited, or, in other words, had failed to comply with an indispensable condition, by using the name and arms of North-Berwick alone? Again, supposing the same measures to be adopted by Sir Hew Dalrymple's eldest son, or by Sir Hew himself as administrator for his children, and maintaining that there was no decree particularly directed against Sir Hew's descendants, would not the answer be satisfactory, that by the entail of Bargany a forfeiture of the heir at the time inevitably, and in every case, involved the forfeiture of his progeny, near or remote? Could it be denied, that John Hamilton had obtained a decree as authorized by the entail, and that he had been served as heir of taillie and provision to James the last Lord Bargany, in consequence of a failure upon the part of his elder brother to observe the conditions of the entail? And if this would have been held as a sufficient answer at the time, can it be supposed that, at the distance of seventy or eighty years, a different and opposite judgment can be given?

It has been said, however, that in pointing out the ways in which the succession might be transferred from a nearer heir to one more remote, in consequence of a failure to use the name and arms of Bargany, the term 'contravener' is used, which, it is said, implies that a decree of contravention was necessary; but this appears to be quite erroneous. The declaration is annexed to the third mode of enforcing the condition, viz. by serving as heir to the remoter ancestor, and does not apply to any of the rest. It could be of no effect where the party contravening had not been served heir, because, in such case, his debts could not affect the heir of entail. But the term 'contravener' does not necessarily apply to one against whom a decree of contravention has been obtained. In the language of the law, as well as in common speech, a 'contravener' is one who has violated his engagement, or a condition lawfully imposed upon him; and nothing, it appears, with submission, can be more unreasonable, than to suppose that the entailer, by the use of this phrase, in-

tended to undo what he had professed his purpose of doing, in order to facilitate the transmission of the entailed estate from the person not observing, to him who was willing to observe the conditions of the entail. June 20. 1825.

Still, however, it is necessary to bring into view the deed of repudiation, although it will be done with brevity; because, in this respect, I agree with the majority of the Court, that a deed of repudiation, in its proper meaning, could not be binding in favour of the descendants of Sir Hew Dalrymple, or against them.

The pursuer was quite correct in stating, that this document was not recorded in the Register of Real Rights, nor in any record for publication; and farther, that it had not been entered in the Register of Entails. It must, however, be admitted, that the deed was recited at length in the summons of declarator, and afterwards, in general terms, referred to in the service of John Hamilton, and in the charter and sasine which followed.

This deed appears to have been intended for two different purposes: first, For declaring, on the part of Sir Hew Dalrymple, that he had determined to reject the estate of Bargany on account of his interest as heir of entail in the more valuable estate of North-Berwick; and, secondly, For reserving to him and his children every right, or claim of right, which might belong to them, consistently with the general declaration which he had made.

Sir Hew Dalrymple mentions, that in case he should then take the succession of the estate of Bargany, he would thereby forfeit his right 'to the estate of North-Berwick for 'himself and his 'descendants.'

He then states his determination to take and hold the estate of North-Berwick, and to allow the estate of Bargany to be taken by John Hamilton, 'in terms of the entail of the estate of 'Bargany,' (*i. e.* as if Sir Hew and his descendants were dead and gone).

'Therefore,' the deed goes on, 'and for the love and respect 'which I have and bear to the said John Dalrymple, and in 'consideration of the settlements of the estates of North-Berwick 'and Bargany above recited, wit ye me, with and under the 'provisions after mentioned, to have repudiated, likeas I by these 'presents do repudiate and refuse to accept of the succession of 'the said estate of Bargany, and that to and in favours of the 'said John Dalrymple, and the next heir of taillie in the said 'estate of Bargany; and I consent that the said John Dalrymple

June 20. 1825.

'shall, in respect of my repudiation foresaid, serve himself heir 'of taillie and provision to the said James Lord Bargany, and 'otherwise make up titles in his person, in such manner as is 'competent of the law, and as he shall be advised.'

Thus far the deed admits of no doubt whatever. It merely acknowledges that the granter could not hold both estates. He then goes on to state, as a consequence which could not be disputed, that he was to repudiate, and could not by any possibility avoid the repudiation, of the succession of the estate of Bargany; and he consents to what it would have been altogether in vain for him to oppose, that his brother, the next heir of entail, should make a title in his person, as heir of taillie to the estate of Bargany, in such a manner as was competent in law; or, in other words, in terms of the entail 1688. And if this had been done in the words of the entail, that is, either simply to John Dalrymple, alias Hamilton, as nearest heir of entail, or adding, 'whom failing, to the other heirs of entail,' it is not easy to see where there could have been room for an argument.

But after this follow the words, 'Providing always, that these 'presents shall nowise prejudge my own or my descendants our 'rights 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; or in case any event 'shall exist in which I or my descendants can take the succession 'consistent with the taillie of North-Berwick; and under which 'express condition thir presents are granted by me, and accepted 'by the said John Dalrymple.'

It will be observed here, that Sir Hew seems to have considered the exclusion of his descendants from the place originally assigned to them by the Bargany entail, to be just as complete as his own; and this is proved by his after conduct, and that of his descendants. He did not conceive it possible that, after he had given up his situation as the eldest son of Joanna Hamilton, either he or his descendants might, at some future time, resume their place, as if there had been no decree of declarator against them.

Neither did John Hamilton, by accepting of this deed, acknowledge any right in the person of Sir Hew Dalrymple, or the descendants of his body. As he was to take up the estate of Bargany in terms of the entail, in the only way which he could do so, by the exclusion of his elder brother and his descendants, he could not, without a forfeiture of his own right, agree at any time to undo what had been done, and to restore to them the right

which had, agreeably to the entail, devolved to him, and to the heirs substituted to him. But events might occur in which, with the most accurate observance of the entail, Sir Hew and his children might have become heirs of entail; and in such events, it was highly proper that the interests of Sir Hew and his issue should be kept entire.

Such a reservation might enable Sir Hew and his children, as the representatives of Mrs Duff of Crombie, to take the estate, when all the prior heirs had failed, or had been excluded by such a decree as John Hamilton obtained, or certainly might have obtained, against his elder brother and his children. Again, after the failure of all the special substitutions in either of these ways, these parties might succeed, under the last substitution, as 'heirs-female of the entailer without division.'

Such events had been provided for by a special clause in the North-Berwick entail; and it might be thought expedient, by the reservation, to obviate all disputes on the subject with regard to the estate of Bargany. At the time this was no unimportant matter. In the case of Simpson and Others *v.* Home, 6th January 1797, it was decided, that an heir of entail, after having once forfeited in consequence of his own act, could never again be admitted to the succession: And this was the opinion of Lord Bankton, B. ii. tit. 3. § 145. although the law seems now to be otherwise settled. It is to be noticed farther, that the deed is subscribed by Sir Hew, bearing the name of Dalrymple only, without that of Hamilton.

Here it may be again admitted, that most assuredly the granter of this deed could not repudiate for his descendants. But we are not to take the intent and force of a deed from the title of it; and because words of repudiation are used, which were altogether ineffectual against the subsequent heirs of entail, we are not prevented from taking into our consideration those statements in point of fact which are contained in the same deed; neither are we to disregard the real evidence which arises from the form of the deed, and from the subsequent conduct of the parties. Sir Hew most specifically and distinctly states as a matter of fact, his situation as heir under the two entails; the impossibility of his holding both estates; and his fixed determination, to which he adhered as long as he lived, not to comply with the conditions of the Bargany entail, but to allow that estate to be taken up (which it was not in his power to prevent) by John Hamilton, his immediately younger brother, in terms of the entail, whereby not only Sir Hew, but his descendants, were expressly excluded

June 20. 1825. from the succession, and John Hamilton, as the next heir of entail, admitted. But that is not all: Sir Hew affixes his family name to the deed, which is duly attested, and not using the name of Hamilton, and his signature is produced and made a part of the writings referred to in the decree.

As to the reservation which is contained in the same deed, it appears to me, upon the same grounds which have been adopted by the majority of the Judges with regard to the act of repudiation itself, that it cannot affect the heirs of entail subsequent to John Hamilton, and representing him only as heirs of entail. Interpreting the deed as the defender wishes, the case appears to be the same as if John Hamilton, in consequence of his elder brother's repudiation of the estate, had granted bond for L. 50,000 or L. 100,000, and had inserted the bond in all the different writings while he possessed the estate. This bond would not have been effectual against the heirs of entail, although, in consequence of it, a greater facility might have been afforded to John Hamilton in completing his title to the entailed estate. But this was not the case. It is manifest that Sir Hew had not the colour of a defence against the action brought against him by John Hamilton; and he could not have offered a defence that could be listened to, without exposing to danger his title to the preferable estate of North-Berwick. But, in fact, the deed so often mentioned, when duly considered and combined with the situation of the parties at the time, contains nothing which could prevent the decree in which it is mentioned from being obtained.

There still remains another view of the case, viz. on the supposition that the charter and infeftment in 1742 were not null and void, but still formed an important and operative part of John Hamilton's right to the estate.

This investiture, it will be observed, the defender must hold either to be effectual or ineffectual. He cannot be permitted to use or reject it, as it may suit his purpose for the time.

Again, if the defender objects to the investiture as disconform to its warrants, he must give up all argument upon the clause of destination that is to be found in it. So far as appears, it is only disconform to its warrants—viz. the entail of Bargany, the decree of declarator and retour—in this, that instead of naming John Hamilton only, it contains a destination to John Hamilton's descendants; and after they have failed, 'to the other heirs 'whatsoever of the body of the said Dame Joanna Hamilton, 'procreate between her and the said Robert Dalrymple, without 'division; whom failing,' &c.

If these words were omitted, there could be no room for doubt. The excluded issue of Sir Hew Dalrymple, who was himself excluded, could never take, as heirs substituted by the entail to John Hamilton and his descendants. June 20. 1825.

It seems hardly possible to dispute, that the expression of 'heirs whatsoever' is flexible; indeed more so, in its general acceptation, than that of 'heirs and assignees;' and the addition 'of the body,' which follows in this case, can make no difference where both claimants are heirs of the body.

The words here used are the same in import as if the destination had been 'whom failing, to the nearest heirs of taillie and 'provision called by the deed of settlement in 1688,' which, in general, might let in those who were descendants of the body of Joanna Hamilton before the pursuer, but certainly not any individual who had been previously excluded by such proceedings as are warranted in the clause already quoted from the entail.

In the case of Wedderburn *v.* Messrs Colvilles of Torryburn, in 1781, where there was an ordinary decree of irritancy and adjudication, on the ground of the defenders having sold part of the lands and burdened the rest, it was found, in terms of the summons, 'That the entailed estate pertained and belonged to the 'pursuer and the heirs of her body; whom failing, to the other 'heirs of taillie, according to the order therein specified.' This case was conducted by Sir Ilay Campbell and the late Lord Meadowbank, then at the Bar; but it was never imagined, that if the pursuer and the heirs of her body were to fail, or should in their turn suffer a decree of irritancy, the estate was to go, not to the heirs of entail substituted to them, but to those who had been formerly excluded. The words were used, as we say, applicando singula singulis; that is, their meaning being adapted to the state of the parties, and an exception necessarily implied with regard to those who had been excluded by a decree of declarator, and who, by the entail itself, are placed in the same situation as if they had never existed.

In such a case, there is hardly occasion to resort to the general rules of construction. It will only be observed, that in our practice a greater latitude is allowed than perhaps in any other country. Besides the explanations which arise from different parts of the same deed, we are accustomed to interpret one deed by another, not only where the former expressly or by necessary implication refers to the latter, but where the one creates or conveys a right that is subordinate or inferior to the other.

Besides this, feudal rights may be governed by considerations

June 20. 1825.

arising from the state and condition of the parties interested. A conjunct fee to two persons, otherwise unconnected with each other, gives a joint right pro indiviso; but if such right is given to a man and his wife, the fee is understood to be in the husband, the wife being only a liferenter. But this general rule may be obviated by particular circumstances; as, for instance, where the heirs of the wife are immediately substituted to the conjunct fiars, or where the property originally came from the wife.

So, where a right is taken to a husband and wife in conjunct fee and liferent, and to the heirs of the marriage in fee, the husband is fiar, the wife liferenter, and the heirs only substitutes. In the same manner, in the case of a disposition in favour of a father in liferent, and to the heirs to be procreated of his body in fee, the liferent granted to the father resolves into a fee-simple, so that he may sell or burden the lands.

In such a case as the present, therefore, in consequence of the express reference to the entail of Bargany, and the different documents which have been mentioned, if there be an ambiguity, the charter and infeftment can have but one construction and effect—Sir Hew and his descendants being excluded, and the remoter substitutes called in their order.

In this case, there are circumstances which seem to leave no room for doubt as to the intention of parties, although there may be a latent ambiguity arising from certain circumstances not explained, or not fully explained, by the deed itself.

If a person were to dispone his estate to his 'nephew Thomas,' when he had two nephews of the same name, the conveyance might prima facie be thought favourable to that nephew who was nearest by inheritable relation to the maker of the settlement; but if that nephew had become an alien, or had been attainted for high treason, or in any way rendered incapable of succeeding, the result would be different.

And the case would be still stronger, if the maker of the deed or settlement were prohibited, under a penalty, from conveying his estate to one of his nephews, or obliged by some special covenant to denude, or to allow it to descend to the other. It is needless to say how this illustrates the present case. If by the charter and infeftment in 1742 it had been declared in express terms, that, upon the failure of John Dalrymple and his descendants, it should not go to the next heir of entail substituted to him, but to his elder brother Sir Hew Dalrymple, not only the destination would be ineffectual, but John Hamilton might have been exposed to the loss of the estate by a decree of contravention.

June 20. 1825.

But the question must here be decided as if it had occurred in 1742; the terms of the deed, if ambiguous at the time, continuing in the same state until the present action was brought. And if John Hamilton in 1742 had been challenged for introducing such a destination as here occurs, his only satisfactory defence would have been by stating, that the words, when taken in their proper sense, could only let in those who might succeed as heirs of entail, and in the order of the entail as affected by the previous proceedings, and therefore exclusive of his brother and his descendants: And if such would have been necessarily the terms of John Hamilton's defence at the time, it is not easy to see how, at the present conjuncture, John Hamilton, or those claiming under a gratuitous deed from him, can be in a better or different situation.

But it is hardly necessary to dwell on those circumstances. A destination of the succession is not an alteration of the succession, though it may lead to it: It can only become an alteration when it is followed out by a party taking the estate in consequence of the destination. But here nothing followed until the death of John Hamilton in 1796; and whatever has been done since that time, has now been completely brought under challenge; and although John Hamilton is now in his grave, it is unnecessary to say, that any alteration of the succession proposed by him may be set aside.

It is in vain to state, that there was here no decree of irritancy or contravention, in the usual meaning of these words: The question arises from a particular clause, directing the transfer of the estate from one class of heirs to another in a certain event, and where the heir having immediate benefit from the clause has adopted the very course which was prescribed to him by the entailer. Here there is no room for avoiding any act which was done by the heir of entail; there was not even occasion for a decree in express words resolving his right and that of his descendants: It was only necessary to have it found, that the right to the estate had fallen by the existence of the condition, and belonged to the pursuer of the action. This would have been the case in a conditional grant of lands unconnected with any entail. And it has in this case been provided, that besides the action competent under a complete and formal entail, the next heir may adopt either the particular forms mentioned by him, (two of which seem to have been correctly followed), or use the common law remedy in such a case.

June 20. 1825.

Upon the whole, it appears to me, that by the proceedings held by John Hamilton, which have been considered at so great length, the right of succession to the estate of Bargany was duly taken from the late Sir Hew Dalrymple, and the descendants of his body, and transmitted to John Hamilton and to the heirs substituted to him; and that, at the death of John Hamilton without issue, the estate did not revert to the present Sir Hew Dalrymple and his descendants, but opened to the pursuer, being, in the existing circumstances, the heir of entail substituted to John Hamilton.

Lord Pitmilly.—In considering this cause, which involves the discussion of several nice and important points of law, I found it difficult to form an opinion satisfactory to my own mind, and would find it equally difficult now to express the opinion which I have formed, without beginning by laying down an arrangement of the different points, so as, if possible, to keep every thing in its proper place, and yet to comprehend all the different matters the consideration of which is important in the decision of the cause.

It has been much pressed on the attention of the Court by the defender's Counsel, that Sir Hew Dalrymple is the heir called to the succession by the entail 1688, as heir-female of the body of John Lord Bargany, according to the effect given to that destination by the judgment of the House of Lords in 1739. I think this point has been properly urged. The entail 1688 is founded on by both parties. Whatever, therefore, may be the effect of the consideration, that Sir Hew is undoubtedly the nearest heir under the entail 1688, it is clear that this is the point from which we must set out; and the general question we must put to ourselves is, How has Sir Hew, who is undoubtedly the nearest heir under the entail 1688, been excluded from the succession? The general answer made by the pursuer is, that Sir Hew is excluded by the transactions which took place, and the different titles that were made up, in 1740, 1741, and 1742, and by the possession which has since taken place.

In order to try whether this answer is satisfactory, I propose to consider the case under the four following heads:—

1st, I shall consider whether the deeds and titles in 1740, 1741, and 1742, were, in their own nature, calculated to cut off the succession of the defender's branch of the destination in the entail 1688.

2d, Whether, supposing they were of that nature, they can

have been attended with this effect, unless prescription has followed on them. June 20. 1825.

3d, I shall consider whether prescription has followed on them.

And,

4th, I shall attend separately to the question, which of the parties is the heir called by the investiture 1742.

Upon each of these points, after the utmost attention I can give to them, I have come to form my humble opinion that the plea of the pursuer is not well founded.

I. In considering the nature of the deeds and titles in 1740, 1741, and 1742, it is necessary to begin by attending, which I shall do very generally and briefly, to the relative situation of the parties at the time of executing these deeds and titles, and by contrasting the arrangement proposed by the Lord President, the grandfather of the parties, with the arrangement which was actually adopted.

It is important to observe, that there is no prohibition in the entail 1688 against the heirs of Bargany holding any other estate, nor is there any provision to bear the name and arms of Bargany exclusively. The difficulty felt by the parties was not from the Bargany entail, but from the entail of North-Berwick; and in that entail it was provided, that the heir-male of the marriage of Robert Dalrymple and Joanna Hamilton, if there were more sons than one, and if Bargany should descend to the heir-male, should have no right to North-Berwick, which should go to the second son; but if there should only be one heir-male of the marriage, or so often as this should happen, this single heir-male 'shall in every degree of succession, and as often as this shall 'happen,' have right to both estates. Here, then, there was no provision in favour of the heirs-female in the Bargany entail. The only person interested, at the time when the succession opened, to enforce the condition in the North-Berwick entail, was John Hamilton; and it must have stared him in the face, that in the event of his and his brother Robert's failure without issue, his elder brother Sir Hew, or if Sir Hew left an only son, such son would be entitled to hold both estates; so that what the parties had to provide for was, that if there should be two sons of the marriage, the estates of North-Berwick and Bargany were to separate, but if only one heir-male, by the failure of John and Robert, both estates were to go to the heir-male.

We must next attend to the arrangement which, to carry into effect these provisions in the North-Berwick entail, was in the contemplation of the Lord President. Your Lordships observe,

June 20. 1825.

that, before the succession opened, the Lord President had executed certain deeds in 1736, on this narrative, 'That it is for 'the interest of both families that the said Hew Dalrymple be 'enabled so far to accept of the succession to the estate of Bar-'gany as to be served and retoured heir of taillie to that estate, 'and thereby to be in a condition to denude himself thereof in 'favour of the next person called to the succession by the taillie '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 taillie of the said 'estate of Bargany.' And accordingly he made an appointment, by which he ordained his grandson to divest himself of his right in favour of John Dalrymple, and so on.

If this arrangement had been carried into effect, there would have been a devolution of Bargany, such as took place in the case of Earlshall, referred to by one of your Lordships, where the obligation in the entail was to make up titles, and convey to the second son. But this arrangement was not carried into effect; and it is impossible for the pursuer to found on it, because it was departed from. It is not so much as mentioned in any of the deeds, except in the factory to Craig.

But it is important to contrast this arrangement with the arrangement which was actually gone into. For, instead of Sir Hew serving himself heir to Bargany, and denuding himself of the estate, a plan very different in its legal consequences was adopted.

First, Sir Hew executed the deed of repudiation of 13th August 1740, which, it must be kept in mind, is the foundation and groundwork of the title to the estate that was afterwards completed in the person of John Hamilton. It is a deed of repudiation of the succession for himself, and for himself alone; and contains the important provision, which has been improperly called a reservation of the right of his heirs, which he could not touch, and also of his own right in certain events. This deed of repudiation was the foundation of the decree of declarator; and is engrossed at full length in the summons which laid the foundation for the decree of declarator, and in the decree itself. It is a decree proceeding on the deed of repudiation alone, and the provision therein contained as its groundwork. The decree not only engrosses the whole of the deed of repudiation, but, as already observed by one of your Lordships, it pronounces decree in favour of John Hamilton, 'after the form and tenor of the 'writs before narrated.' It is impossible to stretch this decree

June 20. 1825.

to any farther effect than the decree itself bears. It is impossible to look on the grounds on which it proceeded, which are engrossed at length in it, and to say that it could have any farther effect than that John Hamilton should be served heir in consequence of the deed of repudiation, and under the provision contained in that deed. John Hamilton did not attempt to enforce the deed 1736 against his brother; he was content to proceed on the ground of the deed of repudiation, and particularly under the provision, not only in favour of the right of the heirs, but even of Sir Hew himself.

This decree in 1741 is the foundation, and the only foundation, of the general service of John Hamilton as heir of taillie to James Lord Bargany, by which he acquired right to the procuratory of resignation in the entail 1688. His general service is founded on the decree, and the decreet again is founded on the deed of repudiation. The retour bears expressly, that John Hamilton is the second son of Joanna Hamilton, and that he is served under the entail because of the deed of repudiation, and only because of the deed of repudiation. Without the decree and the deed of repudiation, there was no ground for the service. It could proceed on no other ground.

There then followed on this service the charter 1742, which, again, must just depend on the previous titles; but I shall say nothing on that at present, as I mean to consider afterwards who is the heir called by the charter 1742.

Now, it must be observed, that this general service of John Hamilton, which was the foundation of the charter 1742, would have been a perfect nullity, if it had been, as now maintained by the pursuer, a simple service as heir, and not qualified by the deed of repudiation. In support of this proposition, I refer to the following cases in the Dictionary, vol. ii. p. 397., voce Succession:—'An inquest was found to have committed error, in 'serving a man as heir to a defunct while there was a nearer 'heir in existence, notwithstanding the nearest heir had re-'nounced all his right and claim in favour of the other. The 'reason is, that here the inquest did not answer that point of the 'brieve, quis sit legitimus et propinquior hæres, and the verdict 'of an inquest is only declaratio sanguinis; and as to the renun-'ciation, it was not in itself a habile conveyance, nor did it pro-'ceed a habente potestatem, the granter of the renunciation 'not being served and infeft. Colville, February 1558. Hay 'v. ———. A general retour will not be sustained where there 'is a nearer heir in life, though the nearer heir has renounced.

June 20. 1825.

'Haddington, March 1612, contra ———. Though the nearer 'heir renounce, it will be to no purpose to charge the next appa- 'rent heir, who cannot enter while there is a nearer in existence. 'Haddington, 1st December 1609. Dalgleish *v.* Anderson.' So that it is plain, that if John Hamilton had attempted to serve himself simply as nearest heir, although he held himself out as the second son, it would have been a nullity. He had no right to be served except in consequence of the deed of repudiation, and of the decreet following on that deed.

But, without dwelling on the service, I beg to say a few words on the legal character and efficacy of the other titles, in farther prosecution of the inquiry, whether the titles made up are sufficient in their own nature to cut off the right of the defender, and the branch to which he belongs, and to devolve the succession on the remoter heirs.

In considering this point, it is surely of the utmost importance to keep in view, that there is no pretence of an irritancy having been incurred by John Hamilton, and his brother Sir Hew Dalrymple. If these titles and deeds had inferred an irritancy against the Sir Hew who was a party to them along with John Hamilton, and if this had been declared in a regular action, there would have been an end of the defender's claim; because Sir Hew would have forfeited both for himself and his descendants. But every idea of irritancy and contravention is out of the question; and though the whole case is remitted to us, it is remitted with this important point already settled by the House of Lords. The pursuer first began by attempting to set aside, on the ground of irritancy and contravention, these very deeds which she now founds on as the sole foundation of her title. She was advised to bring such action both against Sir Hew and John Hamilton; and in this she failed. The House of Lords have found, that none of the matters alleged in her summons were sufficient to maintain the conclusions thereof, or any of them. The pursuer must be satisfied of this now; and accordingly she founds on these very deeds as giving her a title to the estate, which confessedly does not belong to her under the entail 1688. She first maintained, that these deeds are a contravention of the entail; but she has been beat out of this plea; and now, instead of saying they are contraventions, she acknowledges them as the groundwork of her own title. This is stronger than a mere absolvitor from the action of declarator of irritancy; for the pursuer is now forced to found upon these very deeds. Therefore she cannot maintain that there was any contravention. Now, if

there is an end to the pursuer's case on the ground of contravention, I am at a loss to see the other grounds on which it can rest.

Reference, indeed, has been made to the clause in the Bargany entail, which allows the heir to make up a title by adjudication, declarator, or serving heir, &c. But this is just the common clause in all entails, and to be found in all the style books. It is verbatim copied into the North-Berwick entail,—just the common clause, that when there is a contravention the heirs shall make up their titles in that way. I do not see that it is founded on by the pursuer herself in any other way. She says in her memorial, 'It will be recollected that the entail of 'Bargany authorizes the next substitute to have recourse to ad-'judication, declarator, serving heir, or other legal remedy, if 'the heir of entail in possession of Bargany should contravene 'the limitations in the taillie.'

I imagine it to be an established point, that the rights of heirs of entail cannot be resolved and cut off without a declarator of irritancy. Erskine, B. iii. tit. 8. § 32. says, 'No substitute in 'an entail can enter into possession of the entailed estate, upon 'the contravention of the former heir, without first declaring 'the irritancy against him;' and Lord Stair lays down the same doctrine, B. iv. tit. 18. § 7.

But farther, if it were granted that the form of the title were sufficient, what is it that has been done? It is conclusively settled, that there has been no irritancy or contravention; and yet the pursuer pleads on these titles, to the same effect as if there had been a forfeiture. This plea cannot be rested either on the words or on the spirit of the titles themselves. It must always be remembered, that all the titles flow from the deed of repudiation, with the important conditions and provisions contained in it. If John Hamilton was allowed to be served heir, and to procure a charter in that character, it was under an acknowledgment that he had an elder brother, and under a condition that the rights of the elder brother and his descendants were saved and secured.

But another ground has been taken. It is said that John Hamilton, the second brother, having been allowed to serve heir and to take a charter, the succession cannot revert. This idea, indeed, seems to be the foundation and the whole groundwork of the pursuer's plea; that because, in some way or other, the second son has been allowed to serve himself heir, there is a legal incompatibility in the succession reverting to the eldest

June 20. 1825.

branch, which has been passed over. It is said, that it is of no moment in what way this has been done; that it is the same as if they were all dead and gone; that it is enough to fix on the fact that the second brother served heir; and that he having once been allowed to succeed, the succession cannot revert.

It appears to me, that this part of the case has not been sufficiently attended to, and that due pains have not been taken to ascertain the principles of law which come under discussion. It was held for a long time, that a remoter heir could not be served while there was a chance of a nearer heir existing. It was so decided in the case of Bruce *v.* Melville, 22d February 1677, Stair's Decisions: But this decision was altered in the later cases of Lord Mountstewart *v.* M'Kenzie, and M'Kinnon *v.* M'Kinnon. These cases prove, 1*st*, That a remoter heir may serve at a time when no nearer heir exists; and, 2*d*, That he must denude when the nearer heir is born. The case of M'Kinnon was a very strong case. It appeared in that case that the remoter heir had been about eighteen years in possession of the estate, and had sold a great part of it, and yet, on the existence of the nearer heir, he was obliged to denude.

Now, in these cases, the remoter heir, who had served, was still alive and in possession, and the great difficulty was to deprive him of a right which he had legally acquired. It was argued that there had been an aditio hæreditatis, which could not be defeated by any contingency, upon the rule semel hæres semper hæres. Such was the plea maintained, and it is stated in the Faculty Report to that effect.

But in the case of Melville *v.* Bruce it was considered, what would happen if the remoter heir were dead, and a nearer heir had come to exist,—would the nearer heir take the succession, or would it go to the heir of the remoter heir who had served? That point was argued in the important case relative to the succession of an Earl of Leven, which is reported by Lord Stair at great length; but it will be sufficient at present to notice what he says of it in his Institutes. The facts of the case were briefly these:—The Earl of Leven had entailed his estate on the heirs-male of his body; which failing, to the eldest heir-female without division; which failing, to the second son of Lord Rothes; which failing, to the second son of Lord Melville, who had married the Earl of Leven's sister; which failing, to the second son of the Earl of Wemyss, who had married Lord Leven's mother. The Earl of Leven left three daughters, who died unmarried. The Earl of Rothes having no second son, David Melville, who

was second son to Lord Melville, took out a brieve for serving himself heir of taillie to the Earl of Leven. The question agitated was, Whether he could serve while Lord Rothes might have a second son? and it was found that he could not. This decision was overturned in the later cases of Mountstewart and M'Kinnon. But it came to be argued on the Bench, what would take place in the event of David Melville taking up the succession and then dying? and, if a second son of Lord Rothes should exist, would that second son, or would the son of David Melville, take the possession? Here is a case for trying the principle as to a taillied succession reverting. I shall now read what Lord Stair says, B. iii. tit. 5. § 50.—'Many of the Lords 'were of opinion, that David Melville should enter as heir of 'taillie, yet so that if the Earl of Rothes, then Chancellor, had 'a second son, he or his issue would succeed as heir of taillie to 'David Melville, and neither his own heirs of line, nor the Earl 'of Wemyss's second son; because, at the time of David Mel-'ville's death, the Chancellor's second son would be a nearer 'heir of taillie to David than his own son, as being of a prior 'branch of the taillie.' It appears from the report of the case of Mountstewart, from the decision in which he dissented, that Lord Stair himself was one of the many Lords who thought that the succession would revert, and that the existing second son of Lord Rothes would take it up. No difficulty was expressed from any supposed rule against the succession reverting or ascending. The principle is just this, that in taillied succession the only question in such cases is, what is to be presumed would have been the intention of the entailer? It was presumed to be the intention of the entailer, though David Melville had taken as the nearest heir at the time, yet if Lord Rothes had a second son, that that second son should take the succession in preference to the son of David Melville. Now if this rule can be applied in a case where there is no nearer heir in existence at the time, is it not equally applicable where the nearer heir is prevented from taking the succession by some extraneous circumstance? In the present case he was prevented by the clause in the North-Berwick entail; but when that obstacle is removed, even in his own case, and more so in that of his heirs, the presumed intention appears to be in favour of the nearer heir. I am not, however, bound at present to go into the question, whether you are to find that such was actually the will of the entailer in this particular case; for at present I am merely dealing with the principle, and endeavouring to shew that there is nothing in the idea of the

June 20. 1825.

June 20. 1825.

supposed impossibility of the succession reverting, and that in taillied succession it depends on the will of the entailer. It therefore appears to me, that there is nothing in the nature of the titles, or in the idea that the succession cannot revert, to exclude the defender's succession.

II. But I come now to the second head which I proposed, namely, assuming that Mrs Fullarton was called after John Hamilton and Robert Dalrymple and their descendants; and assuming, that when once the right of old Sir Hew was cut off, the succession could not revert, the next question is, If this can have any effect, unless prescription has run? It is here only that prescription can come in. You must in this point assume, that the titles are in Mrs Fullarton's favour, and then consider whether they can be supported unless prescription has run.

This is a question on which I do not think it possible for us to differ in opinion. I will suppose the Sir Hew who was a party to the deeds to be dead; and that the question is, 1st, If a person, who was not born at the time, can be excluded, unless prescription has run on the titles? and, 2dly, If this can be done, when it is finally settled that there has been no irritancy or contravention?

Now, just suppose that within ten or fifteen years of the deed 1742, (I steer clear at present of any question as to the vicennial prescription), old Sir Hew had been dead, and his son was willing, at all hazards, to take the estate of Bargany, and had contested the matter with John Hamilton, is it not plain that John Hamilton's claim could not have stood for one minute against him? I do not speak at present of the mode or form of making the claim, but of the right itself. If old Sir Hew had been dead, and his son, who was no party to the transaction, had come forward and stated to his uncle that he must give up Bargany, it is as plain as any proposition in law can be, that John Hamilton's right could not have stood.

But I put another case, in order to bring it under the doctrine in Melville's case: Suppose that, within the same space of time, John Hamilton and Robert Dalrymple had failed without issue, and that old Sir Hew had left an only son, (he would have been entitled by the clause in the North-Berwick entail to take both estates), could Mrs Fullarton have stood in his way for a single moment? I apprehend that that son would have served heir to John Hamilton, in terms of the opinion of Lord Stair in the case of Bruce *v.* Melville, and that there would have been no need of

a reduction, because he was the nearer heir called to the succession, and there was no prescription against him. June 20. 1825.

III. I am of opinion, therefore, that it is quite necessary that this lady's right under the charter 1742, which is assumed in the present view of the argument to have been a valid right, should be fortified by prescription; and if so, let us consider under the third head of my arrangement, how the fact of prescription stands. The infeftment on the charter 1742 is dated in September 1742; and in October 1780 John Hamilton was infeft on a disposition, by which the estate of Bargany was conveyed to him by Sir Hew Dalrymple by name, and the descendants of his body, failing John Hamilton and the descendants of his body. I shall not here repeat what was stated by Lord Glenlee, and to which I entirely subscribe, with regard to the negative prescription.

But with respect to the positive prescription, it is very true that the disposition and infeftment in 1780 did not alter the right of property or possession of John Hamilton; and, therefore, any right which he, or the descendants of his body, had acquired by the charter 1742, had been enjoyed for more than forty years. But is it not very different with regard to the heirs called after John Hamilton? The pursuer is here assumed to have acquired right under the charter 1742 to succeed after John and Robert and their descendants, because the charter 1742 is, in the present state of the argument, supposed to have called her after them, and to have been the title of possession for more than forty years. Now, at the end of thirty-eight years this prescription was interrupted, and John Hamilton possessed thereafter on the infeftment 1780, which did not indeed alter his own possession, but put an end to the possession supposed to have been running in favour of Mrs Fullarton, and expressly called Sir Hew after John and his heirs. It will not avail Mrs Fullarton to plead here, that John Hamilton had no right to make the deed 1780. The question at present is, Whether John Hamilton possessed forty years on a title which called her after John and Robert and their heirs? Assuming that the charter 1742 did so, the disposition 1780 did not; and it, with the infeftment, was the title of possession after 1780. The parties are here in a reduction of the deed 1780, on the ground of its flowing a non habente potestatem. Surely the prescription necessary for Mrs Fullarton's purpose must have been completed before the date of the deed which she wishes to reduce; and she cannot deny that that deed, with the infeftment on it, being a title of possession to

June 20. 1825.

John, was an interruption of the prescription supposed to be running in her favour.

I am, therefore, clearly of opinion, that there is no room for prescription; that, supposing the charter and infeftment 1742 to have been favourable to Mrs Fullarton's claim, neither has the negative prescription run against Sir Hew, nor the positive prescription in favour of the heirs supposed to be substituted to John and Robert and their descendants; and that, therefore, the pursuer has no right to reduce the disposition and infeftment 1780.

As to the vicennial prescription, I think I need say little; it can have no effect whatever in the present case. It could only establish a right of a personal nature in favour of John Hamilton. It may have established, that John Hamilton served heir of taillie to James Lord Bargany, in consequence of the repudiation by his brother: but even if the retour could not be set aside on account of the error appearing ex facie, it would not advance the pursuer one single step; for the Act 1617, c. 12. makes no difference between the time necessary for prescription, when titles are made up by service and retour, and when they are made up in any other habile mode. This is distinctly stated in the opinions of the consulted Judges, to which, without saying more, I beg to refer. The parties ought to have looked farther into the second case of M'Kinnon in 1765. I have already mentioned, that the remoter heir, who had been served, had sold part of the estate, and there was a reduction brought of the sale; and the Court refused to reduce the sale, because they held that he was rightfully in possession at the time, and therefore that his acts were valid. A new action was raised, which you will find stated in the report of the case, for setting aside the service in 1737, and then more than twenty years had run, and yet the vicennial prescription was not so much as pleaded. The reduction was dismissed; and the case went afterwards to the House of Lords, and the judgment was affirmed.

But according to the view I have taken, the question of prescription is not very important, as it can only occur in case of the pursuer having right by the title 1742; and as I think she has no right by these titles, the question of prescription is not important.

IV. I come now to say a few words on the fourth point, which of the parties is the heir called by the destination in the charter 1742, which has been so often recited; and, 1st, Though I think we must be guided by the legal construction of the dispositive clause, and not by the intention of the parties, yet as so much has been

pressed on us as to the intention, I must say a few words concerning it, and I think the intention quite plain. In considering the intention, we must take into view the whole of the deeds and circumstances together, and the relative situation of the parties. It is only by a full and fair consideration of all these that the purpose and intention can be discovered. In the next place, we must consider the intention of the parties, in the particular case of a competition between the pursuer and the defender, on the failure of John and Robert without issue. A great deal has been said with regard to the intention of Robert succeeding on the failure of John and his descendants. But that is not the case for consideration here. We must confine ourselves to the competition between a descendant of old Sir Hew and Mrs Fullarton. June 20. 1825.

" On that point it appears to me, that what I have already said affords clear evidence of the intention of the charter 1742, that, in the event of the failure of John and his descendants, it should be in the power of the descendant of Sir Hew to succeed, if, by the entail of North-Berwick, he was entitled to do so. I shall only observe one single additional circumstance. In the charter 1742, even the claim of Robert Dalrymple (though expressly reserved in the deed of repudiation) is kept out. The lands are simply destined to John, and the heirs of his body; whom failing, to the other heirs of the body of Joanna Hamilton. So that this is an additional proof that the parties intended to call the heir of Sir Hew, in the event of John failing, and to leave it to the descendant of Sir Hew, being entitled to take both the estates, to adjust matters with Robert Dalrymple, if Robert should survive.

On the technical import of the destination in the charter 1742, it does not appear to me that there is any room for doubt. The words, ' whom failing, to the other heirs whatsoever of the body ' of Joanna Hamilton,' I apprehend, quite plainly included, in legal construction, the eldest son of Joanna Hamilton and his heirs. The charter 1742 must be taken by itself in construing the destination in it; yet it is only by conjectures, and inferences drawn from the other deeds, and by extraneous circumstances, that Sir Hew and his descendants can be supposed to be excluded. It will never do to exclude some of ' the other heirs of the body ' of Joanna Hamilton,' because it may be guessed (and even the conjecture I think groundless) that they were intended to be excluded. What was the plea of the pursuer formerly? She said, that by the investiture 1742 ' an undue attempt is again made ' by the said John Hamilton, failing heirs of his body, to make

June 20. 1825.. 'the said estate revert back to the said Sir Hew Dalrymple, and 'his heirs and descendants.' That was the view she formerly took of it; and I think she was right in that view of it, for it was a charter conveying the lands to Sir Hew, as one of the other heirs of Joanna Hamilton. But I need not enlarge on this point, as I can add nothing to the opinions of the consulted Judges, and of others of my brethren who have given their opinion.

I have therefore only farther to say a few words on the subject of prescription, applicable to this view of the case. If the destination in the charter 1742 be in favour of Sir Hew Dalrymple, it is plain that the prescription, in place of being against him, is in his favour. It fortifies his title; and if he is called by the charter 1742, after John and the heirs of his body, any supposed difficulty as to the succession reverting is quite inapplicable; for Sir Hew, independently of any title under the entail 1688, has a separate and sufficient title under the charter 1742, which is secured by prescription in this view of the case, to which the objection of the legal incompatibility of the succession reverting does not apply.

Lord Justice-Clerk.—As it appears from the information we have of what passed on this case when last in the House of Lords, that some complaint was made, or regret expressed, that the opinions of this Court were not given in such a way as to possess that most Honourable House of the grounds of our opinions, I shall on this occasion state mine, so as not to be misunderstood, however tedious it may be.

It appears to me, that in proceeding to fulfil the duty imposed on this Court by the remit from the House of Lords, it is necessary to attend distinctly to the terms of that remit. Your Lordships know, that after having stated the various proceedings that have taken place in this cause, the judgment of the House of Lords proceeds in these terms:—'Therefore the Lords find, 'that the judgment of this House on the petition of appeal de- 'pending 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 which is the subject of her 'present petition of appeal; without prejudice, 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 decreet of the 25th February 1741, or the re- 'tour of service in pursuance of said decreet, or the said charter 'of the 26th July 1742; or the right, if any he hath, under the

June 20. 1825.

'limitations contained in the said charter of 1742, or under the 'deed of the 21st day of June 1780, or the infeftment of the '24th and 25th 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 farther ordered and ad-'judged, that the said cross appeal be, and the same is hereby 'dismissed this House.'

Although it is obvious that these are not the words used in other late remits, directing us to review the interlocutors formerly pronounced, yet your Lordships clearly understood that such was the true meaning of the House of Lords; and, accordingly, you ordered the case to be argued at full length, and have taken the opinions of the other Judges, which are imbodied in the unanimous shape now before us.

Before proceeding to the case on which our judgment is to be given, I must observe, that notwithstanding the finding in the remit from the House of Lords to which I have called your attention, that the decision in 1801 does not preclude the question now agitated under the present summons, that judgment established a point, which, as a Judge called on to decide between the parties at the Bar, appears to me of vital importance. With this view, I must look to the terms of the original summons in 1793, which has been furnished to me by both parties; and I must beg your Lordships' attention to one or two of the statements contained in it. I shall not notice the alleged acts of contravention of John Hamilton, in one of which Sir Hew Dalrymple was also charged as concurring, by executing deeds and obtaining the charter 1742, altering the succession, and making it revert; but shall read only those passages that are applicable to Sir Hew Dalrymple. There is this distinct statement:—'And whereas the said Sir 'Hew Dalrymple did, immediately after this judgment of the 'House of Peers, assume and bear the surname, arms, and desig-'nation of Hamilton of Bargany, and enter into possession of the 'estate; but, some time thereafter, he not only laid down the sur-'name, arms, and designation of Hamilton of Bargany, whereby 'he incurred an irritancy, and contravened the foresaid taillie of 'the estate of Bargany, and in terms of the said taillie forfeited 'all right and title to the said lands and estate for himself and 'the descendants of his body, as if they had been naturally dead;

June 20. 1825.

'but also he executed the disposition and deed of repudiation 'after-mentioned, in favour of the said John Dalrymple, now 'Hamilton, his younger brother, whereby he altered, innovated, 'and changed the order of succession appointed by the said tail- 'lie, and incurred another irritancy and contravention of the said 'taillie, and forfeited all right to the said estate, in terms of the 'said deed of taillie, not only for himself, but for all his descen- 'dants, as if they had been naturally dead.' Then the deed of repudiation is recited at full length, and it is called for as a deed against which the conclusions of the action of reduction are laid. I do not mean to state as an argument against Mrs Fullarton, that all these matters are stated in the summons, as indicating what were her views, and the views of her advisers, in regard to the acts of contravention said to have been committed. It is enough to point out, that, with regard to Sir Hew Dalrymple, it is said that he incurred an irritancy, by assuming the name and arms, and afterwards laying them down, and by granting the deed of repudiation. It is no doubt also stated, that he concurred in another deed along with John Hamilton; but I have nothing to do with that at present. But this summons, when proceeding to the conclusions, farther states, '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, and by not 'bearing and wearing the said name and arms during his whole 'life, and making up titles to the said entailed estate of Bargany, 'in terms of the deed of taillie thereof, has contravened the en- 'tail, incurred an irritancy of, and amitted, lost, and forfeited the 'right, title, and interest to the whole lands and estate, and others 'mentioned in the said entail, both for himself and the other de- 'fenders, the descendants of his body, as if they were naturally 'dead.' And the very same conclusion is stated as to the deed of repudiation; and therefore that it should be found that he had forfeited for himself and his descendants. All I say is, that after every thing which legal ability and ingenuity could urge in support of the matters set forth in this summons, the House of Lords pronounced a judgment, but to the terms of which I do not think sufficient attention has been paid;—because, whatever judgments were pronounced by this Court, either as to the title to exclude, or by mixing up the merits of the question of reduction and declarator with the title to exclude, and then deciding in favour of the defender—the decree of the House of Lords reverses

the whole of these judgments;—for the judgment of the House of Lords, in 1801, is in these words:—'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 not sufficient to sustain the conclusions in those summonses, or any of the said conclusions; and therefore assoilzie the defenders.' Here, on the one hand, we have proof that every thing that this Court had found in this cause was reversed; and, on the other, all that is alleged in the summons as to contravention, and any thing warranting forfeiture, is entirely swept away. The House of Lords pronounced a positive judgment, that the defender should be assoilzied.

This is a point from which we must set out, as irreversibly fixing that contravention never can enter into the consideration of this case. This is an opinion from which, as a Judge, no power on earth shall ever lead me to depart. It is the solemn adjudication by the Court of the last resort, which, on a summons which did bring forward every one thing as to the conduct of Sir Hew Dalrymple which could be twisted into a forfeiture, fixed that there was no foundation for that conclusion. This incontrovertible proposition must be kept in view in every step of the present inquiry, whether the pursuer is, notwithstanding, entitled to prevail in this action.

In considering this case, and in giving my opinion upon it, I feel it absolutely necessary to take an accurate view of the facts of the case, out of which the questions of law arise, however irksome it may be to myself and others. I must take notice of all and each of the deeds, in order to shew that some of them are competent elements for the decision of this case, and others of them not fit subjects to rest any thing on whatever.

The first and most material of these deeds is the entail of Bargany, the destination of which to the eldest heir-female of the body of John Lord Bargany is well known to your Lordships: and I agree with Lord Pitmilly in thinking, and had marked it as an important circumstance in this case, that in this entail of Bargany there is nothing like an indication of the will of the entailer that the person taking the benefit of it should not take any other estate. I do not mean to trouble your Lordships with reading unnecessarily the clauses of that entail; but I must call your attention to what is the leading and primary condition, the first restriction on the heirs of entail; because you will find that that clause, so much dwelt on, contains exactly the

June 20. 1825.

same provision as for every other act of contravention in the entail. What I mean is on page 16. of the Appendix:—'That 'the haill heirs of taillie above-mentioned, as well male as fe-'male, and the descendants of their bodies, who shall happen to 'succeed to the said lands, baronies, and others foresaid, accord-'ing to the foresaid destination, or by virtue of the said writ 'apart sua to be granted by the said John Lord Barganie, shall 'be obliged to assume, use, and bear the surname, arms, and 'designation of Hamilton of Barganie, as their proper arms, 'surname, and designation, in all time thereafter; and if any of 'the said heirs of taillie, male or female, or 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 taillie, male 'or female, and the descendants of his or her bodies, sua con-'travening, 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 taillie who 'would succeed, if the contravener, and the descendants of his 'or her body, were naturally dead.'

Now, it is impossible, in the first place, to read this clause without seeing that the will of the entailer is, that the not bearing the name, arms, and designation of Hamilton of Bargany is to be held a substantive act of contravention, inferring the forfeiture of the contravener and his descendants. It is, no doubt, a potestative condition, as Lord Stair calls it, in the heir's power, but it is the leading provision in the entail, that without complying with it, the heir shall be guilty of contravention. The entail then provides, that certain proceedings shall take place, to give effect to the will of the entailer, and to open up the succession to the next heir; and this is done by these words, 'That it shall be leisome to the next heir of taillie 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 'seized therein, preceding the contravener, (and that without 'being liable to the contravener his or her debts), or by any 'other manner of way consisting with the laws of this kingdom.' And which provision is applied in the succeeding parts of the entail to every one of the other matters that are declared acts of contravention, viz. the altering the order of succession, the contracting debts, and others. Upon that part of the case, it is impossible to doubt that you have here a declaration of the will of

the entailer, as an express condition of the acceptance of the inheritance, and that an heir neglecting it shall be held to have contravened the entail, whereupon recourse was to be had to a process, which is not peculiar to this act of contravention as to bearing the name and arms, but is appointed for every other act of contravention whatever. June 20. 1825.

Now, to assimilate this to an ordinary devolving clause, to which effect may be given by an ordinary action, is in my opinion just to state what is completely opposite to this entail. It is not a devolving clause, and an ordinary declarator is not the proper mode of getting redress. The only mode is by proceeding against the party contravening according to the rules of law, to declare the contravention, and to have it found that the estate has devolved to the next heir. The case of Earlshall has been appealed to, as if it were at all available. I have looked narrowly into that case, and there is just a common clause of devolution, that in the event of the heir making up a title, and attempting to possess the estate of Fordel, the very fact should entitle the next heir to bring an ordinary action; and accordingly an ordinary action was brought, and effect was given to it: that case of Earlshall, therefore, has no earthly connexion with the merits of this question, where the clause relates to an act of contravention. I have been anxious to explain myself fully on this point, because it is the very thing which pervades the whole argument of the pursuer, that though John Hamilton did not do what was pointed out by the entailer, effect can be given to an alleged violation of his will without following out the mode of proceeding pointed out by the entail. I most entirely agree with Lord Pitmilly, that this clause in the Bargany entail is just the ordinary clause in case of contravention in every entail. I have looked into the Juridical Styles, and I find that a declarator of contravention is necessary before the next heir of entail can possibly take any benefit by it. Thus, in the form which is given of an ordinary disposition and deed of entail, with prohibitory, irritant, and resolutive clauses, it is declared, (vol. ii. p. 206.) 'That if 'the heirs-male of my body, or any of the said heirs of taillie, or 'substitutes above-written, shall contravene any of the conditions or limitations herein contained, &c. the person contravening, &c. shall, for him or herself only, forfeit, amit, and lose all 'right, title, and interest to the foresaid lands and estate above 'disponed, in the same manner as if the contravener were naturally dead; and the right thereof shall devolve upon the next 'heir of taillie, though descended of the contravener's body, to

June 20. 1825.

'whom it shall be lawful, whether major or minor at the time, to 'pursue declarators of irritancy, and to make up titles to the 'said lands and estate, by serving heir to the person last infeft 'therein before the contravener, or to the contravener him or 'herself, without being anywise liable for such contravener's 'debts and deeds, or to make up titles by declarator or adjudi-'cation, or any other way by law competent.'

Here you see, that in a common clause of this kind you must proceed by a declarator of irritancy, and that declarator must precede making up the title.

The entail of North-Berwick provided, no doubt, that the estate should not be held by one and the same person except in one event; but that event is most important, namely, that if there should be but one heir-male of the marriage, he should, without incurring an irritancy, enjoy the estate of Bargany. It is material, however, that you should observe, that in regard to this very matter, as to the effect of the clause in the Bargany entail, you have the authority of the Lord President Dalrymple that the view which I have taken of it is the correct one. For in the entail of North-Berwick there is one devolving clause, but there are a great many other clauses as to acts of contravention, in which he repeats the very same provisions as are contained in the entail of Bargany, I mean the clause on page 69. of the Appendix:—'Therefore it is hereby expressly provided and de-'clared, and shall be so provided and declared, by the resigna-'tion and infeftments to follow hereupon, that in case there shall 'be more sons than one of this present marriage, and that the 'succession of the said estate of Bargany shall fall and devolve 'on the heir-male thereof, then and in that case the said heir 'accepting of the succession of the said estate of Bargany, and 'the descendants of his body, shall ipso facto amit and lose all 'right and interest they have, or can pretend, to the lands, 'barony, and estate of North-Berwick and others above dis-'poned, and the succession thereof shall immediately devolve to 'the next son of this present marriage, who shall have access to 'serve himself heir to his predecessor who died last vest and 'seized therein, as if the heir so accepting of the succession of 'the said estate of Bargany, and the heirs of his body, had never 'existed.'

There you see a distinct devolving clause, requiring nothing to carry it into effect but an ordinary action and service. But then there comes the important provision which immediately follows:—'Or if the foresaid taillied estate of Bargany should

'happen to devolve to any heirs descending of this present mar- June 20. 1825.
'riage after their succession to the foresaid lands, barony, and
'estate of North-Berwick, and that the said heirs should accept
'of the succession of the said taillied estate, then and in that case
'the said heir or heirs their right to the said lands and estate
'above disponed shall ipso facto cease and become void, except
'in the case of only one son descending of this present marriage
'in manner after specified, and the right of succession thereof
'shall immediately devolve upon, appertain, and belong to the
'next heir not descending of the body of the contravener, by ac-
'cepting of the succession to the said estate of Bargany, sicklike
'and in the same manner as if the person so contravening, and the
'heirs of his body, had never existed; and it shall be leisom and
'lawful to the said next heir to establish the right thereof in his
'person, either by adjudication, declarator, or serving heir to the
'person who died last vest and seized therein preceding the con-
'travener, or any other manner of way competent by the laws of
'this kingdom for the time.'

As to this act of contravention, therefore, and every other contained in this entail, the precise same method of ousting the contravener, and declaring the forfeiture of him and his descendants, is provided in the entail of North-Berwick by the Lord President, as in the Bargany entail in regard to not assuming the name and arms.

Your Lordships are aware, that in the entail of North-Berwick there is a reserved power to vary certain parts of it, but so as not to be prejudicial to the heirs of the marriage, namely, 'to 'discharge or qualify' any of the prohibitory and irritant clauses, meaning thereby to lessen them, not to enlarge and extend them. Now attend to what was done by the Lord President. I need say nothing as to the deed in 1734 authorizing, in contemplation of his right of succession to Bargany, his grandson Sir Hew Dalrymple to serve heir to his father as fiar of North-Berwick, without inserting in his service the clauses relative to the estate of Bargany.

Upon the death of Lord Bargany, the Lord President executed the deed of 8th April 1736, which your Lordships recollect authorized, or rather directed, Sir Hew to accept the succession of Bargany, and obtain himself retoured heir of taillie, and possess the estate so long as he should be allowed, and no longer; and also reserving power to the Lord President 'to 'alter and innovate what had thereby been allowed, and to 'renew and redintegrate the said provision that was contained

June 20. 1825.

'in the said contract of marriage, disabling the heirs of North-'Berwick to enjoy both estates.' But this reserved power we have seen was not to be prejudicial to the heirs of the marriage.

On the succeeding day, 9th April 1736, the Lord President executed the next deed, on which great stress has been laid by the pursuer, and which has been stated in another quarter as requiring attention. By this deed the Lord President allowed Sir Hew Dalrymple to continue in possession of Bargany during the granter's life, and no longer, and ordained him to divest and denude himself of the estate of Bargany, within six months after the President's death, in favour of John Dalrymple, his second brother, and the other heirs of taillie, and declaring that, on failure, he should incur an irritancy of his right to North-Berwick.

Now, I must observe on this deed, in the first place, That we have no evidence of its delivery, and there is no clause in it dispensing with the non-delivery of it. But I say farther, that it is liable to this observation, that holding it as a deed executed in regard to the granter's reserved powers under the North-Berwick entail, it purposely omitted that important clause in the North-Berwick entail, in regard to only one heir-male existing of the marriage, and his right to hold both estates. In so far, therefore, as it ordained Sir Hew to divest himself absolutely of the estate of Bargany in favour of the heirs of taillie, on failure of his brothers and their issue, it was obviously ultra vires of the Lord President. It was an exercise of power which vitiated the deed altogether. But it is important to observe, and I have gone through the whole of the deeds, that the only place where any notice is taken of this deed is in the factory to Craig; but that factory was granted the very same day, and I agree with the pursuer, that it bears evidence in itself of having been prepared under the eye of the President, and I consider it in fact as his instrument, carrying through his arrangement for effectually separating the succession of the two estates as far as he had power. But he had no power to execute such a deed, because the exception in favour of the single heir-male of the marriage was an inherent and unalterable provision in the marriage-contract; and, therefore, it is not surprising that there should never be discovered the slightest reference to that deed in any of the after deeds or proceedings.

Now it does appear, and I wish to pass over nothing, as the pursuer founds on the whole facts of the case, that two factories to Craig and Kennedy were granted by Sir Hew Dalrymple

under the signature of ‘ Hamilton,’ giving power to them to uplift the rents of Bargany. But when you look at the dates, these factors seem to have had but a sinecure office; for your Lordships will recollect, that the judgment in this Court, in the contest for the estate of Bargany, was in favour of Sir Alexander Hope; and it was not until 1739 that the judgment of the House of Lords was pronounced, altering that judgment, and finding that the estate descended to Sir Hew Dalrymple; so that, whatever may be the effect of the paper on which these factories were written, you have pretty good evidence that they could not operate much in the way of levying the rents. June 20. 1825.

We come now to the deed of repudiation by Sir Hew Dalrymple in 1740, which I will not read at length, as it has been so often quoted. But you will particularly observe, that it takes no notice of these deeds by the Lord President, and I think purposely omits any mention of them; for I shall shew your Lordships immediately that this was intentional. The Lord President had by these deeds appointed his grandson to make up titles to the estate, to enjoy the rents of Bargany during the President’s life, and afterwards to denude in favour of his younger brother: but in the deed of repudiation there is no notice taken of all this; he declares that his brother shall have right to the rents since the death of the said James Lord Bargany, and in time coming; and he never made up a title nor denuded himself as required. It is thus clear that the deeds by the Lord President were entirely disregarded, and therefore they are not legitimate elements for our consideration in this case: they were not recorded in any register, and were not delivered, but were departed from, and never founded on by any human being.

But there is another circumstance which I must notice. In this deed of repudiation there is a word used which I think somewhat material; it is in reference to what would be the consequence of taking the estate of Bargany. The words are, that ‘ in case I shall *now* take the succession of the estate of Bargany.’ This little particle ‘ now’ appears to me to be important, in reference to the nature of these proceedings. Sir Hew Dalrymple refers, in the deed of repudiation, to both entails. The entail of North-Berwick did provide, that he could not possess both estates, if there were more than one heir-male of the marriage; but it has also this provision, that in the event of there being only one heir-male of the marriage, he might take the estate of Bargany, and every other single heir-male of the marriage might do so without incurring an irritancy. Now here, in this deed of

June 20. 1825. repudiation, reference is emphatically made to the time when the granter felt himself under this difficulty of taking the estate; but it is not said, that if he should at any time be enabled to take possession, he abandoned all claim to the estate. On the contrary, such claim has been imbodied in the clause of reservation, as it has been formerly called, in the deed of repudiation, but as to which expression I now stand corrected, and I am sure all your Lordships must stand corrected, after what has been so ably stated by Lord Glenlee, that it is not a reservation, not a right retained, but an express condition, and part of the repudiation itself, consented to by John Hamilton, as appears on the face of this instrument. For it was well observed, and ought never to be lost sight of, that these words follow, 'with which express pro-'vision thir presents are granted by me, and accepted by the said 'John Dalrymple.'

The acceptance of a deed in these terms, containing a condition and provision of this nature, must fix, if there is any principle of law at all fixed, that the condition and provision must be taken along with the entire deed. It never was heard of, that a corner, or scrap, or line of an instrument was only to be taken, when you see that the person granting the deed declares that it can only be taken under an express condition. I have, indeed, heard it said, that you may take the act of repudiation, throwing aside the fact stated in it, that he had not then taken the estate, but that he reserved his right to take it; and, in short, that you are to take every thing that makes for the pursuer,—that when you come to put a plain and common sense meaning on the deed, you are to shut one eye, and only to view it in so far as it is favourable to the argument of one of the parties. I must, however, enter my protest against any such doctrine. I am not entitled to look on the deed of repudiation without taking it as an entire deed. I must take it tantum et tale as it stands. We never can forget that, while it contains the consent that John Hamilton should take the estate, it is with the qualification imbodied in the essence of it, and on which alone it is an accepted deed by the donee, of the granter's right to take again the estate in a certain event.

The deed of repudiation was followed by the decree in 1741; but it is material to keep in view that it is a simple decree of declarator. It contains a recital of the entails of North-Berwick and Bargany; but there is a total absence of any reference to the deeds and proceedings of the Lord President. It does not take three lines out of the deed of repudiation, but recites it ad

longum, with the condition or reservation, and its date, and the date of registration, with this alteration only, that the word 'now' is turned into 'then;' marking emphatically, that there was something due to that particular word from the way it was used. And then, we know, that after going through all the forms, 'the said 'John Hamilton compearing by Mr Robert Craigie, advocate, 'who for instructing the points and articles of the foresaid sum-'mons for him, produced in presence of the said Lords the whole 'writs before mentioned libelled on, of the dates, tenors, con-'tents, and registrations before specified;' decree was given, as asked, after the form and tenor of the writs before narrated, 'conform to the conclusions of the libel.' June 20. 1825.

Now to suppose that we can look on this in any other light than as a decree proceeding on the deed of repudiation as a whole, is what I cannot understand. It might be just as well to take two or three words out of the entail of Bargany, and then John Hamilton might have got the estate in fee-simple. But when the whole repudiation is produced, and recited ad longum, and decree is given conform to the writs produced, it must embrace the whole of these deeds.

After obtaining this decree in absence, as being in strict conformity with the arrangement between him and his brother Sir Hew, John Hamilton was then served heir of taillie and provision to James Lord Bargany, according to the entail 1688; according to the judgment of the House of Lords in 1739; according to the deed of repudiation of 13th August 1740, registered 11th November same year; and according to the decree of declarator in 1741, all expressly referred to in the retour.

This was followed by the charter 1742, on the terms and construction of which the claim of the pursuer is rested, and which will of course require particular attention in considering the questions of law. After obtaining this charter 1742, we know that John Hamilton possessed the estate till June 1780, when he executed the deed of that year in favour of himself and the heirs whatsoever of his body, whom failing, to his brother Sir Hew Dalrymple, and the heirs whatsoever of his body, &c.; and I do consider it of some consequence, that you have in this deed a declaration on the part of John Hamilton, which was in perfect consistency with every part of the proceedings prior to the charter 1742; for it expressly bears to be granted '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 con-'tract of marriage, of date the 18th November 1691 years,' (this

June 20. 1825.

was the date of recording, but the entail 1688 was clearly meant), 'and to the conditions upon which my own right and title to 'the lands under-mentioned was founded.' That is the solemn and deliberate declaration of John Hamilton, in strict conformity with the whole transactions.

Such being the facts of the case, the pleas of the pursuer have been various, but I think they may be reduced to three:—

1. That she is now to be held as the heir entitled to take under the entail of Bargany, in consequence of the facts and circumstances which have taken place.

2. That she is expressly called as next heir to John Hamilton and the heirs whatsoever of his body, (Robert and his heirs having failed), by the terms of the destination in the charter 1742.

3. That she is entitled to reduce the deed 1780, under which the defender is now infeft in the estate.

Your Lordships are quite aware, that these pleas are met by pleas of an opposite nature. The defender states, 1st, That he is, by the entail 1688, and the judgment of the House of Lords, the undoubted nearest heir, being the direct lineal male descendant of the body of Joanna Hamilton, who was the eldest heir-female of the body of John Lord Bargany. 2d, That he is directly called, and not excluded, by the destination of the charter 1742. And, 3dly, Supposing that the pursuer were entitled to claim the benefit of that charter, no prescription has ever followed on it; that, if it were necessary, he could set it aside; and, therefore, that as he is now in possession under the deed 1780, he is entitled to maintain his possession under the existing investiture, which the pursuer has no title or interest to reduce, as it merely replaced him in his legal situation.

Keeping in view the terms and true nature of the various deeds and proceedings already referred to, it appears to me to be impossible in point of law to sustain the first plea of the pursuer, that she is now to be held as the nearest heir of taillie to this estate. No person has yet controverted, that, looking to the entail 1688, the defender is the undoubted heir, as he is the nearest descendant of Joanna Hamilton, who was the eldest heir-female of John Lord Bargany. But, unquestionably, if it can be shewn that, by any proceedings, by any legal process that has taken place, the right which thus belonged to him under the entail 1688 has been annihilated, forfeited, or lost, the pursuer is entitled to the benefit of such proceedings. But I conceive that the onus probandi lies on the pursuer, to show the particular step

of judicial process, or the combined effect of circumstances, having this consequence.

In considering this question, it is certainly necessary to look at the entail of Bargany; and I have already pointed out what I think is the fair import of that important provision as to the necessity of bearing the name and arms. If I am right in the view I have taken, that the omission to do what is there declared is a substantive act of contravention, and that any person incurring it would be liable to be forfeited, am I not entitled to ask, in what part of the proceedings since 1739 have such consequences taken place? Where is there any judicial act affecting the rights of the defender? We are acquainted with the rules of law as to contraventions, that no heir can acquire an entailed succession, on the ground of a prior heir having incurred a forfeiture for himself and his descendants, without producing evidence that his right has been so forfeited by a declarator of irritancy. This is laid down as a first axiom by Lord Stair, by Mr Erskine, and must be the opinion of every lawyer. There is no such thing in law as ousting the contravening heir by implication. If there is no such decision in a court of law declaring a contravention; if there is no principle of law to allow it by implication; and if the mere fact of there being a contravention cannot enter into your minds, unless the contravention has been declared by a decree, I do conceive a most important point is now fixed in this cause.

But the case here is totally different from any such forfeiture being declared. We know, that there was not only no step of that kind followed with success, but that the attempt has been made and has failed; and it has been finally determined, that no contravention or forfeiture can be declared. Supposing, therefore, there was a complete violation of the entail; that old Sir Hew Dalrymple, though merely the heir-apparent, who had not made up titles, yet, in strict construction of the Bargany entail, was bound by all the conditions therein imposed, and that, by not assuming the name and arms, and by granting the deed of repudiation, he had committed a contravention; what can all this avail the pursuer under the circumstances of the case? All these things she put in issue in the former action, and she followed it up with all the industry, and all the ability of her legal advisers, and we have seen the result; and therefore this being a fixed point in the case, that no contravention or forfeiture has taken place, it is of itself almost decisive of the present question. For I would ask, if it ever was known that an heir of

June 20. 1825.

entail, or a descendant of one whose right has not been forfeited, or an effectual title secured against him by prescription, was deprived of his inheritance?

But I am aware that it has been said, that there are certain acts and deeds, the effect of which, when taken in a combined view, are sufficient to make up for this deficiency of a decree of declarator of contravention. This position is founded on the deed of repudiation, on the decree of declarator, and on the retour of the service of John Hamilton. I do not mean again to enlarge on the deed of repudiation. If it is good for any thing, it must be taken as a whole. If it is taken as a whole, and the consequences follow from it which the pursuer maintains, let these consequences follow. But I am not warranted in taking one part of the deed, as to the abandonment of the estate, without taking into view also what the provision is on the face of it which qualifies it. If this deed is so taken, I profess my utter inability to comprehend how it can have any such effect as has been given to it by the pursuer. That it was a waiver by Sir Hew of his right for the time no person can doubt, or that it was a deed repudiating for himself and his own right alone, but not for what he could not legally do, or consent to, for his descendants and their rights. For, must I not take along with the deed the very essence of it, that it should be without prejudice to him, the granter, taking the estate upon failure of John and Robert and their descendants, or in case any event should occur, in which he could take it consistent with the entail of North-Berwick; and most certainly the same stipulation is made in favour of his descendants? But it did not require him to make any reservation in favour of his descendants; they stand on the foundation in law of their own right, without any reference to the maker of this deed. Seeing also that this deed was so cautiously worded as to make no reference to the deeds of the Lord President, we have complete evidence to show, that they were as utterly disregarded by the maker of this deed as by John Hamilton the donee. For if these deeds had been any bar to the transaction, it could never have been carried through.

If such is the proper view of the deed of repudiation, is there any thing in the decree of declarator, as contended for by the pursuer, to exclude the right of the defender? The decree 1741 is a qualified decree, and proceeds on grounds and warrants which are fully recited in it. It gives decree only conform to these grounds and warrants; and to give it any other effect, or to hold it as approaching in the most distant degree to a decree of

declarator of forfeiture, has no earthly foundation in law. We must take it as it is. It allows John Hamilton, no doubt, to be served heir of taillie and provision, but you have on the face of it the provision under which he was to be served. This decree appears to me to be nothing more than a mode of carrying into effect the concerted arrangement between the two brothers. They were aware of their situations and of the two entails, and in order to facilitate the making up a title by John Hamilton, the deed of repudiation was granted, and then the decree was pronounced conform to that deed. It will be observed, that it was in absence too, which of itself would have been a ground of challenge within the forty years. I am very decidedly of opinion, that if Sir Hew had thought proper to appear, nothing could have prevented him, if an attempt had been made by John Hamilton to extend the decree beyond the deed he had granted, and on which alone the decree proceeded, to have effectually resisted its being obtained: and you have real evidence that he would have appeared, and put an end to any such attempt. I agree also with Lord Pitmilly, that if, at the distance of years afterwards, Sir Hew had brought a challenge of the decree, by shewing that he was then entitled to take the estate, or chose to run the risk, let the consequences be what they might, (it might perhaps have allowed John Hamilton to deprive him of the estate of North-Berwick, but I am speaking now of the possibility only), this Court would have been entitled to set the decree aside. If it did not appear on the face of it as forfeiting Sir Hew, I ask, how could you imply it? or are you to resort to conjecture as to what effect might be drawn from it? This would be to subvert the fundamental principles of law. No implication can be derived from the face of the decree unfavourable to the defender, and no implication can in any case be resorted to when the meaning is plain.

But there is, lastly, the retour of the service of John Hamilton, the terms of which have been already noticed. It is most important to recollect, that that service proceeds according to the tenor of the deed of repudiation, which is expressly referred to in it by its date, and the date of its registration, and according to the tenor of the decree also referred to in it; and as this is the retour of a general service, which does not require the insertion of the whole contents of the deed of entail, of the deed of repudiation, or of the decree; and as there is a general reference to them on the face of the retour, every thing that is in these instruments is fair and legitimate subject of consideration. The

June 20. 1825. retour is according to the entail 1688, and you must look at that entail; it is according to the deed of repudiation, and you must look at that deed; and according to the decree, and you must look at it. This service is, therefore, one sui generis. It sets forth the fact, that the estate had descended to the elder brother, and that John Hamilton is the second brother, and that Sir Hew had repudiated the succession, and consented, that the said John Hamilton, in respect of his said repudiation, should serve himself heir of taillie and provision to the said James Lord Bargany, and make up titles in his person to the said estate of Bargany, in the mode competent by law. This reference to the deed of repudiation naturally lets you into the consideration of the whole of that deed. You must take it as a whole; and, on the face of it, it was a qualified service, and one of a peculiar nature, to which all the doctrine drawn from the Act 1617, establishing the vicennial prescription of retours, is entirely apart. That prescription may have its effect in certain circumstances; but it is personal to the individual served: and in this case it is impossible to look at the retour, without seeing that John Hamilton was not the nearest heir in life; that it was merely for a temporary purpose, and that it does not even raise the question of prescription, as to which I concur in thinking that a satisfactory answer is contained in the opinions of our brethren who have been consulted. Without any reduction of the service, I am clear that any party, founding on this deed of repudiation, would have been entitled to say, 'I pay no regard 'to that service; it is enough for me to shew, that I have right 'to the estate by the very terms of the instrument by which you 'were served.' There can be no doubt that the benefit of this service was personal to John Hamilton; and, in any question that might have arisen between him and another party, he might have said, 'I take no benefit by that service.' On looking into the second case of Edinglassie, I have seen nothing interfering with the first decision of it; and there is another circumstance to be noticed as to that case, that the losing party enters a protest against the judgment for remeid of law in Parliament, which was the form of appealing at that time. This appears from the report of the case by Lord Fountainhall, and we see nothing farther of it.

I have never yet been able to comprehend how the service of John Hamilton by itself can be of any importance in this case, as nothing in the previous proceedings had occurred to deprive the defender of his undoubted right as heir of taillie under the

entail 1688. Could this service prevent an heir from entering into possession of the entailed estate? I apprehend not. It would be establishing a new doctrine in the law of succession, for which I have never seen any authority in our institutional writers, or in your Lordships' decisions. Therefore, neither by itself, nor combined with the deed of repudiation and the decree, can I find any thing in this retour in the least degree aiding that proposition, that under all the facts of this case Mrs Fullarton is the heir entitled to take under the entail 1688. June 20. 1825.

As to the difficulty with regard to the succession reverting, I have little to add to what has been stated by some of your Lordships. In the first place, as to the legal impossibility or incongruity in the succession reverting, I have no conception that there is any foundation for it. The cases of Lord Mountstewart and M'Kinnon establish the direct contrary, that there is nothing so incongruous in the circumstance of a right of succession reverting. But I have another authority which is deserving of attention, because it is to be found in the deed of that very person whose will and intention are so much relied on; I mean in the entail of North-Berwick. If the reverting back of the succession is so incongruous, it would be surprising that the Lord President, the Head of the College of Justice, should execute an entail, not only contemplating such an event, but making an express provision for it. It is, however, expressly declared in the North-Berwick entail, 'That albeit the next heir of taillie 'existing may, upon the said contravention, obtain established 'in his person the right of the saids lands and estates, by declarators, adjudications, service, and retour, or any other way 'competent by law, yet, notwithstanding thereof, in case a nearer 'heir of taillie should happen to exist, after obtaining of the 'foresaid declarator, or adjudication, or service and retour, by 'virtue of the contravention, as by procreation of a child or children of the contravener's body; in that case the person so succeeding upon the contravention shall not only be holden immediately thereafter to denude in favour of the said nearer heir, 'and other heirs of taillie above-written, under the conditions 'and irritancies foresaid, that the course of succession be no farther diverted than to exclude the contravener himself; but also the right of the person so succeeding upon the contravention, 'and their heirs of taillie foresaid, shall ipso facto become extinct, void and null, so soon as the nearer heir exists.' Here you see that this, which is held an incongruity in the law, is looked on not only as innocent, but is actually provided for. I

June 20. 1825. know that this is only the will of that person, but it shews that there was not supposed to be any incongruity in the circumstance.

But this being the will of the entailer of North-Berwick, I agree with Lord Pitmilly, that, in this question, it is a more legitimate source of inquiry to see what was the will of the entailer of Bargany. Now, is it to be found in the entail of Bargany, that, in the case of an heir being absent, or abroad for a length of time, and a remoter heir having served, if the nearer heir had afterwards returned, that he was to be excluded? Suppose that Sir Hew Dalrymple had been a long while abroad, and evidence had been brought forward at the service of John Hamilton to shew that, from all that could be learned, there were good grounds for holding that he was dead, (and I myself was introduced to a Mr Hunter lately, on my circuit at Glasgow, who had been for above twenty years among the North American Indians), and that John Hamilton had been served, I say that though he had possessed for thirty-nine years on his service, if Sir Hew had made his appearance, or a descendant of his body clearly making out his propinquity, he might have put an end to all these proceedings—he might have disregarded this service altogether.

But while you have clear evidence that Sir Hew Dalrymple never was forfeited of his right, you have the declared will of the entailer, that he was entitled as nearest in blood to succeed to the estate.

This leads to the second proposition, however, as to the effect of the charter 1742. Your Lordships are aware that the pursuer founds on these words, as directly calling her, and excluding the defender, 'Quibus deficientibus aliis hæredibus quibuscunque 'ex corpore dict. Dominæ Joannæ Hamilton.' The question is, What is the true legal construction of these words? Do they destine this estate only to those heirs who, in the order of nature, or in the order of law, or of this entail, are entitled to succeed posterior to John Hamilton and the heirs of his body? or do they not include all and each of the heirs of the body of Joanna Hamilton, other than John Hamilton and the heirs of his body, whether before or after him?

I had thought it had been admitted, but it is difficult to find out in this case what is admitted, that if these words had been found in an original charter, there would have been no doubt as to their meaning. But whether it is admitted or not, I have not the slightest doubt that, according to the plain and obvious, as well as the legal and technical meaning of these words,

there is not a ground in law for doubting that they do not only not exclude, but that they actually comprehend all and each of the heirs of the body of Joanna Hamilton, other than John Hamilton and the heirs of his body. The meaning of the clause appears as plain, as if it had occurred under the circumstances of John Hamilton being the youngest son, and there being no daughters. Had there been ten elder children preceding him, they must have been all included under this destination. But I don't think the meaning of the clause would have been a bit clearer in that case, than in the actual circumstances. For, I must ask this question, what is there on the face of the destination to warrant me in saying, that some of the heirs are not included? Are the words not so broad as to include both? It is indeed said, that the term heirs is flexible. It may be so. But then it is only with regard to the heirs of a particular individual, when the question is, whether it is the heirs of the body, the heirs-male, or the heirs whatsoever of such a person? But there is no room for conjecture here as to what sort of heirs is meant; the words 'other heirs whatsoever of the body of Joanna Hamilton,' remove all ambiguity; and when you see the words 'other heirs of 'the body,' must they not, by the clearest principles of common sense and grammar, include all the others? I profess myself unable even to raise a doubt on this question; and I would be just as well warranted to say, that it was meant to confine it to the daughter that had married into the Reay family, and to leave out the daughter married to Duff of Crombie. I must give fair play to the words; and neither in grammatical, nor in legal and technical construction, do I find the least difficulty in saying, that not only is the defender not excluded, but that he is positively included. There is a maxim to be found in the Roman law, which ought never to be lost sight of. It is in the Pandects, lib. 32. tit. 3. l. 25. 'cum in verbis nulla ambiguitas est 'non debet admitti voluntatis quæstio.' That is a maxim which must ever predominate in your Lordships' minds; and it is laid down by every writer on the interpretation of deeds, that if words of a plain legal meaning are used, and especially in the dispositive clause of a charter, you cannot deny effect to them, unless there is plain declaration in the instrument itself, that the maker of the deed used them in a different sense. We have had lately cases of that kind before us, the cases of Marchmont and Urrard. In these cases, your Lordships will recollect that it was the opinion of the Court, that the words, being clear legal technical terms, were to have their full effect; and even in that question

June 20. 1825.

June 20. 1825.

of Urrard, where it was said that there were other parts of the deed tending to shew the words were used in a different sense, the Court held that there was no such sufficient declaration plain as to controul the legal meaning of the words.

I have heard reference made to another case, namely, that of Wedderburn *v.* Colville, in 1781, where it being found that the estate belonged to the pursuer and the heirs of her body, whom failing, to the other heirs of taillie, according to the order therein specified, it is said that no doubt was entertained, that if the pursuer and the heirs of her body were to fail, the estate would go, not to the heirs who had been formerly excluded, but to the heirs substituted to the pursuer and her heirs. But there is this material circumstance attending that case, that it was one of a declarator of contravention and irritancy, for finding that the party's right should be forfeited for ever; and no doubt when the decree is so taken, it appears on the face of it that the contravener's right was forfeited, and then that the destination was to be thereafter in terms of the entail. But that is not a case on which the question can be raised, because you cannot look at the decree without seeing that the contravening party had lost and forfeited the estate for ever. In the present case, if there had been a declarator and decree of contravention and forfeiture against Sir Hew Dalrymple and his descendants, it would have been imbodied in the investiture 1742, which would have referred to that decree as much as to the entail and the deed of repudiation; and if it did so, I say it would not be a case where this question of construction could occur. You would only require to read the decree with your eyes open, and you would see Sir Hew's right, and that of his descendants, forfeited and lost for ever; and then that the destination was to go on in the terms of the entail. But there is just that desideratum in the present case, that there was no decree of irritancy.

I must however observe another circumstance, which, whether it be considered material or not, has its effect on my mind, that the construction put by the defender on the terms of the destination in the investiture 1742 is no invention of his, because it is the construction that was put on it in the former proceedings by the legal advisers of the pursuer herself. This very circumstance of the destination being taken in the terms it is, was substantively laid by her in her former summons as an act of contravention, in which not only John Hamilton was concerned, but Sir Hew Dalrymple, for the purpose of making this estate revert to Sir Hew; and, therefore, it is a pretty important circumstance in

June 20. 1825.

the question of construction, that the defender is not inventing the construction he contends for, but that he has the authority of all the legal advisers who assisted the pursuer in the former action, that such is the proper construction, and which I must say every lawyer must put on it when taken per se.

I am quite aware that two views have been taken, as leading to the putting a different construction on the destination in the charter 1742, and these have been very ably urged.

1st, It is maintained, that by reference to other parts of the charter itself, and taking into view the entail 1688, you have a key to the true meaning of the destination; and, 2d, That by referring to the intention of the parties, it is clear that the pursuer's construction is the right one. I have no objection to meet the pursuer on both these views.

Looking to the quæquidem clause of the charter, to which reference is made, (though it may well be questioned whether it is either safe or competent for any Judge to refer to such a clause to controul the clause of destination), your Lordships will recollect that it refers to a variety of deeds and proceedings; but if this clause is to be resorted to at all, I have arrived at this conclusion, that it must be resorted to as a whole. I hold it to be contrary to the rules of law, as well as of eternal and immutable justice, to look at one part of this clause, and not at the whole of it. It is easy to conceive, that if you are to take one member of the clause, and leave out another, a party may just found on what is favourable to him, and leave out all that is unfavourable. By taking part only of the deed of entail, which is also contained in this charter, the estate might be held in fee-simple. So say I as to the quæquidem clause; you must take it as a whole; and when you attend to that, and look at this clause, as containing the grounds and warrants on which the charter proceeded, so far from finding any thing to aid the construction of the pursuer, you will find real evidence against it.

Your Lordships know, that the clause of quæquidem contains the whole progress of the titles and proceedings, by which John Hamilton arrived at the time when he could take the charter 1742. I will not go through the deeds again, as your Lordships will recollect them. It states the deed of entail 1688, the deed of repudiation, according to its date and registration, the decree of the Court of Session by its date, which we know contains ad longum the deed of repudiation, and lastly the retour of John Hamilton's service. It just contains a reference to every one of those judicial acts and proceedings, which led to the fact of John

June 20. 1825. Hamilton having acquired right to the procuratory of resignation in the entail 1688, all distinctly specified, though not fully imbodied in the clause of quæquidem.

Now, to be told, that though reference is made to these deeds, yet, because they are not recited ad longum, we are not to look at them, is about the wildest doctrine I ever heard. The clause refers most distinctly to these different proceedings; and I am no more entitled to put out of view any clause in the deed of repudiation, than I would be to put out of view any clause in the deed of entail. I must take the whole as the grounds and warrants of the charter; and then, with that special reference to the deed of repudiation, I am bound as much to take it with all its parts as any other clause of the deeds. If such be the result of an examination of this clause, and I find no other clause to give me any assistance, and taking into view the entail 1688, which prefers the nearest heir-female of Lord Bargany, I profess I have not been able to find any thing on the face of the charter to create any doubt that the words of the destination have a different meaning from their plain and obvious sense. Therefore it is not by the charter itself, nor by the sasine, that you can interpret the clause of destination differently from what it legally bears. It is said that there is no reference in the sasine to the deed of repudiation; but then there is no reference in the sasine to the entail 1688; and according to this argument the estate must be held in fee-simple. The sasine must therefore be held as relative to an original charter; and if the charter 1742 is viewed as such, it seemed admitted that the estate must go to the defender.

But then, in the last place, it is said, that, from the facts and circumstances of the case, there is evidence that the destination was purposely framed to exclude Sir Hew and his descendants. I have no intention of going back on what I have already said on this point; but I will just state in general, that, considering the whole train of the proceedings, the absence of all attempt to forfeit Sir Hew Dalrymple or his descendants by John Hamilton, the perfect understanding that seems to have subsisted between John Hamilton and his brother, shewing that every thing that was done was in reference to Sir Hew's then situation; the terms of the deed of repudiation, not only with the condition contained in græmio, but no notice taken of the deeds of their grandfather, while the decree proceeds on the deed of repudiation, and recites it at full length, and the retour makes special reference to it;—there seems no reason to doubt, that the destination was purposely framed so as to include Sir Hew and his descendants, and to

facilitate the exercise of the undoubted right he had expressly reserved. June 20. 1825.

It is not necessary, in this question of intention, to suppose that John Hamilton contemplated any actual challenge of his own right or that of his children. But when you consider the terms of the deed of repudiation, in which Robert Dalrymple and his descendants are mentioned, and when you see that the destination 1742 is not taken to Robert and his descendants, I think you have a manifest proof that the predilection was in favour of Sir Hew and not Robert: There is nothing to shew any predilection to Robert or those after him. On the contrary, when the proceedings of John Hamilton are taken in reference to those of Sir Hew, you have proof that his predilection was in favour of his elder brother, to allow him to take the estate in terms of the express provision of the deed of repudiation. If the right of John Hamilton alone had been in view, it would have been enough to take the destination in favour of himself and the heirs of his body: he had no motive to go farther than the heirs of his body; but he had every motive to frame the clause in such a way as to bring in Sir Hew, or at all events his descendants.

But it occurs to me, that the clause of destination itself affords evidence of the true meaning and intention of framing it in the way it has been done. Your Lordships are aware of the words of the charter 1742, 'Quibus deficien. aliis hæredibûs quibus-'cunque ex corpore dict. Dominæ Joannæ Hamilton, procreat. 'inter illam et dict. Dominum Robertum Dalrymple;' then follows, 'quibus deficien. aliis hæredibus femellis ex corpore dict. 'demortui Joannis Domini Barganie;' and then a long train of names. But if it had been the object of John Hamilton to frame the destination in the way contended for by the pursuer, where was the difficulty in stating that in the destination in express terms? Is there any conveyancer who would have found any difficulty in putting this beyond the possibility of a doubt, by declaring, that by the hæredibus quibuscunque were meant those following in the order of law or of nature, or in terms of the entail 1688, after John Hamilton? There would not have been the slightest difficulty in this. But if this could be done, it is a material circumstance in the construction of this clause, that though it makes no express reference to the entail 1688, yet it will be found, on a careful comparison between this destination in the charter 1742, and the original clause in the entail 1688, that, with the exception of that general phrase, 'to the other heirs of 'the body of Joanna Hamilton,' the writer of it has just inserted

June 20. 1825.

one and all of the heirs, and classes of heirs, entitled to take under the entail. Now, I ask your Lordships, when the fact is notorious that at the time John Hamilton had a younger brother, Robert, and two sisters alive, if the intention had been (we are here only speaking of the intention) to bring in only them, and to leave out Sir Hew, and when you see this enumeration of every other individual and class of heirs, and, instead of the destination particularizing Robert and his sisters, this general phrase purposely used, 'aliis hæredibus quibuscunque ex corpore dict. 'Dominæ Joannæ Hamilton,'—does it not amount to a legal demonstration, that the intention was not so to limit it, but directly to include Sir Hew?

If, then, it is the legal construction of the charter 1742 that Sir Hew was not excluded, the only other ground on which the pursuer's plea can rest is, by interpolating an exception which would exclude him; and that, because he had temporarily consented that his brother should take the succession, you are to arrive at the conclusion, that a meaning, totally different from that of the whole charter and the intention of parties, is to be put on the destination 1742. This appears to me the most dangerous doctrine ever stated in any case,—that where there has been no forfeiture, no legal process to establish forfeiture, nothing judicially done to have the effect of a forfeiture, your Lordships are still to imply it. It appears to me to be a monstrous proposition, for which I find no law or authority—no decision in the least degree bordering on it.

But though I am of opinion that such is the legitimate construction of the terms of the charter 1742, I am quite aware that there is this ground maintained by the pursuer, which would entitle her to take the succession,—namely, that taking for granted that we are all wrong, and that she is truly called by and entitled to the benefit of the charter 1742, and to reduce the disposition 1780, that right has been secured, and the right of the defender under the entail 1688 cut off, by prescription. This has been met by the defence, that there has been no prescription, and that the defender is entitled to reduce the charter 1742.

On this last branch of the question I am decidedly of opinion, that if it were granted that the destination in the charter 1742 was in favour of the pursuer, and prejudicial to the defender, he would be entitled to reduce it; because no prescription has run so as to give the pursuer the benefit of that destination; the fact being, that the charter and sasine on it are dated in 1742, and that in 1780, when forty years had not elapsed, a new deed was

executed by John Hamilton, followed by infeftment, doing away all the effects of the charter 1742 to the prejudice of the defender. It is impossible to doubt that this is true in point of fact, as we have only to recollect the terms of the disposition 1780, to see whether, after that, there continued any investiture which excluded the defender. John Hamilton had possession under the charter 1742 for only thirty-eight years; and undoubtedly, quoad the interest of the parties in this question, the prescription was interrupted by not leaving the destination in the disposition 1780 doubtful, but directly calling Sir Hew Dalrymple by name. This was the voluntary act of John Hamilton. It was the consistent act of John Hamilton; and there is a declaration in it, that it was in conformity with the conditions on which he held the estate. This was what Sir Hew might have compelled him to do, if, in 1780, he had discovered that John Hamilton had done or intended any thing prejudicial to him; and I hold it clear, that Sir Hew would have been entitled to have had it found and declared, that there was nothing contained in the charter 1742 to operate to his prejudice, and thus prevented the running of a course of prescription. But John Hamilton did voluntarily what he might have been compelled to do. The deed 1780 put a total end to any benefit which can be supposed to have been derived to the pursuer from the charter 1742.

I know it has been said, that, with regard to John Hamilton individually, the disposition of 1780 was not such an alteration of the investiture as would have entitled parties to have ousted him; but you will always recollect, that we are in a question, not with John Hamilton, but with a third party. The pursuer is not entitled to found on the possession under the deed 1780. She cannot take two years from the possession under the deed 1780, to add to the thirty-eight years' possession under the deed 1742; because, by the deed 1780, her right, if she had any under the deed 1742, was completely changed. A new course of prescription took its rise from June 1780; and thirty-eight years having only run of the possession under the charter 1742, she cannot say that prescription has run on it, even holding the destination in that charter to be in her favour. I am, therefore, quite clear, that the defence of prescription is amply sufficient on the part of the defender.

I will only remark farther, with reference to the terms of the charter 1742, and as to the defender being heir under the entail 1688, that I see no difficulty in his serving heir of taillie and

June 20. 1825.

provision to John Hamilton, who was last infeft. There is no incompatibility in his doing so. The investiture 1742 was an investiture for a temporary purpose, and John Hamilton was a mere usurper. But if there were any informality in the defender so serving, he would be entitled to put that investiture out of the way, which, however, appears to me to be unnecessary, as he is already in possession under the deed 1780.

I am, on the whole, clearly of opinion, that the pursuer has no interest, and consequently no title, to reduce the deed 1780, as she is not called by the charter 1742 to the exclusion of the defender; and that, even if it could be shewn that she had an interest as claiming under the charter 1742, her right has not been secured by prescription, nor has that of the defender been cut off by it. The defender is undoubtedly the nearest heir under the entail 1688; and before he can be legally deprived of his estate, it must be proved, either that he has forfeited, or that his ancestor has been declared to have forfeited his right as heir, or that it has been cut off by a prescriptive title acquired by the pursuer. But to neither of these different propositions is it possible for me to accede.

I shall conclude with only one other observation, that it would be the most extraordinary result in the annals of judicial procedure, if, although the defender is unquestionably the nearest heir of taillie under the deed 1688; although he is not excluded, but directly included in the destination of the charter 1742; although this deed, if it could be held conclusively prejudicial to him, has not been fortified by prescription, and could, if necessary, still be removed out of the way; although it is finally fixed, that no contravention or irritancy was declared to have been committed by his predecessor, and none is attempted to be declared against him; although no complaint, in fact, is made that any person, who did not stand before the pursuer in the order of the entail, has for a moment been preferred to her; and although the defender is expressly called to the succession by the deed 1780, and is now in possession of the estate,—yet, notwithstanding all these incontrovertible propositions, to my mind at least, he is still to be ousted by some legal magic, and the estate transferred to a distant substitute,—I do unfeignedly declare, that if such should be the result, I do not know any entailed proprietor in Scotland who would be secure in the tenure by which he holds his estate.

The Court, accordingly, pronounced this interlocutor:—

'Find, that the defender, under the destination of the entail

'executed by John Lord Bargany in 1688, and the judgment 'of the House of Lords in 1739, is the nearest heir of taillie 'and provision now in existence, entitled to the succession of 'the estate of Bargany, as the descendant of the body of the 'eldest heir-female of the body of the said John Lord Bar- 'gany; and that no contravention, irritancy, or forfeiture 'ever was declared against him, his father, or grandfather, 'although an action for that purpose was brought, in which the 'defender's father and others were called as defenders, and in 'which decree of absolvitor was pronounced by the House of 'Lords; and find, that this being the case, no act whatever of 'Sir Hew Dalrymple, the defender's grandfather, could affect 'the interests of any of his descendants, being heirs of taillie: 'Find, that nothing following from the deed of repudiation of 'Sir Hew Dalrymple, the decreet of declarator, or retour of 'John Hamilton's general service, could in law deprive the 'defender of his right of succession under the entail: Find, 'that the defender, by the destination of the charter 1742, is, 'according both to its legal construction and its true intention, 'called to the succession of the estate after John Hamilton, and 'the heirs whatsoever of his body; and that if it were now neces- 'sary for the purpose of completing a title in his person, it would 'be in the power of the defender to obtain himself served heir of 'taillie and provision to John Hamilton, as the person last infeft 'in the estate: Find, that even if the pursuer could constructively 'be held entitled to the benefit of the destination in the charter '1742, her right has not been secured by the positive, nor 'that of the defender to set aside the whole proceedings cut 'off by the negative prescription; and that the vicennial pre- 'scription of retours is not applicable to the case; and there- 'fore, that the pursuer can have no title or interest to challenge 'the deed executed by John Hamilton in 1780, by which the 'defender's grandfather, and the heirs whatsoever of his body, 'were directly called to the succession, on the failure of John 'Hamilton and the heirs whatsoever of his body; but find, that 'for defending himself in this action, it is not necessary that the 'defender should institute any process of reduction. They there- 'fore sustain the defences now pleaded for the defender against 'this action, assoilzie him from the whole conclusions, and 'decern.'*

June 20. 1825.

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* 2. Shaw and Dunlop, 655.

June 20. 1825. Mrs Fullarton appealed.

Appellant. Under the circumstances and facts which have occurred, the appellant is now nearest heir of entail of Bargany.

1. She has a right, in terms of the original taillie of 1688, to succeed to the estate of Bargany next after the heirs of the body of John Hamilton, and of his younger brother Robert Dalrymple; and both these brothers have died without issue. No doubt Sir Hew, son of Joanna, had a prior right of succession, or rather carried that right into execution, and did succeed; but for an onerous consideration, (namely, being enabled to keep and enjoy North-Berwick, a more valuable estate), he renounced and relinquished Bargany; and he did so for himself and his descendants. He and his descendants are, in the present question, as if naturally dead; and this answers a great mass of the respondent's pleadings. Sir Hew's place, certainly, was before the appellant's grandmother, Marion. But it was a place enabling him to succeed to James Lord Bargany,—not to succeed to the younger brothers, John or Robert. Looking to the words of the entail 1688, that would be the expression of a palpable absurdity. On the other hand, the appellant's place was to succeed to John and Robert, on failure of their issue; and it is precisely her place that the respondent is attempting to occupy. In entailed succession the question is, whom does the deed of entail point out as heir to the last lawful possessor of the estate? for it is the entail that forms the law which dictates the order of time, and the series of substitutes. But the entail 1688 says, that Sir Hew is the heir to Lord James. It is impossible that he could, under the entail, be heir to John. To say that Sir Hew merely for a time changed places with John, and that the appellant had no reason to complain, seeing she came after both, does not better the matter. In asserting or proposing that change, Sir Hew violated the will, and acted directly contrary to the intention of the entailer, and in manifest opposition to the terms which measured Sir Hew's own right. The holding both estates being, from the fetters in the two entails, incompatible, he had his choice which to retain for himself and his descendants. He chose North-Berwick, and that such choice should be (as intended by the entailer) perpetual, and not temporary, was of value to the appellant. View the case as you may, the result of the judgment of the Court below is enabling an heir, called under a condition, to defeat that condition, to frustrate the view of the entailer, and, without right or title, to wrest from the

party entitled to be benefited a valuable inheritance. There is no disguise which can screen the fact, that Sir Hew, if he obeyed the injunctions of the entail of North-Berwick, could not obey the injunction of the entail of Bargany; and if he did not and could not obey the injunctions of the latter, he must forfeit the estate. But if he had forfeited, then he and his descendants were erased from the Bargany entail. No argument could give them in that case the colour of a claim to emerge again, and step in before a substitute heir; neither can it where Sir Hew, instead of being forfeited, has deliberately renounced for himself and descendants. June 20. 1825.

2. The estate of Bargany was not, through inattention or other cause, left unclaimed by the substitute heirs, on Sir Hew's holding by an entail incompatible by the conditions under which the heirs of the Bargany estate were obliged to possess. His brothers did not decline interfering until, by working off the incompatible conditions, he might have found himself in a condition to hold both estates. On the contrary, John not only accepted a renunciation, formally and deliberately made by Sir Hew, but took the most decisive legal steps to invest himself with a title to the estate; and it is undeniable that he possessed it for half a century. There is no doubt that Sir Hew was entitled to make his option; and if one estate was materially more valuable than the other, it is easy to be predicated on which his option would rest. It is equally clear he was entitled to renounce. An entail is a donation; and a person may refuse a gift; or, having accepted it, may transfer it. He had a jus crediti to the estate of Bargany; but he could waive or assign it. An estate does not descend upon the disponee like an hereditary grant, which inhæret ossibus. Sir Hew agreed, for an onerous consideration with the President, to go out of the Bargany entail; and this agreement was quite lawful. He renounced that estate, and let in John, the next substitute; and John took advantage, in a competent shape, of this event. He, in a legal form, connected himself with the estate, and died vest and seized in it. Then what says the entail?—that the appellant comes in, failing him and his younger brother without issue: and they have so failed. Sir Hew, or his descendants, cannot come in; they cannot be resuscitated. The respondent has endeavoured to meet this view by maintaining, that it is recurring to the exploded ground of contravention on the part of Sir Hew. But this is a mistake. In the appellant's early action, she thought that by the facts stated in her summons a contravention had been committed. The judgment of the House of Lords corrected that error.

June 20. 1825.

She no longer stands on that plea; but that she is the next heir to John,—that John lawfully acquired the property,—and she cares not how Sir Hew has happened to fall out. But even if she did state acts of contravention, provided they were stronger and more relevant than those in her former summons, there would be no bar to the conclusion that must necessarily follow. Of as little weight is the objection, that John in his declarator not having inserted a conclusion that Sir Hew had contravened the entail,—that his right was irritated,—and that he had forfeited the estate, room has not been made for the appellant in a competition with Sir Hew's descendants. Such a precaution was not necessary. The value attached by the Court below to a 'declarator of contravention,' rests on a misapprehension of the statute of entails. It was enough that the summons declared John's right to succeed to the estate. That ousted Sir Hew. Besides, a declarator was the very mode pointed out by the entail 1688. But even if any doubt rested on that point, John (obeying the entail) served himself heir to the person who died last vest and seized in the lands, and thus fixed himself in the succession as rightful heir of taillie and provision; and the retour having been unchallenged for twenty years, cannot now be reduced. To contend that the decree of declarator and service were conditional and temporary titles, is founded on an assumption of a power which Sir Hew did not possess. He could not, by any bargain with John, traffic for that right to the Bargany estate. He might no doubt have kept it, and thus lost the North-Berwick estates. But he could not say to John, 'I, for 'myself and my descendants, shall relinquish the estate for 'twenty or fifty years, or until your death, or the death of your 'children.' The terms of the entail were made by the entailer, and could not be altered by any of the substitutes. If John had accepted, by such a bargain he would have incurred a forfeiture. Accordingly the retour is quite silent as to the reservation, and indeed every one of the steps taken to complete the investiture is inconsistent with the supposition of the renunciation being temporary. They rested on the assumption, that the exclusion of Sir Hew and his descendants was absolute and total. That was the President's intention; and to make it so was an obligation incumbent on Sir Hew, agreeable to his arrangement with the President. But whether or not, at least the appellant has no concern with the reservation. She is entitled to take after the last person vest and seized; and the repudiation containing the reservation forms no part of the titles to Bargany.

June 20. 1825.

3. But, independent of this view, the appellant is under the charter of 1742 next heir of entail to Bargany; John and Robert having failed, without heirs of their bodies. This point depends on the construction to be given to the clause, 'to the other heirs 'whatsoever of Joanna Hamilton.' The respondent maintains, that he has a new title, viz. the charter of 1742, rendered by prescription unchallengeable; and that by that charter he, as included in the list of other heirs whatsoever of Joanna Hamilton, comes in before the appellant. But if so, the deed of 1780, sought to be reduced, does no harm to her, as it merely calls those who independently of it are called before her. In one sense, the respondent is right. He is heir whatsoever to Joanna Hamilton, in preference to the appellant; but he is not heir whatsoever of the body of Joanna, under the charter 1742. This charter was certainly meant to carry into effect the entail of 1688. Its contents prove it. A party must be held to have intended to do that which he had power to do; and John had no power to change the series of heirs, or alter their place. Nothing could speak out this stronger than the recital in the assignation by Sir Hew to the assignee. Indeed, every deed to which reference has been made, shews that, by the term 'other heirs,' John Hamilton must have meant heirs of entail posterior to himself. Nor could the charter have been drawn otherwise. A superior has no power, in granting a charter, to alter the terms of the procuratory, which is its warrant. No doubt there may be a variation to a certain extent,—as in suiting the charter to existing circumstances, as taking 'in favorem' of the heir in existence, without narrating the previous failures; but as to the succeeding order or arrangement, the procuratory is the warrant that must be obeyed. To avoid this conclusion, the respondent represents the charter 1742, and sasine, as forming a special and original title in his favour, independent altogether of the entail 1688; and by virtue of being an original investiture, calls, under the words 'other heirs whatsoever,' &c. Sir Hew's descendants in preference to the appellant. But the charter cannot be considered as 'per se,' or as a solitary instrument. It is merely one of the titles under the entail of Bargany, the first feudalization of the original procuratory of resignation containing the taillie. It was not a deed executed by John in virtue of powers inherent in himself, but was executed under the will and authority of the entailer, who had predestined the series he chose to favour. Consequently, the terms 'other heir what-'soever,' signify the heir of provision of the standing destination; that is, the heir next entitled to take the succession by the relative

June 20. 1825.

taillie of 1688. But even if the charter were to be considered 'per se,' still the appellant is entitled to succeed in preference to Sir Hew. That charter demonstrates, that Sir Hew and his descendants were removed out of the entail of Bargany, and passed by as if dead; consequently, under that charter, the appellant, after John Hamilton, is the next heir whatsoever of taillie and provision of Joanna Hamilton. Indeed, using the expression 'other heir whatsoever,' settles the point. For John could only be considered an heir whatsoever, on the supposition that his eldest brother's descendants were as naturally dead. It is mere fallacy to regard the title 1742 to give the appellant a new right which she had not under the entail 1688. The right she enjoyed was the right of taking immediately after John, (on failure of his and Robert's descendants). But John has taken, and has died without issue; so has Robert; and nothing has been done under the subsequent titles to cut her out and substitute Sir Hew, the person who, if he could, in relation to the entail, have been regarded as in existence, must have excluded John. It is idle, therefore, for Sir Hew to repeat, that he is heir of the taillie 1688. Be it so; but is he heir to John Hamilton under that taillie? To hold that he is, would be a violation of every rule of legal construction. But, even were the steps taken by John Hamilton to vest in himself the right to the Bargany estate challengeable, the titles he did make up, and the possession he enjoyed, are made available to the appellant by the prescription of twenty years applicable to retours, and by the prescription, negative and positive, of forty years. Thus the character of lawful possessor of the estate of Bargany has been fixed on John, and the appellant is next in succession to him. This prescription was not interrupted by the deed of repudiation containing the reservation; for no right of reversion can be effectual if not expressly mentioned in the investitures which enter the public records. Besides, the respondent has lost the benefit of this provision by the operation of the negative prescription. Neither did the deed 1780 interrupt. That deed was a fraud upon the substitute heirs, and against the entail 1688. Besides, John Hamilton neither did nor could ascribe his possession to it. He ascribed his possession to the investiture 1742,—and, consistently with common sense, he could not do otherwise. But the conclusive answer is, that, by the deed 1780, John reasserted the validity of his actings in putting his brother aside, and taking himself the estate. It was the very reverse of a desertion of the right to exclude the elder brother. And how can Sir Hew avail himself of that deed? There,

he is called after John and his issue; but his character is heir after Lord James, yet that character he could not reassume without reducing the deed 1780. But the plea of prescription is not from necessity maintained by the appellant. Sir Hew surrendered his right to the Bargany estate, advisedly, and for a good consideration; and after having enjoyed the benefits of that transaction, it is impossible that he can reduce or recall it. He bartered away, abandoned, and renounced his jus crediti for an onerous equivalent. The defences reserved to the respondent by the judgment of the House of Lords are already answered.

Respondent.—After the House of Lords had ascertained the right of Sir Hew Dalrymple (son of Joanna) to the estate of Bargany, as the heir-female of John Lord Bargany, there was a jus quæsitum established, not only to him, but to his descendants to the last generation, as heirs of taillie, that the right of succession in the estate of Bargany could never pass to other heirs so long as there were in existence any descendants of the sons of Joanna, subject no doubt to a declaration of irritancy for contravention, but to that only. Such an irritancy the appellant endeavoured to have declared; but she was unsuccessful. It must therefore be assumed, not only in words, but in truth and reality, that there has been neither contravention incurred, nor irritancy declared. But the appellant, although she cannot but admit this, rests her principal arguments on the assumption of the reverse. Her claim is unfounded, 1. Because, according to the clear legal import of the destination in 1688, the respondent is unquestionably heir of that entail, and has the only right to succeed to and possess the estate of Bargany. He is the substitute heir, who did not exist in 1740,—who never repudiated the succession,—for whom no repudiation was or could be made,—and against whom no irritancy was ever declared or can now be declared. The appellant, therefore, must shew that the respondent has been excluded from the destination, before she can succeed in her suit. Because, 2. The respondent is heir called by the destination of the charter 1742. This is made clear by putting the question, whether the clause in that deed, 'quibus deficien. aliis hæredibus quibuscunque ex corpore dict. dominæ Joannæ Hamilton procreat. inter illam et dict. dominum Robertum Dalrymple absque divisione,' comprehend the whole other heirs possessing the character to which the description applies, besides John Hamilton and his issue; or whether they comprehend a part of

June 20. 1825.

those heirs and exclude others? If all are comprehended, then clearly the respondent has the right of succession preferably to the appellant. Now, resolving this question by the fixed technical meaning of the terms employed, the answer must be favourable to the respondent. So decidedly and peculiarly technical are the words, that, even if they occurred in a last will, they would not let in presumption of intention, but receive their strict legal meaning. Nothing could be imagined more dangerous to the security of the public records than to admit the principle, that, notwithstanding such a plain destination, its meaning could be entirely altered, the title destroyed, and the estate evicted, upon matter of doubtful construction,—of inferences from the previous history of the charter,—of conjecture from the situation of the parties concerned,—the deduction of former titles,—and of assumed probabilities, insusceptible of ever being with certainty proved. The rule plainly is, to lean to the construction which includes, and against the construction which excludes heirs who would otherwise be called; and particularly here, where it was plainly John Hamilton's duty, in taking the charter 1742, to depart as little as possible from the deed of entail 1688, the meaning attempted to be given to the word 'other' has no foundation. The word used includes all the other children of Sir Robert and Joanna, and all the descendants of those children; and in this list the respondent stands. The clause of destination, and the sasine which followed, afford no means of discovering what it was which brought the title into the person of John. The words are fixed and inflexible, and create a good and valid special and original title. But the appellant endeavours to obviate this difficulty by going out of the record, and attempting from other deeds to controul and misconstrue the destination of 1742; and concludes, that when John took that charter to himself and issue, and then to the 'other heirs,' &c. he could only mean by those 'other heirs,' those called posterior, under the general destination in the entail 1688, to the heirs-female of the body of Lord Bargany. But this is unfounded in point of fact, and is plainly irrelevant in discussing a technical deed, intelligible in itself, and void of confusion or obscurity. The basis of her plea rests on the assumption of that which, after the judgment in the House of Lords, she cannot say in words,—that Sir Hew had forfeited for himself and his descendants: She insinuates that they were as if naturally dead. But there was no forfeiture. Then observe the absurdity into which she falls. She now

says, that prescription has worked the charter 1742 into a good title in John, and protected him from the destination in the entail 1688. But if so, how can she controul the meaning of the charter by a reference to that very entail? If she has no prescription, she has no legal interest to reduce the deed 1780, because she would be excluded by the preferable title under 1688. If she has prescription, then she must confine herself to the charter 1742, and then the respondent is called preferably to her. How can she change the destination itself, by saying there was some ineptness or incompetency in making it in the terms it bears? There is plainly no impossibility in making an estate revert; and if the deed, which has been rendered unchallengeable by prescription, does order such reverting, how can a posterior substitute be listened to, pleading, that by previous titles the elder heir might have taken preferably to the party from whom the estates have now reverted. Besides, she cannot found on the investiture 1742, (which was John's own act), or John's own possession on it, as creating by prescription a title in her person to impeach the deed of John himself, and the investiture on that deed completed in his own person. A person can never prescribe against himself, nor against his own acts; because, since he has the possession, though there may be a title of prescription, it can never run in favour of another party against him; more particularly here, as all the rights of John under his investiture 1742 are carried to the respondent by the deed 1780. But there was not, in fact, possession on the investiture 1742 for forty years, for within that time John executed the deed 1780, which deed excludes the appellant, or rather lets in the respondent preferably. Sir Hew having assented to the service of John, is of no moment in a question with Sir Hew's descendants. If he had expressly repudiated for his descendants, they would not in any way have been affected. But he did not repudiate for them; on the contrary, he reserved for them. Let the appellant shape her arguments as she may, they rest on the postulate, that there was a declared contravention and forfeiture: without that, she knows she must be excluded by the heir called before her, namely, the respondent. But even if the intention of John Hamilton and of Sir Hew could relevantly enter into the present question, the facts unquestionably prove, that nothing could be more distant from their views than letting in the appellant previous to Sir Hew's descendants, or to Sir Hew himself, if John and Robert died without issue. John never contemplated irritating Sir Hew's right. If he had, he would have introduced a clause

June 20. 1825.

for that purpose into his declarator. What induced Sir Hew to renounce is of no importance. It would seem that truly he need not have done so. He had made up titles to the North-Berwick estates, without inserting in his service the clauses in the contract 1707 concerning the succession to the estate of Bargany. No doubt the President afterwards imposed new conditions, but in doing so he exceeded the powers reserved to him; and these new conditions never were recognized by Sir Hew, nor was the deed imposing them allowed to enter upon record. Indeed this document, whatever might have been its importance in the question as to contravention and irritancy, can have none in the present discussion. It cannot affect, one way or other, Sir Hew's descendants. The plea of onerosity of the transaction, is irrelevant in a question with Sir Hew's descendants, and has no foundation in fact. The deed of repudiation is the one which shews the intention of parties. To obviate the effect of the reservation it contains, the appellant alleges, that the respondent has lost the benefit of it by prescription; but the years had not run; nor, taking the true legal import of the deed 1742, has the appellant any title on which prescription can run in her favour against the reservation. On the other hand, the respondent is in a situation to fortify himself by prescription against the appellant. But even supposing that the destination of the deed 1742 could be so construed as, in point of form, to give the appellant a title of succession in preference to the respondent, she, in taking by such a title, would necessarily represent John Hamilton, the maker of that charter, and would, as his representative, be liable to fulfil the express condition of the deed of repudiation and decree of declarator, by restoring the estate to the respondent; and that obligation is not cut off by the negative prescription. And even holding that the appellant, taking by that title, were not bound to restore the estate to the respondent, he would be entitled to set aside that investiture, on the ground of its having been inept and null from the beginning, and in prejudice of the respondent's right as heir of the entail 1688. And this title in the respondent is not excluded or cut off by any prescription, neither by the positive nor by the vicennial. For the former, there was no ground in point of fact; nor were there any termini habiles on which to rest it. The latter is evidently quite inapplicable to the circumstances of the case; and indeed the appellant's legal argument on the point is altogether fallacious. Independent of

all these views, the claim of the appellant is directly inconsistent with the substantial provisions and the avowed design of every deed on which either party have founded. June 20. 1825.

The House of Lords ordered and adjudged, 'that the interlocutors complained of be affirmed, with the following correction, 'namely, in the interlocutor of 12th of February, signed 17th 'February 1824, by leaving out, after the word "according," the 'word "both;" and after the word "construction," the words '"and its true intention."'

LORD CHANCELLOR.—My Lords, There is a case which stands for judgment this morning, which I may truly represent to your Lordships as being one that I have never in the course of my professional life paid more anxious attention, or to any thing that was ever proposed to me for my judicial consideration, than I have paid with reference to this case; and it is a case which, as it seems to me, from the first till very nearly the last, has been very unfortunately conducted indeed. I mean the case of Fullarton *v.* Hamilton.

The judgment, my Lords, of the Court of Session, against which the appellant has entered the present appeal, is expressed in these terms:— 'The Lords having considered the remit from the House of Lords, the 'memorials for the parties on the whole cause, and the relative deeds 'and writings therein referred to, with the unanimous opinion of the 'consulted Judges.' That expression, 'the unanimous opinion of the 'consulted Judges,' is to be explained by informing your Lordships, that by the judgment of this House, when the cause was remitted to the Court of Session, by a condition in which the cause stood, they were required to take the judgment of all the other Judges upon certain points therein stated; and the judgment states, that 'with the 'unanimous opinion of the consulted Judges, find, that the defender, 'under the destination of the entail executed by John Lord Bargany 'in 1688, and the judgment of the House of Lords in 1739, is the 'nearest heir of taillie and provision now in existence entitled to 'the succession of the estate of Bargany, as the descendant of the 'body of the eldest heir-female of the body of the said John Lord 'Bargany.' And I presume that it is correct, that if the libel stood upon the deed of 1688, and the judgment of this House in the year 1739, there can be no doubt that that finding was right, as it stood upon the deed of 1688, and the judgment of the House of Lords in 1739; 'and that no contravention, irritancy, or forfeiture, ever was 'declared against him, his father, or grandfather, although an action 'for that purpose was brought, in which the defender's father and others 'were called as defenders, and in which decree of absolvitor was pro-'nounced by the House of Lords.' This, my Lords, is likewise a proposition in this judgment which I apprehend it is impossible to con-

June 20. 1825. tradict, after the formal judgment of the House of Lords; and so I see the fact is taken to be by all the Judges who were then consulted on this question. Then they find, 'that this being the case, no act whatever of Sir Hew Dalrymple, the defender's grandfather, could affect 'the interests of any of his descendants being heirs of taillie.' That, my Lords, is a pure matter of law. 'Find, that nothing following 'from the deed of repudiation of Sir Hew Dalrymple, the decreet of 'declarator, or retour of John Hamilton's general service, could in law 'deprive the defender of his right of succession under the entail.' That is also a pure matter of law. 'Find, that the defender, by the destination of the charter 1742, is, according both to its legal construction and its true intention, called to the succession of the estate after 'John Hamilton and the heirs whatsoever of his body.' With respect, my Lords, to this finding, in the proposition just stated, I apprehend it must be admitted, that if the defender is, according to the legal intention of the deed, and the legal construction of the charter, entitled to the succession of the estate after John Hamilton, the heirs of his body being now out of the question, I think it will be impossible for a lawyer to doubt, if it be so according to its legal construction, it must be so according to its true intention, according to the notion of an individual who may be considering merely what the parties mean; but it must be so according to its legal construction as indicative of the intention. But it is quite obvious that the Court meant here, that the defender was not only called to the succession according to the legal construction of the charter of resignation, but that he was called to it by what the parties had done with respect to that succession. And they then state, 'and that if it were now necessary, for the purpose of 'completing a title in his person, it would be in the power of the defender to obtain himself served heir of taillie and provision to John 'Hamilton as the person last infeft in the estate.' What is stated in this part of the judgment is probably, I may say certainly, intended to meet a difficulty represented to exist by some speeches made in this case when the last judgment was given in this House, and to which I shall take the liberty hereafter to refer your Lordships. Then they proceed, that they 'find, that even if the pursuer could constructively be 'held entitled to the benefit of the destination in the charter 1742, her 'right has not been secured by the positive, nor that of the defender 'to set aside the whole proceedings cut off by the negative prescription; and that the vicennial prescription of retours is not applicable 'to the case; and therefore that the pursuer can have no title or interest to challenge the deed executed by John Hamilton in 1780, by 'which the defender's grandfather, and the heirs whatsoever of his 'body, were directly called to the succession on the failure of John 'Hamilton, and the heirs whatsoever of his body; but find, that for 'defending himself in this action, it is not necessary that the defender 'should institute any process of reduction.' That, I apprehend, my Lords, is inserted in the present judgment to meet some words to be

found in the judgment of the House by which the case was remitted to the Court of Session. 'They therefore sustain the defences now 'pleaded for the defender against the action, assoilzie him from the 'whole conclusions, and decern.'

My Lords,—Your Lordships will find, that in this case a title was to be made originally under an entail, which was executed so long ago as the year 1688. It is not my intention, nor is it indeed necessary, to state to your Lordships what was the destination or succession which is thereby provided for; for I think it is unquestionable, that if subsequent instruments had not given rise to the question that has taken place in this cause, there could not be any doubt, according to the succession there pointed out, that Sir Hew Dalrymple would be the heir of taillie entitled to take the estate. It appears, however, that in this family, which seems to have had very large property, there is an estate called the North-Berwick estate; and by the entail of that estate it was provided, as far as human foresight and ingenuity could effectuate such a purpose, that the same persons who took the estate of Bargany could not take the estate of North-Berwick, if they did not comply with certain conditions:—if they did not comply with those terms, they should lose the estate of North-Berwick, and not enjoy both.

My Lords,—Passing over what took place in 1736, and all the deeds to which my Lord President referred, and adverting, as I will do only in a single word, to the judgment of this House of 1739, by which it was decided, 'that the estate of Bargany did 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 taillie and provision to the said James Lord Bargany;' it appears that one of the heirs of taillie, Sir Hew Dalrymple, demanded the Court to decree to him the most valuable estate, namely, the North-Berwick estate. Sir Hew Dalrymple executed a deed in the year 1740; which is known in the cause by the title of the deed of repudiation, bears date the 13th of August, is registered 11th of November 1740, and it recites the entail of the Bargany estate, and likewise recites the entail of the North-Berwick estate: it then proceeds to state,—'Sir Hew Dalrymple having duly considered the aforesaid 'taillie of the estate of North-Berwick, contained in the aforesaid con-'tract of marriage, and also the taillie of the estate of Bargany above-'mentioned, dated 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 Bargany should be separately taken and possessed by the heirs 'of the marriage betwixt the said Sir Robert Dalrymple and Mrs 'Joanna Hamilton, except' (which goes to the exception)—'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

June 20. 1825. ‘ to the estate of North-Berwick for myself and my descendants, in fa-
‘ vour of John Dalrymple, counsellor at law, my brother-german; and
‘ I being fully resolved to take and hold the estate of North-Berwick,
‘ 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 Bar-
‘ [redacted]y; therefore, and for the love and respect which I have and bear
‘ t[redacted]he said John Dalrymple, and in consideration of the settlements
‘ of t[redacted]estates of North-Berwick and Bargany above recited, wit ye
‘ me, [redacted]h and under the provisions after-mentioned, to have repudiated,
‘ likeas I, by these presents, do repudiate and refuse to accept of
‘ the succession of the said estate of Bargany, and that to and in
‘ favour of the said John Dalrymple, the next heir of taillie in the
‘ said estate.’ At the time that this deed was executed, the Bargany estates were in possession of the person who executes this deed, and (as an English lawyer would express himself) with remainder to John Dalrymple and heirs of his body; and (as the same English lawyer would say) remainder to Robert Dalrymple and the heirs of his body; and the repudiation is, that he repudiates and refuses to accept of the succession of the estate of Bargany, in favour of John Dalrymple the next heir of taillie; and he consents ‘ that the said
‘ John Dalrymple shall, in respect of my repudiation aforesaid, serve
‘ himself heir of taillie and provision to the said James Lord Bargany,
‘ and otherwise make up titles in his person to the 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.’ If I rightly recollect the facts of the case, Sir Hew Dalrymple himself uplifted the rents in the tenants’ hands which had fallen due. The operation of these words would certainly strike the mind of an English lawyer, if it were an English case, in this way,—that the estate having been limited to him and the heirs of his body, he meant to say, that he gave up the estate for the heirs of his body, and he intended that John Dalrymple should take an estate tail, excluding himself and the heirs of his body; and in case of John and the heirs of his body failing, that then Robert Dalrymple, his third brother, should take the estate to him and the heirs of his body; and if that were the operation of the deed, Mrs Fullarton must have been entitled to the estate. But this instrument goes on to provide in the manner following:—and it is fit here to observe, that there may be, as there certainly is, a very great difference between the operation of an English deed, where the limitation is to a person and the heirs of his body, and a Scotch deed, where the limitation is to a person and the heirs of his body.—Then follows this proviso: ‘ Providing always, that these presents
‘ shall noways prejudge 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; or in case any event shall exist, in which I or 'my descendants can take the said succession consistent with the fore-'said taillie of the estate of North-Berwick.' So that the meaning of this deed of repudiation was this—when I say the meaning of it was this, I should say the meaning which an illiterate person in Scotch law would put upon it would be this—I, Sir Hew Dalrymple, am entitled to this estate of Bargany as heir of taillie under the deed of 1688; that estate goes to the heirs of my family; I, Sir Hew Dalrymple, do, for certain reasons herein stated, repudiate and refuse to accept of the succession of the said estate of Bargany, in favour of my brother John Dalrymple, the next heir of taillie in the said estate of Bargany. Your Lordships will observe, that he renounces for himself,—whether he could renounce and repudiate for the heirs of his body, is another question; but here is no repudiation for the heirs of his body in express terms. But his meaning seems to have been this, probably thinking he could repudiate for the heirs of his body; he meant to say, that John and the heirs of his body shall take, and Robert and the heirs of his body shall take; and to reserve expressly to himself and the heirs of his own body an opportunity of taking after John and the heirs of his body, and after Robert and the heirs of his body had enjoyed the estate; and not only in the particular cases so pointed out, but also to resume his right by going to the heirs of his body, that they should likewise be able to resume his right upon any conditions on which they could resume that right consistently with the holding the estate of North-Berwick. What I mean to state is, that they were to have the power of resuming his right, as far as they could consistently with the terms of the entail; that is, if he Sir Hew Dalrymple could take those estates together. June 20. 1825.

But, my Lords, the question must also be looked at in another point of view, whether Sir Hew Dalrymple, having made this deed of renunciation, he could take the estate again consistently with the entail of the estate of 1688? whether, on the other hand, there was no such contravention, irritancy, or forfeiture of the Bargany estate, that he could never take that estate again? And if contravention, irritancy, or forfeiture has taken place, another question in this case is, whether that innovation is an alteration which can be pronounced to have taken place in other manner of character than that of a forfeiture?

My Lords,—With respect to the action that was brought, I own I cannot get the impression off my mind, which was made very early when I first became acquainted with this case—certainly that is a very long time ago,—shortly after I had the honour of sitting upon your Lordships' Woolsack. You were recommended to adopt the judgment you did, by my Lord Loughborough and my Lord Thurlow, two individuals now no more. The impression then made on my mind, which was an impression I expressed very strongly when we sent this case back to the Court of Session, was this,—that the intention of Sir Hew Dalrymple was, that the estate should be taken, under the effect of this

June 20. 1825.

limitation, by John Hamilton and the heirs of his body, the heirs of taillie, and then by Robert and his heirs of taillie, expressly reserving his right to take back after John and Robert; that if the deed had stopped there, it must have been clearly his intention,—his actual intention, not stating what the law would say was his intention,—that John and Robert, and their descendants, should take, before he and his descendants were to take again if any opportunity occurred, that which he so repudiated, and that he should be at liberty to resume it again. What I mean by that is only this, that he could not, (as it appeared to me, and I am still obstinate enough that it appears to me), according to this deed, if he repudiated, and the deed of resignation which was to take place, under the words 'other heirs of taillie'—(to be found in the instrument that I shall next observe upon)—mean the heirs of his body,—his descendants as the heirs of his body,—and under the effect of those words,—(what may be the legal effect of them is quite a different thing),—but that, under this instrument, the heirs of his body were to come in as heirs of taillie, and take the estate after a certain event. But I am sure it will be in the recollection of your Lordships, that when you sent this case back again to the Court of Session, that I never uttered one single syllable upon that which appeared to me to be the actual intention of the framer of this instrument, without carefully guarding that expression with respect to its right to any operation or no operation by stating, that it might be one thing what was the actual intention, and another thing what was the legal effect, of an instrument, which legal effect is in truth that which is to be taken by lawyers to be the declaration of the intention of the parties; because that which is its legal effect is that which must be presumed to have been intended; and if an individual can be ever so well satisfied of what was the personal intention, the legal intention is that which must give judicial effect to it.

My Lords,—One circumstance struck me extremely, which was this:—Suppose that John had died within a month after these deeds had been executed, and that Robert was still alive, it would be difficult to say, that, according to the actual intention, it gave a right to Hew to take before Robert; yet I cannot deny, upon such a circumstance happening, that is, John's death within a month after the execution without heirs, according to the legal effect of this deed of repudiation, and of others which followed consequently upon it, if Hew could resume, or his heirs if he were dead, it would be impossible, upon an impression which an individual might have as to the personal intention, to decide against that impression which arises from the legal effect of an instrument, and to which a Judge is obliged to submit.

My Lords,—This deed of repudiation was followed by instruments, which, in the minds of English lawyers, would have had considerable effect in this cause; for there is scarcely a word in them but what it is material to look into; so that it is quite impossible to overlook them, even if our attention had not been called to them, and if they had not

been alluded to by the Counsel at the Bar. There is the charter of resignation, dated the 26th July 1742, and the retour of John Hamilton's service; and it is unquestionable that in this instrument John Hamilton was tied up from doing any act contrary to the succession, which was pointed out in the most express terms. Then that is followed by a deed executed by John Hamilton, dated 21st June 1780, which is an instrument the particulars of which I do not mean to detail to your Lordships, as you are fully aware of them; for the deed of 1780, the charter of 1742, and various other instruments, formed the ground, as I understand it, of the cause when it came here some time ago. I allude now to what passed in 1801. In 1801, it was observed, that Mrs Fullarton was suing upon a notion that there had been a forfeiture. The Court of Session, upon that occasion, as they have done upon other occasions, proceeded thus; that is to say, they entered into the consideration first, not whether the pursuer had a title to pursue, but whether the defendant had a title to exclude; and when the case came before the House of Lords, Lord Thurlow, who seems to have been very much out of humour by that mode of proceeding, intimated an opinion, that though he did not mean to say the pursuer had a title to pursue, regard being had to the summons, and to what was laid before your Lordships, yet he thought it was a singular thing that the Court of Session should put the defendant to shew he had a title to exclude. I recollect that he made use of some rather harsh terms, though he meant it in very good humour; that by pursuing that course, perhaps ten years might be employed to ascertain whether the defendant had a title to exclude; and after coming to the end of ten years, it then would require ten years more to determine whether the pursuer had a right to pursue, and the judgment was in this form.—I am speaking from memory only, but the operation of it, I think, was this,—namely, that the cause should go back again, and the Court of Session should be directed to consider whether the pursuer had a title to pursue. My Lords, upon the Court of Session deciding that the pursuer had no title to pursue, it then came back to this House upon an appeal from that decision, and the judgment of this House affirmed what had been done in the Court of Session. Now, whether the judgment of this House affirming what was done in the Court of Session was right or wrong, or whether that judgment so affirmed is right or wrong, is matter of no consequence in the discussion of the present question; because I take it to be extremely clear, that your Lordships are bound by that judgment to the full effect of it; and if that judgment imports that Sir Hew Dalrymple was not guilty of a contravention of the entail, you not only have no judgment which you can call a forfeiture, but you have a judgment expressly finding that there is no forfeiture; and having a judgment finding there is no forfeiture, it then remains for Mrs Fullarton to put her claim upon any other ground, and bring a new action, and in that action making use of a summons differing in its allegations and con-

June 20. 1825.

clusions, stating another ground of action, and affirming that she was entitled on another ground of action. She accordingly did so, and the Court of Session were of opinion that she had no right. That led to another appeal to this House; and upon that appeal coming before your Lordships, you were pleased to give a judgment, which was in the year 1816—No, I am mistaken; it was then that the action was brought, and it stated the grounds of that action, which it is not necessary for me to repeat; for you will learn by the judgment in 1822, by which you remitted it back again, on what grounds you held that she was not concluded by what had passed in the former action. That judgment, my Lords, was stated in this way:—'The Lords Spiritual 'and Temporal, in Parliament assembled, find, 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 present appellant, then the wife 'of Colonel William Fullarton, and the said William Fullarton, were 'appellants, and Sir Hew Dalrymple Hamilton, Baronet, was res-'pondent, whereby it was declared and found, that the matters in the 'then appellants' summonses were not sufficient to sustain the conclu-'sions in those summonses, or any of them, and therefore this House 'assoilzied the defenders, appears to have proceeded only on the insuf-'ficiency of the matters 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 appellant, 'which is the subject of the petition of appeal now before the House, 'is founded on the decreet of declarator of the 25th of February 1741, 'the retour of service in pursuance of such decreet, finding John Ha-'milton, second son of Robert Dalrymple, procreate of the body of 'Joanna Hamilton, the lawful and nearest heir of taillie 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 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 descrip-'tion 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 Hamil-'ton, 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 seized of the lands in question, 'so held to him and the heirs of his body, according to the limitations 'in the said marriage-contract of the 19th June 1688, and the subse-'quent 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

June 20. 1825.

'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 of August 1742, and by virtue of the 'limitation therein contained, on failure of the said John Hamilton 'and the heirs of his body whatsoever, 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 person as, under the said marriage-contract of the '19th of June 1688, was entitled to succeed to the said John Hamil-'ton, 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 appellant, 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 only the right to be 'served heir of entail to the said John Hamilton, the last person 'seized of the said lands under the said marriage-contract of the 19th 'of June 1688, and according to the true construction of said charter 'of the 26th of July 1742, and other charters from the subjects-supe-'riors 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 'which is the subject of her present petition of appeal, without preju-'dice, however, to the right, if the respondent hath any, under the 'deed of repudiation of the 13th of August 1740.' My Lords, when I read to you these words, it recalls to my attention that these words, "without prejudice to the right, if the respondent hath any, under the 'deed of repudiation of 13th August 1740,' were suggested as words proper to stand as part of this judgment, in consequence of a pretty strong opinion, which I before alluded to, having been expressed; and not only in consequence of that opinion, but also the opinion of another Lord, who took occasion upon this subject to state, that the intention of that deed of repudiation was not an intention which would limit to the heirs of the body of Sir Hew Dalrymple, under the words aliis hæredibus quibuscunque, the estate in question,—I say the actual intention perhaps might have meant that, though, as I have before stated to your Lordships, I do not wish to look at actual intention, unless that actual intention be such an intention as the law would consider to be such. The next words are, 'or the right, if any, he now "hath to reduce the said decreet of the 25th of February 1741; or 'the retour of service in pursuance of such decreet; or the said char-'ter 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

June 20. 1825.

'of the 21st day of June 1780; or the infeftment of the 24th and 25th 'of October 1780; or under the other charters from subjects-superiors 'libelled on in this case.' With respect to these words which I have last read, 'without prejudice to the right, if the respondent hath any,' &c. they are words that were used, in order that it might not be overlooked that this House was not then instructing upon a question, whether there was a right to reduce, or whether there was a necessity to reduce; nor with reference to the question, whether an action of any kind whatever was necessary; but the whole was to be left open to the Court of Session. And I feel myself bound to take notice of that, for I find, in some parts of the printed papers, that it is stated as if it were supposed that this House gave a judgment that there was no right, whereas it was meant that it should be left to the consideration of the Court below.

My Lords,—The House was pleased to order, that the cause should be remitted back to the Court of Session in Scotland, and that the Judges of the Division to which this cause was remitted, should require the opinions of the Judges of the other Division of the Court in the matters or questions in this cause; and it was further ordered and adjudged, that the cross appeal should be dismissed this House; and the same was accordingly dismissed with costs.

My Lords,—It cannot surprise any body, that when this cause went back to the Court of Session, that, in the first place, as the purpose of the original suit was to have a declaration of contravention and forfeiture, they thought it necessary there should be a suggestion as to the claim made upon the action, and that the case, when it was so put, being put upon alternative grounds, (if I may so express myself), and as those who had originally judged the case were of opinion there was no contravention—nothing upon which there could be a declarator of forfeiture,—and would in all probability think that there was no other ground upon which the pursuer could succeed, they were entitled to look at the case as a case in which they were to construe the several instruments according to the meaning and intent which the law put upon them; but (what is more material) that whether the judgment was right or wrong in the first instance, this was a case in which there could be no such contravention and forfeiture. Then the case came to be considered, what was the actual intention of the parties under the deed of repudiation, and what was the actual intention of the parties under the charter of resignation. The first question was, what was the actual intention of the parties; and the next question was, how far that actual intention, if that intention is to be taken to be in favour of Mrs Fullarton, had been carried into effect, by instruments binding Sir Hew Dalrymple and the descendants of his body, in such a manner as to enable him to meet the grounds laid in this action.

My Lords,—I before stated, that this is a difficult thing to decide, and so difficult that I have not, I am free to confess, powers of mind

sufficient fully to get over it with reference to what was the actual intention of Sir Hew Dalrymple and of John Hamilton, to look at this as a case in which Sir Hew Dalrymple, or the heirs of his body, were to reassume the possession of the estate in any case whatever, except in that case in which alone he could hold it consistently with the covenants and provisos contained in the entail of the other estate; and according to the judgment which I will now read to your Lordships, you must take it to be the intention, that if he had thought proper the next day to say, that I will not take the estate of North-Berwick, he had nothing to bind himself—nothing to bind those for whom he had not repudiated in form, but whose right he had deserted; but if the law is, as it has been declared to be, whatever speculations your Lordships may have as individuals as to the probable or the true intent of these instruments, you must lay those speculations aside, and give effect only to the legal construction of the instruments.

When this came again before the Court of Session, they took all the points into consideration, requiring at the same time the judgment of the Judges of the other Division. The Judges who were so consulted, accordingly gave their opinions. It does not seem altogether reasonable to pass over the effect of the former suit, without considering it to this extent, namely, what in all probability was the opinion which was then entertained upon the case. Laying that aside, however, for a moment, I will advert to the opinion given by thirteen out of fifteen of the Judges, which was to the following effect, namely—They say, that they 'hold it to be a fixed and unalterable point, that 'neither by the transactions assumed as the grounds of the charter '1742, nor by that charter, was there a contravention committed 'by Sir Hew Dalrymple against the entail 1688. Secondly, As Sir 'Hew did not forfeit, he and his descendants still continued the 'nearest and true heirs under the entail 1688, though by the charter '1742 they lay under a temporary and defeasible exclusion.' They then say, 'The deed of repudiation by Sir Hew did not deprive him 'or his descendants of their character as heirs of entail.' They then go on to say, '.In point of fact, Sir Hew did repudiate only for himself 'personally, and not for his descendants, the right of whom, under 'the entail 1688, was expressly reserved.' Then there follows: 'Sir 'Hew's repudiation for himself personally was further qualified by a 'reservation of his own right under the entail 1688, and of his power 'to assert it whenever he thought proper.' Then they say, that in point of law 'Sir Hew could not renounce for his descendants by the 'deed of repudiation;' and then they give their reasons for that; and they conclude upon that, that 'the present Sir Hew, who was not 'included in, nor affected by the deed of repudiation by his grand-'father, remains the true heir under the taillie 1688.' This proceeds upon an opinion, that Sir Hew could not renounce for himself and his descendants, by the deed of repudiation, by the law of Scotland; but if the renunciation is not a forfeiture, then arises the question upon

June 20. 1825.

which the opinion has been given, which seems to be right, that if the repudiation is not a forfeiture to the descendants; then the question would be, whether the descendants have not the liberty of claiming, notwithstanding one heir of taillie may have repudiated for himself. They then likewise state, that they 'are clearly of opi-'nion that Sir Hew is the true heir under the charter 1742;' and they put it both upon the grammatical construction, and upon the technical construction of that instrument. My Lords, I should detain you a long time were I to comment upon the grammatical construction; but it is another thing, whether it is not so upon the technical meaning. They say, 'But even in the case of ambiguity in 'the expression of an investiture upon an entail, we hold it to be 'quite clear, that a deviation from an original entail is never to be 'presumed.' Then it is said, it is argued by the pursuer, that succession cannot revert or ascend;—but a question may arise, whether it might admit of a construction without saying that succession cannot revert or ascend—I mean in those cases in which it has been decided, that an heir of entail takes an estate by reason of his being heir of entail when he comes into existence; and therefore the former must be excluded from the estate, and has no right to retain possession of the estate at all from him who takes in the order of succession after him; and then that person contends in strict law, that he neither has, nor could, in this way, operate a forfeiture—no declaration of forfeiture having been made—that he neither had, or could have forfeited for his descendants. Then, to be sure, the descendants who had come into existence would be in a situation very similar to that in which parties are placed in cases to which I am alluding,—that they are not bound by Sir Hew's act, because they were not in the world to consent to such act. Then they state in their opinion what is the situation of those heirs whose rights have been for a time usurped. Then, my Lords, they go on to argue upon the actual intention, according to their construction of the instrument. They then farther state, that there are but two ways by which an heir of entail can be deprived of his right to succeed to the entailed estate: They say, 'An heir of entail cannot be deprived of his right to succeed to the 'entailed estate, except in one of two ways, either by an irritancy and 'forfeiture declared against him, or against his ancestor, and directed 'against that ancestor and his descendants; or, secondly, by prescrip-'tion, as a foundation for which the law requires that the estate should 'be possessed for forty years continually, and without interruption, 'under titles and an investiture by which the heir is excluded 'from the succession. In this way, and in no other, can prescription 'operate against the heir.' They then proceed to state their opinion with respect to the doctrine of prescription. Then they go on to dispute the validity of the charter 1742; and they state it as their clear opinion, that it was not necessary for Sir Hew to bring an action to reduce the deed of 1742; and they are 'very clearly of

June 20. 1825.

'‘ opinion, that no difficulty arises from the retour of John Hamilton,
‘ as being fortified by the vicennial prescription under the Act 1617;'
but with respect to the vicennial prescription, they make a great variety of observations as the ground for the opinion which they have given as to the effect of it. Then they state, that the ‘ disposition
‘ of 1780 is a good title if Mrs Fullarton cannot set it aside, which she
‘ cannot; because we hold it to be clear, that Sir Hew can reduce the
‘ charter 1742, which is Mrs Fullarton's only title, if it shall be held
‘ to exclude him, and revert to the original entail; of consequence she
‘ has no interest to reduce the deed 1780, even if she were called in
‘ preference to Sir Hew by the charter 1742; and we are clearly of
‘ opinion, that Sir Hew was called before her by that charter.
‘ Secondly, He may be served heir of provision under the deed 1742.
‘ We have no doubt, as already mentioned, that it is competent to the
‘ true heir to make use of the feudal title erroneously made up by an
‘ usurper, as a convenient mode of making up his own title; or, thirdly,
‘ Reducing that investiture, and disregarding it altogether, he may be
‘ served heir to James Lord Bargany under the entail 1688.' This opinion, my Lords, is signed by the Lord President, by Lord Hermand, by Lord Succoth, by Lord Balgray, by Lord Gillies, by Lord Alloway, Lord Cringletie, Lord Meadowbank, Lord M'Kenzie, and by Lord Eldin. My Lord Pitmilly, and my Lord Glenlee, and my Lord Justice-Clerk, three of the Judges in the other Court, concur in the opinion which has been given by all the other Judges who did not form constituent members of that Court. On the other hand, there are two opinions, exceedingly powerful, given in opposition by Lord Robertson and Lord Craigie; and no man can deny to them the character of great ability. The question for your Lordships now to determine is, whether you will adopt the opinion of the two, or adopt the opinion of the thirteen. That question is not, whether, because there are thirteen one way, you are to adopt that opinion, and not the opinion of the other two; but whether, upon the whole, your Lordships are of opinion that the judgment of the thirteen is, as far as we can understand the Scotch law, which we ought to be very attentive to, the better opinion. My Lords, I have not the slightest difficulty upon the subject in reading this instrument. I do think that there has been no forfeiture incurred by what has been done, though various things may have been done which have been prohibited by this deed; yet it is quite a different thing, whether a party who is an heir of entail under a Scotch deed, if he does that which he ought not to do, whether it can be effectually said that a prohibition against his doing that act can, in point of law, be attended with all the consequences which a party complaining of that act thinks is the legal consequence;—for instance, there may be a forfeiture for himself and for the heirs of his body; but the question is, whether those persons who are innocent parties, the heirs of taillie, can be excluded from a title, with reference to which they have done nothing to exclude themselves, unless there

June 20. 1825.

be not only an act, but a judgment of law to that effect. Now, whether the first decision of this House was right or wrong, is a matter on which I shall not stay one moment to discuss; but I take the judgment to have declared, that Sir Hew's act operated no forfeiture whatever. Then comes the question, whether, if Sir Hew's act operated a forfeiture, those who were the heirs of entail are or are not the persons who are entitled to the estate. Upon the best consideration I can give to this subject, and with respect to Scotch proceedings, I hold it to be my duty conscientiously to declare my own opinion, whatever that opinion may be. In giving that opinion, I know that I have sometimes had the misfortune to differ from the Court below, as I happened to do in the case of Agnew, and by which, perhaps, I have not increased my popularity. I know that my learned friend who sits upon the Woolsack will bear me out when I say—though I do not presume to suppose it was the best opinion that could be given,—that it was the best I could form under the circumstances at the time: right or wrong, however, it is a judgment that must be considered as binding. My Lords, the opinions of Lord Robertson and Lord Craigie, are opinions entitled to much consideration, and founded upon reasons which I would not say that I could fully and satisfactorily answer. But the duty I have to perform is to contrast the judgment of the many against the few, and not to adopt the judgment because it happens to be the judgment of the many, but to determine upon the view which appears to me best to speak the judgment of the Scotch law; in which, however, I may be mistaken. But in this case I am extremely happy to say that the result is, that in my humble judgment the opinion of the many is the better opinion of the two. I cannot but say, from the very unfortunate mode in which this case has been conducted from its commencement almost to its conclusion, it has received a degree of prejudice by not having been set agoing right at first; but with that impression I cannot avoid saying, that I ought to advise your Lordships to refer to it in pronouncing your judgment, though by so doing you are breaking in upon a rule which your Lordships know is a rule of this House, and which I mention in consequence of prejudices arising every day with reference to its judicial proceedings, namely, that it is not usual for your Lordships to give your reasons for your judgment.

There is one observation, my Lords, I forgot to make with respect to the judgment pronounced by the Court of Session. According as it now stands, they 'find, that the defender, by the destination of the 'charter 1742, is, according to its legal construction and its true intention, called to the succession of the estate after John Hamilton and 'the heirs whatsoever of his body.' If, according to the legal construction, he is called to the succession of the estate after John Hamilton and the heirs whatsoever of his body, that is quite enough. It rather looks as if they had been inserted for no other reason than because the true intention had been questioned. The words therefore are not

necessary; and I shall move your Lordships, that the word 'both,' and the words 'its true intention,' should be omitted in the affirmation of the judgment. I state that, because I profess that my concurrence in this judgment goes upon this ground, that whatever may be my individual opinion with respect to the real intention of these parties, I do not think that that real intention of these parties ought, under the circumstances of this case, to determine who should be called to the succession of the estate. But if that which is here stated be the legal construction of these instruments, the defender must have the estate; and that amounts to neither more or less than this, that Sir Hew Dalrymple and John Hamilton set about doing a thing which they have not effectually done, and which not having effectually done, he follows that out by other proceedings to render it so. But whatever might have been their intention, the legal construction of the instrument, though perhaps it may be at variance with its true intention, must, in my opinion, regulate your Lordships' decision. Therefore I humbly advise your Lordships to affirm the judgment which has been pronounced by the Court below, with those slight alterations which I have pointed out.

June 20. 1825.

Appellant's Authorities.—2. Stair, 5. 25.; 2. Ersk. 3. 51.; Creditors of Brighton, June 30. 1739, (10,247.); Monro, May 19. 1812, (F. C.); 1617, c. 13.; 2. Stair, 12. 15.; 2. Bank. 12. 1., and 3. 55.; 3. Ersk. 7. 12. 74.; 2. Stair, 12. 15. 17. 25.; 2. Bank. 12. 1, 2.; 3. Ersk. 7. 4. 6., and 8. 15.; 3. Stair, 5. 12.; 3. Ersk. 8. 47.; Earl of Dalhousie, Jan. 13. 1712, (14,014.); M'Lauchlan, Jan. 12. 1757, (2312).

Respondent's Authorities.—3. Stair, 5. 50.; 3. Ersk. 8. 32.; Lord Mountstewart, Nov. 13. 1707, (14,903.); M'Kinnon, June 16. 1756, (6566.); M'Kenzie's Observ. Act 1617, c. 13.; 3. Ersk. 7. 19.; Lamb, Jan. 11. 1673, (10,984.); Cases in Dict. vol. vii. 397. *v.* Succession; Smith, June 30. 1752, (10,803.); Denham, Nov. 24. 1802, (11,220.); Yuille, March 4. 1813, (F. C.); 2. Craig, 15, 16.; 3. Ersk. 8. 48.; Earl of Selkirk, Jan. 8. 1740; reversed in House of Lords, (14,941.); Hay, June 20. 1771, &c.; affirmed, (15,425.); Hay, April 6. 1773; affirmed, (F. C.); Ball, March 6. 1806, (F. C.); Richardson, July 5. 1821, (1. Shaw and Bal. No. 131.)

EDGE—J. CHALMER,—Solicitors.

Honourable MARIANNE MACKAY FULLARTON, Appellant. No. 43.
SIR HEW DALRYMPLE HAMILTON, Bart., Respondent.

Inhibition.—The Court of Session having found an inhibition on a supplementary action nimious and oppressive, recalled it, and ordered it to be scored in the record, and marked on the margin as done by their authority;—The House of Lords affirmed the judgment in hoc statu, so far as it recalled the inhibition; but reversed it, so far as it found the inhibition nimious and oppressive, and ordered it to be scored on the record and marked on the margin.