[14*th July* 1837.]

JAMES JOSEPH HOPE VERE, Appellant.—*Lord Advocate (Murray)—Sir W. Follett—Dr. Lushington.*

The Right Honourable CHARLES HOPE and others, Respondents.—*Tinney—Stuart.*

Entail—Clause.—A deed of entail was executed in 1708, and an heir of entail expede a charter of resignation and infeftment in 1733, referring to the entail, as if the charter were intended to be in conformity therewith, but which in fact altered the destination; and in an action raised in 1822, it was decided that the charter was fortified by prescription, and was not controlled by the reference to the entail: Held in another action to try whether the fetters of the entail were effectually laid on the heirs of the investiture under the charter, (affirming the judgment of the Court of Session,) that, although the charter was in various respects inaccurately framed, it was, on the whole, effectual to oblige the heirs succeeding in virtue of it to hold the estate under the conditions of entail particularly recited, and to prevent them from altering the order of succession laid down in the dispositive clause, and from holding the estate, in other respects, free from the fetters against selling or contracting debts.

1ST DIVISION.

Ld. Corehouse.

ON the 31st of July 1703 the lands and barony of Craigiehall were entailed by Sophia Marchioness of Annandale to herself and her husband in life-rent, and to her second son and a series of heirs in fee. The destination, after calling the sons of the Marchioness

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and all their descendants, proceeded to call her daughter Lady Henrietta Countess of Hopetoun, in the following terms:—" Whilks failzieing, to Lady Henrietta Johnston " Countess of Hopetoun, our daughter, and the second " son to be procreated betwixt her and Charles Earle " of Hopetoun her husband, and the descendants of " the body of the said second son, without division." The destination followed in favour of various other heirs, and was fenced with the usual prohibitory, irritant, and resolutive clauses. It was expressly declared that every contravener should amit, lose, and tyne all right to the estate, not only for himself, but for the descendants of his body. The entail was recorded in the register of tailzies on the 14th of February 1727.

The succession having opened to the Countess, she made up titles by charter of resignation and infeftment as heiress of tailzie and provision, dated 8th September and 27th October 1727.

On the 25th of July 1733 a contract of marriage was entered into between her second son the Honourable Charles Hope and Miss Katharine Weir, heiress of the estate of Blackwood, to which the Earl and Countess were contending parties; and by which they propelled the estate of Craigiehall to Charles Hope in the following terms:—" They both, with one mutual advice " and consent, have given, granted, and disponed, and " by these presents, with and under the burdens, reser- " vations, powers, faculties, conditions, declarations, " provisions, and clauses irritant underwritten, alle- " narly and no otherways, give, grant, and dispone, " heritably and irredeemably, to and in favours of the " said Mr. Charles Hope, and the heirs male lawfully " to be procreate betwixt him, and the said Mrs. Katha-

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" rine Weir of this intended marriage; whom failing, " to the heirs male to be procreate of the body of the " said Mr. Charles Hope of any subsequent marriage; " whom failing, to the heirs female to be procreate " betwixt him and the said Mrs. Katharine Weir of " this intended marriage; whom failing, to the heirs " female to be procreate of the body of the said " Mr. Charles Hope of any other subsequent marriage, " without division; whom failing, to the next immediate " younger son successive to be procreate of the mar- " riage betwixt the said Henrietta Countess of Hope- " toun and the said Charles Earl of Hopetoun, and the " descendants of the body of the said younger son suc- " cessive, also without division; whom failing, to the " heirs male of the body of the said Henrietta Countess " of Hopetoun of any other lawful marriage, and the " descendants of their body, without division; whom " all failing, to the nearest and lawful heirs and assig- " nees whatsomever of the deceased Lord William " Johnston, second lawful son procreate betwixt the " deceased William Marquis of Annandale and the also " deceased Sophia Marchioness of Annandale his wife, " and brother german to the said Henrietta Countess " of Hopetoun, in fee; conform to the destination of " succession contained in the bond of tailzie of the " estate of Craigiehall made by the said deceased " Sophia Marchioness of Annandale, with consent of " the said (deceased) William Marquis of Annandale " her husband, dated the 31st day of July 1708 years, " registrate in the register of tailzies upon the " and in the books of council and session upon " and no otherways." In the obligation to infeft the Countess becomes bound " duly and lawfully to infeft

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" and seise the said Mr. Charles Hope and his heirs of " tailzie and provision above expressed, with and under " the burdens, reservations, powers, faculties, conditions, " declarations, provisions, and clauses irritant under-" written." The destination was again repeated under all these conditions, provisions, &c.; and it was specially provided to be inserted in all the subsequent titles, and also that the lands should be burdened with the debts of the Marchioness of Annandale. It was likewise " specially provided and declared, and appointed to be " provided and declared, by the charters and infeftments " to follow hereupon, that the said Mr. Charles Hope " and the heirs of his body, and the haill other heirs " and members of tailzie above mentioned, and their " successors, who shall happen to succeed by virtue " hereof to the said lands, barony, and others foresaid, " shall be holden and obliged, immediately upon their " succession thereto, to quarter the arms of Fairholm " with their own arms in all time coming, and to bear, " wear, and use the coat of arms of Fairholm quartered " with their own coat of arms in all time thereafter." This obligation was fenced with irritant and resolutive clauses, and it was declared that the contravener should forfeit for himself and the descendants of his body. The prohibition against altering the order of succession was thus expressed: " And also providing and declaring, " like as it is hereby expressly provided and declared, " and appointed to be insert in and provided and de-" clared by the instruments of resignation, charters, and " infeftments appointed to follow hereupon, that it shall " not be leisum nor lawful to the said Mr. Charles Hope, " nor any of the heirs or members of tailzie above " mentioned, to alter, innovate, or change the foresaid

" tailzie and order of succession before mentioned, or " to do any other deeds, directly or indirectly, in any " sort, whereby the same may be anywise altered, inno- " vate, or changed." This prohibition was also duly fenced with clauses irritant and resolutive, the contravener forfeiting for himself and the descendants of his body. There were likewise clauses prohibitory, irritant, and resolutive against selling, or contracting debt, expressed, mutatis mutandis, in the same way with those against altering the order of succession, the provision being always "hereby" specially made, so as to apply all these prohibitions, conditions, limitations, and fetters to the grant to the heirs of the destination of the marriage contract and tailzie.

The estate of Blackwood was destined to the same series of heirs, and the contract contained a variety of other provisions.

Charles Hope made up titles by charter of resignation and infeftment, dated 26th July and 18th August 1733, containing all the clauses in the contract of marriage, and referring also to the original entail.

The material parts of this charter were as follow: —

" Quæ quidem terræ et baronia de Craigiehall, compre- " henden. ut prædicitur, cum decimis earund. inclusis, " et lie cruive et salmonum piscatione super aquam de " Almond, perprius hæreditarie pertinuerunt ad dict. " Henrettam Comitissam de Hoptoun tanquam hære- " dem talliæ et provisionis, servit. et retornat. dict. " quond. Domino Gulielmo Johnston, virtute dict. obli- " gationis talliæ dict. terrarum et baroniæ de Craigie- " hall, per dict. quond. Sophiam Marchionissam de " Annandale, cum consensu dict. quond. Gulielmi Mar- " chionis de Annandale ejus mariti, et virtute cartæ et

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" infeofamenti sub sigillo postea specificat. super dict.
" obligationem talliæ in favorem dict. Comitissæ de
" Hoptoun sequen.; et per dict. Comitissam de Hop-
" toun, ejusque legitimos procuratores ejus nomine
" specialiter constitut., virtute procuratoriæ resigna-
" tionis specificat. et content. in contractu matrimoniali
" facto et inito inter dict. Magistrum Carolum Hope,
" cum consensu dict. Comitis et Comitissæ de Hop-
" toun, ex una parte; et dict. Magistram Katharinam
" Weir, cum consensu curatorum inibi nominat., ex
" altera parte, ad hunc effectum. De data
" die mensis Julii, hoc præsenti anno 1733, debite et
" legitime resignat. fuere in manibus dict. Matthæi
" Lant, Armigeri, Capitalis Baronis, et reliquorum
" Dominorum Baronum dict. nostri Scaccarii pro tem-
" pore potestatem nostram haben. recipiendi resigna-
" tiones et desuper nova infeofamenta concedendi,
" prout in manibus nostris immediate legitimi supe-
" rioris earund.,—in favorem, proque novis infeofamen-
" tis earun. facien., et conceden. dict. Magistro Carolo
" Hope et hæredibus masculis legitime procrean. inter
" eum et dict. Magistram Katharinam Weir; quibus
" deficien., reliquis hæredibus talliæ supramentionat.,
" eis substitutis per prædict. originalem obligationem
" talliæ modo supra express.; idque omnimodo cum
" et sub onere, reservatione, potestate, et facultate, con-
" ditionibus, declarationibus, provisionibus, et clausulis
" irritantiis suprascript., specificat. in prædict. originali
" obligatione talliæ dict. baroniæ de Craigiehall per
" dict. quon. Marchionissam de Annandale fact., et
" non aliter, vizt.; Providen. et declaran. omnimodo,
" sicuti per dict. obligationem originalem talliæ spe-
" cialiter providetur et declaratur, et destinatur inseri

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" et provideri et declarari per cartas et infeofamenta
" desuper sequen., quod dict. terræ, baronia, aliaque
" prædict. cum pertinen., et carta et infeofamenta de-
" super sequen., affectabuntur et onerabuntur cum
" omnibus justis et veris onerosis debitis et summis
" monetæ quæ per dict. Sophiam Marchionissam de
" Annandale, cum consensu dict. Gulielmi Marchionis
" de Annandale et Hartfel ejus mariti, contracta erunt,
" et quæ restan. non soluta erunt tempore ejus deces-
" sus. Nec non providen. et declaran., sicuti per dict.
" originalem obligationem talliæ expresse providetur,
" et destinatur declarari per cartam et infeofamenta
" desuper sequen., quod licitum et legitimum erit dict.
" Sophiæ Marchionissæ de Annandale, cum avisamento
" et consensu dict. Gulielmi Marchionis de Annandale,
" seu dict. Sophiæ Marchionissæ de Annandale per
" seipsam, in casu decessus dict. Gulielmi Marchionis de
" Annandale ante illam, dict. terras, baroniam, aliaque
" præscript., in toto vel in parte, hæreditarie et irre-
" demabiliter, vendere et disponere, et prædict. talliam
" et ordinem successionis, ut dict. Sophiæ Marchionissæ
" de Annandale idoneum visum fuerit, per scripturam
" vel instrumentum sub manu ejus mutare et inno-
" vare; sub hac provisione solummodo, quod dict.
" potestas et facultas vendendi et disponendi, mutandi
" seu innovandi, solummodo exerceri potuisset per
" illos conjunctim, vel per dict. Sophiam Marchionis-
" sam de Annandale in casu decessus dict. Marchionis
" ante illam, si contigisset quod dict. Dominus Guliel-
" mus Johnston non habebit descenden. ex ejus corpore
" (secundum ordinem mentionat. in dict. originali obli-
" gatione talliæ dict. terrarum et baroniæ de Craigiehall,
" et infeofamento desuper sequen.) et ullo alios filios

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" juniores ex corpore dict. Sophiæ Marchionissæ de " Annandale procrean. et descenden. ex eorum cor- " poribus modo inibi mentionat., et quod Jacobus " Dominus Johnston, postea Marchio de Annandale " defunctus, et descenden. ex ejus corpore, etiam ad " successionem provis. modo inibi express., deficere " contigerit; ita quod dict. Sophia Marchionissa de " Annandale,—ejus facultas disponendi, mutandi, et " innovandi, solummodo locum attineret, si modo suc- " cessionem ad alia membra talliæ devolvere contigisset " quam ad dict. Dominum Gulielmum Johnston, et " descenden. ex ejus corpore, et alios filios juniores ex " corpore dict. Sophiæ Marchionissæ de Annandale " procrean. et descenden. ex eorum corporibus, et de- " scenden. ex corpore dict. Jacobi Domini Johnston, " secundum ordinem successionis inibi specificat.; abs- " que præjudicio verumtamen dict. Sophiæ Marchio- " nissæ de Annandale debita contrahere, et onerare dict. " terras, baroniam, aliaque suprascript., cum eisdem, " etiam in persona dict. Domini Gulielmi Johnston, et " omnium aliorum membrorum talliæ modo inibi ex- " press. Necnon providen. et declaran., sicuti per " dict. originalem talliam specialiter providetur et de- " claratur, et destinatur provideri et declarari per cartas " et infeofamenta desuper sequen., quod dict. Magister " Carolus Hope et hæredes ex ejus corpore, et omnes " alii hæredes et membra talliæ supramentionat., eorum- " que successores, qui succedere contigerint virtute " dict. talliæ ad dict. terras, baroniam, aliaque præ- " dict., tenebuntur et obligabuntur, immediate super " eorum successionem ad easdem, insignia armoria de " Fairholm cum eorum armis quadrare, lie quarter, " omni tempore futuro, et insignia armoria de Fairholm

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" cum eorum armis quadrata portare, gerere, et uti
" omni tempore deinceps; et si ulli dict. hæredum et
" membrorum talliæ supramentionat., quos succedere
" contigerit ad dict. terras et statum de Craigiehall,
" aliaque prædict., in eodem defecerint vel in contra-
" rium fecerint, dict. hæres et membrum talliæ ita
" contraveniens, et descenden. ex corpore contravenien-
" tis, desuper ipso facto amittent et perdent eorum jus
" ad terras, baroniam, aliaque prædict.; et proximus
" hæres et membrum talliæ qui succederet ad easdem,
" si contraveniens et descenden. ex corpore contrave-
" nientis naturaliter essent defuncti, succedet et jus
" habebit ad dict. terras, baroniam, aliaque prædict.,
" similiter et eodem modo ac si contraveniens et de-
" scenden. ex corpore contravenientis naturaliter essent
" defuncti; et hoc, vel per deservitionem hæredis per-
" sonæ qui obiit ultimo infeodat. et sasit. immediate
" ante contravenientem, seu per actionem declaratoriæ,
" vel adjudicationem, aut ullo alio modo consisten.
" legibus et praxi hujus regni, sine subjectione ullis
" debitis seu summis monetæ contract. seu per contra-
" venientem debit., vel ullis factis aut actis contravenien-
" tis: Ad quam irritantiam quadrandi, lie quartering,
" insignia armoria de Fairholm cum eorum armis dict.
" Magr. Carolus Hope et hæredes ex ejus corpore, et
" omnes alii hæredes et membra talliæ ad dict. terras et
" statum de Craigiehall antedict. succeden., astricti et
" obnoxii erunt omni tempore futuro sub irritantia
" supramentionat. Ac etiam providen. et declaran.,
" sicuti per dict. talliam specialiter providetur et decla-
" ratur, et destinatur provideri et declarari per cartas et
" infeofamenta desuper sequen., quod si dict. Mr. Ca-
" rolus Hope, vel hæredes masculi ex ejus corpore,

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" seu ulli alii membrorum talliæ supramentionat., succedere contigerit et jus habere ad statum et dignitatem " de Annandale, quod tunc et in eo casu eorum jus " et titulum ad dict. terras et statum de Craigiehall, " aliaque antedict., desuper devolvent, accrescent, cadent, et pertinebunt ad proximum membrum talliæ " supramentionat., si ulli tunc existent, vel per deservitionem, seu actionem declaratoriæ, aut adjudicationem, " aut ullo alio modo competen. per legem et praxem " hujus regni. Nec non providen. et declaran., sicuti " per dict. originalem obligationem talliæ specialiter " providetur et declaratur, et destinatur inseri, provideri, et declarari per cartas et infeofamenta desuper " sequen., quod si modo ulli dict. hæredum vel membrorum talliæ supramentionat. descenden. ex corpore " dict. Comitissæ de Hoptoun, et succeden. virtute " dict. originalis talliæ ad dict. terras et statum de " Craigiehall, etiam succedere contigerint et jus habere " ad statum de Hoptoun, et quod ulla substituta membra tunc existent,—tunc et in eo casu eorum jus et " titulum ad dict. terras et baroniam de Craigiehall, " aliaque prædict., desuper ipso facto devolvent, accrescent, cadent, et pertinebunt ad proximum membrum talliæ qui succederet ad easdem si dict. hæres " et membrum talliæ ita succeden. ad statum de Hoptoun naturaliter esset defunctus; et hoc, vel per deservitionem hæredis personæ qui obiit ultimo infeodat. " immediate ante dict. hæredem vel membrum talliæ " succeden. ad statum de Hoptoun, seu per actionem " declaratoriæ, adjudicationis, vel ullo alio modo consisten. cum legibus et praxi hujus regni. Ac etiam " providen. et declaran., sicuti per dict. originalem " obligationem talliæ expresse providetur et declaratur,

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" et destinatur inseri, provideri, et declarari per cartas
" et infeofamenta desuper sequent., quod non licitum
" aut legitimum erit dict. Magistro Carolo Hope, neque
" ullis hæredum vel membrorum talliæ supramentionat.,
" prædict. talliam et ordinem successionis supramen-
" tionat. alterare, innovare, seu mutare, aut aliqua alia
" facta, directe seu indirecte, ullo modo facere, per
" quæ eadem ullo modo alterari, innovari, seu mutari
" poterit; et quod non licitum erit illis aut ullis eorum
" dict. terras et baroniam de Craigiehall, aliaque ante-
" dict., seu ullam partem earun., vendere, disponere,
" vadiare, vel impignorare, nec debita contrahere desu-
" per, nec ullum aliud factum omissionis vel commis-
" sionis, seu civile vel criminale, agere, per quæ dict.
" terræ, baronia, aliaque antedict., aut ulla pars earun-
" dem, possunt appretiari, adjudicari, evinci, caduciaria
" escheta fieri, vel confiscari; et si dict. Magister
" Carolus Hope, vel ulli dict. hæredum vel membrorum
" talliæ supramentionat., in contrarium fecerint, tunc
" et in eo casu omnia et singula dict. acta et facta, cum
" omnibus quæ desuper sequi contigerint, ipso facto
" vacua et nulla et nullius roboris, vis, aut effectus
" forent, similiter et eodem modo ac si dict. acta et
" facta nunquam facta, acta, aut commissa fuissent; et
" per dict. talliam declaratur quod persona ita contra-
" veniens, et descenden. ex ejus corpore, immediate
" super contraventionem dict. provisionum vel ullorum
" eorum, amittent et perdent omne jus quod illi habue-
" runt aut pretendere potuissent ad dict. terras, baroniam,
" aliaque prædicta, cum pertinen.; et eadem in casu
" prædict. ipso facto cadent, accrescent, et pertinebunt
" ad proximum hæredem et membrum talliæ ad easdem
" succedere destinat., similiter ac in eodem modo ac si

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" dict. persona ita contraveniens et descenden. ex ejus
" corpore naturaliter essent defuncti, et quod licitum erit
" proximo hæredi talliæ jus terrarum, baroniæ, alio-
" rumque antedict. cum pertinen. in ejus persona
" stabilire; idque, vel per declaratoriam, aut deservi-
" tionem hæredis personæ qui obiit ultimo vestit. et
" sasit. in dict. terris et baronia de Craigiehall, aliisque
" antedict., immediate ante contravenientem, vel per
" adjudicationem, vel ullo alio modo consisten. cum
" legibus et praxi hujus regni pro tempore, sine re-
" spectu personæ contravenien. vel descenden. ex ejus
" corpore, et sine respectu ullius innovationis, altera-
" tionis, seu mutationis prædict. per personam ita
" contravenien. facien., et sine onere ullorum actorum
" omissionis vel commissionis, aut ullorum aliorum
" actorum vel factorum qualiumcunque, quæ secun-
" dum legem interpretari vel inferre poterint contra-
" ventionem dict. clausularum irritantium seu ullarum
" earum; et persona ita succeden. super dict. contra-
" ventionem eisdem irritantiis subject. et obnox. erit
" quibus omnes hæredes talliæ supramentionat. subjecti
" et obnoxii sunt; except. et reservan. omnimodo ex dict.
" clausulis irritantibus suprascript. plenam potestatem et
" libertatem dict. Magistro Carolo Hope, et hæredibus
" et membris talliæ supramentionat. infeofamenti, pro-
" videre vitalis annui redditus eorum uxoribus, et earum
" maritis, vice curialitatis, lie courtesy, (a qua per dict.
" originalem talliam excluduntur,) non exceden. justam
" et æqualem tertiam partem liberi annui redditus et divo-
" riæ terrarum, baroniæ, aliorumque prædict., in quantum
" eædem liberæ et non affectæ sunt pro tempore cum
" prioribus vitalibus redditibus vel realibus debitis, et
" post deductionem usuræ vel annui redditus personalium

" debitorum quæ easdem affectare possunt; et simi-
" liter except. et reservan. potestatem et libertatem
" dict. Magistro Carolo Hope, aliisque hæredibus et
" membris talliæ, providere eorum liberos juniores,
" præter hæredem, ad trium annorum liberum redditum
" dict. status, quatenus idem liberum et non affect. sit
" vel oneratur pro tempore cum vitalibus redditibus et
" realibus debitis, et post deductionem annuorum reddi-
" tuum personalium debitorum quæ idem affectare
" possint, ut dict. est. Nec non except. et reservan. ab
" et ex dict. clausulis irritantibus plenam potestatem
" et libertatem dict. Magistro Carolo Hope, et dict.
" hæredibus et membris talliæ, si opus fuerit, talem
" partem dict. terrarum, baroniæ, aliorumque prædict.
" vadiare, seu vendere et disponere hæreditarie, quan-
" tum satisfaciet et persolvet debita contract. per dict.
" Sophiam Marchionissam de Annandale, cum avisa-
" mento et consensu dict. Gulielmi Marchionis de
" Annandale ejus mariti, vel per dict. Magistrum
" Carolum Hope, seu alios hæredes et membra talliæ
" supramentionat., virtute facultatis et libertatis supra
" script. in eorum favorem concept., pro providendis
" uxoribus et liberis junioribus solummodo, et non
" ultra; et similiter providen. et declaran., sicuti per
" dict. originalem obligationem talliæ providetur et
" declaratur, et destinatur inseri et provideri et de-
" clarari per cartas et infeofamenta ordinat. desuper
" sequent., quod si ulla appretiatio, adjudicatio, aut
" alia diligentia deducetur contra dict. terras, baroniam,
" et statum de Craigiehall, aliaque antedict., ullamve
" partem earund., pro ullis debitis contract. per dict.
" Sophiam Marchionissam de Annandale, cum avisa-
" mento et consensu dict. ejus mariti, vel per dict.

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" Magistrum Carolum Hope, ullosve alios hæredum
" talliæ supramentionat., virtute potestatum et faculta-
" tum illis reservat., modo supraspecificat., tunc et in
" eo casu dict. Magister Carolus Hope, et hæredes
" talliæ qui possidebunt dict. terras et baroniam de
" Craigiehall, aliaque prædict., cum pertinen., pro tem-
" pore, tenebuntur et obligabuntur purgare et redi-
" mere dict. diligentias tres annos ante expirationem
" legalis earund., si modo dict. hæres contigerit suc-
" cedere tres annos et sex menses ante expirationem
" legalis earund.; et si ille vel illa non succedet
" tam cito, obligabuntur easdem purgare infra sex
" menses post eorum successionem; et si eædem non
" purgatæ vel redemptæ erunt infra tres annos ante
" expirationem dict. legalis, saltem infra sex menses
" post eorum successionem, persona ita contrave-
" niens, et descenden. ex ejus corpore, ipso facto
" amittent et perdent eorum jus dict. terrarum, ba-
" roniæ, aliorumque prædict., cum pertinen., et
" eædem immediate cadent, accrescent, et pertinebunt
" ad proximam personam qui succederet tanquam
" proximus hæres ad dict. terras et statum si contra-
" veniens et descendén. ex ejus corpore naturaliter
" essent defuncti, et jus habebit purgare et redimere
" dict. diligentias; idque sine subjectione debitis et
" factis contravenientis; et hoc, vel per declaratoriam,
" seu deservitionem hæredis hæredi vel membro talliæ
" qui obiit ultimo vestit. et sasit. in dict. terris, baronia,
" aliisque prædict. ante contravenientem, vel per adju-
" dicationem, ullove alio modo cum legibus et praxi
" hujus regni consisten.; et persona succeden. super
" dict. contraventionem subject. et obnox. erit eædem
" irritantiæ, si non purgaverit easdem diligentias infra

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" sex menses post devolutionem successionis per pri-
" orem contraventionem; cui obligationi purgandi infra
" sex menses, tam cito ac dict. diligentiæ sunt infra
" tres annos expirandi, dict. universi hæredes talliæ,
" successive post alios, sub periculo earundem irritan-
" tiarum, subjecti et obnoxii erunt per omnem succes-
" sionem omni tempore futuro; cum et sub onere
" cujusquidem reservationum, provisionum, et condi-
" tionum supra mentionat. inseri in cartis et infeo-
" famentis desuper sequend., prædict. procuratoria
" resignationis in contractu matrimoniali supramen-
" tionat. fact. erat per dict. Henrettam Comitissam de
" Hoptoun, cum consensu dict. Caroli Comitis de
" Hoptoun, ejus mariti, et virtute ejusdem resignatio
" facta erat in favorem dict. Magistri Caroli Hope,
" aliorumque hæredum supramentionat. illi substitut.
" secundum originalem talliam dict. status supra men-
" tionat., et non aliter; prout authentica instrumenta
" in manibus Alexandri Hay, notarii publici, sumpta,
" 26to die mensis Julii anno Domini 1733, in seipsis
" latius proportant; tenen. et haben. dict. terras et
" baroniam de Craigiehall, molendina, salmonum pis-
" cationes, aliaque suprascript., cum pertinen. jacen.
" ut prædicitur, dicto Magistro Carolo Hope, et hære-
" dibus talliæ illi substitut., modo suprascript., de
" nobis et successoribus nostris, in libera baronia,
" feodo, et hæreditate in perpetuum, cum et sub om-
" nibus provisionibus, conditionibus, reservationibus,
" oneribus, et clausulis irritantibus," &c.

Charles Hope possessed the estate under these titles, with the exception of a small portion which he conveyed to his son, William Hope Weir, till his death, which happened on the 19th December 1751, a period of about fifty-eight years.

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His son William Hope Weir, made up titles by special service to his father, as heir male of tailzie and provision, in virtue of the entail of 1708, and the marriage contract of 1733, and in terms of the destination contained in the Crown charter following on that contract, but without subjoining to the last substitution any reference as conform to the destination of the entail of 1708. The retour contained all the prohibitory, irritant, and resolutive clauses, and especially the clause against altering the order of succession under the contract and charter of 1733. He possessed the estate (with the exception of a part conveyed to his eldest son, James Joseph Hope Vere, for the purpose of creating a vote,) until his death.

Upon this event his son made up titles by special service and infeftment in the year 1812, in precisely the same manner as his father had done; and in the year 1822, he brought an action of declarator and reduction against the substitute heirs of entail, in which he concluded to have it found, that the destination in the contract of 1733, did not operate as an alteration of the destination in the original entail of 1708, that his grandfather and father, and he himself, had possessed the estate under the original entail, and alternatively to have the contract of marriage, and all the subsequent titles reduced, so far as containing a destination different from that entail.

In defence it was maintained, first, that the pursuer, being a descendant of Henrietta Countess of Hopetoun, was barred from insisting in any reduction of her deeds as in contravention of the entail, because the contravener forfeited not only for himself or herself, but also for his or her descendants. Secondly, that supposing the pursuer were not barred from insisting in the reduction, the action was excluded by prescription.

The Lord Ordinary (Mackenzie), on the 4th of February 1823, sustained the defences, assoilzied the defenders, and decerned. After a variety of procedure, the Court, on the 12th of February 1828, adhered to this interlocutor generally, but, remitted to the Lord Ordinary to hear parties as to the small portions of the estate, embraced within the titles, by which votes were created in favour of the pursuer and his father.[1] No further procedure took place in that action; and the pursuer then raised another action of declarator, for having it found, that he was entitled to hold the estate of Craigiehall in fee simple, or at least subject to no valid prohibition against altering the order of succession.

The Lord Ordinary reported the question on these cases to their Lordships of the First Division, who, in respect of the importance and difficulty of the question, resolved to take the opinion of the other Judges. With this view the following queries were laid before their Lordships:—" First, Whether, under the circumstances " stated on the record, there is a valid subsisting entail " of the estate of Craigiehall, whereby the pursuer " of the present action, Mr. Hope Vere, is effectually " prohibited from altering the order of succession, con- " tracting debt, and selling the said estate?

" Secondly and separately, Whether, in so far as " regards the lands of Upper Craigie and others, of " which a Crown charter was passed in 1758, upon the " resignation of Charles Hope Weir, Esquire, in favour " of himself in life-rent, and William Hope Weir his " son in fee, there is a valid subsisting entail whereby " the pursuer is effectually prohibited from altering the

[1] 6 S. D. 517.

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" order of succession, contracting debts, and selling the " said lands of Upper Craigie?"

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The cause being afterwards heard in presence of the whole Court, an opinion in writing was given in by the Lords of the Second Division and Permanent Lords Ordinary[1] to the following effect:

" The summons in this action bears, that the pursuer " is entitled to have it found and declared, ' that he now " ' holds, or may hold, the said lands and estate of " ' Craigiehall and others, subject to no fetters, condi- " ' tions, or restrictions of entail, or at least that he holds " ' or may hold the said lands subject to no valid prohi- " ' bition against altering the order of succession;' and " therefore, it concludes for a decree of declarator against " the heirs called by the destinations of the estate, ' that " ' the pursuer does hold, or is now entitled to hold, the " ' said lands of Craigiehall and others, subject to no " ' fetters, conditions, or limitations whatever, at least " ' subject to no valid prohibition against altering the " ' order of succession.'

" The particular question which is raised under this " conclusion is, Whether, by the form and construction " of the investitures of the estate constituted by the " charter of resignation of date the 26th of July, 1733, " the restrictions and limitations of entail therein ex- " pressed, are effectually applied to the heirs to whom " the estate is destined by that deed, and the marriage " contract on which it proceeds, and for the protection " of the course and order of succession thereby laid " down?

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[1] Lords Glenlee, Cringletie, Meadowbank, Mackenzie, Medwyn, Corehouse, Fullerton, Moncrieff. The Lord President declined himself, as did also the Lord Justice Clerk.

" There is no doubt, that in this question the pursuer " is entitled to a strict construction. For though this is a " declarator inter hæredes only, the question relates to " the imposition of fetters or restraints upon the right of " property, and in all such questions a strict interpreta- " tion must be given. We understand this principle, as " established by the authorities and decided cases, to " mean, not merely that without direct words such " limitations cannot be imposed from presumed or " implied intention, but that even where there are " words within the deed having a certain tendency to " indicate the intention of the granter, they may, under " the strict construction of the law of entail, fail of " effect, either from want of technical precision, or from " error in the form and manner in which they are " introduced.

" But taking this principle to be undoubtedly fixed, " we hold it to be clear, on the other hand, that the " necessary clauses of limitation may be imposed on the " heirs called in various forms. There are certain " technical words in general use, some of which are " essential in the clauses themselves. But there is no " fixed rule as to the place or form in which they " may stand in the deed. It is not even essential, in " the first constitution of an entail, that the clauses " should be within the deed itself, though, under the " statute 1685, it is necessary to make it effectual " against third parties, that they should be engrossed in " the investitures following on it. For it has been " repeatedly decided, that an entail may be effectually " made by reference—by declaring that the lands shall " be taken and held under all the conditions, prohibi- " tory, irritant, and resolutive, expressed in an entail

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" of lands already completed. Don v. Don.[1]—Lawries " v. Spalding.[2] In such cases it is necessarily implied, " that the special clauses referred to cannot be taken " literatim, applicable as they are to other lands, and " perhaps to a different series of heirs. The words of " restriction in the first deed of entail must be taken " and applied, by the force of the words in the deed, " referring to the lands and to the heirs expressed in " that deed. There are other examples of the same " principle, where all the clauses are within the same " deed; as in the entail of Roxburgh, where the limiting " clauses were all applied in point of words to the " 'persons before designed,' 'above written,' &c., but " were held, by means of other general words, to be " effectually imposed in regard to the posterior destina- " tion in the same deed.

" In the present case, the question appears mainly, if " not exclusively, to depend on the charter of resigna- " tion 1733, and the seisin following on it, which have " been found to constitute a prescriptive title in favour " of the series of heirs therein mentioned. It may " perhaps admit of some doubt and difference of opinion, " whether, as the charter proceeds expressly on the pro- " curatory of resignation in the marriage contract which " immediately preceded it, it may not be competent to " look into that contract for an explanation of any thing " which may appear to be doubtful in the charter itself. " But as the pursuer and his predecessors have possessed, " by charter and seisin, far beyond the years of prescrip- " tion, according to the terms of the investiture on the " charter, and as that has been found to constitute a

[1] Don v. Don, Feb. 5, 1713, Forbes, 654. Mor. 15591.

[2] Lawries v. Spalding, July 24, 1764, Fac. Coll. 3. 324. No. 140. Mor. 15612.

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" prescriptive title against him, it appears to be the safer " rule of judgment, to consider the operation of the " restrictive clauses exclusively on the terms of the char- " ter itself.

" It seems, however, to be very clear, that if the pur- " suer is allowed to hold by the charter exclusively, he " must take it as it is, and stand by it absolutely and " consistently. If we are to go out of it all, the most " material deed referred to is the marriage contract; " and if that be looked into, the intention at least is " perfectly certain. But if all explanation by means of " the contract is to be excluded, neither can the old " entail of 1708, be considered in its particular clauses, " to the effect of qualifying or affecting the operation of " the limiting clauses in this charter.

" In the cause which was decided between the same " parties, by the Lords of the Second Division, it did " certainly appear, that there was a discrepancy in legal " effect between the destination in the entail 1708, and " the destination in the marriage contract and charter " 1733. And, notwithstanding the reference from the one " to the other, it was held that the charter must regulate " the succession, that is, that the lands were effectually " resigned, and charter and seisin given, in favour of the " series of heirs therein specified.

" In the present question, it does not appear that the " discrepancy between the two destinations is material, " or competent for the consideration of the Court. The " point settled is, that the heirs called are the heirs " expressed in the dispositive clause of the charter. And " the single question now is, Whether the fetters, as laid " down in that deed, are effectually applied to the heirs " so called, and to the order of succession so appointed?

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" There is difficulty in this question, arising from the " peculiar structure of the charter. It has not been " framed, as it ought to have been, according to a cor- " rect system of conveyancing. The dispositive clause, " as it stands in the commencement of the deed, makes " no mention of conditions or limitations. The grant " and disposition is made to Charles Hope and the " series of heirs particularly mentioned, and then there " is a reference to the entail 1708, which reference may " either relate to the whole destination under a mistake " as to the effect of it, or only to the heirs who come " after the special heirs of Charles Hope in his marriage " with Katherine Weir, or in any subsequent marriage " —the words admitting of either construction. But, " however it be taken, it is settled that this reference " does not qualify the destination. The lands are then " inserted by general description.

" The clause of Quæquidem is very inaccurately " framed. It bears that the lands had belonged to " Countess Henrietta, and that they were resigned in " virtue of the procuratory granted by her in the mar- " riage-contract, specified by its date, ' in favorem,' &c. " Then follows what ought to have been an exact " recitation of the procuratory. But it is not so; and " to this cause we attribute all the difficulty, or appear- " ance of difficulty, which there is in the case. It does " not insert the destination. But it must clearly be " held, in consonance with the former decision of the " Court, that the words ' reliquis hæredibus talliæ " ' supramentionat.,' and the words ' modo supra ex- " ' press.,' relate to and take in the destination, as given " in the dispositive clause, notwithstanding the inter- " vening words of reference to the original bond of

" tailzie. The narrative of the resignation in favour of
" those heirs is followed by the clause ' idque omni-
" ' modo,' &c. under the burdens, conditions, &c. &c.
" Here there is a plain blunder in the words ' supra-
" ' script.;' but it is followed by the reference to the
" old entail, and then by the videlicet, covering all the
" clauses of limitation as specifically inserted.

" It seems to be unnecessary to go into a minute
" analysis of the whole clauses. There are some of
" them, in which, from the awkward manner in which
" the sentences are framed, the purpose of the parties,
" in so far as it may be legitimate to collect it from
" the marriage contract, might fail of effect. As an
" example, we may refer to the provision for the event
" of any of the heirs succeeding to the honours and
" estate of Hopetoun. But, attending to the conclu-
" sions of the present action, it seems not to be at all
" necessary to resolve every particular case which might
" in possibility arise. The material point is to consider,
" whether the ordinary clauses, prohibitory, irritant,
" and resolutive, are applied to the heirs in whose
" favour the resignation was made and the charter of
" resignation granted, and for the protection of that
" destination.

" These clauses are ' Ac etiam providen. et declaran.,
" ' sicuti,' &c. Under this word ' sicuti ' there is a
" reference to the old entail, but the ' providen. et
" ' declaran.' are clearly part of the procuratory of
" resignation narrated. And what is provided and
" declared? ' Quod non licitum aut legitimum erit dict.
" ' Magistro Carolo Hope, neque ullis hæredum vel
" ' membrorum talliæ supramentionat. prædict. talliam
" ' et ordinem successionis supramentionat. alterare,

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" ' innovare,' &c. It is certainly unfortunate that the " writer of the deed should have here and in other places " curtailed the most important words, so as to leave the " grammatical case of the participle ' supramentionat.' " under a possibility of doubt. But we think it suffi- " ciently clear upon the whole words, that the heirs, and " the order of succession here referred to, are the heirs " and the order of succession before mentioned in this " deed. Thereare no other heirs before mentioned, either " in this charter or in the first part of the procuratory, if " that could be referred to. The destination to them " is the only order of succession to which the words " could be applied. And it may be observed, that in " the clause of exemption and reservation, where similar " words with the same abbreviation are used, the heirs " and members of tailzie ' supramentionat.' are so put " in opposition to the provisions of the original entail, " that the supramentionat. must relate to the heirs of " tailzie above mentioned, and cannot relate to the entail " of 1708.

" The prohibitory clause, therefore, appears to be " sufficient, and it is not said that it does not contain " all the necessary words. A question has been raised on " the resolutive clause. There is perhaps some diffi- " culty in the construction of the words and sentences, " but we think that the words ' providen. et declaran. ' cover all these clauses. The ' sicuti ' reaches them ' also, adopting the clauses of the old entail, but apply- " ing them to the heirs of the charter itself. And the " words ' et per dict. talliam,' &c. might perhaps be " considered as a continuation of that part of the sen- " tence which forms the irritant clause, beginning ' et " ' si dict. Magister Carolus Hope,' &c. shall do in the

" contrary, their whole acts shall be null and void, ' and
" ' by the said tailzie it is declared that the person so
" ' contravening,' &c. But supposing this not to be the
" right construction, then the clauses would run thus,
" ' Providing and declaring,' as it is provided and de-
" clared by the original entail, that it shall not be lawful,
" &c.; and if any of the heirs shall do in the contrary,
" their acts shall be void; and as it is declared by
" the said tailzie, that the person so contravening shall
" forfeit, &c.

" The powers reserved are clearly reserved to the heirs
" of the charter, and then the conclusion of the quæ-
" quidem bears—' Under the burden of which[1] reser-
" ' vations,' &c. the resignation was made in favour of
" Charles Hope ' aliorumque hæredum supramentionat.,'
" where this last word must necessarily be a genitive,
" and refer to the heirs as before mentioned, and of
" course, according to the previous decision, not qualified
" by the reference to the old entail which follows.

" The quæquidem clause being finished, the clause of
" tenendas is then brought in, and this undoubtedly is
" very clear and precise. The lands are to be held by
" Charles Hope, and the heirs of tailzie substituted to
" him ' modo suprascript., cum et sub omnibus pro-
" ' visionibus, conditionibus, reservationibus, oneribus,
" ' et clausulis irritantibus particulariter supra express.,'
" without any reference to the old entail. And, finally,
" the precept of seisin refers to the conditions in similar
" absolute terms.

" On a review of the clauses of this charter, we are

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[1] There is a mistake in the word cujusquidem, but is is of no consequence.

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" of opinion, that though it is in various respects in-
" accurately framed, it is on the whole effectual to
" oblige the heirs succeeding in virtue of it to hold the
" estate under the conditions of entail particularly
" recited in the quæquidem clause, and to prevent them
" from altering the order of succession laid down in
" the dispositive clause, and from holding the estate in
" other respects free from the fetters against selling the
" estate, or contracting debts to affect it. We can
" imagine particular cases to arise out of this entail,
" which would be attended with greater difficulty. But
" in order to meet the conclusions of the present action,
" it does not appear to us to be necessary to anticipate
" the opinion which might be formed on any such par-
" ticular cases.

" The restraining clauses are not in this case en-
" grossed in the dispositive clause. But as a charter
" of resignation is not an original writ, but the act of
" the superior, upon the resignation of the vassal, we
" are of opinion, that, in a title-deed of this nature, it
" is sufficient, to render the clauses effectual, that they
" are clearly laid down in the recitation of the terms
" on which the resignation was made, and referred to
" in the clause of holding and in the precept of seisin.

" On the whole, in answer to the first question pro-
" posed to us, we are of opinion, that, under the circum-
" stances stated on the record, there is a valid subsisting
" entail of the estate of Craigiehall, whereby the pursuer
" of the present action, Mr. Hope Vere, is effectually
" prohibited from altering the order of succession, con-
" tracting debt, and selling the said estate.

" We do not understand that our opinion is now
" required on the second question originally submitted

" to us relative to the special case of the lands of " Upper Craigie and others."

In consequence of no answer being returned to the second of the queries, the case was remitted back for an opinion upon that question. This additional opinion was given:"

" We understand it to be the desire of the parties " expressed in the minutes that we should make some " answer to the second question which was proposed for " our opinion by the Lords of the First Division, in " order that the cause may be exhausted in this Court, " so far as it can be now exhausted.

" That question is, Whether, in the particular situa- " tion of the lands of Upper Craigie, in respect of the " Crown charter in 1758, as described in the question, " there is a valid and subsisting entail as to these lands " by which the pursuer is effectually prohibited from " altering the order of succession, contracting debt, " or selling the lands?

" We are of opinion that it is impossible to give any " satisfactory judgment on that question in the present " action until some further proceedings shall have been " taken by the pursuer, or by one of the parties, for " finally disposing of the previous action referred to in " the record, which, in so far as it related to these lands " of Upper Craigie, is still in dependence in the Second " Division of the Court.

" By the summons in that action the pursuer con- " cluded to have it found, that he was entitled to possess " the lands comprehended in it by the title of the old " entail of 1708, under all the conditions and limitations " of that deed. But when the Court decided the ques-

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" tion which was there raised in regard to the other " lands, they remitted 'to the Lord Ordinary to hear " 'counsel for the parties further on the effect of the " 'conveyance by Charles Hope Vere, the pursuer's " 'father, dated the 11th of February, 1758, and titles " 'following thereon,'—' and to do therein as his lord- " 'ship shall see just.' The titles thus referred to, are " those, which apply to the lands of Upper Craigie. But " we do not find that any farther discussion has taken " place under the remit; and the action is still in " Court, but before the Second Division.

" Attending, therefore, to the nature of the conclusions " in the present action, compared with those in the " former, and to the grounds of argument employed in " support of them, it seems to us to be altogether im- " possible to give any judgment on the question now " submitted to us until it be first determined, in the " previous depending action, whether the pursuer must " be held to have possessed these lands of Upper Craigie " by the title of the old entail, or by what other title " he has possessed them, or at least until that other " action shall have been in some manner disposed of in " its application to the lands in question."

The judges of the First Division concurred in that opinion, and the Court, on the 5th of March, 1833, pronounced the following interlocutor:—" The Lords sustain " the defences, and assoilzie the defenders, so far as " respects all the lands and estate mentioned in the " summons of declarator, except the lands of Upper " Craigie and lands of Standanstain, with the teinds " contained in the charter 23d February, 1758, and " decern; and as to the lands and teinds in the said

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" charter 1758, they reserve the consideration of the " entail of these, until the issue of the action of declarator, and reduction, still in dependence in the Second " Division of this Court: Find the pursuer liable in " expenses, appoint an account to be put in, and remit " to the auditor to tax the same, and to report."[1]

Thereafter, on the 22d June, 1833, decree for expences was pronounced.

Mr. Hope Vere appealed.

Appellant.—1. By the true construction of the deeds constituting the investiture under which the appellant holds the estate of Craigiehall, no fetters or limitations of entail were effectually imposed on the heirs of that investiture, but only on the heirs under the old entail of the Marchioness of Annandale, which has long since been extinguished by prescription.

All the judges agree that in the present question the appellant is entitled to the benefit of a strict construction of the investiture in his favour. This principle has been illustrated in the late case of Morehead against Morehead[2], which so far resembled the present, that there the question was, whether the fetters of entail were imposed on the institute, or merely on the substitutes? while here the point in dispute is, whether they are imposed on the heirs of a new investiture, or of the old?

Although it were conceded, that the intention of the Countess of Hopetoun, was to create a new entail by the marriage contract of 1733, still, if the charter

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[1] 11 S., D., B, 520. [2] 1 Shaw and Maclean's Ap. C. p. 28.

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of resignation and sasine following thereon, which constitute the standing investiture of the estate, did not, by proper, and legal technical language, carry that intention into effect, the fetters of an entail cannot be imposed on the appellant.

The structure of the charter of resignation, which forms the basis of the investiture, is of a very peculiar and anomalous nature. In the usual form, where it is meant to impose the fetters of an entail, they are introduced into the dispositive clause as conditions of the grant. But in this case the dispositive clause contains no limitation; it simply dispones the lands to Charles Hope and the other heirs therein mentioned. Then comes the quæquidem clause, or recital of the former holding of the lands, which is merely narrative, and neither does nor is it intended to impose any substantive fetters. The tenendas clause, merely declares, that the lands given by the dispositive clause are to be held "cum "et sub omnibus provisionibus, conditionibus, reserva- "tionibus, oneribus, et clausulis irritantibus particula- "riter supra express."

The appellant does not admit, that an entail can be effectually made by á narrative of the conditions of entail in the quæquidem clause, coupled with a declaration in the tenendas that the lands are to be held under all the above conditions. The usual and natural course is to insert the limitations in the dispositive clause. But, waiving this objection, it is plain, that unless the provisions and limitations are set forth in the quæquidem as clearly applicable to the series of heirs introduced by the dispositive clause, they never will be made applicable to them by the tenendas. That clause takes them as they stand, and substantially reim-

poses them, but only to the same effect as has been stated narrative.

But all the provisions and conditions as set forth in the quæquidem clause are declared applicable only to the heirs of the tailzie 1708; and consequently, as there is no clause declaring, that these shall be applicable, mutatis mutandis, to the heirs of the marriage contract, there is no substantive imposition of any fetters upon them.

The only deed mentioned in the charter of 1733, is a tailzie, the entail of 1708. It is described in the outset of the charter as "obligatio talliæ status de Craigiehall " per dict. quondam Sophiam Marchionessam de An- " nandale." Next, in the quæquidem, the Countess of Hopetoun is described as " hæredem talliæ et pro- " visionis,"—" virtute dict. obligationis talliæ,"—" per " dict. Sophiam Marchionessam de Annandale." In these cases the terms "talliæ" and "hæredem talliæ" apply entirely to the old entail.

But further, it must be observed in whose favour and for what purpose the resignation is stated to have been made. The deed expressly bears, that it was for new infeftment to Charles Hope and his heirs male; whom failing, "reliquis hæredibus talliæ supramentionat. eis " substitutis per prædict. originalem obligationem talliæ," and that on the conditions "specificat. in prædict. ori- " ginali obligatione talliæ dict. baroniæ de Craigiehall " per dict. quon. Marchionessam de Annandale fact. " et non aliter."

This express declaration cannot be explained away, by saying that its meaning is, that resignation was to be made in favour of the heirs mentioned in the dispositive clause, whom the grantor believed to be iden-

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tical with the heirs of the tailzie of 1708, and erroneously described as such. The term "talliæ" in every prior clause in the deed refers to nothing but the old entail, while the marriage contract is never described as an entail, but simply as "contractus matrimonialis." The whole deed plainly excludes the supposition, that it was intended to create a new entail by the contract, 1st, because it goes on to state, the heirs of entail in whose favour resignation was made are the heirs substituted to Charles Hope by the original entail; and, 2d, because new infeftment is only to be given to them under the conditions of the "original bond of tailzie, and no "otherwise." Thus the only warrant for new infeftment, in the procuratory of resignation, is in favour of the heirs of the old entail, and under the conditions of that entail; and if this general clause is found to be applicable to them only, the particular clauses and conditions will be presumed, even if the expression were ambiguous, to be directed in the same manner.

In the opinion of their Lordships it is said the words "heirs and members of tailzie 'supramentionat.' "are so put in opposition to the provisions of the "original entail, that the 'supramentionat.' must relate "to the heirs of tailzie above mentioned, and cannot "relate to the entail of 1708." The words of the clause, appear to lead to an exactly opposite conclusion:— "Except. et reservan. omnimodo ex dict. clausulis irri- "tantibus supra script. plenam potestatem et libertatem "dict. Magistro Carolo Hope et hæredibus et membris "talliæ supramentionat. infeofamenta vitalis annui red- "ditus eorum uxoribus et earum maritis vice curialitatis, "lie courtesy, a quâ per dict. originalem talliam exclu- "duntur." The original entail prohibited terce and

courtesy, but gave a power of granting life-rents to a certain extent of rental. The charter in like manner, reserves "hæredibus et membris talliæ supramentionat." the same power, in room of that from, which they were excluded by the original entail. It is therefore evident that the words have reference to the heirs under the original entail, for the heirs "above mentioned," whose wives or husbands are excluded from terce and courtesy, are plainly the heirs of that original entail, and no others.

It is then clear, that the terms "tallia" and "hæres talliæ," as used in the charter of resignation, are uniformly applied to the entail of 1708, and that there is no one instance in which they can be shown to have been used as applicable to the marriage contract, or to the destination which it contains.

2. But independently, of the view that none of the restrictions are imposed on the heirs of the contract, there is a defect in the present entail which entitles the appellant to have it found, that he is laid under no effectual prohibition against altering the order of succession. Assuming that the prohibitory and irritant clauses are effectual to reach the heirs of the marriage contract, and that these are complete in themselves, there is a palpable defect in the resolutive clauses.

The prohibitory and irritant clauses are introduced thus:—" Ac etiam providen. et declaran. sicuti per " dict. originalem obligationem talliæ expresse provide- " tur et declaratur,"—" quod non licitum aut legitimum " erit," &c., and then follows the enumeration of the acts prohibited, and a declaration in the irritant clause that such acts shall be void; that is to say, (keeping in view the structure of the deed, and the fact that all the

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conditions are contained in the recital of the procuratory of resignation,) it is narrated, that by the procuratory of resignation it was provided, as it was provided by the original entail, that certain acts should not be done, or if done should be void; and this, if followed up by the declaration in the tenendas, that the lands were to be held under the conditions contained in the procuratory, might make a sufficient prohibitory or irritant clause. But the resolutive clause which immediately follows, does not contain any statement that the heir contravening shall forfeit. It simply narrates the fact, that in the old entail there had been a provision to that effect:—" Et per dict. talliam declaratur quod persona " ita contraveniens et descen. ex ejus corpore, immediate " super contraventionem dict. provisionum vel ullarum " earum, amittent et perdent omne jus quod illi habuerunt " aut pretendere potuissent ad dict. terras, baroniam, " aliaque prædict., cum pertinen., et eadem in casu " prædict. ipso facto cadent, accrescent, et pertinebunt " ad proximum hæredem et membrum talliæ ad easdem " succedere destinat., similiter ac in eodem modo ac si " dict. persona sic contraveniens et descend. ex ejus " corpore naturaliter essent defuncti."

The difficulty arising upon this clause has been thus solved by the judges.

They say, " There is perhaps some difficulty in the " construction of the words and sentences, but we think " that the words 'providen. et declaran.' cover all these " clauses. The 'sicuti' reaches them also, adopting the " clauses of the old entail, but applying them to the heirs " of the charter itself; and the words 'et per dict. talliam,' " &c. might perhaps be considered as a continuation of " that part of the sentence which forms the irritant

" clause : ' et si dict. Magister Carolus Hope,' " &c. shall do in the contrary their whole acts shall be null and void, " and by the said tailzie it is declared that the " person so contravening," &c. But supposing this not to be the right construction, then the clauses would run thus:—" Providing and declaring, as it is provided " and declared by the original entail, that it shall not " be lawful, &c.; and if any of the heirs shall do in the " contrary, their acts shall be void; and, as it is declared " by the said tailzie, that the person so contravening " shall forfeit," &c.

This reading can only be arrived at by a stretch of construction which, after the judgment in the late case of Sharpe [1], cannot be supported. It can only be made out either by leaving out the words " et per dict. " talliam declaratur quod," and inserting the word " et," so as to make the resolutive clause connect with the irritant, and thus to bring both under the operation of the words " providen. et declaran. sicuti per dict. " originalem obligationem talliæ declaratur," with which the prohibitory clause is prefaced; or else by inserting in the commencement of the resolutive clause, the words " providen. et declaran. sicuti," so as to give it a substantive force. As the words stand, they cannot be construed as is done in the opinion of the judges, for there is no warrant for the insertion of the word, " as," by which they connect this clause with those which preceded it.

If the appellant be right in holding that there is properly no resolutive clause in the charter, he is entitled to decree finding that he holds the lands without any

[1] 1 Shaw & Maclean, Ap. C., p. 594.

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effectual-fetters of entail. He assumes it to be now fixed by the cases of Ascog[1] and Tillycoultrie[2] that a prohibition against selling, if not fenced with a resolutive clause, imposes no restraint against the heir in possession, and that in a declarator by him the Court would find that he was at liberty to sell; that it is also fixed that he is under no obligation either to reinvest the price or to pay damages to the heirs of entail; in short, to use the words of Lord Cringletie and Lord Wynford, in the case of Ascog, that "the prohibition is "a mere restraint, and does not constitute any obliga-"tion whatever either in law or equity;" that "it raises "only one of these imperfect obligations which no "court of law could enforce."

Respondents:—The ground, upon which the appellant seeks to have it found that he is free of the fetters of the entail, generally is, that from the form of the charter of resignation of 1733, the fetters, instead of having been directed against the heirs called by that deed, have been imposed upon the heirs of the old entail of 1708, who are a different series from those called by the destination of 1733. The appellant has endeavoured to show that there are principles of law, as affecting the construction of deeds of entail, involved in this question. Yet it is one purely of technical Scotch conveyancing; neither is the unanimous opinion of the Court below upon such a matter upon light grounds to be disturbed.

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[1] Stewart v. Fullerton, 23d Feb. 1827, 3 S. & D., p. 418 & p. 396, (new edit.); Reversed in House of Lords, 16th July 1830, 4 Wilson & Shaw, p. 196.

[2] Bruce v. Bruce, 15th Jan. 1799, Mor. 15539.

The respondents do not dispute the plea of the appellant, that deeds of entail must be strictly interpreted, that fetters are not to be reared up, or imposed by implication, and that the intention of the party, however clear or explicit, is immaterial in a question of this kind, unless that intention has been carried into effect by a deed properly expressed in clear technical language. Their plea is, that, looking rigidly to the terms of the charter of 1733, and construing that deed according to the true sense of the words actually used, the fetters have been imposed upon the heirs of the destination thereby called to the succession. There are two ways in which that deed may be construed, by viewing it either with reference to the other deeds which preceded it, and with a due regard to its meaning and purpose, or by viewing it as it stands, without going beyond its four corners. In the opinion of the judges it is held that the sounder mode of determining the question is to look at the investiture of 1733, per se, without reference either to the terms of the marriage contract or to the tailzie of 1708. On that strict view of the case, the respondents are quite ready to put their argument, but they are also equally ready to argue the case upon the sound construction of the charter, looking at the contract as its warrant, and to all that preceded it.

Whether by the contract of 1733, it was intended to alter the destination of 1708, and purposely to commit an act of contravention or not, (which might have been done with perfect safety, as nobody could have challenged that act of contravention,) it is not material to inquire. One thing is perfectly plain, that the contract of 1733, imposed fetters on the heirs of the destination, called by that contract. Whether the fetters

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imposed in the contract of 1733, have been effectually feudalised, and distinctly imposed upon the heirs of the contract is another point; but that the contract imposed the fetters clearly and unequivocally upon the heirs called by that contract, is now res judicata, and it is not seriously disputed that it is the standing destination. The estate is disponed "with and under the burdens, "reservations, powers, faculties, conditions, declara- "tions, provisions, and clauses irritant underwritten, "allenarly and no otherways." Charles Hope and the heirs of the destination are then introduced in their order. The procuratory of resignation, is in the same terms with the dispositive clause, and the clauses prohibitory, irritant, and resolutive, are introduced with the distinct expressions, "but always with and under the "burdens, reservations, powers, faculties, conditions, "declarations, provisions, and clauses irritant under "written, allenarly, and no otherways." Each of these clauses is preceded by the expression that "it is hereby "provided." The heirs of the destination are always referred to as the heirs and members of taillie "above "mentioned," or "before mentioned," or "succeed- "ing by virtue of these presents," or "Mr. Charles "Hope and his above written;" and the precept of sasine is in favour of "the said Mr. Charles Hope and "his heirs of tailzie and provision before expressed, "always with and under the reservations, faculties, con- "ditions, provisions, and clauses irritant, above insert." It seems incontestible, that the contract of marriage is in itself a valid entail, and a reference contained in that deed to the old entail of 1708, is unimportant.

Upon the procuratory contained in that contract, the Crown charter of resignation was expede, and infeftment

followed. It is possible that the charter may not have carried into effect the purpose of the contract. It certainly is not primâ facie probable that such has been the case; but it might have been done intentionally, or it might have been done through error. The appellant's case is, that, no matter what was intended, the thing done by the charter of 1733, is to impose the fetters, not upon the heirs of the destination in that charter, but upon the heirs of the exploded destination of 1708, — in other words, upon no heirs whatever.[1]

Now, while on the one hand it is admitted, that defects in a tailzie are not to be supplied by inference, and, on the other, effect is not to be given to strained or over-subtle constructions, it is to be observed, that the act of 1685, contains no form or order in which the various clauses of a deed of entail are to be set forth. There must no doubt be effectual prohibitions, with irritant and resolutive clauses, with such provisions and conditions "as the granters may think fit," and these provisions and irritant clauses, must be set forth in the subsequent investitures, and the tailzie recorded in the register of entails. But if the maker of the tailzie comply with these requisites, and express each prohibition in proper language, and fence it with irritant and resolutive clauses, he has satisfied the statute, and it is of no importance in what order or form the different provisions of the deed may be arranged. Nay, it has been

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[1] Duntreath case, 1771, Mor. Feb. 1, 1799; Mor. 15452; Jan. 19, 1804, Mor. 15559; Feb. 26, 1801, Mor. App. voce Taillie, p. 15; July 13, 1722.

Kennedy v. Arbuthnot; July 13, 1722, Kames, R. Dec. 1. 65, No. 33; Mor. 1681, Feb. 1725; Kames, R. Dec. 1. 109, No. 57; Mor. 12615, July 8, 1725. Edgar, 185. Mor. 1477.

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decided, that an entail of one estate may be validly executed by reference to the conditions in an entail of another estate, provided always, of course, that these conditions are inserted in the investiture.

But, looking at the terms of the charter of 1733, exclusively, which, with the infeftment following upon it, has been found to constitute a prescriptive title, it seems impossible to make out that it has not effectually imposed the fetters of a strict entail upon the heirs of the destination which it contains.

It proceeds upon the procuratory contained in the marriage contract,—gives to the heirs of that contract the lands, which are duly resigned for new infeftment "in favour of Charles Hope, and the other heirs "above mentioned, and that always under the condi- "tions underwritten, and no otherwise, viz." Then, after the conditions with the different irritancies are verbatim set forth, the charter declares that the resignation was made with and under the burden of the conditions so above inserted, in favour of the heirs above mentioned, to be holden under the conditions above expressed. The grant is thus to the heirs of the marriage, and it is made only under the conditions set forth in the investiture.

It is true that the conditions are not inserted in the dispositive clause, and merely appear in the quæquidem. The style, as given in the present style-books, no doubt inserts the conditions in the dispositive clause. But if the grant be given under certain conditions, and these are expressed in the deed, it cannot be said that this is an unconditional grant. Upon this point the appellant argues most inconsistently, for he does not

maintain, in construing the special clauses, that there are no fetters imposed at all; he merely argues, that the fetters are imposed on a series of heirs different from those called; while, if his general argument could avail any thing upon the form of the deed, it would amount to this, that there were no legal fetters of any kind. But there is no occasion for inserting the conditions at length in the dispositive clause; they must, no doubt, be narrated in the deed, but this is all that is necessary. The approved form, as laid down by Dallas[1], is to insert the conditions in the quæquidem. He gives examples of various signatures in that form, and the charter must of course be conformable to the signature. A charter of resignation, is in truth, nothing else than a warrant to obtain a new infeftment, and the infeftment can only be obtained by a precept of sasine. If, then, the precept be granted under certain burdens and conditions expressed in a former part of the deed, and the sasine be taken under these burdens, setting them forth at length upon the record, it cannot be maintained, that this is not an effectual conditional infeftment. Although it be true that the conditions of the grant must appear on the face of the grant, it can make no difference whether the superior dispones the lands which were resigned, under certain conditions (narrating them), with and under the burden of the conditions above expressed, or dispones the lands with and under the conditions after mentioned, and then narrates them. The whole deed must be taken together; and the object being to obtain a new infeftment under the conditions which that deed enumerates, conformably to which the

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[1] Dallas's Styles, Part ii. pp. 600, 614.

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precept is granted, and if the infeftment, be accordingly so taken, nothing more can be required.

Now if it is incompetent to go beyond the charter of 1733, how does it appear that there ever was an entail in 1708, at all, or, that that deed contained a destination different from the charter of 1733? The charter says, it is provided hereby, as it was provided by that old entail, "sicuti providetur." The charter therefore necessarily leads to the conclusion, that the provisions were the same. The destination is set forth as contained in the contract of marriage, and in the old entail, so that from this also it must be concluded that the destinations were identical. Two opposite and conflicting destinations — two inconsistent deeds of entail — cannot be gathered from the charter of 1733, to have existed. Looking at the charter alone, they must be held to be one and the same; and if prescription has set its seal upon that charter, as excluding all inquiry beyond it, then it is even incompetent to aver that there is a discrepancy betwixt the two investitures which that charter treats as identical. If there had been no entail in 1708, or had the entail of 1708, been liable to some radical defect in its prohibitions, or had all or any of the conditions set forth in the charter, been different from the corresponding conditions in the tailzie of 1708,— had it been a mistake to say "sicuti providetur et declaratur," either because there was no old entail at all, or no effectual entail, or because the entail provided differently, it clearly could not have been maintained, that in any of these events, the heirs of the contract of 1733, were not bound. The erroneous reference never could have taken away the force of the direct binding words, and no substitute could have contended that he was freed from the conditions

contained in the deed by which he was called; because, although that deed in itself, contained the conditions as provided and declared by its own force, it referred to another entail, as containing a similar set of conditions, in which reference there was an error. But if this could not be argued, it makes no difference that there was an old entail containing similar provisions. The force of the fetters does not arise from the similitude, or dissimilitude, which they bear to the fetters of another deed, but from the efficacy of the words contained in the investiture itself, and nothing else.

The investiture of 1733, having been declared to be a prescriptive investiture, the effect of that declaration is to exclude all inquiry into the state of the prior titles, and all reference to the entail of 1708. The existence of the old entail, therefore, and its terms, are matters as irrelevant to the succession of this estate, as the terms of any other entail, with which the lands of Craigiehall have no connexion. But if the reference to the destination in the old entail cannot control the destination called by the deed of 1733, that reference cannot have the slightest effect, with the view of working off the fetters of the deed of 1733. That deed does not set forth the destination of the entail of 1708; and if it once be admitted, as it seems impossible to deny, that fetters are imposed by the charter of 1733, and if that charter is the prescriptive title, beyond which it is incompetent to look, it can never be held that the fetters thereby imposed, are wrought off, because, a prescribed and extinct investiture can be shown by inquiry, extrinsic to the investiture of 1733, to have a different destination; nor can this be maintained, because the deed contains a reference to that extinct investiture, for it is res judicata, that that reference is

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wholly insufficient to carry the estate to any series of heirs, different from that which the deed of 1733, itself calls to the succession.

By the judgment in the former case, it was decided that the investiture of 1733, being fortified by prescription, it was incompetent to go beyond that investiture, even for the purpose of explaining it, and if so, still less can such reference be permitted for the purpose of contradicting it. The same principle has guided the determination of the Court in various cases. Thus in the case of the Duke of Buccleuch v. Cunynghame, 30th November 1826,[1] it was held, "that a party having "possessed an estate on a title from the Crown for up- "wards of forty years had acquired a prescriptive right, "although his title bore that the Crown had right by "virtue of the act of annexation, in which there is an "express exception of the right of the Crown to such "lands." The same rule was followed in the case of Forbes against Livingston.[2]

LORD BROUGHAM.—My Lords, there were two cases heard at the early part of this session when my noble and learned friend behind me who has just addressed your Lordships (Lord Lyndhurst) was present; I mean Vere v. Hope and Ross v. M'Leay. Very great attention was bestowed by my noble friend and myself upon both those cases, and they have been further considered since the argument; but it will not be in my power,

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[1] Duke of Buccleuch v. Cunynghame, Nov. 30, 1826, 5 S. & D. p. 57, (new. edit.) p. 53.

[2] Forbes v. Livingston, Jan. 31, 1822, 1 S. & D., p. 282, (new edit.) p. 263; 1 W. & S. App. C. p. 657; Rem. Nov. 29, 1827; 6 S. & D., p. 568, (new edit.); Feb. 16, 1832, 10 S. & D. p. 341, (new edit.)

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in moving your Lordships to give judgment upon them, to enter at any considerable length into either of them, and into one of them I shall not be able to enter at all. Were I to go into the particulars, either of the legal arguments upon the one, or of the arguments chiefly in point of fact upon the long detailed accounts, and the controversy in which those accounts were involved, in the other, I should occupy a very considerable portion of your Lordships time, and should moreover find that I had not sufficient time allotted to me, for reducing the argument into such a shape, as might render it worthy of your Lordships attention, and profitable to the parties respecting whose interests that argument would be addressed to the House. My Lords, this is owing to the sudden termination of the present sitting of this House; if one or two days more had been given for the purpose of enabling my noble and learned friend and myself, to reduce into writing the reasons upon which our opinion is grounded, and on which we are about to move your Lordships to give judgment in the cases,—if only so much time had been allowed us, it would certainly have been more satisfactory to ourselves, and possibly it might have been more satisfactory to the parties as well as to your Lordships.

From the course, however, which we are about to recommend to your Lordships in both of these cases, the impossibility of entering into a detail of those reasons in the one case, or of giving any thing more than a mere general statement of opinion in the other, is the less to be regretted upon two accounts: first, because we are prepared to recommend to your Lordships, to affirm in both appeals: secondly, because in the course of the very elaborate arguments which were held

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at the bar in each during a very considerable part of the early period of this session, from the conversations (if I may so term them) which took place between your Lordships, and the parties at the bar, and the constant opportunities which we had of stating how different points struck us as they were successively argued, the parties can be at no loss to know, nor will they, when I shall very generally state the grounds of the decision, be at any loss by recollecting to perceive, what the grounds are upon which our recommendation to your Lordships is founded.

My Lords, the case of Vere v. Hope, the first of these cases, arose from an action of declarator brought by Mr. Hope Vere the present owner, under an entail of the estate of Craigie Hall, in which the other heirs of entail were called to appear for the purpose of having it declared that he was free from the fetters of an entail said to have been constituted in a charter executed by the Countess of Hopetoun in 1733, or at least to have it found that he was free from any fetters which should effectually prohibit him (that is to say, by prohibitory, irritant, and resolutive clauses,) from altering the order of succession in those estates. The question then, which was raised in the appeal which had been made before the Court below, upon which the opinions of the other judges had been taken, and upon which their Lordships after much deliberation had pronounced their unanimous opinion, was substantially, Whether, upon the true construction of the deed of conveyance of 1733, by itself, or the two deeds of 1733, and 1758, together, constituting the investiture under which the estates are held, there is an effectual prohibition against the heirs of entail successively, of whom the appellant

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is one, altering the order of succession,—whether there is by that investiture a valid and effectual entail constituted; and, my Lords, the opinion of the consulted judges, in which we entirely coincide, was, that though the conveyance by the charter of 1733, was inartificially framed, though it was not conceived and executed in the proper technical form—in the best or any thing like even a tolerably good technical form—of Scotch conveyancing, nevertheless upon that deed itself, without going to the deed of 1758, there was a valid entail constituted with fetters sufficient to restrain the present appellant, from altering the order of succession.

My Lords, this is a question purely of Scotch conveyancing; it would therefore have required a case very clear from any doubt,—it would have required a very strong, and unhesitating opinion, to have been found by my noble and learned friend or myself,—to have justified us in recommending to your Lordships to alter in this place, a judgment so pronounced, by such authority upon such a question; nevertheless if upon examining the case fully,—if on minutely sifting the different parts of this instrument,—we had come to the conclusion that there was error in the judgment of the Court below, that the reasons which were supposed to justify its decision were insufficient, and that the arguments tendered to your Lordships in support of that judgment were not satisfactory, we certainly should have had no hesitation in doing upon this occasion, that, which we have done on former occasions of a similar description, and which this House expects shall be done whenever it may be necessary by those filling the situations which we have held, and still hold, of advising your Lordships in matters of law, though the questions on which those

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cases may turn, may be purely subjects of Scotch law, and even technical questions of Scotch conveyancing. Reversals have been found unavoidable, both in former times, and very recently, in such cases. But, my Lords, the result of our examination into this case was not of that kind. On the contrary, such of your Lordships as may have been present when the case was heard, may recollèct that we most minutely scrutinized the whole of the clauses of the deed of 1733, and we came to the conclusion then, and further consideration has completely fixed me in the conclusion, that, notwithstanding the inartificial manner in which this deed is framed, there is nevertheless, according to the precedents and practice of conveyancing in Scotland, sufficient to constitute a prohibition of altering the succession, if not perfectly apt, sufficiently apt in the fencing to render it effectual.

My Lords, there was another property involved in the same question on which the consulted judges in the Court below were on the second remit (not having answered on the first) again consulted,— I mean the lands of Craigie and Standingstanes,—Whether the tailzie of that estate was sufficiently constituted, and the first deed made effectual by the subsequent deed of 1758? That question, however, has not been disposed of in the Court below, but has been reserved in consequence of other proceedings in an action of declarator and reduction now pending in the Second Division. The judgment I propose to your Lordships will affirm the interlocutors appealed from of the 5th of March, 1833, and that of the 22d of June, 1833, (which merely related to the costs), and will not affect in any degree the interlocutory part relating to the estate of Craigie, and Standingstanes, on which I will not make on the present

occasion any observation. I now move your Lordships that these interlocutors be affirmed, but under all the circumstances of the case do not propose to your Lordships to give any costs.

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LORD LYNDHURST. — My Lords, it is only necessary for me to say that I entirely agree in the observations of my noble and learned friend.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House; and that the interlocutors, so far as therein complained of, be and the same are hereby affirmed.

RICHARDSON & CONNELL — SPOTTISWOODE & ROBERTSON, Solicitors.