

Dame ANN PATERSON or ANSTRUTHER, and Lady DIANA H. No. 56.  
 CAMPBELL and Others, Appellants.—*Ross—Clerk—Hope.*  
 Sir W. PURVES and Others, Respondents.—*Warren—Irving.*

*Prescription—Clause.*—A party who possessed an estate under an entail, prohibiting, inter alia, any alteration of the course of succession, having, by his son's contract of marriage, bound himself to convey the estate to a different series of heirs, and under different conditions from those in the entail, agreeably to which he granted a disposition and procuratory of resignation; and, in expediting the charter of resignation, the conditions and order of succession in the entail having been introduced historically in describing the lands; but the conveyance of them being made in terms of the marriage-contract, and under the conditions 'supra script. ;' and sasine having been taken accordingly, and possession enjoyed for forty years:—Held, (affirming the judgment of the Court of Session,) that the original entail was superseded, and that the charter and sasine formed the governing investiture of the estate, free from the limitations of the entail.

IN the year 1697 Patrick Lord Polwarth was created Earl of Marchmont, with a destination to his heirs-male whatsoever; and in January 1703 he executed a procuratory of resignation of his estates of Polwarth, Redbraes, Greenlaw, and others, situated in Berwickshire, in favour of himself in liferent, and Patrick Lord Polwarth, his eldest son, and a series of heirs, in fee, under the restrictions of an entail, and particularly that they should assume the arms and title of Hume of Marchmont, and should not alter the succession thereby destined. Upon this procuratory he obtained a Crown charter on the 29th of July 1704, the dispositive clause of which was thus expressed:—'Sciatis nos, &c. dedisse, 'concessisse, et disposuisse, et pro nobis nostrisque successoribus 'pro perpetuo confirmâsse, sicuti cum avisamento et consensu 'prædict. damus, concedimus, et disponimus, proq. nobis et successoribus nostris pro perpetuo confirmamus prædilecto nostro 'consanguineo Patricio Comiti de Marchmont, Domino Polwarth, ' &c. in vitali reddito, duran. omnibus suæ vitæ diebus, et Patricio Domino Polwarth, ejus filio legitimo natu maximo, et hæredibus masculis de ejus corpore legitime procreand., in feodo; 'quibus deficien., dict. Patricii Comitis de Marchmont hæredibus masculis sui maritagii cum quond. Domina Grisella Kerr; 'ejus sponsa, Comitissa de Marchmont; quibus deficien., dict. 'Patricii Comitis de Marchmont proximis legitimis hæredibus 'masculis quibuscunq.; quibus etiam deficien., suis proximis legitimis hæredibus-fœmellis, natu maxima hærede-fœmella semper excluden. reliquas ejusq. gradûs, et succedere absq. divisione; quibus etiam deficien., ejus proximis legitimis hæredi-

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 ‘ cum et sub expressis provisionibus et conditionibus semper sub-  
 ‘ tus specificat.’

There then followed a description of the various lands; after which the charter bore that they were resigned in the hands of the Crown for new infeftment to the Earl in liferent, and the above heirs of tailzie in fee:—‘ Et cum et sub dict. provisionibus  
 ‘ et conditionibus subtus specificat. viz. Proviso, sicuti tenore  
 ‘ præsentis cartæ expresse providetur et declaratur, et sic pro-  
 ‘ videbitur infeofamentis desuper sequen., quod dict. Patricius  
 ‘ Dominus Polwarth, et reliqui hæredes masculi et substituti  
 ‘ succeden. ad dict. terras et lie estate virtute talliæ supra script.,  
 ‘ astringentur, tenebuntur, et obligabuntur nominare et designare  
 ‘ seipsos cognomine de Hume solummodo, et gerere et portare  
 ‘ arma et tunicam armoream familiæ de Marchmont: Et etiam  
 ‘ proviso, sicuti tenore præsentis cartæ providetur, quod si (de-  
 ‘ ficien. hæredibus masculis) contigeret dict. heredes-fœmellas  
 ‘ succedere ad dict. terras et lie estate virtute talliæ supra script.,  
 ‘ tunc et in eo casu dict. hæres-fœmella sic succeden. astringetur,  
 ‘ tenebitur, et obligabitur nubere viro nobili vel generoso cogno-  
 ‘ mini de Hume, vel qui, ejusq. hæredes quos succedere contigeret  
 ‘ ad dict. terras et lie estate virtute talliæ supra script., dict. cog-  
 ‘ nomen assument, et gerent et portabunt arma et tunicam armo-  
 ‘ ream dict. familiæ de Marchmont: Et similiter proviso, sicuti  
 ‘ tenore præsentis cartæ ulterius providetur, quod non erit lici-  
 ‘ tum nec legitimum dict. Patricio Domino Polwarth, nec aliis  
 ‘ hæredibus talliæ supra script., vel eorum cuilibet, quodvis  
 ‘ factum vel actum directe vel indirecte facere ad frustran-  
 ‘ dum, infringendum, innovandum, vel alterandum hanc præ-  
 ‘ sentem talliam in ordine successionis, et sub provisionibus  
 ‘ et conditionibus ejusd. supra express., aliquo modo: Et si  
 ‘ contigeret dict. Patricium Dominum Polwarth, vel quemlibet  
 ‘ hæredem talliæ supra specificat., deficere in exacta et punctuali  
 ‘ præstatione conditionum supra express., vel quodlibet actum  
 ‘ vel factum directe vel indirecte facere in contraventionem  
 ‘ ejusd., tunc et in eo casu, et quoties evenire contigeret, contra-  
 ‘ veniens ipso facto perdet et amittet jus ad dict. terras et lie  
 ‘ estate, et eadem devolvent, accrescent, et pertinebunt ad proxi-  
 ‘ mum immediatum hæredem talliæ, sub provisionibus et condi-  
 ‘ tionibus supra express.; idque ope exceptionis, sine qualibet de-  
 ‘ claratione, cui erit legitimum se cognosci et deserviri hæredem  
 ‘ in speciali vel contravenienti, vel contravenientis immediato  
 ‘ prædecessori qui obiit ultimo vestit. et sasit., et desuper obti-  
 ‘ nere seipsos debiter intrat., infeodat., et sasit. in dict. terris et lie

‘ estate, sicuti congruit, sine qualibet subjectione seu obligatione Mar. 10. 1823.  
 ‘ pro debitis aliisque factis contravenientis, qualibet modo.’

In the deed there was no prohibition against alienation, or the contracting of debt; and although there was a resolute clause, relative to the prohibition of altering the order of succession, yet there was not an irritant one. A power was reserved to the Earl to sell the estate and contract debts; and a clause was introduced, incorporating the whole lands into a free lordship and regality, of which Greenlaw was to be the head burgh. On this charter sasine was taken on the 26th of August 1704.

Patrick Lord Polwarth, the institute, predeceased his father without issue; and on the death of the Earl he was succeeded in his honours and estates by his second son Alexander, who made up titles under the investiture 1704, by special service, as heir of provision to his eldest brother Patrick. Earl Alexander married the heiress of Campbell of Cessnock in Ayrshire, by whom he acquired in fee-simple the estates of Cessnock and Sornbeg in that county. He had a son, Hugh Lord Polwarth, who in 1731 entered into a contract of marriage with Miss Ann Western, an English lady of considerable fortune. By this contract (to which Earl Alexander was a party, and in which Charles Lord Binning, and David Mitchell of Papes in the county of Hertford, were trustees for the lady) the Earl, in consideration of the marriage, and of the payment to him of £18,000, (being part of the lady’s portion,) bound and obliged himself to convey to these trustees his whole estates, both in Berwickshire and Ayrshire, ‘ in trust, never-  
 ‘ theless, and to and for the uses herein after mentioned, and to and  
 ‘ for no other uses, purposes, and intents whatsoever:—that is to  
 ‘ say, to the use of the said Hugh Hume Campbell, commonly  
 ‘ called Lord Polwarth, and to his heirs-male lawfully begotten  
 ‘ on the body of the said Ann Western, his intended wife.’—  
 Then followed certain provisions for the lady and for younger children, and a reservation of the Earl’s liferent, with other conditions not necessary to be specified.

The marriage having taken place, the Earl, in implement of the above obligation, executed, on the 21st of May 1731, a disposition and procuratory of resignation, proceeding on a narrative of the terms of the contract of marriage. The dispositive clause was thus expressed:—‘ Therefore wit ye us, the said Alexander  
 ‘ Earl of Marchmont, (with consent of the said Charles Lord  
 ‘ Binning and David Mitchell, trustees aforesaid,) for the love,  
 ‘ favour, and affection which we have and bear to the said Hugh  
 ‘ Lord Polwarth, our said son, and for implement and fulfilling  
 ‘ of our part of the said marriage articles, and for divers and

Mar. 10. 1823. ‘sundry other good causes and considerations moving us here-  
 ‘unto, to have given, granted, and disposed, as, by the tenor  
 ‘hereof, (with and under the express reservations, provisions,  
 ‘and declarations under written, allenary, and no otherwise, which  
 ‘are to be insert in the infestment to follow hereupon,) we, with  
 ‘consent foresaid, give, grant, and dispone, heritably and irredeem-  
 ‘ably, to the said Hugh Lord Polwarth, our eldest son, and his  
 ‘heirs-male of the marriage with the said Ann Western; which  
 ‘failing, to his heirs-male of any other marriage; which failing, to  
 ‘his other heirs who are to succeed to the honours and title of  
 ‘Earl of Marchmont,—all and hail,’ &c. There was then inserted  
 a description of the lands in Berwickshire and Ayrshire, which  
 was followed by the provisions; reservations, and conditions  
 inserted in the contract of marriage. In the procuratory of  
 resignation he gave authority to resign the lands ‘in favour  
 ‘and for new infestments of the same to be made and granted to  
 ‘the said Hugh Lord Polwarth, and his heirs-male of the mar-  
 ‘riage with the said Ann Lady Polwarth; which failing, to his  
 ‘heirs-male of any other marriage; which failing, to his other  
 ‘heirs who are to succeed to the title, honours, and dignity of  
 ‘Earl of Marchmont, heritably, in such due and competent form  
 ‘as accords, with and under the reservations, provisions, and de-  
 ‘clarations before and after mentioned.’ There were then again  
 inserted the provisions, reservations, and conditions contained in  
 the marriage-contract, and an obligation that Hugh Lord Pol-  
 warth should expedite his infestments, ‘with and under all and  
 ‘every the provisions and declarations contained in this present  
 ‘right and disposition, and no otherwise.’ No allusion whatever  
 was made in this deed to the investiture 1704, under which the  
 Earl possessed the estates in Berwickshire, and by which they  
 were destined to a different series of heirs. This disposition was  
 followed by a supplementary one on the 5th of March 1734, in  
 relation to lands which had been accidentally omitted in the former  
 one, but which was precisely in the same terms.

On the 12th of February 1736, the lands were resigned in the  
 hands of the Crown; and an instrument of resignation was expedite,  
 bearing that the resignation proceeded ‘by virtue of the procu-  
 ‘ratories of resignation contained in the respective rights and  
 ‘dispositions of the said lands, lordships, and others under writ-  
 ‘ten, made and granted by the said Alexander Earl of March-  
 ‘mont to and in favour of Hugh Hume Campbell Lord Pol-  
 ‘warth, his son, and his heirs-male of the marriage with Dame  
 ‘Ann Western Lady Polwarth; which failing, to his heirs-male  
 ‘of any other marriage; which failing, to his other heirs who were

‘ to succeed to the title, honours, and dignity of Earl of March- Mar. 10. 1823.  
 ‘ mont, heritably and irredeemably ;—the one of the said disposi-  
 ‘ tions dated the 27th of May 1731, and the other of the said  
 ‘ dispositions dated the 5th day of March 1734.’ After de-  
 ‘ scribing the lands, the instrument stated, that ‘ which several  
 ‘ lands, &c. and others above written, with the pertinents, viz. the  
 ‘ said lands and barony of Redbraes, the lands and barony of  
 ‘ Polwarth, the lands and barony of Greenlaw, with the advoca-  
 ‘ tion, &c. were all formerly unite in ane hail free burgh of ba-  
 ‘ rony, called the barony of Polwarth, conform to the charter  
 ‘ above mentioned; as also the said lands and barony of Green-  
 ‘ law Redpath, comprehending as said is, &c. formerly belonging  
 ‘ to the said deceased Patrick Earl of Marchmont, and were by  
 ‘ him and his lawful procurators duly and lawfully resigned in  
 ‘ the hands of the Lords Commissioners of the Treasury and  
 ‘ Exchequer of his deceased Majesty King William of blessed  
 ‘ memory upon the 24th day of the month of June 1700, in fa-  
 ‘ vour and for new infestments of samen to be made and granted  
 ‘ to the said umquhile Patrick Earl of Marchmont in liferent,  
 ‘ and the deceased Patrick Lord Polwarth, his eldest son, his  
 ‘ heirs-male, and other heirs of tailzie and provision after speci-  
 ‘ fied, in fee, with and under the express provisions and conditions  
 ‘ under written ; as also the said lands of Rowinston, with the  
 ‘ pertinents thereof, formerly pertaining to the said deceased Pa-  
 ‘ trick Lord Polwarth, and were by him and his lawful procura-  
 ‘ tors also duly and lawfully resigned in the hands of the Lords  
 ‘ Commissioners of Treasury and Exchequer of her deceased Ma-  
 ‘ jesty Queen Anne upon the 22d day of the month of January  
 ‘ 1703, in favour and for new infestments of the same to be made  
 ‘ and granted to the said deceased Patrick Earl of Marchmont  
 ‘ in liferent, and to the said deceased Patrick Lord Polwarth,  
 ‘ and the heirs-male lawfully to be procreated of his body, in fee ;  
 ‘ which failing, to the said deceased Patrick Earl of Marchmont  
 ‘ his heirs-male of the marriage with the deceased Dame Grisel  
 ‘ Kerr, his spouse, Countess of Marchmont ; which failing, to the  
 ‘ nearest lawful heirs-male whatsoever of the said deceased Pa-  
 ‘ trick Earl of Marchmont his nearest heirs-female, the eldest heir-  
 ‘ female always excluding the rest of the same degree, and suc-  
 ‘ ceeding without division ; which also failing, to his nearest law-  
 ‘ ful heirs and assignees whomsoever, heritably and irredeemably,  
 ‘ and with and under the provisions and conditions after specified,  
 ‘ viz. Providing, as by the said resignation and charter granted  
 ‘ thereupon it was expressly provided, and ordained to be provided  
 ‘ by the infestments following thereupon, that the deceased Pa-

Mar. 10. 1823. ‘ trick Lord Polwarth, and the other heirs-male and substitutes  
 ‘ succeeding to the said lands and estate by virtue of the tailzie  
 ‘ above written, should be holden bound and obliged to name and  
 ‘ design themselves by the surname of Hume, and to carry or  
 ‘ bear the ensigns or coat armorial of Marchmont: As also pro-  
 ‘ viding, as by the said charter it was provided, that if (the heirs-  
 ‘ male failing) it should happen the heirs-female to succeed to  
 ‘ the said lands and estate by virtue of the tailzie above written,  
 ‘ then and in that case the said heir-female so succeeding should  
 ‘ be holden bound and obliged to marry a nobleman or gentle-  
 ‘ man of the surname of Hume, or who, and his heirs that should  
 ‘ happen to succeed to the said lands by virtue of the tailzie above  
 ‘ mentioned, should assume the surname, and carry and bear the  
 ‘ ensigns and coat armorial of the said family of Marchmont:  
 ‘ And likewise providing, as by the said charter it was further  
 ‘ provided, that it should not be leisome or lawful to the said de-  
 ‘ ceased Patrick Lord Polwarth, nor to the other heirs of tailzie  
 ‘ above written, or any of them, to do any fact or deed, directly  
 ‘ or indirectly, to frustrate, infringe, innovate, or alter the said  
 ‘ tailzie in the order of succession, and under the provisions and  
 ‘ conditions above expressed, any manner of way whatsoever:  
 ‘ And if it should happen the said Patrick Lord Polwarth, or any  
 ‘ other heir of tailzie above specified, to be deficient in the exact  
 ‘ and punctual observance of the conditions above set down, or to  
 ‘ do any fact or deed, directly or indirectly, in contravention  
 ‘ thereof, then and in that case, and as oft as the same shall hap-  
 ‘ pen, the person contravening shall thereby amit and lose all  
 ‘ right to the said lands and estate, and the same shall devolve,  
 ‘ accresce, and pertain to the next immediate heir of tailzie under  
 ‘ the provisions and conditions above expressed, and that simply  
 ‘ by way of exception, without any declarator to whom it should  
 ‘ be lawful to serve and cognosce themselves heirs in special, either  
 ‘ to the contravener, or his immediate predecessor who died last  
 ‘ vest.’ There were then introduced the other clauses contained  
 in the titles of 1704, which were followed by a resignation of the  
 lands in Ayrshire. After this the instrument proceeded to state,  
 that the resignation of these several lands was made ‘ in the hands  
 ‘ of George Dalrymple, Esq. one of the Lords Barons of said Ex-  
 ‘ chequer, for himself, and in name and behalf of the remanent  
 ‘ Barons of Exchequer, who accepted and received the same in  
 ‘ favour and for new infestment thereof to be made and granted  
 ‘ to the said Hugh Hume Campbell Lord Polwarth, and his  
 ‘ heirs-male of the marriage with the said Ann Lady Polwarth;  
 ‘ which failing, to his heirs-male of any other marriage; which

‘ failing, to his other heirs who are to succeed to the titles, honour, Mar. 10. 1823.  
 ‘ and dignity of Earl of Marchmont, heritably, in such due and  
 ‘ competent form as accords, with and under the reservations,  
 ‘ provisions, and declarations therein and after mentioned.’ The  
 reservations and provisions contained in the contract of marriage,  
 and no other, were then inserted.

A charter of resignation was then expedite on the 12th of February 1736, the dispositive clause of which bore, that his Majesty conveyed ‘ dilecto nostro Hugoni Hume Campbell Domino Polwarth, filio legitimo natu maximo Alexandri Comitis de Marchmont, &c., et hæredibus ejus masculis maritagii cum Domina Ann Western Domina Polwarth; quibus deficient., hæredibus ejus masculi cujusvis alterius maritagii; quibus deficient., aliis ejus hæredibus qui honoribus et titulo Comitis de Marchmont succedere designantur, hæreditarie et irredimabiliter, cum et sub expressis reservationibus, provisionibus, et declarationibus subscript. solummodo, et haud aliter, quæ in hac præsentis carta et infeofamentis desuper sequen. inseri ordinantur, totas et integras terras,’ &c.

There then followed a description of the lands, and a translation of the above clauses contained in the titles 1704, specifying the limitations and prohibitions therein expressed, precisely as had been done in the instrument of resignation; after which this clause was introduced:—‘ Quæquidem terræ, dominium, regalitas, baroniæ, molendina, terræ molendinariæ, decimæ, rectoriæ et vicariæ, jura patronatûs, aliaq. particulariter supra specificat., jacen. modo respective supra mentionat., cum omnibus suis pertinent. (terræ et baroniâ de Sornbeg, comprehendentes particulares terras, decimas, aliaq. supra mentionat., exceptis,) ad dict. Alexandrum Comitem de Marchmont perprie hæreditarie pertinerunt, per illum ejusq. prædecessores de nobis nostrisque regiis prædecessoribus tent., et quæ per præfat. Alexandrum Comitem de Marchmont, ejusq. legitimos procuratores ejus nomine ad hunc effectum specialiter constitut. per patentes literas procuratoriales content. in jure et dispositione præmissorum, et concess. per dict. Alexandrum Comitem de Marchmont, cum consensu demortui Caroli Domini Binning, et Davidis Mitchell de Papes vicecomitatu de Hertford, Armigeri, pro dict. Anna Domina Polwarth, fidecommissariorum; ad et in favorem dict. Hugonis Domini Polwarth, ejus filii, ejusq. prædict., de data Londini vigesimo septimo die mensis Maii, anno Domini millesimo septingentesimo trigesimo primo, et content. in jure et dispositione fact. et concess. per dict. Alexandrum Comitem de Marchmont, cum consensu prædict.; ad et in favorem præfat. Hugo-

Mar. 10. 1823. ‘ nis Domini Polwarth, de data Londini quinto die mensis Mar-  
 ‘ tis, anno Domini millesimo. septingentesimo trigesimo quarto, in  
 ‘ manibus dict. Dominorum Scaccarii nostri Baronum apud  
 ‘ Edinburgum duodecimo die mensis Februarii instantis, debite  
 ‘ et legitime resignatæ fuerunt in favorem proque hoc novo  
 ‘ nostro earund. infeofamento præfato Hugoni Domino Polwarth,  
 ‘ ejusque hæredibus masculis maritagii cum dict. Anna Domina  
 ‘ Polwarth ; quibus deficient., hæredibus ejus masculis cujusvis al-  
 ‘ terius maritagii ; quibus deficient., aliis ejus hæredibus qui titulo  
 ‘ et dignitati Comitis de Marchmont succedere designantur, hære-  
 ‘ ditarie et irredimabiliter, dand. et concedend. in tam debitâ et  
 ‘ competenti formâ uti congruit, cum et sub reservationibus,  
 ‘ provisionibus, et declarationibus in dict. dispositione content.  
 ‘ et postea mentionat.’

The reservations and provisions here mentioned were those which were inserted in the contract of marriage. The tenendas clause bore, that the lands were to be held ‘ sub reservationibus ; provisionibus, et declarationibus supra specificat. ;’ and the precept of sasine directed sasine to be given, ‘ cum et sub expressis reservationibus, provisionibus, et declarationibus supra script. solummodo, et haud aliter.’ These words, ‘ supra specificat.’ and ‘ supra script.,’ were capable of being applied to the whole provisions, conditions, &c. previously inserted in the deed, including those taken from the titles of 1704:

In virtue of this charter, sasine was taken in October, and recorded in November 1737. The instrument commenced by narrating, that the attorney of Hugh Lord Polwarth had come to the ground, ‘ habens et in suis manibus tenens quandam cartam, præceptum sasinæ sub insert. in se continen. fac. dat. et concess. sub Magno Sigillo S. D. N. Regis, præfato Hugoni Hume Campbell Domino Polwarth, et hæredibus ejus masculis maritagii cum Domina Anna Western Domina de Polwarth ; quibus deficient., hæredibus ejus masculis cujusvis alterius maritagii ; quibus deficient., aliis ejus hæredibus qui honoribus et titulo Comitis de Marchmont succedere designantur, hæreditarie et irredimabiliter, cum et sub expressis reservationibus, provisionibus, et declarationibus subscript., et haud aliter, quæ in hoc præsentî infeofamento inseri ordinantur, de totis et integris terris, &c., aliisque particulariter subtus specificat.’ After this there was inserted a description of the lands, and the provisions, conditions, &c. of the investiture 1704 were then introduced in the same way as had been done in the instrument and charter of resignation. The sasine then stated that the lands &c. had been resigned in the hands of the Crown, in



‘ favorem proq. novo earund. infeofamento præfato Hugoni Mar. 10. 1823.  
 ‘ Domino Polwarth, ejusque hæredibus masculis maritagii cum  
 ‘ dicta Anna Domina Polwarth ; quibus deficient., hæredibus ejus  
 ‘ masculis cujusvis alterius maritagii ; quibus deficient., aliis  
 ‘ ejus hæredibus qui honoribus, titulo, et dignitati Comitis de  
 ‘ Marchmont succedere designantur, hæreditarie, irredimabiliter,  
 ‘ dand. et concedend. in tam debitâ et competenti formâ uti con-  
 ‘ gruit, cum et sub reservationibus, provisionibus, et declarationi-  
 ‘ bus in dict. dispositione content. et postea mentionat.’ There  
 then followed the reservations, provisions, and declarations con-  
 tained in the contract of marriage ; and sasine was given, ‘ cum  
 ‘ et sub expressis reservationibus, provisionibus, et declarationi-  
 ‘ bus supra script. solummodo, et haud aliter.’

In 1739 Earl Alexander died, and was succeeded by his son Hugh Lord Polwarth, now Earl of Marchmont, who continued to possess the estates, in virtue of the above charter and sasine, till 1794, when he died. He left three daughters,—Lady Ann, who was dead, but had a daughter by Sir John Paterson,—Lady Margaret, who died without issue,—and Lady Diana, who was married to Walter Scott of Harden, by whom she had children.

On the death of Hugh Earl of Marchmont, it was found that he had executed a trust-disposition and deed of settlement conveying his estates to Messrs. Wauchope and Cumming, writers to the signet, for various purposes, and, inter alia, to make them over to a series of heirs nominated in a relative deed of tailzie ;—‘ whom failing, the heirs-male of the body  
 ‘ of Lady Diana Hume Campbell, alias Scott, to be procre-  
 ‘ ated between her and any other husband she might happen  
 ‘ to marry after the decease of Walter Scott, Esq. of Harden,  
 ‘ in case she shall survive him ; whom failing, any daughter or  
 ‘ daughters to be procreated of the body of the said Lady Diana  
 ‘ Hume Campbell, alias Scott, by any other husband than the  
 ‘ said Walter Scott, in their order, and the heirs-male of their  
 ‘ bodies respectively ; whom failing, any other daughter or daugh-  
 ‘ ters yet to be procreated of my own body, and the heirs-male  
 ‘ of their bodies respectively ; whom failing, the heirs of the body  
 ‘ of Sir Alexander Purves of Purveshall, and to the heirs-male of  
 ‘ their bodies,’ &c. The trustees, in consequence of this deed, ex-  
 pede a charter of resignation, and were infeft, and thereafter con-  
 veyed the lands to the respondent Sir William Purves, the son of  
 Sir Alexander, and who had right under the deeds executed by  
 Earl Hugh. On the other hand, Lady Diana and her family,  
 and his grand-daughter Lady Paterson or Anstruther, claimed  
 right under the investiture of 1704, by which the estates in Ber-

Mar. 10. 1823. wickshire were destined to the heirs-female of Patrick Earl of Marchmont, failing heirs-male—an event which had now occurred. They therefore brought an action of reduction and declarator, in which they concluded to have it found, first, that the investiture of 1704 was still subsisting and available, and that the charter and sasine of 1736 was made under the limitations contained in that investiture, so that they had right to succeed under the destination in these titles to heirs-female, failing heirs-male of the body of Earl Patrick; and that the trust-disposition and entail of 1794 were contrary to the prohibitions contained in these titles, and therefore unavailing;—and, second, that in the event it should be found that the charter and sasine in 1736 were inconsistent with the original tailzie in 1704, it ought to be declared that that charter and sasine were not effectual, as flowing a non habente potestatem, and therefore that effect should be given to the original investiture.

In defence, and as a title to exclude, it was maintained by Sir William Purves, and the other heirs having right under the deeds executed by Earl Hugh in 1794, that by the charter and sasine of 1736 in favour of his Lordship, the estates had been conveyed to him and the heirs therein mentioned, subject only to the reservations and provisions in his contract of marriage, and without any of the limitations imposed by the original tailzie; and that as he had possessed on that charter and sasine for more than 40 years, he had acquired an effectual prescriptive title to the lands in fee-simple.

The Lord Ordinary found, that ‘ by the marriage articles of  
 ‘ the 1st of May 1731, Alexander Earl of Marchmont, with a  
 ‘ view to the marriage of his son Hugh, then Lord Polwarth,  
 ‘ with Miss Ann Western, and to the payment of £18,000 of  
 ‘ the lady’s fortune, became bound to convey the estate of March-  
 ‘ mont to trustees for behoof of the heirs-male of the marriage,  
 ‘ and under certain ‘ reservations, provisions, and declarations’  
 ‘ in favour of himself and of his son’s wife, and of the younger  
 ‘ children of his son’s marriage, but without any other limita-  
 ‘ tions, and particularly without reference to the provisions and  
 ‘ conditions contained in the tailzie of 1704, under which Alex-  
 ‘ ander Earl of Marchmont held the estate, and also without re-  
 ‘ ference to the nomination or substitution of heirs contained in  
 ‘ that deed: That, in implement of the said marriage articles,  
 ‘ Alexander Earl of Marchmont executed a disposition on the  
 ‘ 21st May 1731, and a supplementary disposition in 1734-5,  
 ‘ conveying his estate, under the same ‘ reservations, provisions,  
 ‘ and declarations’ as those expressed in the marriage articles,

‘ in favour of himself and of Lady Polwarth, and of the younger Mar. 10. 1823.  
 ‘ children of his son’s marriage, to his son, then Lord Polwarth,  
 ‘ and the heirs-male of the marriage, and substituting, (though  
 ‘ this was not required by the marriage articles,) in the event of  
 ‘ the failure of heirs-male, the heirs-male of his son of any other  
 ‘ marriage; whom failing, ‘ his other heirs who are to succeed  
 ‘ to the honours and title of Marchmont:’ That an instru-  
 ‘ ment of resignation having been expedite on the procuratories  
 ‘ contained in the dispositions 1731 and 1734-5, a charter of re-  
 ‘ signation followed in 1736, on which infeftment was taken by  
 ‘ Hugh then Lord Polwarth in 1737, and on which titles his  
 ‘ Lordship (who in 1739 succeeded to his father, and became  
 ‘ Earl of Marchmont) possessed till his death in 1794: That  
 ‘ the charter 1736, and infeftment upon it, were conceived in fa-  
 ‘ vour of the series of heirs above mentioned, as contained in  
 ‘ the disposition 1731, and supplementary disposition 1734-5,  
 ‘ and cannot be held as granted in favour of the series of heirs  
 ‘ contained in the tailzie 1704: That the charter and infeft-  
 ‘ ment referred to, were granted under the ‘ reservations, provi-  
 ‘ sions, and conditions’ in favour of Alexander Earl of March-  
 ‘ mont, and of Lady Polwarth, his son’s wife, and of the younger  
 ‘ children of their marriage, and under no other limitations; and  
 ‘ in particular that the charter 1736, and infeftment, were not  
 ‘ burdened with the conditions, prohibitory and resolute, con-  
 ‘ tained in the tailzie 1704; and that although the charter 1736,  
 ‘ and infeftment on it, in describing the lands and former titles  
 ‘ under which the estate was held, mentions both the series of  
 ‘ heirs of the entail 1704, and the ‘ provisions and conditions’  
 ‘ contained in that deed, yet that the insertion of the nomination  
 ‘ of heirs, as well as of the prohibitory and resolute clauses of  
 ‘ the tailzie, is only made in detailing the former titles, and  
 ‘ that the charter 1736 is expressly taken to a particular series of  
 ‘ heirs distinctly enumerated in the dispositive clause, and differ-  
 ‘ ent from the series of heirs in the entail 1704, and under reserv-  
 ‘ ations, provisions, and declarations which are also distinctly  
 ‘ enumerated in the proper clause, and are totally different  
 ‘ from those in the tailzie: That, therefore, Hugh the last Earl  
 ‘ of Marchmont having possessed the estate under the charter  
 ‘ 1736, and infeftment 1737, till his death in 1794, thereby ac-  
 ‘ quired a prescriptive right in fee-simple; and further, that the  
 ‘ pursuers not having been called to the succession under these  
 ‘ titles, the defender, whose right is derived from the last Earl  
 ‘ of Marchmont, has produced a sufficient title to exclude the  
 ‘ pursuers founding their right on the entail of 1704: On these

Mar. 10. 1823. ' grounds, assoilzies the defenders from the conclusions of the  
' libel, and decerns.'

Against this judgment the appellants reclaimed; but the Court, on the 19th of February and 27th of May 1819, adhered.\* The appellants then entered an appeal, and contended,—

1. That as the deed of tailzie in 1704 contained effectual clauses against altering the order of succession, Earl Alexander could not competently grant any deed for making an alteration of that course of succession; and therefore, if the deeds of 1736 were to be considered as inconsistent with the original tailzie, they were null and void.

2. That the deeds of 1736 were expressly qualified with the limitations of the original tailzie, because the dispositive clause in the charter conveyed the lands subject to the conditions of that tailzie, and precept was given to infest subject to the conditions ' supra script.,' and sasine was taken under the conditions ' sub-script.,' which referred to those of the original entail; and therefore the deeds of 1736 could form no title of prescription, so as to create a more extensive right to the lands than under the entail of 1704: And,—

3. That supposing they could afford such a title, still, as they were qualified by the limitations created by the original tailzie, under which the appellants had right to the estate, they were entitled to claim by virtue of these deeds, and independent altogether of the original tailzie; and that, even by the deeds of 1736, Earl Hugh was effectually prevented from executing the trust and entail of 1794.

On the other hand, it was maintained by the respondents,—

1. That the original tailzie was entirely superseded and swept away by the charter and infestment in 1736, and the possession had thereon, which titles thenceforth became the governing investiture of the estate.

2. That although, in framing the charter and sasine, the terms of the original tailzie had been introduced, yet this had been done merely historically, and with the view of describing the subjects; and that accordingly the charter was granted, and the sasine taken, only under the reservations contained in the contract of marriage.

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

*Appellants' Authorities.*—2. Ersk. 3. 23. 24; 1. Jur. Styles, 438.

J. RICHARDSON,—SPOTTISWOODE and ROBERTSON,—Solicitors.  
(*Ap. Ca. No. 6.*)