BRAXFIELD. As to sexennial prescription, this obligation does not fall under it. It is a holograph obligation, good for twenty years.

ESKGROVE. The Act 1772 respects *promissory-notes;* and not an obligation like this, which is not of the nature of a promissory-note.

PRESIDENT. The using of the word *promise* is no evidence that a *promissory-note* was here intended.

On the 7th December 1784, "The Lords found that the letter from Howison does not fall under the sexennial prescription of the statute 12th Geo. III."

1784. *July* 13. GEORGE ALEXANDER GORDON *against* JANET GORDON and MARGARET GRANT.

PRESCRIPTION—TAILYIE.

How far interrupted by the minority of substitute heirs.

[*Fac. Coll. IX.* 293; *Dict.* 10,968.]

PRESIDENT. It was found, in the case of *Makerston*, that no minority could interrupt. But that case went not to the House of Lords: it was settled by my decreet-arbitral; and a large sum was awarded to the heir. I think that the minority of the next heir ought to be deducted.

On the 13th July 1784, "The Lords found that the years of the minority of the next heir ought to be deducted from the prescription."

Act. W. Honeyman. *Alt.* R. Blair.

Reporters, Alva and Henderland.

December 21. MONBODDO. Every heir of entail has an interest, and, of consequence, a right to oblige the heir in possession to make up his titles on the entail. The question is, Whether his minority is to be deducted from the time allowed for his compelling the heir so to do? This entail is not old: it was not a latent deed; and the first institute in it is the person who began to possess contrary to the entail; and consequently, in all those particulars, it is a more favourable case than that of Makerston. If this heir-male has not the privilege of minority, no substitute in an entail can ever have the privilege. The statute 1617 is very express. It was said that there was a distinction between the negative and the positive prescription, though it was admitted that the decisions of this Court had made no such distinction: there was no negative prescription

in the Roman law; neither was any such term known with us at the time of the statute 1617. All prescription is both positive and negative. It is said that there was a joint right of heirs of entail. But no such thing is known in our law. This is confounding a right *pro indiviso* with a right in succession. It is said that no minority can be pleaded against acquiring a private right over a highway. *Answer, There* all individuals have a right at once, and not in succession. It is said, that at this rate there may be a perpetual succession of minorities. *Answer,* The heir cannot plead any minority but his own. An heir of entail is not the heir of his predecessor, even although he were his heir-at-law: he would take, not as such, but as heir of the entailer. In the case of *Kinadie,* that distinction was not attended to here; but the House of Lords observed it, and reversed the judgment of this Court. As to the case of *Makerston,* I have great respect for the judges who were then on the bench. But it was a very circumstantiated case; and I confess that I do not approve of the decision. It happened then, as Livy says of the deliberations of the Carthaginian senate, *major pars meliorem vicit.* I will not say concerning the decisions of *those* judges what he adds, *quod plerumq. fit.*

JUSTICE-CLERK. The statute 1617 is a very important part of our law: these words are in it, *nor by any other person pretending right to the same, by virtue of any other infeftment, public or private.* The persons here meant are not those who have a contingent or eventual right; he who pleads his minority must have a right that enables him to *compete* for the estate. Let us apply this to the present case: Mr Alexander Gordon was in possession of a fee simple, and in the course of acquiring a right to it by prescription, when, by the death of Charles Gordon, the pursuer came one step nearer to the succession of Mr Alexander Gordon. I admit, that if, at that time, (1775,) Mr Alexander Gordon had died, the pursuer would have been a *competitor* with the heir of line of Mr Alexander Gordon, and then his minority would have *interrupted.* I use the common phrase, though in propriety we should say, the years of his minority would have been deducted. It is on this very principle that the case of Makerston was judged. What would be the state of landed property in Scotland, where there are so many entails, were the minorities of substitutes to interrupt *ad infinitum?* The counsel tried to make a distinction: they limit the deduction to the minority of the *next* heir. But *who* is the *next* heir? Here the person, understood by that name, is the next to the unborn issue of Mr Alexander Gordon. Every heir of entail has an equal interest, though *that* of the nearer substitute may be the most valuable. I shall not easily part with such a decision as that of Makerston.

MONBODDO. I know no difference between the nearest and the most remote substitute; but it is only the nearest who can claim.

HENDERLAND. The Act 1617, in the very preamble of it, takes notice of the interest of minors. The exception in the statute as to minority is very broad: it relates to every case where there is a minority with a termination; and therefore it does not relate to boys in an hospital. This right is so far personal that no person who does not take in the minor's right can claim the benefit of it. But, when a substituted heir of entail pleads minority in his own right, I do not see how he can be excluded. [He then went into a calculation of the time

during which there could be minorities sufficient to interrupt; but his argument, depending on calculations and supposed cases, could not be followed.] It could not be the intention of the legislature, in establishing entails, to exclude the privilege of minors. The quotation, read from the statute by Lord Justice-Clerk, is very strong: but then the statute adds, *pretending* to have a right though not infeft. I do not see how the case of *Sheddan* can be held to have been rightly determined, unless the right of substitutes in an entail be held good.

BRAXFIELD. I do not mean to enter into the merits of the decision in the case of *Sheddan*, and other cases. Perhaps it would have been as expedient had the legislature not deducted minorities. I think, however, that these cases were well decided. But the question is, Who is it then can plead minority? It is the *verus dominus*, and not the person who has merely a contingent right. If a tailyie in Scotland were of the same nature as an English entail, I should think that the minority of each heir might interrupt, because each is understood to have a separate estate in him; but in Scotland a tailyie is a right *sub modo*: the person in possession has the whole right in him, and the substitutes have no right but a power of challenging any contravention. If the heir in possession sells, the minority of the substitute will not diminish the right of the purchaser: why should the case be different while the heir himself possesses? Substitutes have a right, but it is a right of action, undivided and indivisible. When a bond devolves on two or more persons, minority will interrupt only as to the share belonging to the minor: but the case is very different in an entail; for every substitute has an equal right, and the effect of interruption by the most *remote* substitute is as great as when made by the nearest. Suppose that action is brought by a company; the debtor objects prescription. Can the company say, one of the company was minor? Certainly not. Such minority will not interrupt, either in whole or in part. He quoted the case of *Lesley Johnston of Knockhill*, where the plea of the fiar was repelled, because there was a liferenter who had the *jus exigendi*: as also the case of *M'Callum's Trustees*; *Fac. Coll.* vol. I. p. 302.

The being a *nearer* substitute, or one more *remote*, does not alter the nature of the right. It is said, why may not each man plead his own minority? *This* would make a *hotchpotch* of our law: this precise point was determined in the decision of Makerston; and I should be sorry to see it altered.

ESKGROVE. In former times it was a subject of debate, whether an heir of entail, being also an heir of line, could acquire an absolute right of property? But *that* has been determined in the affirmative; and the only question *here* is, *who* is the person that may plead minority? I do not inquire whether the case of Sheddan was rightly judged. I hold the positive prescription to be applied to every person who can claim the estate. Who is it that could claim here as a right to interrupt that prescription? It is the person who can come to the possessor of the estate, and say "give it me, it is mine." But the substitutes have nothing except a bare *spes successionis*. I cannot distinguish between nearer and more remote substitutes: their case with us is very different from that of *remainder* men in England. This was admitted in the cases of *Makerston* and *Kinnadie*. In the case of Kinnadie it was held that the case of Ma-

kerston fixed the law of Scotland on the point in question; and there has been no decision contrary to it for upwards of forty years. All the right that the substitute has is a *personal*, not a *real* right, and that *personal* right cannot carry off the estate.

KENNET. My former opinion was that the minority of the pursuer was to be deducted; but now I think it ought not. The only certain rule that we can go by, is, that the only minority to be regarded is the minority of the person who can vindicate the estate.

SWINTON. There must be a *jus succedendi* before a *non valentia agere* can be an excuse for the silence of minors. Had the succession opened by a contravention, then the minority of the heir-male might have been pleaded; but here is no contravention, for the entail is not guarded with clauses irritant and resolutive.

PRESIDENT. I heard the case of Makerston judged, and I revere it. President Forbes and Lord Arniston supported the decision: the principles in the case of Makerston were adopted in the case of Kinnadie, by President Craigie, and Lord Justice-Clerk Tinwald, who had been lawyers on the losing side in the case of Makerston. Both Lord Hardwick and Lord Mansfield approved of the judgment. We must not wreathe the yoke of entails about our necks beyond practice, and without necessity: it must be the minority of a man having right that can be pleaded. A substitute has no such right; for he cannot, as the Act 1617 says, *compete* in prescription: there must be a right against a right.

On the 21st December 1784, "The Lords found that the years of the minority of the pursuer, before the death of Mr Alexander Gordon, are not to be deducted from the term of prescription pleaded by the defenders;" altering, on a hearing in presence, their own interlocutor.

Act. R. Blair, R. Dundas. *Alt.* W. Honeyman, Ilay Campbell, &c.

Diss. Monboddo, Henderland, Rockville.

Non liquet, Ankerville.

I never understood this case till I heard Lord Justice-Clerk give his opinion.

1781. *January* 19. MARY MORRIS *against* ROBERT WRIGHT.

FOREIGN.

Succession of moveables governed by the law of the place in which they were situated at the death of the proprietor.

[*Faculty Collection, IX.* 304; *Dict.* 4616.]

PRESIDENT. In the case, *Duncan at Rotterdam*, 1738, the great lawyers ex-