her husband's settlement; and in respect that she does not offer to convey her right to that estate in favour of the pursuers, or even to repudiate her husband's settlement thereof, therefore that she is not entitled to claim a terce out of the lands in Scotland; and the interlocutors of the Lords of Session, of the 20th January and 9th of February 1797, in so far as they adhere to the parts of the Lord Ordinary's interlocutor above mentioned, be, and the same is hereby *reversed;* and it is hereby declared, that the appellant, Mrs. Lowthian, is not bound to give up the benefit of the devise to her by the will of the 12th October 1782, and codicil thereto of her husband, before she can be admitted to the possession of her terce out of the lands in Scotland: And it is further ordered and adjudged, that the rest of the said several interlocutors be affirmed.

For Appellant, *Sir John Scott, M. Ross, Wm. Tait.*
For Respondents, *W. Grant, Geo. Ferguson.*

[Bargany Cause.]

SIR HEW HAMILTON DALRYMPLE of Bargany and North Berwick, . . . } *Appellant;*
MRS. FULLERTON and HUSBAND, . . *Respondents.*

House of Lords, 18th Dec. 1797.

ENTAIL— CONTRAVENTION — PRESCRIPTIVE RIGHT—MINORITY.— A party was said to have contravened the prohibitions of an entail, and to have made up titles not under the entail, but otherwise, upon which he possessed unchallenged by the next substitute heir of entail for more than forty years. In a question with an heir-substitute, who was a minor at the time this contravention took place, Held in the Court of Session, *that in this case,* in computing the period of prescription, the period of the substitute-heir of entail's minority was to be deducted, and therefore that there was no sufficient title to exclude. On appeal to the House of Lords, the case was remitted, with an instruction to the Court of Session to review their interlocutor. And opinion indicated, that if the pursuer could establish that she was in the situation of next heir-substitute of entail, that she might plead her minority.

Mr. John Hamilton, otherwise Dalrymple, *second* son procreated between Sir Robert Dalrymple of Castletown, and Joanna Hamilton, only daughter of John, Master of

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Bargany, obtained from the Crown a charter of resignation of the barony and lands of Bargany, limiting the succession to the heirs whatsoever of his body; whom failing, to the other heirs whatsoever of the body of Joanna Hamilton, his mother, without division; whom failing, to the other heirs female of the body of the deceased John Lord Bargany, &c.

July 26, 1742. Upon this charter sasine followed, and Mr. Hamilton possessed the estate of Bargany on this title for fifty years, thereby acquiring an unchallengeable prescriptive right. On failure of heirs of his body, the succession by the above charter, devolved on the appellant, under the description of nearest heir whatsoever of the body of Joanna Hamilton.

Prior to this deed in 1742 the lands stood devised thus:

June 1688. In the year 1688, Lord Bargany had executed a deed of entail, by which the succession to his estate was limited to his eldest son John, Master of Bargany, and the heirs male of his body; whom failing, to William his second son, and the heirs male of his body; whom failing, to the heirs male to be procreated of his own body; whom failing, to the eldest heir-female of his own body, and the descendants of her body without division; whom failing, to the next heir-female to be procreated, &c.

This deed contained a condition, that the heirs of entail should use and bear the surname, arms, and designation of Hamilton of Bargany, but without any prohibition to use any other name or designation *along with it*; and it also contained the usual irritant and resolutive clauses against contracting debt, selling the estate, or altering the course of succession which it prescribed.

John, Master of Bargany, the institute in this entail, died before his father in 1709, leaving an only daughter, Joanna,

1707. who, in 1707, had been married to Sir Robert Dalrymple of Castletown, eldest son of Sir Hew Dalrymple of North Berwick, Bart., Lord President of the Court of Session. Under the limitation in the entail, William, afterwards Lord Bargany, succeeded to the deceased, and was accordingly served heir of tailzie and provision in general to John, Master of Bargany.

William, Lord Bargany, died in 1712, leaving one son, James, and a daughter, Grizel, afterwards married to Thomas Buchan of Cairnbulg. James became Lord Bargany, was served heir of tailzie and provision in general to his father, and, dying in 1737, without issue, in him ended the male succession of John Lord Bargany, the maker of the entail.

Upon this event, a question arose, who was entitled next

to succeed by entail under the description of eldest heir-female of the body of John Lord Bargany. In this competition, the claimants were the late Sir Hew Dalrymple of North Berwick, the appellant's father, and eldest son of the marriage between Joanna Hamilton and Sir Hew Dalrymple of Castletown; Sir Alexander Hope of Kerse, eldest son of Nicholas Hamilton, only daughter of John Lord Bargany; and Mary Buchan, daughter of Grizel Hamilton, only daughter of William Lord Bargany. By judgment of your Lordships, it was decided that "The estate of Bargany did de-
" scend to Sir Hew Dalrymple, eldest son of the daughter, March 1739.
" and only child of John, Master of Bargany, and that he
" ought to be served heir of tailzie and provision to the late
" James, Lord Bargany."

Sir Robert Dalrymple was the eldest son of Sir Hew Dalrymple of North Berwick, (Lord President of the Court of Session). By an entail executed by his father, (the said 1707.
Hew), he settled his estate of North Berwick on the heirs male of his son, Sir Robert Dalrymple's marriage with Joanna Hamilton, with a proviso, that if at any future period the estate of Bargany should devolve upon the heir male of that marriage; in that case, by accepting the succession to Bargany, the heir should forfeit his right to the estate of North Berwick; reserving ample powers to discharge or qualify the whole, or any part of the prohibitory or irritant clauses. Sir Robert Dalrymple died in 1734, leaving three sons, Hew Dalrymple, afterwards Sir Hew Dalrymple the eldest, the father of the appellant John Dalrymple (afterwards called Hamilton) the second, and Robert, the third son, who died without issue; and two daughters, Marion, grandmother of the respondent, and Elizabeth, deceased.

Sir Robert Dalrymple's father, the maker of the entail of North Berwick, being still alive, when his son died, having survived him for many years, he seemed to have altered his views as to preserving a separate representation in his family, for, by deed of this date, he declared that the non-inserting the Nov. 1, 1734.
said clauses relating to the estate of Bargany, in his grandson's service, as heir of tailzie, *should not infer any irritancy against him.*

On his death, his grandson succeeded, became Sir Hew Dalrymple, and served heir in special, and was feudally in- 1734.
vested with the estate of North Berwick, free of any limitation or restraint to prevent him or his descendants from holding it and the estate of Bargany together, and under

1797. this title he possessed for fifty-six years, until his death in 1790, when the appellant, his son, succeeded.

Before his death, and in 1739, the succession to the Bargany estates had opened; and in the competition which arose thereon, he, Sir Hew Dalrymple, was preferred as the descendant of the body of Joanna Hamilton, under the destination in the entail of that estate of 1688. Although he was thus successful, yet he never made up titles; and afterwards by a deed, reciting the two entails of Bargany and

Aug. 1740. North Berwick, "he repudiated and refused to accept of the succession to the estate of Bargany," in favour of John Hamilton, otherwise Dalrymple, the next heir of tailzie, and "consented" that he should make up titles to the same. Accordingly, the crown charter and infeftment in

1742. 1742, above referred to, was expede by Mr. Hamilton. This charter ran as follow: "Dilecto nostro Joanni Hamilton de "Barganie, jurisconsulto, filio secundo demortui Domini Ro- "berti de Castletown procreat, inter illum et demortuam "Dominam Joanna Hamilton unicam filiam demortui Joannis "Magistri de Barganie et sic hæredum femellam demortui "Joannis Domini Barganie, ejus avi et hæredibus quibus- "cunque ex corpore dict. Joannis Hamilton; quibus deficien- "tibus alijs hæredibus quibuscunque ex corpore dict. Dominæ "Joannæ Hamilton procreat inter illam et dict. Dominum "Robertum Dalrymple absque divisione; quibus deficien. "alijus hæredibus femellis ex corpore dict. Joannis Domini "Barganie absque divisione," &c. Then followed the strict prohibitory irritant and resolutive clauses, with limitations precisely similar to the original tailzie of Bargany.

1780. In 1780, Mr. Hamilton, in contravention of the entail 1688, executed a disposition of the estate of Bargany, by which he disponed the same to himself and the heirs of his body, "whom failing, to Sir Hew Dalrymple, Bart., and *the* "*heirs* of his *body*, without division, whom failing, to the next "heir of the body of the said John Lord Bargany, and the "other heirs of entail, contained in the entail of 1688, exe- "cuted by the said Lord John Bargany," and infeftment was taken upon by this disposition.

Upon the above charter, 1742, Mr. Hamilton enjoyed the estate, without challenge, for forty years, until the respondent brought, as above set forth, the present reduction and declarator against the late Mr. John Hamilton (who died during the action) and the appellant.

This action was founded on the contravention of the entail, as to the Bargany estate, in the person of Sir

Hew Dalrymple, and set forth, that after having made up titles to North Berwick, he had succeeded to the Bargany estate; that he had assumed the surname of Hamilton of Bargany, and had entered into possession by intromitting with the rents; that he had afterwards repudiated the succession in favour of his younger brother, Mr. Hamilton, by which he attempted to alter the order of succession; that John Hamilton had accepted the estate, and made up titles in the character of nearest heir-male of John Lord Bargany, which he could not be, so long as his elder brother was alive; and that both Sir Hew and his brother, Mr. Hamilton, had therefore contravened and forfeited for themselves and the issue of their bodies, the said estate of Bargany, leaving the succession open to the respondent as next substitute, and nearest heir of Joanna Hamilton. The action, therefore, contained a declarator of irritancy against all prior substitutes under the entail 1688.

In defence against this action, the appellant produced his charter of 1742, and sasine thereon, as a prescriptive title to exclude. Against this title to exclude, it was pleaded, 1st, That the charter and sasine were themselves brought under reduction. 2d, That this investiture was not secured by the positive prescription, because of its interruption by Mrs. Fullerton's minority from 1768 to 1784.

The case, then, resolved itself into the question of prescription, and whether that prescription had been interrupted by Mrs. Fullerton's minority? Opposed to this plea of interruption of prescription, two grounds were taken: 1st, That the years of minority do *not in any case* form a deduction from the *positive* prescription; 2d, That even admitting the contrary, yet that substitute heirs of entail were not entitled to plead minority.

The Lord Justice Clerk, Ordinary, found, "That in com- Mar. 11, 1795.
"puting the period of prescription, the years of the pursu-
"er's minority are not to be deducted; and in respect that
"the charter and sasine 1742 are *ex facie* unexceptionable,
"and that no nullity or objection does from thence appear
"to lie against them; and that it is averred by the defend-
"er, and not denied by the pursuers, that the defender has,
"in virtue of that investiture, possessed the estate of Bar-
"gany from the date thereof to the commencement of this
"action, without any challenge or interruption, finds that
"the defender's right to the estate is secured to him by the
"positive prescription, and that he is entitled to hold and
"possess the estate, under the foresaid investiture, in time

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" coming, and that the same is sufficient to exclude the title " of the pursuers in the reduction; and therefore alters the " former interlocutor, and assoilzies from the reduction; re- " serving to pursuers to insist in the declaratory conclusions " of their libel; and particularly how far the tailzie 1688 is " affected by the investiture 1742, and whether or not the " defender has incurred any irritancy under the entail; " And as the cause has been very fully stated on both sides, " the Lord Ordinary discharges any representation to be " received, and decerns."

Feb. 9, 1796. On reclaiming petition the Court, of this date, altered, and found, " that *in this case*, in computing the period of " prescription, the years of the pursuer's minority are to be " deducted, and therefore that the defender has not pro- " duced a sufficient title to exclude, and remit to the Lord " Ordinary to proceed accordingly." And, on a second re-

Dec. 6, 1796. claiming petition, the Court adhered.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—1. Minority does not in any case suspend the course of the positive prescription of land rights. It only operates as an exception to the negative prescription. The deduction of the years of minority would be totally inconsistent with the peculiar nature of the positive prescription, as understood in the law of Scotland, contradictory to the just construction of the act of Parliament 1617, c. 12, as well as to the statutory views of the legislature in framing that statute, and subversive of the security to land rights thereby intended to be protected. 2. But, assuming that minority interrupted both the positive as well as the negative prescription in the act 1617, it does not apply to the case of a *substitute* heir of entail, challenging after the lapse of forty years. This was decided in the case

Vide Ante. of Macdougall of Mackerston in the year 1739, and by the case of Monypenny in the House of Lords in 1757, which decisions rest upon the principle that there is an essential distinction between the case of substitute heirs of entail, (each of whom has a vested right of action to support the entail, which he may exercise at any time), and the common case, where the right of action is confined to the individual immediately entitled to succeed and injured by the intrusion. The same principle and distinction, taken not from ideas of expediency conceived by the courts of law, in opposition to the words and spirit of the statute, but upon a fair and just

construction of that law, and upon the reason of it, which was to quiet men in their possession after the period of forty years, was again recognised in the case of Gordon *v.* Gordon in 1784, and by the House of Lords in the case of Auchindachy. The result of all which decisions establishes this position, that according to the construction of the act 1617, when a person has possessed for forty years upon a charter and sasine *ex facie* good, and one of full age, under no legal disability, and entitled to possess, has for that period neglected to make his claim, or assert that title, the actual possessor is not thereafter to be disquieted, or the title on which he actually possessed defeated, at the suit of posterior or collateral heirs, though such heirs were under age, or some personal disqualification, to sue during the whole, or during part of the time. The statute had in contemplation one general case, viz. that of a person in possession, under a title apparently good, but at bottom bad, or liable to challenge; the *quasi dominus sed non vere dominus;* and one out of possession, though entitled to it, the *verus dominus* or rightful owner. If the last neglects to assert his right, all who might have taken under or after him or her, suffer by this negligence. Heirs of entail stand precisely in the same predicament, with this difference, that any one of the heirs of entail, however remote, may bring their challenge at any time within the forty years, though not to the effect of attaining possession, yet to the effect of removing any bar to their possession when it shall open to them by course of descent. Their hands are not tied up by the conduct of those who stand before them in the order of succession. They may use the privilege to challenge at any time; and hence the distinction made in regard to substitute heirs of entail pleading minority. Nothing can be figured more demonstrative of the principle than this, that it is the age of the person entitled to the immediate possession, the *verus dominus,* and not the age of the substitute, or expectant heir, even the nearest, that is to be regarded in construing the statute. If it were otherwise, it is clear that such rights would never prescribe, and thus the act would be defeated. 3. Yet this difficulty was attempted to be surmounted by the creation of a puzzle, grounded on the shape of the action and the form of proceeding. Supposing Mrs. Fullerton could not set aside the exclusive or prescriptive title by pleading minority, she maintained that she was the person all along by law entitled to succeed;

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that she was the *vera domina*, against whose immediate and vested right to possess, the prescription was running, and that all the prior heirs of entail were to be held as out of the field, or *civiliter mortui*; because Sir Hew Dalrymple, the appellant, having incurred an irritancy, had thereby *ipso facto* forfeited the estate for himself and his descendants by his conditional repudiation, which was an alteration of the course of succession; and Mr. Hamilton had also forfeited, by making up his title by the charter and investitures challenged. This new argument seemed to take effect with the Court, and the interlocutors complained of are the fruit of it. It is not difficult to show where the fallacy of this argument lies. She seeks to assume, that from the moment of Sir Hew Dalrymple's giving up the estate to his brother, and Mr. Hamilton passing the charter 1742, she was the *vera domina* of the estate, *virtually in possession*, and all along has been legally, although not feudally vested in the estate. How is it possible to hold her to be rightful owner when she cannot exercise legally a single act of ownership? Can she levy the rents? Can her creditors affect the estate? Can she incur an irritancy? It does not require a feudal investiture to confer these rights: they are the legal consequences of apparency. Has she used her right as apparent heir? Besides, this idea of hers is groundless upon the statute 1685, c. 22, declaring that the right of an heir of entail in possession, who contravenes, cannot be considered as resolved or forfeited, nor any right vested in the next substitute, until decree of declarator of the irritancy be obtained. 4. Besides, the plea of minority can only relate to the negative prescription and not to the positive, the two clauses in the act as to both being separable; and the exception of minority made only to apply to the negative and not to the positive.

Pleaded for the Respondents.—1. Minority is an exception pleadable against the positive as well as against the negative prescription. The exception in the act 1617 is coextensive with, and applies to the whole enactments of the statute, and there is nothing in the wording of the act to countenance the proposition which would confine it to the one kind and not to the other. Neither equity nor expediency can justify a construction which would limit the operation of the statute so manifestly to the disadvantage of minors, whose rights, it is reasonable to presume, were the chief object of the legislature in framing the act. Sir Geo.

Mackenzie, B. iii. tit. 7, § 15, and Stair, B. ii. tit. 12, § 18, have never drawn such a distinction, in laying down the law on the subject, and refer to minority as an exception applicable equally to the one as to the other. Mr. Erskine, B. iii. tit. 7, § 35, only says, it has been doubted whether it applies to the positive prescription, but this doubt has since been resolved; and the law on the subject has been considered as settled ever since the existence of the act. And in the case of Blair *v.* Shedden, decided in 1754, Fac. Coll., the question was solemnly argued and decided, that minority was to be deducted in counting the *positive* prescription. This law was also expressly recognized in the case of Nicolson *v.* Gifford, 11th March 1779 (unreported). It has been contended that the doctrine in Blair's case was overturned in the House of Lords, in the case of Campbell of Otter *v.* Wilson; but though pleaded at the bar, yet there is no evidence that the House of Lords went upon that ground, there being a variety of specialties in it, (vide ante vol. ii. p. 193), and in the subsequent case of Gifford, as above quoted, where the decision in the House of Lords in Campbell of Otter was specially pleaded, the Court of Session were satisfied that *that* judgment did not at all affect the question.

2. The appellant, when arguing that it is matter of uncertainty whether the respondent, had she brought her declarator within the forty years of the acts of contravention, would have succeeded or not, forgets entirely that we are here in a question upon a title to exclude, in which, from the very nature of the case, it must be assumed that, had she brought her action within the forty years, she must have succeeded.

It is a mistake to say, that after the contravention was committed, the respondent had only a contingent right to the estate or *spes successionis*. Before the acts of contravention were committed, she certainly had no more than a chance to become entitled to the estate. But the moment the prior substitutes failed, or contravened the entail, she became the person to whom *de jure* the estate belonged. She had then a right to enter into possession. It is stated that Sir Hew Dalrymple, and not the respondent, was the next heir to Mr. Hamilton. It is sufficient to answer, that both contravened the entail, and by that contravention the succession opened to her; so that her plea of minority is a sufficient answer to the title to exclude.

But, 3. In regard to the plea that minority is not to be

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deducted, when pleaded by substitute heirs of entail, there seems no ground in law or reason for this distinction, or to withhold the benefit of the exception in the act from heirs of entail. Assuredly the act makes no such distinction. True, heirs of entail have no right, upon the contravention of the heir in possession, to the property of the estate, yet that can be no reason for not deducting minority when prescription is pleaded against them, for their right under the entail is still valuable, though contingent and uncertain; and the cases of Mackerston, Kinnaldie, Whitley, and Kincraigie, referred to, as depriving substitute heirs of entail of the benefit of the plea of minority, are not adverse to the respondent's doctrine. On the contrary, they support her plea,—because, in these cases, where the question was, Whether an entail was destroyed by the negative or positive prescription? the argument rested entirely upon the allegation that the remote substitute heirs of entail with only a *spes successionis*, had no right to found upon their own minority, or upon that of any other substitute. Even admitting the cases referred to, to have been perfectly well decided, the doctrine that she maintains stands altogether uncontradicted by those decisions. It is a false argument to say, 1st. That entails would never prescribe, because, if that is the consequence that results from the statute 1617 as to prescription, and the statute 1685 as to entails, it is the province of the legislature, not the duty of judges to interfere. 2d. It is impossible, with any justice, to liken heirs of entail to a corporation. Where is the similarity? Heirs of entail cannot plead, or be impleaded, except as individuals. And it is impossible to figure any reason why the negligence of one heir of entail should be prejudicial to another. 3d. Although it be very true that substitute heirs of entail have no right, upon the contravention of the heir in possession, to the property of the estate, yet that can be no reason for not deducting their minority, when prescription is pleaded against them; for their right under the entail is valuable, though contingent and uncertain. But there is nothing either in the statute 1617, or in the reason of the case, to prevent the saving clause of that act of parliament from extending to rights of that description as well as to others. The difference between the case of Mackerston and the present case, is obvious in many respects, but particularly in this most important circumstance, that Thomas and William M'Dougal, the minors, never had more than a *spes successionis* contin-

gent upon the event of their surviving their brother Henry, and of course they could never set forth that the right to the estate had devolved upon them during their minority. The Court of Session considered that circumstance as of great consequence, and accordingly the interlocutor assigns as a *ratio decidendi*, that the minorities of Thomas and William could not be deducted; in fact, the right to the estate had not devolved upon them, as is here the case. In the present case, the right to the estate of Bargany devolved upon the respondent during her minority. Had she claimed it then, immediately on her father's death, her right to it would have been declared at once. But as her minority prevented her from doing so, therefore that minority is a sufficient answer to the plea of prescription. In like manner, the case of Kinnaldie (Ayton *v.* Montgomery, 31st July 1756), it was not the minority of Thomas Ayton that was pleaded, but the minority of *prior substitutes in the entail who had failed*, In like manner, the Whiteley case, Gordon *v.* Gordon, 21st December 1784, was precisely the same with that of Mackerston; it is not so much as pretended that George Alexander Gordon, during his minority, was entitled to have raised a declarator claiming the estate as devolved on him, by irritancy or otherwise. And in the printed collection of the decision, this is mentioned by the collector as the ground upon which the judgment of the Court proceeded. Again, the Auchindachy or Kincraigie case, went on specialties—the entail there never having been recorded, could not be set up against creditors. The contravention, in the present case, although happening fifty years ago, without any declarator of irritancy being raised by the respondent, ought not to prejudice her, she being minor, and therefore not to be injured by any omission or neglect, or by any possession held against her during her minority. And deducting those years of minority, it is an admitted fact that the years of prescription are not run upon the charter and infeftment 1742.

Vide Ante.

Vide Ante.

After hearing counsel,

Lord Thurlow said,*

" My Lords:

" I shall not need at present to enter into all the topics in this

* These notes, together with others bound up in a volume, were most kindly presented to me by the late Lord Anderson, recently before his death; than whom, in such questions, and of feudal law generally, none was more eminently distinguished.

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cause which were discussed at the bar; for there are some of the points nearer and more material to the merits.

"I have attended to the hearing of this cause with more dissatisfaction than I remember to have felt on any similar occasion. It is a lamentable thing, that, when parties are full of, and ready to argue every thing that is material in a cause, the practice of the Court of Session should be such, that, instead of the obvious and apparent merits, the Court is to go to a collateral point. With regard to the practice, I own that I am in a state of invincible ignorance; abstractedly, I see no reason for it; and I cannot find its source or authority in any writer of the law of Scotland; all I can learn is, that it is the practice.

"I shall now state to your Lordships the subject of this cause, and the several points which it contains. I wish my health had permitted me to investigate them with more accuracy, and that it had not made me forget some part of the argument which has been urged; but I believe I have not forgot any material part of it.

"Last century, an entail was made of an estate in Scotland, in which, as it stands, Sir Hew Dalrymple and his children are the nearest substitutes. Mrs. Fullerton, the pursuer in the present action, is the tenth substitute. When the action was brought, she, by the form of the Court, called for production of certain deeds; because no judgment could be had in the reduction of those deeds without production. In her summons, she recited the entail, and the descent of the estate to Sir Hew Dalrymple, the appellant's father, as heir female of John, Lord Bargany, the maker of the entail. She then stated, that upon the occasion of another estate coming to Sir Hew Dalrymple (the estate of North Berwick) Sir Hew, in 1740, executed a renunciation of the estate of Bargany in favour of his brother John Dalrymple, afterwards John Hamilton, qualified thus, that upon the failure of the issue of John Hamilton, and another brother, if the tenure of the estate belonging to the Dalrymple family would permit, Sir Hew and his descendants might claim the estate.

"This is the only instrument stated by the respondent, as giving away the estate. In consequence of it, John Hamilton brought an action, stating, that in respect of his brother's renunciation, he was entitled to serve himself heir under the entail, and take the estate. In this action, decret in his favour passed in absence, though this decree was not binding on third parties He was by it declared next heir, and entitled to be served as such; and he was served accordingly, and took out a charter thereon, which was followed with sasine.

"All these alterations were antecedent to the title of the present pursuer; her right was not diminished, nor was she barred by these deeds, from any claim which could accrue to her under the original entail. These transactions took place in 1742, and in 1793 the present action was brought, reciting the entail, stating the transactions

which had taken place, and assuming that these were contraventions. The respondent accordingly claimed the estate.

" To this action the defender pleaded his charter 1742, and prescription from forty years possession thereon. In reply, the respondent contended, that she had been a minor when part of the prescriptive term was current, and had remained a minor for such a number of years that the prescription was not run. The Court of Session, after some previous interlocutors to the contrary, at length allowed this plea; and this point is now brought before your Lordships upon appeal.

" This deduction of minority, the respondent pleaded upon the act 1617. The statute introduced the positive prescription, as it is called, into the law of Scotland; and it enlarged and corrected the negative prescription. The negative prescription, is a title in bar of all action for claiming a right after the lapse of forty years. This is the only sort of prescription known in this country; and it is the only sort known in the Roman law; the positive prescription then introduced into the law of Scotland was novel in that country, and is unknown in all others. This, instead of applying the prescription to the *person*, applied it to the *possession*, whether upon a good or bad title, and made the lapse of forty years a sufficient confirmation of it. I have considered this act 1617, with as much attention as I could; and if it had fallen upon me to decide the question, I should have held that the last clause in the act relative to the deduction of minority, had a reference only to the negative prescription; not only because the grammatical construction required such an interpretation, but because the exception is contrary to the nature of the positive prescription. But this point was decided differently a long time ago. It is not impossible to interpret the statute so as to justify that decision; and it would be dangerous to bring the matter into question now.

" What is the effect of this decision when applied to entails? Mr. Erskine said at the bar, that they were excepted from this rule, otherwise they would never prescribe; but all difficulty is cleared by this, that every heir of entail has an independent right of action; and thus prescription will apply to him as well as to a stranger, and so I think it does. It was insisted, that it would be inconvenient to allow deduction of minority to all the substitutes in an entail: for, on account of their number, the prescription would never run. This reasoning, however, proceeds upon a mistake; for no case could occur where the prescription could run tō more than sixty-one years, as every substitute has an independent cause of action, and as he must come within forty years of the original cause of action, it is not worse to allow the deduction of minority to all the substitutes than to one individual, against whom the prescription could only run for sixty-one years. If not in existence at the time of the contravention, the prescription would not begin to run till his existence. It would

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then be suspended during his minority; and, by the statute, it is only the years of minority that fall to be deducted, which would still keep it within the limits I have mentioned.

"Upon these grounds, I have no difficulty to say, that if this case be new, the Respondent comes in time to bring her action: but it appears, that if your Lordships were to decide the question thus, you would go beside the opinion of every judge in a learned court. The judges who were in favour of the Respondent, held her to be first substitute under the entail; and it was avowedly upon that ground that they decided the question. The other judges held it not a matter of much moment, whether she were first or last substitute, because, in an entail, which was likened to a corporate body, *a familia*, it would run to perpetuity if the deduction of minority were allowed to any substitute heir. In support of this, the case of Maclellan's children has been quoted, but no other case upon this point was stated at the bar. It is possible that that case may have been decided upon different grounds; and, at all events, I have no difficulty to say, that I cannot assent to that case, as pleaded by the appellant. In that case, some difficulty occurs, by its being an undivided right in the children, which the trustee might divide; but he was the only person who could bring an action on the bond; and, after a lapse of forty-three years, no person could bring an action upon it. But, supposing it were true that the case was decided upon the ground of a joint right, two judges, eminent for their learning and abilities, the Lord President and the Lord Justice Clerk, state their opinions, that if one joint creditor were major during the currency of prescription, they would not allow the deductions of the minority of any of the other creditors. With regard to the family of Maclellan, it is not stated to us that the forty years had run against any of them.

"But upon this point, I will speak my opinion openly, as I conceive it will be proper to send back the cause to be further considered by the Court of Session. It is impossible to qualify the several rights of action competent to the heirs of an entail by the idea of *a familia* or joint right. The estate is to be enjoyed separately and distinctly by a series of heirs, each in their turn, exclusive of all others; it is distinct in its commencement, in its enjoyment, and in its conclusion. Nor is it an undivided possession. The same holds of estates tail in this country, they are neither joint in their origin, nor in their possession. I therefore hold it inadmissible, that prejudice could arise to any one heir from what happens to another.

"The judges seem to hold, and my mind is considerably in doubt upon the subject, how far certain cases have gone to controvert what I quoted from Mr. Erskine's book; but it is difficult to say what ground or *ratio decidendi* prevailed in any of the four cases stated at the bar. In the case of Mackerston, as stated by Kilkerran, Thomas Macdougall took the estate in 1669, and there was no question of

his majority. In the other report of this case in *Home*, the argument runs, that as the estate was taken only in liferent in 1669, and a faculty reserved to make deeds, &c., that the faculty, when exercised in 1684, was to be drawn back to the original deed in 1669 which created it, from which period, it was contended, the prescription ought to run. But it seems too great a refinement to say, that the prescription ran from 1669. The reports of this case are defective, as they do not state the several minorities of those that were craved to be deducted. It appears that Henry, the son of Thomas, became major in 1709; consequently he was born in 1688, and the four years when he did not exist, could not be deducted from the prescription. He possessed the estate in fee simple till 1715, when he made a new settlement thereof: Titles were made up under it, after his death, in favour of his daughter; and the curators sold this estate to a gentleman of the name of Hay, in consideration of his marrying his daughter, and paying £1500 to discharge the family debts. In this case, therefore, of an unrecorded entail, the judges went out of the way to determine any thing respecting the prescription; if Mr. Hay was an onerous purchaser, the entail was cut off. I should dissemble, were I not to state, in mentioning the result of all the pleadings in this cause, that the Court also went upon the notion, that it was not competent for a substitute under an entail, to found upon the minority of a prior substitute, and that he had no right to deduct his own minority, as he could, during it, have only brought an action to preserve the entail; not to claim the estate. On these points I shall only say, that it is not essential to the justice of a judgment, that the whole *rationes decidendi* be well founded in law. It would not have been competent to appeal this case because some of the *rationes decidendi* were not right, if it contained good points in it, upon which it must have been affirmed in a court of appeal.

" In the case of Kinaldie, unless the minority of other heirs than the pursuer were deducted, it would not have saved the prescription.

" In the case of Auchendachy, I have not a report of the decision, but it is not necessary for me to examine it; it was a matter between creditors, and has nothing to do with the present question.

" I do not think, that upon examination, the Court will be precluded by these cases from finding, that every different heir of entail must have his own minority allowed or not allowed, as his situation may entitle him.

" But what can your Lordships do here? Several material questions, it appears to me, must be solved before we can do any thing. 1st. Whether the present action be not *jus tertii* to the respondent, whose right under the original entail, was not prejudiced by the alleged contraventions? 2nd. Whether it be possible to qualify a forfeiture against Sir Hew for himself and his children, after his own death, there being a great difference between the competency of an action for replacing an estate under an entail, and the forfeiture of that

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estate for contravention? 3d. Whether the renunciation by Sir Hew could amount to a forfeiture for himself and issue? In the summons in the present action, that deed is called a disposition of the estate to John Hamilton *a stranger;* and the summons afterwards states the transactions of John to amount to a forfeiture, because he was *not a stranger* in the estate. If I were to agree with the majority of the Court, in the present question, that the respondent is in the situation of a person who could obtain a decree to serve heir, I could not learn how this conclusion was to be drawn. This plea, which was set up by the defender, goes to a bar of the pursuer's action; and if the summons, and what is there stated, do not bear out the action, the plea is nonsense. According to the interpretation of the majority of the judges, Mrs. Fullerton is only entitled to deduct her minority *hac ratione*, because she is first substitute; but how do they know this? What *termini habilis* have they for their opinion? It was said, if I understand the argument aright, that what she has alleged as to her title to call for production of the papers must be considered as waved; and that the defender, by putting in his plea, must be considered as an *actor pro hac vice*. But there was no way to learn whether she was first substitute or not, but because she had stated so in her summons; and no doubt, if she had stated a sufficient title, she would have a right to call for production. But all this remains, as I have already stated it, and the Court must have pronounced that she is first substitute in order to apply *termini habiles* to their judgment; and at sametime it appears from the judgment itself, that the consideration of that matter has hitherto been rejected. But I am not prepared to pronounce that the respondent is first substitute, without first pronouncing that the matter of her libel makes her so. The consideration of this point has hitherto been much waved, as I said before. Mr. Erskine contended at the bar, that we must take the judgment as it stood, and that we might go to the consideration of that proposition, whether she be first substitute or not. I, however, remember a rule upon *that* subject, which was laid down by these eminent characters, Lord Hardwicke and Lord Mansfield, when they sat in this House. They would not pronounce judgment on any point not already discussed in the Court below; and they considered the province of a Court of appeal to be, to say whether the judgment was right or wrong upon what had passed in the cause.

"I should think it wrong in the present case, for a Court of appeal to enter into this point, especially as it relates to the law of Scotland, with which your Lordships are not so intimately acquainted. I should think it the safest mode, to remit the matter to the Court of Session, to have it fairly stated and discussed, before being drawn to a determination upon it."

LORD CHANCELLOR LOUGHBOROUGH.—"The noble and learned Lord has so effectually disentangled this cause from the difficulty

in which it was involved, that nothing remains for me, but to express my acknowledgments for his accuracy in resolving my doubts.

" I too feel the impossibility of coming to any decision upon this cause, as we cannot follow up the *ratio decidendi*, nor find upon what state of the case the conclusion assumed as true was drawn. Both parties have seemed to consider this question as a simple proposition ; but the opinions of the judges, for or against either party, all clearly evince that this is not a simple but a complicated proposition. On the point upon which a determination has taken place, one part of the judges contend that the minority of no substitute heir of entail was to be deducted ; on the other side this was not denied ; but the judges took a distinction, that the first substitute after the persons contravening, was entitled to deduction of the minority ; and they assumed that Mrs. Fullerton is such first substitute. It is obvious however, that she is not in that order under the entail.

" In an action of declarator, it is not in general necessary to enter further into the title of the pursuer than was done in the present case. There, if it be contended that the title of the pursuer is bad because a possession of forty years has run against it, the only question will be, whether or not such possession has been bad ? But the case is different, where the action arises between privies in blood, where the pursuer sets forth the entail, and certain acts of the other party, which are stated to be contraventions ; and the conclusion is thence drawn, that she is heir of entail, entitled to take possession. In the present cause, that point is no where determined ; but, according to the printed opinions of the judges, there is not one who does not go to the full extent, that if Mrs. Fullerton be a remote substitute, she would not be entitled to deduction of her minority.

" In order to avoid adjudication upon this point, and to give the Court room to consider the case with attention, and, as I agree with the statement given by the noble and learned Lord, I therefore move, That the cause be remitted back to the Court of Session in Scotland to review the interlocutors appealed from, and to consider how far the validity of the title to exclude set up by the defendant is in this case involved with the title set up by the pursuer to sustain the action of reduction and declarator, as having become the nearest substitute under the deed of entail in the manner alleged on her behalf ; and if the Court shall hold these questions to be in this case involved with each other, that they do pronounce an interlocutor for or against that title, and also on the effect which such judgment may have upon the interlocutors directed to be reviewed."

Accordingly it was

Ordered and adjudged that the cause be remitted back to the Court of Session in Scotland to review the interlocutors appealed from, and to consider how far the

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validity of the title to exclude, set up by the defender, is in this case involved with the title set up by the pursuer, to sustain the action of reduction and declarator, as having become the nearest substitute under the deed of entail, in the manner alleged on her behalf; and if the Court shall hold these questions to be, in this case, involved with each other, that they do pronounce an interlocutor for or against that title, and also on the effects which such judgment may have upon the interlocutors directed to be reviewed.

For Appellant, *Henry Erskine, Geo. Ferguson, Thomas Thomson.*

For Respondents, *Sir John Scott, W. Grant, J. Anstruther, Wm. Adam, Wm. Tait.*