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the law of Scotland, can be said to vest a bonâ fide right in the assignee of the Bank, to the exclusion of the rights of the creditors, as represented by the trustee on the sequestrated estate; that it was the setting up of a fictitious person between the one party and the other, by a collusive transaction, and by means of such latent right as is always reprobated in the Scotch law of real property; that the right was not validly passed in such way as to exclude the trustee from entering into competition for it; that there was no parting with the possession, though the transaction purported to part with it; and as to the sub-tack, it appears to me, instead of mending the case on the part of the Bank, greatly to impair it; for I cannot conceive any more flimsy expedient as a right of possession, than to make the possession become, by virtue of a sub-tack, no longer the possession, such as Newbigging had before under his landlord at first, as main lessee, but a possession under his own assignee of the term, taking back from the Bank a sub-leasecollusivelyand latently, to defeat the proper right of the parties. Upon these grounds, and in the circumstances of this case, and without advising your Lordships to decide the general question with respect to the sufficiency of intimation, without possession, I am of opinion your Lordships ought to affirm the judgment now complained of.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

RICHARDSON and CONNELL,—MONCRIEFF, WEBSTER, and THOMSON,—Solicitors.

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MURDO MACKENZIE, Appellant. — *Mr. John Campbell* — *Dr. Lushington.*

No. 40.

ALEXANDER MACARTNEY, for the Commercial Bank of Scotland, Respondent. — *Mr. Murray* — *Mr. Miller.*

*Cautioner.*—A principal debtor in a bond for a cash account with a bank failed, and executed a trust the deed of accession to which allowed a supersedere of diligence for three years; the bank lodged a claim and affidavit, without signing the deed of accession, and a delay of seven years took place: Held (reversing the judgment of the Court of Session), that the cautioner was liberated.

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2d DIVISION.
Ld. Cringletie.

IN 1811 Mackenzie, along with Ross and Geddes, became bound to the Commercial Banking Company in a bond for a cash credit

to the extent of 500*l.*, to be kept in the name of Geddes. This bond contained, inter alia, the following clause:—"And it is "hereby declared, that there is nothing hereby meant to super- "sede or vacate the security which the said company already "hold or may hold over the shares which we, or either of us, "hold or may hold of the stock and profits of the said com- "pany, for any advances under the bond, or otherwise." It was provided also, "that each member hereby assigns to the "committee of management for the time his own shares and "profits of the concern, in security of the debts and engage- "ments of the company, and in security of any debts and pres- "tations that may become owing or prestable by him to the "company, and for enabling the committee of management, if "and when necessary, to sell and dispose of his shares and "interests in the company, in terms of the provisions above "written, and in general, in security of the performance and "observance of his part of the premises." At this time Geddes held four shares, on each of which 100*l.* had been paid up, and which might be worth 125*l.* each. By the contract of the bank, shares are liable for any advances that may be made to the holders, who, on the other hand, are entitled, without finding further security, to operate upon them to the extent of three fourths of the input stock effeiring thereto. The bank are further entitled to the refusal of all shares proposed to be sold; and the holders can only sell at the price at which they were offered to the bank and refused. Geddes subsequently acquired six other shares. Sept. 23, 1831

Geddes continued to operate upon this cash account for several years. In 1816 his affairs became embarrassed, and considerable correspondence passed between him and William Murray and Son, agents for the bank at Tain, where the cash account had been opened, as well as between these agents and the secretary of the bank at Edinburgh, relative to the disposal of Geddes's bank shares. In October 1816, Geddes wrote Murray: "Owing to the present pressure of the times, I find "it necessary to dispose of the ten shares which I hold of the "Commercial Bank stock, and I hereby offer them to the bank "at 130*l.* per share. You will please forward this letter to the "manager, and advise me, when convenient, if my offer is "accepted." This letter, Mackenzie alleged, was forwarded to

Sept. 23, 1831. Edinburgh by Murray, on the 26th of that month, but Macartney the Edinburgh secretary denied its having been received there. In December thereafter, Macartney for the Bank, wrote Messrs. Murray: "Mr. John Geddes, Ardmore, writes us, that "he had desired you to make offer to us of the ten shares, at "130*l.* per share. Such an offer, however, never has been made. "In the above letter he offers them at 125*l.* per share, and "requests, in the event of a refusal, that they may be trans- "ferred to your Mr. William Murray, at that price. The "directors have allowed Mr. Murray to get these shares." On 6th March, he again wrote Messrs. Murray:—"You have not "yet returned the transfer by Mr. John Geddes, in favour of "your Mr. William Murray, of ten shares, which you will please "observe must be done before the transaction can be com- "pleted."

The transfer was completed on 20th March 1817. Prior to that period, however, the cautioner Ross had become bankrupt. On the 12th Mackenzie wrote Geddes, that he was resolved to withdraw his name from the cash credit, and on the 22d, he wrote Messrs. Murray:—"As my name is affixed to a bond of "caution, as surety for Mr. John Geddes of Ardmore, in his "cash account with the Commercial Banking Company of Scot- "land for 500*l.*, in conjunction with Mr. John Ross of Balblair, "I beg of you to inform the Bank, that I now withdraw my "name as cautioner for Mr. Geddes, and that they are not "to look to me, as such, in any transactions with him, in "consequence of said bond, from this date; and I trust the "Bank will accordingly be pleased to give directions to get "the said account immediately settled, and the bond annulled, "to save expence or loss to either party." After the receipt of this letter, no further advances were made to Geddes. Shortly thereafter, he called a meeting of his creditors, and on the 2d of April 1817 he executed a trust deed in their favour. At the meeting Mackenzie attended, and was entered in the sede- runt as appearing in room of the manager of the Commercial Bank. Murray also attended; but it was alleged he did so on account of other debts than that in question. The trust deed was drawn up by him, and marked as examined and revised by Mackenzie. In that deed the bank is stated as a creditor to the extent of 500*l.* the amount of the cash account, forming

the only debt due by Geddes to the bank. Murray was named one of the trustees, but Macartney maintained that to this trust the bank had never acceded. The deed of accession contained a supersedere of diligence for three years. On the day on which the trust was executed, the secretary wrote Murray:— Sept. 23, 1831.

"Mr. Mackenzie's letter to you, wishing to withdraw his secu-
"rity from the bond for Mr. John Geddes's cash account, has
"our attention." "From the circumstance of one of the co-
"obligants for the above cash account having become bankrupt,
"and the other wishing to withdraw his name, the directors,
"having no alternative, have ordered the account to be called
"up, which you will please immediately intimate to Mr. Geddes
"accordingly." On 23d June 1817, Messrs. Murray wrote the secretary:—"We have reason to hope, if prices of farm pro-
"duce continue to improve, every person will be paid, with a
"considerable reversion to his (Geddes's) family; and we would
"therefore, on that account, recommend to the Directors not
"to press his sureties for payment of the cash credit, until
"we see what way sales will turn out. All the business con-
"nected with his farms will continue to be conducted at this
"office." The secretary, on 3d July 1817, wrote Messrs. Murray:—"The directors will not agree to any delay in payment
"of the balance, unless a bill at three months' date is granted
"by all the obligants in the bond. Indeed, they do not con-
"sider themselves at liberty to give delay, after the letter from
"Mr. Mackenzie, which you sent us in March last, and
"Mr. Ross having become bankrupt. I am directed to add,
"that you should have reported the state of this account, and
"of the security, at the time Mr. Geddes sold his shares, that
"the directors might have judged of the propriety of stopping
"the transfer." At this period the bank seem to have entertained no doubt of Geddes's solvency. Bills to the amount of several thousand pounds were then current in the bank, and 200*l.* yearly was allowed to Geddes under the trust. The bank lodged a claim and affidavit. The trustees continued to manage the trust estate, and paid off several of the debts. The bank repeatedly urged the Messrs. Murray to get their claim settled; and on 14th April 1824 the secretary wrote those gentlemen:—"Have there been any operations on John Geddes's
"account, or should we now call it up?" Matters remained in

Sept. 23, 1831. this state until the 24th of that month, when the secretary intimated to Mackenzie, for the first time, that he must pay up the balance due on the cash credit. Mackenzie denied his liability. A charge was thereafter given him on the bond, which he suspended, and thereafter action was raised. The Lord Ordinary (24th June 1829) having very fully explained his opinion, by a note for the reasons therein expressed, repelled the defences, decerned against the defender in terms of the libel, and found him liable for expences, &c.

The Court (4th June 1830) adhered.*

Mackenzie appealed.

*Appellant.*—Effect ought to have been given to the plea of the appellant, that he was liberated from all liability, under the cautionary obligation undertaken to the bank, by the conduct of the bank in departing, without his consent, from a collateral security held for the debt; in altering, most materially, without intimation made to him, the nature and extent of his risk; in granting the principal debtor time, delay, and a surcease of diligence, notwithstanding a call on them to urge him to an immediate settlement; in delaying, for seven years, to make any call on the appellant, whilst, in the meantime, they entered into a separate transaction with the principal debtor, got his estate under their control, and, without the cautioner's knowledge, neglected and mal-administered it, so as to destroy his means of relief; and, generally, in failing to observe that due regard to the interests and security of the appellant which is incumbent on a creditor towards a cautioner, under the penalty of liberating him from his obligation of suretyship.

*Respondent.* — The appellant undertook the obligation to the Commercial Bank of Scotland, of which he now seeks to be relieved, and, on the faith of that obligation so undertaken by him, along with Geddes and Ross, the bank advanced to Geddes the money of which the appellant now refuses to make repayment. The bank did not give time to Geddes, or to any other party, in regard to the repayment of the money due to them;

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* 8 Shaw and Dunlop, p. 862.

that is, the bank never prorogated or prolonged the time at which they could have demanded payment from any of the parties concerned of the money in question; but, unfortunately, in spite of all their exertions to recover this money, these parties, including the appellant himself, delayed to make payment, and this is what he now calls giving time, whereby his own delay in making payment is gravely pleaded as a sufficient ground why he should now be relieved from making payment at all. In point of law, and in so far as regards the bank, the appellant cannot be viewed as a cautioner or surety, but must be held to be a principal debtor, as he appears to be on the face of the bond in question. The respondent has no means of knowing the private arrangements or understanding which subsisted between Geddes, Ross, and the appellant; and, though it may be true that, in relation to Geddes or Ross, the appellant was a mere surety, the bank neither had, nor have, any means of ascertaining how the fact stands. The bank were not barred by the bond in question, either from advancing money to Geddes on the shares of stock he held in the bank, or from allowing Geddes to dispose of these shares of stock as he thought proper. The bank did not concur in the trust granted by Geddes, or in the system of management under which his affairs were placed by his trustees. The appellant himself concurred in this arrangement, and he had no interest in doing so, except as being the debtor of the bank for the sum drawn out by Geddes, under the bank credit in question. There is no evidence, and no relevant averment that the bank had any transactions with the alleged principal debtor, or can be chargeable with any negligence or delay in attempting to recover payment of the balance in question.

*Lord Chancellor.*—My Lords, I shall certainly, on the present occasion, recommend to your Lordships to take some little time to look into the matter, respecting the construction of this bond—not that I entertain any doubt that it is in its nature a cautionary bond; for although it puts the party contracting in the same condition, in some respects, with the principal debtor, nevertheless, the manner in which it states the consideration for which it was granted shows, upon the face of it, that the bond is cautionary—that the debt is from one of the obligors to the obligee, and that the other binds himself with that one for the payment of that one's debt; yet, as I am

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pressed with the opinion of Scotch lawyers, and with the opinion of the Court of Session who are conceived to have decided otherwse, (of which however I do not see any clear evidence, for they might have decided entirely on the other ground) and as it is stated that these obligations are exceedingly common, and that this is the ordinary form of security in such transactions, I think it my duty to look into the matter further, with a view to seeing whether a certain form of words must be used—whether the word " for" for instance, which appears to have been thought necessary in a case, the report of which, however, is one of very little distinctness, must be inserted, or some equivalent term. We are told by authority in Scotch cases, that even the word " for" is not always enough; and that, to make it a bond of express cautionary obligation, there should be the word cautioner or surety, or something of that kind introduced. But though I cannot conceive how technical words should be required to constitute suretyship or caution, yet I think it will be our duty to consider it fully before it is determined. If this should be found to be strictly, as I conceive it is substantially, a cautionary bond, the question will then be, whether, by allowing of the sale of shares, or by giving time, or by other measures, the Commercial Bank have released their claim on Mackenzie as a surety. With respect to this point, I have, during most of the argument, struggled with what appears to me to have great weight, that this case ought to have been sent to be tried as an issue in the Jury Court. I wish that had been the course adopted in the beginning; it would have saved a great deal of trouble—a great deal of discussion in the Court below—a great deal of expence,—and also, in all probability, would have saved the present appeal. Nevertheless, as the question has been brought here, it will be with the greatest possible reluctance that I shall advise your Lordships to occasion any further delay in the final decision of the case; and I consider that the acting under the bond to which my attention has been in the last stage drawn, and which I certainly was not aware of till a very late period of the argument, does throw very considerable doubt on what might appear to be otherwise free from doubt. Perhaps I ought—as that was not originally presented in the argument—to have called upon the learned Counsel on the other side, or, at all events, to have given him the liberty to address a few observations, of course not exceeding the bounds of a very moderate rejoinder, upon the matter; they do appear, however, to have had notice of it, for it is mentioned in their own paper; and consequently, they cannot be said to be taken by surprise; but they may say they have been taken so far by surprise, as that matter had not been presented by the Counsel for the appellant in opening the case. I shall therefore give the learned Counsel an opportunity

of referring your Lordships to any thing which may do away the effect of that circumstance; and if, in the result, I shall feel it to be possible to advise your Lordships to make a final decision here, without sending it to be tried by way of issue, I shall feel the strongest desire so to do. If the learned Counsel can show, by legal evidence, that Macartney had assumed to act for the Bank, and, without authority, had become a party acceding to the trust deed, it would be an explanation of the Bank afterwards having taken advantage of it, though I should say, still it would be difficult to say, that their conduct must not be taken to have been an adoption of the deed. Sept. 23, 1831.

*Mr. Miller* was heard on this point.

*Lord Chancellor.*—I would now move your Lordships that the further consideration of this case be postponed.

*On a future day.*

*Lord Chancellor.*—My Lords, this case arose under particular circumstances. The principal question—which, after the comments I made upon the case, is all that remains for consideration—was, whether or not I could, upon the evidence in the cause, safely advise your Lordships, as I was most anxious to do if I could, to decide the question finally here; or whether it must go back to an issue to be tried in the Court below? For I had the misfortune of not being able to take the same view of the case as the learned Judges who decided below, upon grounds which, in some respects, I cannot understand; and which in other respects, so far as I understand them, I do not assent to—that the appellant Mackenzie is, under his bond to the Commercial Bank, not merely a surety, but a principal debtor. My Lords, it is impossible for any lawyer to read this instrument, and to doubt for a moment that he is cautioner only. It is stated he binds himself with Geddes: For what? For the repayment of 500*l.* to be advanced to Geddes. In every respect, therefore, unless the word "cautioner" or some such technical word must of necessity be used upon all such occasions, and unless it is not sufficient for a man to state in other words what he means, it is impossible to doubt that this is a bond of caution. I put it to the learned Counsel at the bar, if he was asked what he had done for such a one whom he had assisted by signing such a bond, whether he would not describe himself by the word "cautioner?" Whether he would not answer, I am his cautioner in a cash account—I have given a bond of caution in a cash account. No different construction can be applied to this instrument, because it happens to be a bond for a cash account—a very common instrument. It would be very important, as far as the question of discussion goes, if I was asking your Lordships to declare, by your decision, that these parties

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were not co-obligors, but I say no such thing; the bond is carefully, artificially, and successfully drawn, and most effectually excludes that construction. A party may be bound as a principal obligor, though not for himself, but for a benefit conferred upon the principal obligor. He is truly cautioner, but still he may not have the benefit of discussion;—no bank would take this bond, if the benefit of discussion was implied—that benefit gives the cautioner a right to say, You have not discussed my principal: not merely, you have demanded and been refused; but you should have gone against him by full diligence. There must be the fullest discussion; he must be fully sold up, and every thing must be done that the obligee can do to get hold of his property. It would be a great disadvantage to any bank if this discussion were to exist, for their object is to have two persons instead of one; so that though the principal debtor does not pay, the other must, as the co-principal. As the doctrine seemed to be considered of some importance, I have had a communication with the Court below upon this subject, and my opinion that this is a cautionary bond is entirely confirmed by the learned Judges with whom I have communicated. Then I hold Mackenzie to be a surety; and being a surety, he has all the equities of a surety, and among those, that any act of the obligee giving time, or any advantage in the nature of time, to diminish the security of the surety, lets the surety off. That is the law of England, the common law of England, and it is the law of Scotland, and of every commercial country. One thing the Bank do, is parting with the shares; the other thing is, the giving time by a superseding of the process for three years. Now, with respect to the parting with the shares, I do not say so much upon that, although I do not think it immaterial. Lord Cringletie, in an elaborate note upon this subject, considers that words are of no importance in an instrument, if they are words of common style. He does not rest the case upon this not being a bond of caution; he does not give any opinion upon it, nor do the Judges (who however plainly treat Mackenzie as a cautioner); but he observes, "the Lord Ordinary, however, does not think that the "merits of the cause rest on this—he is of opinion that the clause in "the bond was merely words of common style of such a deed, which "is inserted in all such bonds, whether any of the parties happen to "have any shares of the Bank stock, or not."—But really, my Lords, I do not understand that a clause is to have no meaning, because it is inserted very often. "Signed, sealed and delivered, in the pre-"sence of A. and B.," as attesting witnesses, are words of common style; half the bond is in words of common style; but does it follow, because an instrument contains words often, nay, universally used for a certain purpose, that they are unmeaning and unavailing to ac-

complish that purpose? The more words are used frequently, the more they have a legal import, and a legal importance. The words are, "And it is hereby declared, that there is nothing hereby meant to "supersede or vacate the security which the said Company already "hold or may hold over the shares which we or either of us hold "or may hold of the stock and profits of the said Company, for "any advances under this bond or otherwise, or to be advanced." A doubt might be raised whether the Bank selling those shares, without working out their own security over them, and paying their balance out of the price, or without notice to the surety, did not operate in favour of the surety. But I am doubtful upon that subject; and upon that I am not disposed to differ so much from the Court below. It is upon the ground of the deed of accession and supersedere, by the creditors of Geddes, among whom, upon the face of the instrument, Macartney is expressly included as representing the Commercial Bank to the amount of 500*l.*, that being the only claim that the Bank had against Geddes's estate, namely, this very 500*l.* The Bank say, first, that they were no parties to the trust deed; secondly, that they were no parties to the deed of accession and supersedere; and thirdly, that Mackenzie has no right to complain of giving time, for he was present when this deed was executed, though it is not pretended he signed it—that he represented the Bank as their agent—that he had notice of it, and that he was a voluntary acceding party, and has no right to complain of it; and my Lord Cringletie plainly proceeds upon this view of the subject; for he says, "a draft of a deed of accession by the creditors was "also produced to the meeting, and the defender is entered upon "the minutes of that meeting as appearing for the behoof of the "pursuer, claiming as creditors on the bond by Geddes and him-"self." Now it is alarming to see such a thing as this stated. Here is a learned Judge, who gives a very elaborate decision, and yet he says, that the defender is entered upon the minutes as appearing for the behoof of the pursuers, as claiming creditors. My Lords, the learned Judges in the Court below should apply their minds to that without which no court can do justice, no court can avoid error, and no court ever discovered truth—I mean, the observing strictness in applying the rules of evidence. Lord Cringletie considers this to be evidence, that the appellant, Mackenzie, is agent for the Bank, and present at the important meeting, because there is a minute (which is very much praised in the pleadings, as being signed by a gentleman of high respectability, and incapable of putting his name to any thing that is not accurate,) stating that circumstance. That is the sort of rule by which a man's property is to be taken from him, and given to another by the

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practice of Scotland. It is a minute made behind my back by a respectable man. I do not care how respectable he is. Three persons going to an ale-house, and signing a minute, that A.B. was present, and agreed to give up his claim to the equities he enjoys as a surety, and as an obligor in a bond, is to entirely conclude him, because they produce this minute signed by a respectable man. It never seems to have entered into the mind of his Lordship to doubt that this was the best possible evidence. You have a minute, forsooth. Why, if it had been a record of a judgment, it would not have bound me, if I had not claimed through one of the parties in the judgment; but, because it is a minute, signed by a respectable man, but not signed by me, and my authority, it is conclusive. To be sure there is evidence (and that is the only point which I have a doubt upon) of Mackenzie having put his initials to the draft of the trust deed, but that is only the draft of the deed. I may have intended to sign the deed, and afterwards have altered that intention. If so, I have not given time. But it is plain that a surety has an absolute right to be let off, if time is given to the principal by the obligee. If the surety himself gives time, he would defeat his equities to be let off; but if he intended only to give time, and did not do it, his equities enure to his benefit as much as ever. That time was given by the obligee by accession is no doubt a fact to be proved; and it is not pretended that the Bank signed the deed of trust and accession; and as to Murray's having signed, they certainly appear by the correspondence to be the Bank's agents, but as they were general agents they might be representing other clients, and thus not bind the Bank. But there is a most important statement in the papers of the Bank themselves, which clearly, in my humble judgment, makes it unnecessary for me to advise your Lordships, which I should otherwise do, to send the case back; the Bank admit, that they made an affidavit of the amount of the debt due by Geddes, and lodged a claim to that amount against his estate. How?—There was no sequestration against Geddes—there was no other trust deed against Geddes and therefore the Bank have set up this trust deed, and they have acted under it, and taken the benefit of it. It is true that they say they did it for the sake of the surety as well as themselves, in order to give him the full benefit of the claim, but that avails them little. They have, under the trust deed, made an affidavit of debt to the amount of 500*l.*, for which they are stated to be creditors in the introductory part of the trust deed, and it is too late to say that they will disaffirm that deed, or will have nothing more to do with it. They have approbated it, by lodging under it a claim against the estate, and cannot now be permitted to allege that they have not given time by the trust deed, and the supersedere

for three years. I do not go into the correspondence; this is a shorter ground for disposing of the case and upon these grounds; I move your Lordships that this judgment be reversed. Sept. 13, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be reversed.

*Appellant's Authorities.*—Bell's Com. B. 3, P. 1. c. 3. sec. 3; Ersk. III. 5. 11, III. 3, 66; Bowman Fleming, 23d May 1826; W. & S. Vol. III. p. 277. Thomson, 11th June 1824; 2 Shaw, p. 347; Grant, Dow, VI. p. 252; 3 Ersk. 66; Fell on Guar. p. 160; 3 Ersk. 366; Fell, p. 176; Stewart, 31st May 1814; Fac. Col. Leslie, 10th Jan. 1665 (2111); M'Millan, 11th Jan. 1729; 6 Geo. IV. c. 120, sec. 10.

*Respondent's Authorities.*—Hotchkis *v.* Royal Bank, 28th Feb. 1797.

RICHARDSON and CONNELL, — MONCRIEFF, WEBSTER, and THOMSON, — Solicitors.

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Sir MICHAEL SHAW STEWART Bart., Appellant.—*Lord Advocate (Jeffrey)—Knight.*

No. 41.

JAMES CORBET PORTERFIELD Esq., Respondent.—*Lushington — Rutherford.*

*Entail—Faculty—Prescription.*—A party executed a deed of entail in favour of an institute and the heirs male and female of his body, and the heirs male of the entailer's body; whom failing, heirs to be named by any writing under his hand; whom failing, other heirs; reserving a power to alter the succession generally, except as to the institute and the heirs male and female of his and the entailer's body; thereafter he made a deed whereby he altered the line of succession, and nominated heirs preferably to the heirs female of the institute, and to the other heirs called after the substitution hæredibus nominandis; and the estates were possessed for more than forty years on the entail alone, without reference to the deed of nomination:—Held (affirming the judgment of the Court of Session on a remit from the House of Lords), that the deed of nomination was a valid exercise of the faculty to name heirs; that an heir called by it was preferable to an heir called by a posterior substitution; and that prescription had not taken place so as to exclude the former.

IN this case (the facts of which will be found ante, vol. ii. p. 369,) the Second Division of the Court of Session had (22d June 1820) found, "That Mr. Corbet Porterfield is entitled "to be served heir of tailzie and provision under the brieves Sept. 23, 1831.

2D DIVISION. INNER HOUSE.