

APPENDIX. II.

NOTES OF THE OPINIONS OF THE JUDGES OF THE COURT OF SESSION, AT ADVISING THE CAUSE BETWEEN THE HONOURABLE MRS FULLARTON AND SIR HEW HAMILTON DALRYMPLE, BART. ON THE 23D NOVEMBER 1798.

LORD MEADOWBANK.—When the cause was advised by this Court in December 1796, it appeared to me, that the pursuer, before she could succeed in her objection to the sufficiency of the exclusive title, set up in defence, was bound to shew, in the *first* place, That, from her statement in point of fact, it would follow in point of law, that she ought to have been successful in her present claim to the estate of Bargany, had that claim been brought in her minority, or within forty years from the investiture 1742; or, in other words, that, in point of law, she was entitled to be considered as first substitute under the entail of Bargany, Sir Hew Dalrymple, and his brother, Mr John Hamilton, having committed a fatal contravention, which could not be purged, which, without declarator, constituted her first substitute, and which gave her immediate access to the estate: And *2dly*, As to the objection itself, that, though a substitute heir of entail, she was entitled, as being first substitute, to have her minority deducted from the years of the positive prescription, which, following on the investiture 1742, formed that title which the defender maintained was exclusive.

I then thought that the pursuer, by having neglected to argue formally, and establish the relevancy of her allegations upon the first of these points, was not entitled to claim a judgment of your Lordships upon the second, which alone had been fully treated. At the same time, after expressing the doubts which had occurred to me of the relevancy of her allegations on the first point, I had no difficulty as to the second point, in being very clearly of opinion, that her claim to have her years of minority deducted, was ill-founded.

At that time, such of your Lordships as agreed with me in this last opinion, holding it immaterial whether the pursuer was to be considered as the first or as a remoter substitute, for that in either case the years of her minority could form no *vitium* in the positive prescription pleaded for the defender, did not think it necessary to insist upon the pursuer's arguing the relevancy of those claims which she alleged ought to have been brought by her within the years of prescription; and the majority of the Court, that were of a different opinion on the question of the deduction of minority, permitted the pursuer to assume it as a *postulatum*, that her claim to be accounted nearest substitute, was at least, *in hoc statu*, well founded; and, of consequence, your Lordships pronounced an interlocutor, finding that she was entitled to have the years of her minority deducted.

This interlocutor having been carried to the House of Lords, the cause has been remitted to us, with a special direction, by which I think we are called upon, with sufficient clearness, to consider the relevancy of the pursuer's title to the character she assumes of first substitute, and then to determine, if we find it relevant, or perhaps though we find it not relevant, whether the validity of the defen-

der's title is thereby impeached or not. The words of the remit are these, which I think plainly confine us to the discussion of the pursuer's objections to the defender's exclusive title, and to try the relevancy of those objections, without permitting her to assume any *postulata* in point of law:—(*Reads words of remit.*)

In the *first* place, therefore, I lay totally out of my consideration the fifth question argued in the memorial for the pursuer, which resolves into a claim to the benefit of that exclusive title, which it has been her object in all the rest of the litigation to impugn. The remit of the House of Lords plainly considers this exclusive title as belonging to the defender, and the object of the remit is to try her objections to the validity of that title, not to enquire which of the parties had the best right to it. Besides, I cannot help thinking, that if the pursuer means seriously to maintain a claim to the benefit of this title, she must admit, that this action, as originally directed against the late John Hamilton, and the investiture 1742, was ill-founded, and that, after his death, instead of joining issue with the present defender, as in right of that title, she ought to have contented herself with challenging the investiture 1780, in order to make way for taking up the succession as heir under the investiture 1742. Whether, however, she has, in this manner, barred herself from laying claim to the investiture 1742, we are not called upon to consider. But, at any rate, there appears to be no doubt that this claim is totally foreign to the object of the remit of the House of Lords.

As to the relevancy of the pursuer's claim to Bargany, had it been made *tempestivè*, she has undertaken, or must be held to have undertaken, to establish all and each of the following propositions:

1st, That she was entitled to complain of a violation of the will of the tailzier, when the late Sir Hew Dalrymple, and his brother, Mr Hamilton, attempted to change situations in the actual enjoyment of the estate of Bargany, although both of them were called to the succession before her by the terms of the entail.

2d, That Sir Hew Dalrymple, the nearest heir, by taking possession of the rents of the estate while heir-apparent, subjected himself to the fetters of the entail.

3d, That Sir Hew forfeited the succession for himself and his descendants, when he repudiated the estate, laid down the name and arms, and contributed some aid to his brother in making up a title to the estate, which, though an innovation in the succession of the entail, and irregular in point of law, was capable of being rendered valid by prescription.

4th, That Mr Hamilton forfeited, by taking such a title to the estate against the will of the tailzier.

5th, That these contraventions were not purgeable.

6th, That the fact of these contraventions having been committed, was singly, without declarator, sufficient to deprive Mr Hamilton, and the descendants of Sir Hew, of their rights of nearest substitutes, and to vest that character in the pursuer, so as to render her *vera domina*, or the person who had the true right to the estate of Bargany, and so entitled to deduct her years of minority from the prescription said to be running against her.

7th, That the delay which has occurred, of not bringing the action till after the death of Sir Hew, the alleged contravener, is not a bar fatal to the pursuer's now insisting in having the contravention declared, and the rights of his descendants resolved.

I presume there can be no doubt that the pursuer is bound to establish all and each of these propositions to the satisfaction of your Lordships, as legal consequences of the allegations in point of fact stated to the Court, before she can claim an adherence to the interlocutor of 6th December; for, as I understand, it was not then the opinion of any of your Lordships, that it was competent to every substitute, or to any except the first, to have the years of minority deducted from the positive prescription. It is very true, mention has been made to your Lordships of a different doctrine having been elsewhere entertained. But the pursuer's counsel, excepting the opening counsel at the hearing last summer, have not thought proper to argue it in this Court, and most certainly there is nothing in the remit of the House of Lords that gives the smallest countenance to it; on the contrary, we are called on to discuss the pursuer's title to the character of nearest substitute, and to judge whether that character impeached the validity of the exclusive title; whereas this discussion would have been altogether superfluous, if the minority of any substitute, however remote, was to operate as a bar to the currency of the positive prescription. It is plain, therefore, that the contravention of the late John Hamilton, though I do not observe it formally maintained in the pursuer's memorial, is as necessary for the pursuer to maintain, as that of the late Sir Hew Dalrymple.

I do not propose to speak in detail as to all the foregoing propositions. I wish to abstain from repeating what has been formerly said; and perhaps it might be sufficient for me to say, that the doubts I expressed in December 1796, except, perhaps, those on the first of the seven propositions above enumerated, have not been removed by the very able discussion of the subject of them which has since taken place. On some of them, however, I shall beg leave to say a few words.

As to the circumstances in which Sir Hew stood when the transactions complained of took place, I think it is sufficiently made out in the minute distributed last night, that Sir Hew Dalrymple was heir-apparent under the standing investiture of the estate, and so entitled to the possession of the estate, till compelled to denude in terms of the entail 1688, by those having interest under it. I looked into the appeal cases 1739, in the competition between Sir Alexander Hope, Miss Buchan, and Sir Hew Dalrymple. But though the statement of the titles there is loose and contradictory, I conceive we may depend on the fact, that William Lord Bargany did not expedite a charter under the old investiture, as stated in the case for Miss Buchan, but merely obtained a service, and precept of seisin from Chancery, thereby continuing the investiture of 1633, which stood in favour of the heirs-male and assignees of the first Lord Bargany. If Lord William had expedite a new charter under the old investiture, whereby he himself and his heirs-male would have been the grantees of the investiture, it is plain his granddaughter, Miss Buchan, would, by the failure of heirs-male, have been the heir under that investiture, and that such charter and infestment of Lord William would have extinguished the procuratory of resignation in the tailzie 1688. It would therefore have been altogether inept to have proceeded to make up titles under that procuratory, as was done in 1742. Miss Buchan must have been com-

2d Propo-
sition con-
sidered.

pelled to make up titles; and denude by proceedings competent for that purpose.

But if Sir Hew was heir-apparent under the old investiture 1633, which was certainly his proper title of possession, it does not seem obvious how his intromissions with the rents of Bargany can be imputed to his character of nearest substitute under the entail 1688, which was still personal, and only created an obligation on the heir of the investiture to denude. At the same time, I have no difficulty in being of opinion, that though his intromissions were to be imputed to the character of apparent-heir under the personal deed of entail, still that intromission could not subject him conclusively to the fetters of the entail, and put him in the capacity of forfeiting an estate which was not in him. Mr Erskine says expressly, "That as passive titles have been received into our law, merely for the security of creditors, therefore, where questions arise concerning behaviour among the different orders of heirs, in which creditors have no concern, the heirs are not liable to one another *in solidum*, but are only accountable *in valorem* of their several intromissions;" which is, in other words, merely saying, that this sort of intromission, in a question among heirs, remained on its original footing as it stood under our old feudal law, before the institution of this Court: for, by that law, intromission created nothing but an obligation to repay to those having interest, since it subjected to none of the conditions upon which the estate was held. The heir-apparent in possession was liable in none of the feudal services, nor subject to any of the casualties to which the proprietor was liable. The superior might take his declarator of non-entry, and assume possession; but if he did not take possession, he could take nothing else, not even the single avail of marriage, till after the heir had entered. But if taking possession of the estate did not subject the heir to the conditions of the grant from the superior, I think it is impossible to hold, that it should subject him conclusively, and as a matter of course, to the conditions of an entail, by which he was entitled to enter to the property. It is accordingly the actual entry as heir, which all our lawyers state as the step which, if once taken, cannot be retracted, while the naked taking possession had no other effect among heirs than to render the intromitter accountable for what he received. The taking possession, therefore, cannot be held to go farther than to intimate an intention of entering. But if an heir of entail alters his purpose, and chuses to abandon the possession, I cannot see on what ground any substitute could challenge such a proceeding as a contravention of an entail, where no prohibition against lying out unentered is expressed. I observe, that in the deed of repudiation, Sir Hew conveys the bygone rents to Mr Hamilton. But though this might be proper *ob majorem cautelam*, or to prevent all ground of complaint, I do not conceive that there could be any necessity in point of law, even for that measure, at least from the terms of the entail of Bargany, which, I think it very clear, is the only entail that the pursuer is in this cause entitled to found upon.

B. 3, tit.
8. sec. 86.

3d Propo-
sition.

But if Sir Hew could not contravene an entail which he had not bound himself to accept, nor forfeit a property which he had abstained from assuming, it is plain, that his entering into a combination with his brother to enable him to get hold of the estate, as if he

had stood before him in the line of succession, cannot be a contravention on the part of Sir Hew. Whether it was so on the part of Mr Hamilton, is not, I think, a more difficult question.

I am of opinion, that a donatar of non-entry from the Prince might 4th Propo-
 have set aside Mr Hamilton's entry to the estate; but it is not easy to sition.
 see on what ground a substitute could have got him forfeited as a contravener. The pursuer said, that he should have brought a declarator of contravention against Sir Hew, for abandoning the possession, and not making up titles. But I have stated my reasons for thinking that there was no ground for such a procedure; and it is very plain, that the pursuer, a substitute under the entail of Bargany, could not give him any trouble upon the terms of the deeds relative to North Berwick. All the pursuer, therefore, has to complain of is, that when nearest substitute, Mr Hamilton took up the estate in the same manner as if he had been the nearest heir, instead of suffering it to fall into non-entry, the casualty of which the Prince of Scotland might have gifted to any of his friends, till Sir Hew or his descendants chose to enter. And what better would the pursuer have been, had this been done? The right of succession must have remained entire in the family of North Berwick: she must have remained as remote a substitute as ever. The title taken by Mr Hamilton cannot have served her worse than this, nor disappointed more the intention of the tailzier. It is likewise very difficult to conceive, that the taking prematurely an estate, should be deemed a contravention by the taker. The innovation prohibited seems to be entirely levelled against the granter, not against the grantee. I must doubt, therefore, both of Mr Hamilton having contravened, and of the pursuer's interest to challenge what he did.

The same circumstances which I have just mentioned, show, if the 5th Propo-
 transactions 1742 were deemed contraventions, how they might be sition.
 purged. An action at the instance of any of Sir Hew's children would, I think, have done away the hazard of their being postponed to Mr Hamilton's issue; or if Sir Hew and Mr Hamilton could have prevailed on the superior to challenge the investiture 1742, and insist to enter into possession, as being without a vassal legally entitled to the estate; every thing would then have been restored precisely to where it stood, and the estate must have fallen back into non-entry, and into the possession of the superior, without any forfeiture whatever. But the investiture 1742 is now invincible by the superior.

As to the necessity of a declarator, to entitle the pursuer to the 6th Propo-
 character of next substitute, and so, as alleged, *vera domina*, I shall sition.
 say nothing in addition to what I formerly stated, except that as all that is complained of might thus have been completely undone, there can be no doubt that any declarator she might have brought in her minority, was something very different from a declarator of property, accompanied with a reduction of what stands in the way of the *rei vindicatio*, or that sort of declarator of contravention which may be considered as merely ascertaining a simple condition of descent, e.g. where, on the succession to a Peerage, an estate is provided to devolve on the next heir, who is a commoner. There, indeed, the declarator admits of no defence, and merely operates as a service; whereas in the case put, it was to remedy an innovation of succession, which might be completely remedied, and every thing placed *in statu quo*.

7th Propo-
sition.

But if the alleged contraveners might have purged, before prescription had run against the superior, as heritable debts may be got renounced, sales surrendered, and so forth, will the law permit them to delay till the contraveners die, and prescription is run against the superior, and still give the full penal effects of forfeiting the property to the action of contravention? Entails, no doubt, must contain both irritant and resolute clauses, to have the efficacy intended for them by the statute; but actions proceeding on these clauses may competently effect an irritancy without a resolution: And it surely may admit of serious consideration, whether it is agreeable to the genius of our law, to allow of an action to forfeit, when, by the pursuer's fault, a delay has occurred which excludes the defender from the means of avoiding so penal a consequence. Craig has long ago observed, that the *leviores pœnæ* are always adopted by our law, and that it is slow to inflict any thing of a penal consequence, on a failure to implement an obligation. Witness the law as to legal and conventional irritancies, &c.; and whatever the pursuer may argue, it seems to me impossible to doubt, that contravention *sapit naturam delicti*, and that forfeiture in consequence of it, especially when reaching to the offspring of the contravener, is a most severe punishment; and, after all, in the present case, are not the contraventions complained of now done away, and things exactly placed agreeably to the destination of the entail, which, on the contrary, the pursuer's success would completely invert?

Second Point.—Is there any part of the period of the term of possession required in composing the prescriptive title pleaded on by the defender, to be deducted on account of the minority of the pursuer, though held to have been first substitute?

The argument for the pursuer, when the cause was before your Lordships in 1796, went entirely to show, that she, as substitute of an entail, who, as she alleged, was, in consequence of acts of contravention, entitled, not only to obtain decree resolving the right of the contravener, but to take the estate as nearest in the succession, ought therefore to be considered as having in truth been *vera domina*, and equally, as in the case of a claimant *jure sanguinis* in fee simple, entitled to insist that the years of her minority should be deducted from the period of the positive prescription, pleaded as establishing a title that excluded her claim. At that time the majority of the Court adopted this doctrine; but I do not recollect of having so much as heard in any part of the deliberation, the plea once stated, that any one substitute of entail, however remote, might insist to have his minority deducted from the positive prescription, excluding the entail, or the still more novel plea, That in a question concerning the positive prescription, every substitute, though he may insist for deduction of his own minority, cannot insist for deduction of the minority of those who were nearer the succession than himself, and to whom the benefit of a successful challenge might have been even immediate and direct; so that, according to this doctrine, an entail shall be complete and incomplete at one and the same time,—shall be excluded *quoad* one class of substitutes, and effectual *quoad* another class of them. These doctrines are not light matters in the law of Scotland. Had they formerly met with countenance from

any of your Lordships, I don't think they would have escaped my memory, nor been overlooked in the Cases lodged in the appeal taken against the judgment of this Court; but now that they have been mentioned to us as matters deemed of very serious consideration by great and respectable authority, I thought it my duty to examine them with attention, and having done so, I am bound, with due deference, to say that they appear to me adverse to the established principles of our law, and tending directly to involve entailed property in an inextricable labyrinth of confusion and uncertainty.

With respect to the peculiar rights of the nearest substitute, I shall say nothing in addition to what I stated in December 1796. It then appeared to me sufficient to state, in support of my opinion, that as, in the general case, irritancies may be purged, of course declarators of contravention do not necessarily and immediately resolve the right of the contravener; but, in the first place, only operate as a powerful compulsitor, in order to make him rectify wherein he had violated the restraints of the entail; for I thought it followed of necessity from this known doctrine of law, that an action of contravention was *sua natura* different from a claim of property, and was precisely of the same nature, whether brought by the nearest or most remote substitute. A claim of property is a simple *vindicatio domini*, an assertion of absolute right already fully in the claimant; and if well founded, not to be defeated by any thing the defender can do after the commencement of the action,—*pendente lite nihil innovandam*; whereas the action of contravention is founded on a *jus obligationis* of the defender, the proprietor, to fulfil the conditions on which he holds his estate, in which every substitute is equally a creditor: and though, in case of the nearest substitute, it involves a claim to the estate, still that claim is liable to be disappointed *pendente processu*, by the defender purging the contravention, and is, therefore, at any rate, only a contingent *modus acquirendi domini*, not *vindicandi*. This argument therefore proved, that as it was then allowed that the minorities of the remoter substitutes did not suspend the positive prescription, so neither could that of the nearest.

It is plain, however, that this argument does not conclude, where it is contended, that the minorities of remoter substitutes are to be deducted from the positive prescription. This doctrine, therefore, remains to be considered; and I understand that it proceeds on the notion, that as every substitute has a separate and independent interest in the entail, which he is entitled to maintain by the action of contravention, of course when prescription is pleaded in bar of that action, he may deduct his own minority, but no other.

But this argument, I apprehend, proceeds on confounding the characters of the positive with those of the negative prescription, and involves also a mistake as to the true nature of the action of contravention.

In the *first* place, The positive prescription does not operate against the title to pursue of the claimant, but only in establishing the title of property of the person in possession; nor does the validity of the one imply the invalidity of the other: *jus sanguinis* cannot be abandoned or lost *non utendo*; the vicennial prescription only renders the verdict of propinquity in a *retour a res judicata*. Accordingly it is a general rule of law, that *jus sanguinis* suffers no prescription. The title to pursue for the estates of our ancestors is

accordingly perpetual, and not to be lost, like a *jus obligationis*, by forty years neglect; and the validity of the positive prescription, as a title of property, depends on the nature of the possession of the defender, not on extinguishing the right of action in the claimant. Possession for forty years by the defender, or his authors, undisturbed by the claimant and his predecessors, following on title-deeds *ex facie* unexceptionable, affords *presumptione juris et de jure* a valid right to the estate claimed, and of consequence a sufficient defence on the merits, like an onerous purchase, or any other ground of right, but creates no impeachment of the claimant's *jus actionis* or title to pursue. The deduction of minority, therefore, in the positive prescription, arises, not from saving the claimant's right of action, but from the imperfection it occasions in the presumption which creates the prescriptive right to the estate. It is evident, that the presumption arising from long undisturbed possession, of the right having been originally good, is much weakened, if it appears that the person or persons who, according to the statement of fact given by a claimant, were the *vera domini*, had been minors during part of the forty years, so that the undisturbed possession of the defender might, with reason, be in some degree ascribed to the inattention of minors to their interest, and to the peculiar inconveniences attending the carrying on of law-suits at that period of life. Hence it is, that in the deduction of minority from the term of the positive prescription, a consequence has invariably taken place, clearly incompatible with the plea of the pursuer now under consideration, viz. that the deductions of the minorities of the whole *veri domini* in succession has constantly been allowed, whether the claimant represents them or not, or inherits through them or not. An uncle, on the death of a nephew by an elder brother, serves heir to his own father, or a more remote ancestor, and then brings his challenge, and is met by a prescriptive title; but he deducts the minority of his deceased nephew, and of his deceased elder brother, as well as those of his own father, or others whom he represents. I need not quote to your Lordships the cases of Campbell of Ottar, Maclean of Broloss, and numberless others, where this practice was followed. The deceased *veri domini* often lived in poverty, and it was not safe to represent them. But it never was questioned, that if a claimant was at all entitled to deduct minority from the positive prescription set up against him, he was entitled to this deduction on account of the minority of every *verus dominus*, who, according to the evidence, was a person that, in his own time, had the true right to the estate, and that equally whether the claimant represented such *veri domini* or not, or inherited his right of blood through them or not. In short, it was a *vitium* in the right of the defender, that he detected and excepted against, in the same manner as he might take exception on account of any irregularity in the form of the title set up as the ground of the prescriptive possession, or because the defender, or his predecessors who enjoyed the possession, were incapable of legal possession, as being aliens or traitors, &c. It seems to me, therefore, manifestly impossible, that any person entitled to insist for deduction of the years of his own minority from the term of the positive prescription, shall not be also entitled to insist for a similar deduction on account of minorities that occurred before his right accrued to him, or even before his birth. If there is a *vitium* in the defender's plea of un-

disturbed possession on account of the claimant's own minority, is not there a like *vitium* on account of the minority of the claimant's predecessors, whether he represents them or not, and must be entitled to allege this *vitium*, like any other defect in the title opposed to him? This at least is certain, that so the law has been held to stand, whenever minority was objected to the positive prescription; so that if the deduction of it is to be allowed from respect to usage, the principle of that deduction is entitled to similar treatment. I think myself, therefore, authorised to conclude, that the doctrine of each substitute deducting his own minority, but no other, is adverse to the principle on which that deduction has been hitherto allowed in the positive prescription. Besides, it certainly may concern the interest of a remote substitute to deduct minorities of earlier or nearer substitutes from a prescription excluding the entail; and if his own *jus actionis* in minority is sufficient to create a *vitium* in the undisturbed possession of the defender, why should not the *jus actionis* of preceding minor substitutes, whose activity would have preserved him the estate, be pleadable by him as a similar *vitium*?

I may here, by the by, observe, that it was on the above known rule of deduction of minority that I formerly held the case of Ayton of Kinaldy as a great authority for the doctrine, that the minorities of no substitutes, not even the nearest, can be pleaded as a *vitium* in the positive prescription. There Thomas Ayton, the claimant, attempted to plead on the minority of his nephew David, the nearest substitute, as creating a *vitium* in the prescriptive possession founded on by the defender; but James Monypenny denied that this could impeach his prescriptive right of property under the investiture 1700; and the House of Lords, *inter alia*, directed this defence on prescription to be sustained. No doubt, Thomas was, during the same period, major; but however this might operate by means of the negative prescription, against his own title to pursue as a substitute, which is certainly a very nice question, it plainly never could validate the defence of Monypenny on the positive prescription.

But in the *second* place, The object of the statute 1685, is to preserve estates agreeably to the will of the donor; and the contrivance adopted for the purpose is, not to split the fee among the institute and substitutes, and leave to every one to take care of his own portion of the fee; it is, on the contrary, to vest the whole fee in the heir in possession of the estate, and to entitle the whole substitutes to compel him to use it agreeable to the conditions prescribed by the donor, or else to part with it to the nearest substitute. The object, therefore, of the *jus actionis* of every substitute, is not merely to guard his own immediate interest, but to insist for obedience to the whole will of the donor, so far as signified in the manner directed by the statute. This action, therefore, is calculated to preserve the entail as an *unum quid*; and its distribution among members like an *actio popularis* sufficiently enables it to produce its effect without any privilege in favour of minor substitutes against the act 1617, while, at the same time, it does not involve even a contingent claim of property, (unless when the nearest substitute is pursuer), so as to afford any claim on principle to such a privilege. It appears to me, therefore, not only to form a very violent stretch (nowise called for by either law or expediency) of the doctrine of deducting minorities from the positive prescription, to attribute such an effect

to the *jus actionis* competent to all substitutes of entail; but to amount to a demolition of the system of the law relative to entails, to adopt it as a rule that, in a question with certain substitutes, a contravention of the will of the donor, destructive of the entail, may be effectual, and with others may be challengeable. It surely would be nowise desirable or agreeable to the intendment of the statute 1617, that so feeble an interest as that of a minor-substitute, the fiftieth, perhaps the hundredth in degree, should be sufficient to shake the security destined by that *palladium* of Scottish property; and for my own part, I cannot form a conjecture how the questions could be extricated, which must arise, if the action of contravention can be held competent to remote substitutes, though near ones stand excluded by the positive prescription.

Dec. 13,
1695.
Fountain-
hall.

It is impossible to do justice to these topics within the limits of discussion which a Member of this Court can, with any propriety, occupy. Your Lordships know that it was distinctly found in the case of Innes of Auchluncart, that a right of action was preserved from the negative prescription, while, at the same time, the term of the positive prescription was also found to have been running, which afforded an invincible defence against that right of action; and as to consequences, only put the case, that the pursuer had been major at her father's death, that the present action had been brought by Miss Mackay, and that she had been successful in pleading the pursuer's doctrines, I ask, would your Lordships have given the estate to Miss Mackay, to Mrs Fullerton, or to Sir Hew Dalrymple and his children? Could you give it to Miss Mackay, when Mrs Fullerton had done nothing to forfeit? Could you give it to Mrs Fullerton, while Sir Hew stood secured by prescription against her? And could you give it to Sir Hew, while Miss Mackay had got a declarator of contravention, forfeiting him and his issue? Or, suppose the pursuer to succeed in her present suit, and she and Miss Mackay not to leave issue, would the estate, at their decease, return to Sir Hew Dalrymple and his children, under the inversion of the succession in the charter 1742, secured by prescription against the other substitutes? Or what would become of it? Would the pursuer's action operate in favour of all posterior substitutes, though her minority could not? Or would its effect be confined to her own interest, and leave every other person *in statu quo*?

I am therefore for sustaining the exclusive title of property produced by the defender, and finding articulately, that the pursuer's title to pursue involves no quality tending to impeach the validity of that exclusive title.

LORD SWINTON.—We ought to find that Sir Hew Dalrymple did not contravene; and, at any rate, that if there was a contravention, it may be, or has already been purged.

What I had to say has been anticipated by my brother who has now spoken.

Quotes the former Interlocutors of the Court of Session, which were appealed from.—These interlocutors, it was said, in the House of Lords, had proceeded on an assumption of law, which we had no title to make; and now, in consequence of their remit, we are to decide the point which was formerly assumed.

In a question of construction of this kind, we should keep in mind, *non solum verba legis tenere, sed vim et potestatem.*

Quotes the Clauses of the Entail of Bargany, containing the prohibitions relative to the order of Succession.—Wherein did Sir Hew Dalrymple alter, innovate, or change the order or course of the succession?—He is said to have done so by the deed of repudiation.—*Reads the material clauses of the deed.* Here in effect he says no more than this—“ I delay taking up the succession to the estate; “ there is no provision in the entail, nor any rule of law, which can “ oblige me to take it up immediately; I only mean to lie by, and “ for a time; and in doing so, I hurt nobody.”

What says the act 1685? (*Reads the clause relative to frustrating the course of succession.*) But whose succession did Sir Hew frustrate? Was it Mrs Fullarton's? This is not even pretended; she certainly stands where she did before. Did it frustrate Mr Hamilton's? He could not say so; for his succession was, on the contrary, brought forward, as was that also of Dr Robert Dalrymple, the third brother.

If, in place of this, the brothers had made an agreement, that Sir Hew should take up both estates, and should give to his brother, Mr Hamilton, a lease of one of them for a mere pepper-corn, it would have been equivalent to what really was done: or, with the same effect, they might have stipulated, that if Mr Hamilton was ever disturbed by Sir Hew in drawing the rents of the estate of Bargany, he should then bring an action of irritancy against him, under the entail of North-Berwick.

It is clear that Sir Hew did no harm to any one. He *frustrated* the succession of nobody, and by that word I explain the other words, *innovate* and *alter*. It may now be said, that it is the pursuer alone who is attempting to alter the will of the entailer, and to frustrate the succession.

Thus it appears, that the assumption in our former judgment was not well-founded.

LORD ARMADALE.—The only question formerly considered by this Court was, Whether Mrs Fullerton's minority ought to be deducted from the positive prescription pleaded by the defender upon his charter and infestment 1742, as a title sufficient to exclude the pursuer's pretensions and claim to the estate of Bargany?

Upon that question this Court found, “ That in this case, in computing the period of prescription, the years of the pursuer's minority are to be deducted, and that the defender had not produced “ a sufficient title to exclude.”

That judgment having been carried by Appeal to the House of Lords, the Judges in that Court have taken a more enlarged view of the case than had occurred, or perhaps had been pleaded, to your Lordships. The question of prescription, even upon the *data* assumed by your Lordships, appears to have been attended with difficulties. It seems also to have been questioned, whether your Lordships ought to have taken for granted certain conclusions in law essential to be held as true by the pursuer for founding her plea, and the judgment of the Court thereon; and, independently of the plea of prescription, further difficulties appear to have arisen in the minds of the Judges there, in regard to the merits of the pursuer's claim, in competition with the right and title of the defender.

The House of Lords pronounced a judgment highly becoming

and proper in the view of the case which they seem to have entertained; and with these difficulties before them, they neither reversed nor affirmed, but remitted to your Lordships to review the interlocutors you had pronounced, to consider how far the rights of the contending parties were involved, and to pronounce such judgment, for or against the pursuer's title, as, upon farther consideration, it should seem to deserve.

I do not enter upon any critical discussion of the words of the remit; I take the broad import of it to be what I have now stated; and unquestionably, as there is no affirmance or reversal of any part of the judgment, it is entire, and proper, and necessary, that the case now sent to be reviewed should undergo the most enlarged and extensive discussion that is consistent with, and admissible by the forms of proceeding in such a process, to which, I presume, the Supreme Court of this kingdom will ever pay respect.

The form of the pursuer's action is a summons of reduction at her instance, subsuming certain facts as true, which, *in hoc statu*, she is entitled to do. It also draws certain conclusions in law from these facts; and upon these self-assumed grounds in law and in fact, it calls for production and reduction of certain writings, which she specifies, and farther, of all other dispositions, charters, &c. any-wise affecting or relating to the lands and estate of Bargany; and it finally concludes, that she should be found and declared to have right to the property of said estate. Against this general and extensive demand, Mr Hamilton of Bargany, and now the present defender, Sir Hew Dalrymple, have produced to exclude, as a preferable, unchallengeable, and exclusive title to the estate of Bargany, in opposition to any thing that the pursuer has alleged in fact, or is *entitled* to assume in law, a charter and infestment upon that estate in 1742; and having possessed that estate upon this title for upwards of 40 years, the period of the positive prescription, he maintains that he is the legal proprietor thereof.

With regard to the form of this defence, although, from the writings that appear, some of them upon record, and others produced by the parties, your Lordships may possibly have all the material lights in the shape that you would have had if the production called for in the summons had been satisfied; and although it may perhaps be of little consequence to the parties in this cause, whether the decision shall proceed upon the preliminary defence to exclude, or upon the secondary form by a production satisfied; yet it appears to me to be of essential consequence to the landed property of Scotland, (one great object of the law of the country,) that that form, viz. a title and right to exclude in a process of reduction-improbation, should be preserved entire; that a general production of a proprietor's whole title-deeds, of his charter-chest, (as it is termed,) or a decree of certification *contra non producta*, should not be required or allowed, wherever a defender can at once show a preferable and exclusive right in competition with any party laying claim to an estate which he possesses.

Formerly, in a process of reduction and improbation, every writing behoved to be specially called for; and the certification of forgery could be pronounced against no writing but that against which there was a special reason of reduction libelled. Now, however, that the most general and even fictitious reasons of reduction are libelled,

for the mere purpose of compelling a general production of writings, no otherwise specified than that they are relative to, or affecting the estate or subject in question; the practice has become general, and is established, and the propriety, even necessity of it is obvious, that a defender may select and produce, *in limine*, what he conceives to be a preferable title sufficient to exclude; and if your Lordships in any case think so, there is an end to the question, and of all further production.

A title to exclude may be of different kinds, and the same title may have different qualities, tending to exclude the pursuer's action and claim. It may be a mere title of prescription, which, followed with 40 years possession, does, in terms of the act 1617, constitute a prescriptive right; but the same title may, independently of prescription, carry with it a preferable and exclusive right to the property which the pursuer claims.

It is in this twofold view that this case presents itself to my consideration. And although the question of prescription, is one which, if founded, would supersede the consideration of the other, and therefore might perhaps first be considered; yet, in viewing this case, and delivering my opinion thereon, I deem it more proper to consider, in the *first* place, the title of the pursuer in competition with the right in the defender, independently of prescription, because I think that the merits of these two rights, when considered in that shape, throw considerable light upon the question of prescription, and if held by your Lordships in the manner that I do, may perhaps relieve you from the difficulties which you had upon the question of prescription, as formerly determined.

The pursuer's general assertion is, that she is the nearest substitute under the tailzie of Bargany, and upon whom that estate has now devolved. And, in order to support and instruct that assertion, she contends, that the late Sir Hew Dalrymple of North Berwick, committed certain irritancies of the estate of Bargany, and under the tailzie thereof, by which he forfeited that estate for himself and for his heirs; and, of course, that the present Sir Hew, and the eight substitute heirs of his body, being set aside, she is now the proprietor.

The points which arise out of that general question are various, they enter deeply into the feudal principles and practice of the law of Scotland, and require to be separately considered.

The *first* point is, Whether the late Sir Hew Dalrymple was in a capacity and situation, in regard to the estate of Bargany, that he could commit an irritancy by any thing which he actually did regarding it? A *second* point is, Whether what Sir Hew Dalrymple did amounted to an irritancy? A *third* point is, Whether, if irritancies were committed, they were of a purgeable nature? And a *fourth* point is, Supposing that Sir Hew could contravene, and did contravene, whether the contravention operated *ipso jure*, or if it can now be declared after his death?

The first of these points is, perhaps, attended with some difficulty; I proceed to examine it in this manner. It is an acknowledged fact, that Sir Hew made up an active title to Bargany that connected him inseparably with that estate, or which vested that estate in him as an heir of tailzie; it is likewise acknowledged, that this tailzie does not contain an usual, and, I apprehend, a very useful clause for the preservation of tailzied succession, a clause obliging the

heirs of tailzie to make up titles under it, within a limited time, or cutting off the right of any apparent heir omitting to do so within a given time. On the other hand, I think it is sufficiently proved, that Sir Hew Dalrymple did enter into possession of the estate of Bargany, and that he possessed as *apparent heir* of tailzie.

But although an apparent heir has, by the law of Scotland, a title to possess, and has other privileges annexed to his mere right of apparenacy without any further connection with the estate; and although it is likewise true, that certain legal effects do arise from his possession, namely, of accounting to creditors and third parties, and even, in some cases, being subjected to an universal passive title; yet the question remains behind, and is a different question altogether, whether it is one of the legal effects of an apparent heir's possession to *oblige* him to make up titles, or in the event of his not doing so, to hold, *de jure*, that he had made up titles, to the effect of fulfilling, and also of contravening, by counteracting the conditions of a gratuitous deed of tailzie.

Many estates in Scotland have been possessed by apparent heirs, and by one apparent heir after another. The debts and deeds of an apparent heir do not, by the common law of Scotland, attach upon an estate to which he had not at the time entered by service, or does not thereafter serve. The estate remains in *hereditate jacente* of his ancestor who died infest; and with regard to an apparent heir of tailzie, as he cannot do any effectual deed to destroy or injure the tailzied estate; so he cannot derive any effectual benefit from the provisions and conditions in favour of the heirs of tailzie. If he die in apparenacy, his wife has no benefit—his children have no benefit—his creditors take nothing; and the next heir of tailzie will serve as if he had never existed.

It was to restrain frauds against creditors, and to regulate the effects of an apparent heir's possession, that a statute was necessary, viz. the act 1695, to bring the debts and deeds of an apparent heir, who had possessed for a certain time, (three years) against the estate; and the same statute declares, that an apparent heir possessing or acquiring debts otherwise than at a public sale, shall be liable for the debts and deeds of his predecessor.

But even in the case of apparent heirs of line coming under the description of the statute, the obligation upon the apparent heir so possessing, has not been extended to the gratuitous debts of the ancestor, as has been found in different cases. And with regard to apparent heirs of tailzie, it has been expressly found, that the act 1695 did not at all apply to them.

Case of
Græme of
Hourston,
May 13,
1795.

The words of the tailzie-act 1685, establishing the obligation upon heirs of tailzie, enacting, that it shall not be lawful to them to sell, annailzie, or dispone, and declaring all such deeds null and void, must have had in view singly *those* heirs, the proprietors of, and connected with the tailzied estate, “who could sell, annailzie, and “dispone,” &c. as the act recites. It does not in terms, it could not, in the spirit of the act, or consistently with the principles of the law of Scotland, be extended to substitute heirs not served, and who might never have any connection with the estate; and therefore, upon this point, I am inclined to hold, that Sir Hew Dalrymple not having connected himself by service or other feudal title, with the estate of Bargany, and there being no clause in this tailzie

requiring him to do so in a given time, that he was not in a capacity, in regard to this estate, that he had not acquired that active legal or necessary relation to this estate, by which he could incur a forfeiture of it. The deed granted by him to John Hamilton of Bargany, whether considered as a deed of conveyance, or of renunciation, was a null and void deed, *a non habente*.

If right in this, there is an end to the pursuer's plea, of Sir Hew having forfeited for himself and children. But as that is only one of the points, and may strike your Lordships differently, the next point is, Whether, supposing Sir Hew was in a capacity to irritate and contravene the tailzie of Bargany, did he actually commit any irritancy?

Three things alleged as Irritancies or Contraventions of the Tailzie of Bargany.

1mo. That Sir Hew Dalrymple acquired debts, upon which a part of the estate was carried off.

2do. That he executed a certain deed, in consequence of which his brother, John Hamilton of Bargany, took up the estate.

3tio. That he assumed, and afterwards laid down, the name and arms of Hamilton of Bargany.

With regard to the first of these alleged contraventions, a most satisfying answer is made *in fact*, pages 75 and 76 of Memorial for the defender, to which I merely refer, as it consists of a statement of sums, dates and transactions, which I think must be convincing to your Lordships upon this head.

With regard to the second alleged irritancy, viz. The deed granted to John Hamilton of Bargany, the single question to be considered is, What the legal import and construction of that deed is, according to the practice and forms of the law of Scotland? I cast aside many of the criticisms that I have heard made upon it on both sides, and I put it to this legal and fair test for my mind, namely, Would John Hamilton of Bargany, holding this deed, and construing it as a deed of disposition, or a deed of obligation to dispoise, (which is the pursuer's plea and construction of it), have been entitled to bring an action against his brother, Sir Hew, to compel him to make up titles to validate this alleged disposition, or to adjudge in implement upon a charge to enter heir? I apprehend clearly, that he would not have been so entitled, and that Sir Hew would have been founded in this good defence:—I have neither entered, nor do I mean to enter heir, nor will I allow you to maintain any process to the effect of compelling me to do so. I have merely repudiated the succession; take it as you can and may, but not through me,—not under any express or implied title created in me. This I take to be the plain import,—the rational construction, and the legal substance of this deed, which no conveyancer versant in the law of Scotland can denominate a disposition of lands in the circumstances of the case.

In regard to Sir Hew's assuming, and then laying down the name and arms, there is nothing in it. When he resolved to renounce, it was just what he ought to have done, and fell to do; and, as a man, by renouncing after mere possession, or not taking a succession, does not contravene, there was no contravention in what he did.

According, then, to the view in which this matter occurs to me,

the question, how far these contraventions, had they been incurred, would have been purgeable by Sir Hew, if any challenge had been brought; and whether they could now be declared after his death, are entirely superseded? But upon these points I have still less difficulty in expressing my opinion, founded, as I conceive, upon the established principles of law and practice in similar cases, that such contraventions as these here alleged were purgeable; and I do not think, that, as contraventions, they could be declared after Sir Hew's death.

That such contraventions are purgeable, and have been allowed in similar cases to be purged, is certain. All contraventions which *de facto* can be purged, may be so before declarator. Cases of Ross Munro, Hamilton Gordon of Halcraig, and of Price *contra* Hamilton of Raploch, all in point.

It is founded in justice, and in the principles of the law of Scotland, that a man should be allowed to do away, if he can, in due time, those acts from which forfeiture is inferred;—and it arises also from the nature of a tailzied fee, and from the manner in which an heir or substitute having an interest to establish a contravention, must proceed in establishing it. For, if there is a point incontrovertible in the law of Scotland, it is this, that there is no such thing as *ipso jure* irritancies or forfeitures, in regard to feudal rights and infeftments in lands. There is no such thing as an *ipso jure* extinction, *confusione*, of rights constituted by infeftment, even where there is no irritancy in the case: And where a tailzied fee is completed by infeftment, as it ought, nothing less than a decree of declarator of contravention can resolve the right of the heir of entail. Lord Stair says expressly, “that there must be declarators before “the tailzied infeftment can be annulled or resolved.” So strongly founded is this, that, in the case of tenants, also in the case of feuars, there must be a decree of declarator of irritancy, before the lease of a tenant, or the feu of a vassal, can be annulled, *ob non solutum canonem*. Case of Ballantine against the Duke of Argyle.

In the case of tailzies, the Act 1685 clearly points out, that where a contravention is incurred, and where that is to become the ground of a forfeiture of the heir contravening, a declarator must be pursued. The words are: “The next heir of tailzie may immediately, “upon contravention, pursue declarators thereof, and serve himself “heir to him that died last infeft, and did not contravene.” Until a decree of declarator of contravention is obtained, the heir in possession remains proprietor of the estate, and may exercise every act consistent with the conditions of the tailzie.

On the other hand, as all irritancies, which *de facto* can be purged, have been, and always are allowed to be so, before a decree of declarator; and, as a declarator of contravention is indispensably necessary, to forfeit and annul the right of the heir contravening, the next question is, and a very general one it is, Whether a declarator of contravention can, or ought to be allowed to proceed after the death of the person contravening?

I am humbly of opinion, that a declarator of contravention under a tailzie cannot, and ought not to be sustained after the death of the contravener. My reasons are,

1st, The presumption of law and of reason is, That an heir apparently contravening has had the latent warrant of the entailer, (of

which there is a very remarkable instance in this case), or the consent of the heirs of entail, to do that which is founded on as a contravention. He may have had other defences sufficient to relieve from, or to justify what he has done. He may have had a back-bond from, or other stipulation with those whose contracts are founded on as contraventions, by producing which he could at once have put an end to the pretended act of contravention.

2dly, As a declarator of contravention is a penal action, drawing with it the forfeiture of the whole substance a man may have in this world, with beggary to himself, and ruin to his heirs and family, who may be consequentially stripped of every thing that they have relied on; it would be unjust that such trial should be held, or punishment inflicted, after the death of the guilty person. Nor is it necessary, for the safety or security of the other heirs of tailzie, nor for the will of the entailer, that a contravention should be declared after the death of the contravener; because the deeds of the contravener may thereafter be annulled;—and, when the ends of justice may thus be attained, and the estate of the entailer preserved entire, without declaring a forfeiture against one who is dead, and when he can no longer defend his own acts, it seems as unnecessary in itself, as it is contrary to every principle of law and of justice, to permit an action of declarator of contravention to proceed after the death of the contravener.

3dly, No instance can be pointed out upon record, before or since the act 1685, upon common law, or upon the enactments of that statute with regard to tailzies, in which an irritancy was declared, or attempted to be declared, after the death of the contravener. By the ancient common law of Scotland, an heir of tailzie contravening, forfeited not only for himself, but for the descendants of his body; and that too, without an express clause forfeiting the right of the descendants in the deed of tailzie. Such was the rigour of the ancient law; and it must be obvious, that while such was the law, remote heirs of tailzie had a manifest and strong interest to declare irritancies after the death of the contravener, if a declarator of contravention after death had been competent. But no heir of tailzie has been found so hardy; no practitioner so wild; nor is there any instance to be traced in our law books or decisions, of an attempt made to declare a contravention after the death of the contravener. What appears in the printed case of Gordon of Park against his Majesty's Advocate, as the able argument of counsel on both sides, and the judgment of the Court, so far as it went, is diametrically adverse to the idea of contravention after death; and I trust, that no such plea will ever, for a moment, be listened to in this Court.

It is, perhaps, of less consequence to inquire, or at least to decide, whether a declarator of contravention could now be pursued against the late Sir Hew Dalrymple, if any irritancies had been committed by him; because the fact is, that whatever Sir Hew may have done, or whatever his brother John Hamilton of Bargany may have done, every thing, by the hand of time, and before any declarator of contravention obtained, has been wrought off, and brought into the precise situation in which it ought to be, without the slightest particle of injury or loss of any kind to the pursuer; and, I apprehend, it is a solid and unanswerable plea, "That where there has

“ been no violation in effect committed against the will of the entailer, and no injury done to the substitute-heir, there is no interest, and there can be no right or foundation in law, for pursuing a declarator of contravention.

Put the case of a tailzie prohibiting leases beyond nineteen years, or any other period. An heir of tailzie grants a lease for a longer period, and thereby is liable to have an irritancy declared against him, and his estate forfeited; but, before a declarator of irritancy and contravention is brought by a substitute heir of tailzie, the period of the lease is run out: would any of your Lordships hesitate, for a moment, to dismiss such declarator of contravention?—Put a similar case: A tailzie prohibits all liferent-securities to the wife of the heir of tailzie beyond a certain sum, or a certain proportion of the rents of the estate; an heir of tailzie counteracts that prohibition, by granting a liferent-infestment to his wife to a greater amount: But, before a declarator of contravention is brought upon this act, which appears on the public record, the wife is dead; but the substitute heir of tailzie nevertheless insists that the granter of this infestment has forfeited his estate:—What lawyer could maintain such a plea? or, would a Judge of the law of Scotland entertain it as a matter of consideration, if it could be pleaded? I conclude, therefore, that the principle is sound and just, and which, in itself, is a full defence against this action, that as there has been no violation in effect committed against the will of the entailer, and no injury done to the substitute heirs of tailzie, there is no just interest in them, and there can be no right or foundation in law for pursuing a declarator of contravention in these circumstances.

The only thing which, upon the first view of it, seemed to be attended with a good deal of difficulty in my mind, was, whether the title which Mr Hamilton of Bargany did expedite, by service in 1742, was altogether regular and unexceptionable in itself, independent of prescription, when, in fact, his elder brother and nearer heir was in existence. But I think there is a solid answer to this, when pleaded by the pursuer. A substitute heir of entail is entitled to maintain every action that is necessary for preserving the entail; and, if the heir of entail in possession omits any of the provisions or clauses in the entail, he is entitled to insist that these shall be inserted. But I do not conceive that his right goes one step farther;—he is not the proprietor of the estate; he is not entitled to regulate or controul the heir, as to the mode of making up titles, further than that the tailzie shall not be omitted. We see very often the difficulties that occur, and the questions that arise as to the proper mode of completing titles, where a progress is long and involved, and formal titles not regularly made up.

But an heir of tailzie has no further interest or right to inquire into the title made up by the heir of tailzie, than that the conditions of the tailzie be inserted in that title, whatever it is. Was it ever heard of, that a substitute heir could say to the heir in possession, that he ought to have made up his title by a special service, or by a general service, or by an adjudication in implement, or by taking infestment upon an unexecuted precept in the disposition of tailzie? If there was any error, therefore, in the nature of the title made up by John Hamilton of Bargany, which I am not prepared to say there

was, I do not think it could avail the pursuer, as a ground for declaring an irritancy; and it is also wiped off by prescription.

The chief impropriety committed in the charter 1742, was to the prejudice of this defender and his children, by calling in the heirs of the body of John Hamilton of Bargany, in preference to the defender and his children, whose rights were entire. But, by the death of John Hamilton of Bargany, without children, there is an end of that; and the estate now stands, as it would and ought, without the least injury to the pursuer, or to any of the other substitutes in this tailzie. There has been no violation in effect, and no injury now exists that can be the foundation of a declarator of irritancy.

If the opinion which I have now given is well founded in any one of the various points which I have considered, the conclusion to be drawn is twofold:

1st, That the defender has a preferable right under the titles produced by him, independently of prescription, sufficient to exclude the pursuer's claim; and,

2dly, That she is not, and cannot prove herself to be, the first substitute under this entail.

And having detained your Lordships so long, I shall say but a single word upon the point of prescription, and that for two reasons.

In the *first* place, If the pursuer ever was, or could now show herself to be the first substitute, I do most implicitly and fully assent to every word of the opinions delivered upon the former question (when I did not sit here), I mean the opinions of Lord President, Lord Justice-Clerk M'Queen, and Lord Meadowbank.

From the first time I could distinguish the merits of such a question, I had learned, and held upon the authority of different decisions, and more particularly from the deliberate and full opinions of this Court in the case of Gordon of Whitley, that, admitting minority to be a deduction from the positive prescription, it was not the minority of a substitute, first or last, or of any or all the substitutes in a tailzie, that could interrupt; that it is the minority of that person, and of that person only, who can show that he is the *verus dominus* in competition with the *non dominus*, whom the prescription would otherwise support; that this is the exception which the statute admits; that this is the only exception which the principle of the positive prescription allows. And in addition to what I see stated in these opinions, and do adopt as the grounds of mine upon this point, I shall just make a single observation, illustrative of the principle, and demonstrating, in my opinion, the very singular effects which would result from allowing those who are mere substitutes in deeds of tailzie to plead their minorities.

The shape in which cases of this kind generally occur, exhibit but a very imperfect view, both of the principles and of the consequences attendant upon the plea of minority in substitute heirs of a tailzie being sustained. Thus, it generally happens, that the substitute who has minority to plead in his favour, brings an action against the heir who has been acquiring by prescription contrary to the tailzie; and he insists that either his own minority, or the minority of some other substitutes, shall be deducted from the period of prescription, in order to show, that when such deduction is made, the positive prescription has not run in favour of the party pleading it.

But let us suppose the shape of the action reversed, that the proprietor of an estate which had been under the fetters of an entail, has possessed it upon unlimited titles for upwards of forty years, and having thus acquired an absolute right to the estate in terms of the act 1617, he, to render the matter more clear, brings an action of declarator of property before your Lordships, against all and each of the heirs of tailzie called under the prescribed deed of tailzie, concluding to have it found and declared, that he was the unlimited proprietor of the estate; that the heirs of tailzie, if they had any thing to say against that plea, should come forward with it; and that it should be found and declared upon the prescriptive right produced, that the tailzie was at an end, and that the estate was his without limitation or restraint of any kind. Accordingly, a numerous set of heirs of tailzie come forward, some of them majors during the whole course of prescription, others minors during the whole course of prescription, some of them in minority during a part, and in majority during the remainder of the years of prescription, some of them who had no existence during the prescription, and others who had come into existence at the last moment of prescription. According to the pursuer's plea, that the minority of substitute heirs interrupts, it would lead to the grossest absurdity—to a situation unparalleled in the most whimsical conception of tailzies.

The pursuer of the declarator would prevail in having it found, that he was free from the fetters of entail as to those who had not minority to plead; but it would be found, that he was subject to the fetters of the tailzie in regard to those who were minors; in short, that it was both a tailzied and untailzied fee at the same time, and in the same person; a situation incompatible with the law of tailzies, absurd in itself, and consequential of the doctrine that is pleaded by the pursuer.

But, in the *second* place, Whatever difficulty or difference in opinion may have occurred formerly, there is an end of that. When the *data* the pursuer assumed, and behoved to assume, are probed to the bottom, they are found to be untrue; when her title and character as first substitute are investigated, it appears to me demonstratively not to exist: She is not at this moment the *first*, but the *ninth* substitute.

On the whole I conclude, that the defender has produced both a preferable and a prescriptive right, sufficient to exclude the claim of the pursuer, and that in my opinion your Lordships ought to find accordingly.

LORD ESKGROVE.—In some points I must differ from what has been advanced by some of my brethren. Some things have been said which would go to destroy the principle of our former interlocutor.

In that interlocutor we went upon the ground of an hypothesis, that the pursuer was the first substitute. In the shape of the cause at that time, the pursuer not being allowed to go into the declaratory conclusions of her libel, I still think she was entitled to that assumption.—This was not understood above.—It was the necessary consequence of the nature of the pursuer's plea, and of having her *declarator* stopt until the issue of the question of prescrip-

tion. However, I greatly applaud the attention of the Honourable House, and agree in the propriety of what they have done. Observing that the essence of the pursuer's plea was merely an assumption, they have corrected our error of not going first into the declaratory conclusions, before determining the point of the exclusive title. They have not ordered the production to be satisfied, reserving objections to the pursuer's title;—they have not gone so far;—but in effect, they have directed us to go into the consideration of the declaratory conclusions. It is remitted to us then, to reconsider our former opinion, and whether the exclusive title is good or not.

I hold, and ever have held, that the minority of every substitute saves from the effect of prescription *quoad* his own individual right and interest. But I also held, that your Lordships had determined the contrary. However, I considered that the first substitute in an entail had some more substantial right than the others. I am still of opinion, that by the very words of the act of Parliament we are expressly bound to allow the minority of every person *against whom prescription is objected*. I find no distinction in the act.

It was another question of interpretation, Whether the exception in the act applied at all to the positive prescription? Your Lordships have long ago decided, that it applies to both positive and negative prescriptions. I should not have been sorry if the question had been differently decided; for I think it would have been more expedient to have excluded the exception of minority altogether from the positive prescription. I must, however, observe, that before any decision had ever been given by your Lordships, no doubt upon this point was ever insinuated in the pleadings in the case of *Mackerston*. Holding the exception as applicable to the positive prescription, I still think the words of the act so express, that, the decisions of this Court notwithstanding, the minority of every substitute ought to avail himself.

This leads to the consideration of the question *as affected by former decisions*.

1. *Case of Mackerston*.—The facts of this case are known. *There* there was no reduction or declarator of irritancy on the footing of past contraventions. The action was, to ascertain which of two deeds was to regulate the succession. In the whole proceedings there is not a word of reduction, or of declarator of irritancy. The action would equally have lain, although there had been no irritant or resolute clauses in the entail. Here the *negative* prescription was a natural plea, as well as the *positive*. It was replied to this at first, that as both titles under the former investiture, and under the latent entail, coincided in the person of the heir in possession, no prescription could run against the latter. This was justly over-ruled. It was next pleaded, that the minority of the heir in possession had interrupted the prescription. This also was over-ruled. Then the minority of the substitutes was pleaded. To this the answer was, That during their minority, the right in the estate had never devolved upon them: That until the possession was diverted from the line of the entailed substitutions, they could not have laid claim to the property: That, therefore, during their minority, they had no title to bring an action, at least none to claim the estate. Certain it is, that in this case no irritancy was founded on, as giving a ground of action to those substitutes. Their plea was over-ruled:

but the judgment was carried by a casting vote; and the dispute was afterwards compromised without having been carried to appeal.

2. *Case of Kinaldy*.—I was myself of counsel in the cause. *Here* there were clauses irritant and resolute. The defence pleaded was prescription.—It was at first pleaded in reply, as in the case of Mackerston, that prescription could not begin to run against the entail until the line of actual possession split from that under the entail. This being over-ruled, minority was next pleaded. To this it was answered, that the person pleading minority had himself been of age during the years of prescription, and the minorities of other substitutes could not avail him.—*Quotes from the Appeal-case for the defender*.—But it was not here pleaded, that the pursuer's own minority would have been equally unavailing, or that his own minority was not available to every substitute, *against whom prescription was objected*. The judgment of your Lordships in this case, was not only no support to the case of Mackerston, but was directly contrary to it; and that of the House of Lords, reversing it, proceeded on the footing that a substitute might have pleaded his own minority, but that in this case the pursuer had been all along of age.

3. *Case of Whitley*, in 1784.—*Quotes from the report of the case in the Faculty Collection*.—*Here* there were no clauses irritant or resolute.—Your Lordships found the substitute not entitled to plead his minority.—Still I would doubt the decision, if there had been irritant or resolute clauses to found an action for evicting the estate from the contravening heir in possession.

4. *Case of Auchindachy* has been quoted, but is admitted not to apply.

Thus, neither the case of Mackerston nor that of Whitley ought to be considered as of force to alter the express enactment of the statute 1617. In this I am the more confident, from the opinion which appears to have been delivered by Lord Thurlow in the present case.—On these grounds, I think the plea of prescription would be obviated completely in this case.

But another question remains, How far a judgment over-ruling the defence of prescription would be of much benefit to the pursuer? If your Lordships are to go upon the ground of the pursuer being or not being a *first* substitute, it becomes necessary to inquire, whether an irritancy has actually been incurred, (as to which I coincide in opinion with what has been said by my brethren), and what the direct effects of that irritancy would have been.

As to the effect of an irritancy upon the question, I do not think it necessary that a decree of declarator must be obtained, to found the plea of minority. The right of challenge is founded on the entail, and the statute itself speaks of forfeiture *ipso facto*. It is idle to talk of minority being counted only from the date of a decree of declarator, for then the party has actually won his cause. But the point is not material in the circumstances of the present case; which leads us to consider,

Whether an irritancy has here been incurred, and what its effect on the interest of the pursuer?

And, first of all, Did Sir Hew Dalrymple so connect himself with the estate, as to become liable to the obligations imposed by the entail? He assumed the name and arms, and afterwards laid them aside; he possessed the rents, &c. I see the force of the argu-

ments founded on his conduct in these particulars. They would be strong circumstances, if the question was merely, Whether he acted as heir of tailzie? But I cannot think he had the character of heir of tailzie vested in him in that way, which would have enabled him to do what the entail had prohibited. He ought to have been served heir, and to have made up feudal titles, and then he would have become liable in the obligations of the entail, and an irritancy could have availed the next substitute. It was a *personal* entail; and your Lordships have decided, that when an entail is personal, it affects the claims of creditors, even although not recorded. Any act of Sir Hew's, therefore, could not have affected the estate. If he had done as his grandfather wanted, and had first *served*, I am clear that the subsequent acts, if amounting to a contravention, would have occasioned a forfeiture. In speaking of an heir of entail incurring an irritancy, the law means an heir vested in the estate. But Sir Hew did not put himself in a situation to forfeit, even although he had granted a disposition of the estate. As there was no clause which could have compelled him to enter, nothing could have been done to make such a deed effectual. He was not in a capacity to contravene.

But even if he had been *in titulo* to contravene, another question would remain: Did his acts amount to a contravention? If he had made up titles, a deed of repudiation, such as he executed, would have been of no effect. As it was, if he had merely repudiated, without saying that he did so in favour of a particular person, it would have been still more prudent for himself, but still it was no disposition.—It would be a very strange effect of an entail, to oblige a man to take under it. Not being obliged to take under it, he could only give it up so far as it was in him; and still he did so under an express qualification, of resuming the estate in certain circumstances. This reservation, though it serves to show the intentions of the parties, is not material. Even without it, the deed would not have inferred an irritancy; and his descendants could have challenged Mr Hamilton's possession. Now, Mr Hamilton is dead, without heirs of his body; Sir Hew is also dead; and the events have occurred which the deed of repudiation had in view. I see nothing, therefore, to prevent the succession from now opening to his descendants.

I shall not enter into the other points which have been debated. In some things I agree with what has been said, in others I differ. As no irritancy has been incurred, it is unnecessary to say any thing of the defender's right to purge it. It has at any rate been already purged, if it ever existed. As to the competency of an action after Sir Hew's death, I should hesitate in considering that event as an absolute bar to a challenge. Contraventions may be committed, perhaps in the last moments of existence, which can only be obviated by a declarator of irritancy after the contravener's death.

But my opinion does not rest on any of these grounds. It is founded on this, That Sir Hew Dalrymple was not in a condition to irritate, and that what he did, he had a right to do without injury to himself or his descendants.

LORD CRAIG.—After so much has been said, I shall not go into any detail of the merits of the cause. The question formerly be-

fore us was, Whether the pursuer, assuming the character of a first substitute, was excluded by the production of a prescriptive title? Upon the hypothetical case then argued, I thought her minority ought to be deducted. Now the case comes before us in a different shape; we are not to take her alleged character for granted, but are to enquire whether she is entitled to that character. My opinion is, that she has failed in shewing that such was her character.

. *1st*, Sir Hew Dalrymple was not in a character in which he could possibly contravene. There was no clause in the entail to force him to enter; he did not enter; and his possession was merely an apparençy.

. *2d*, Independently of that consideration, an action of declarator of irritancy cannot now proceed, because it was not brought against the contravener himself. Much has been said concerning the penal nature of irritancies. When it is declared that a man shall *amit, lose* and *tine* his right, it is certainly, in common sense, a forfeiture, especially when it is to affect not only himself, but his innocent descendants.

3dly, I fully concur in what has been stated (by Lord Armadale), that if an irritancy has been incurred, it has purged itself, as, by the hand of time, the succession has again come into its proper course.

LORD CULLEN.—I agree in the opinion delivered by Lord Eskgrove. I concurred in the former interlocutor, but my opinion did not go on the ground of the pursuer being a first substitute. I thought that every substitute was entitled to deduct his own minority. On that ground, I should still be of opinion, that the defender had produced no title sufficient to exclude. But there are other grounds which would render such a decision of no advantage to the pursuer.

1st, I think Sir Hew Dalrymple was not in a situation to incur an irritancy; and,

2d, That no irritancy was actually incurred.

On the other points which have been argued I am not equally clear; but their decision is here unnecessary.

LORD DUNSINNAN.—I have given much attention to all the questions which have been here argued: but it is not necessary to decide them all. Now that the case is fully before the Court, I am of opinion, That in the situation in which Sir Hew Dalrymple stood, he could not incur an irritancy, and that he did nothing which could have inferred one. No effectual action could have been brought against him even in his own lifetime, much less now that he is dead. As I am of opinion that the minority of a remote substitute cannot be deducted, and as, on the supposition of an irritancy having been incurred, Mrs Fullarton is still a remote substitute, I think that her plea of minority cannot be allowed. On the other points formerly argued in this cause, I continue of the same opinion; but they are now immaterial to the issue.

LORD METHVEN.—I coincide in opinion with what has been delivered by the greater number of your Lordships. Formerly I dissented from the majority in the question of prescription. I do not

think that the minority of even the nearest substitute is to be deducted. Still less can I admit the principle now pleaded for Mrs Fullarton, that each heir is entitled to deduct from the years of prescription those of his own minority. It appears to me inconsistent with the principles of our law, that the positive prescription should run against one substitute, and not against another; yet this consequence would unavoidably follow from admitting the principle contended for.

By the remit of the House of Lords, we are now called upon to say, Whether Mrs Fullarton is in fact the nearest substitute? I think she is not; for, in order to make way for that supposition, it must be held, that not only Sir Hew Dalrymple, but also Mr Hamilton, had been previously forfeited, and might have been deprived of the property; yet in the whole of the pursuer's memorial, not a word will be found to prove that Mr Hamilton had incurred an irritancy; and if he had, unquestionably he at least could have purged the irritancy, by laying down the estate in one capacity, and taking it up in another. But I do not think that Sir Hew ever contravened. On that head I agree to what has been said by most of my brethren.

LORD GLENLEE.—I was decidedly of opinion, with a few of your Lordships number, against the former interlocutor in this cause. I held, that the minority of no substitute whatever could be deducted in a case of positive prescription; and I am still, with great confidence, of the same opinion.

I now think, that, independently of prescription, nothing has been done which could have enabled Mrs Fullarton to evict the estate.—The deed of repudiation was a mere *non repugnantia*, and could not infer an irritancy, unless your Lordships should be disposed to carry the matter so very far as to hold, with the pursuer in some parts of her pleadings, that mere *non repugnantia*, such as not defending an action, may amount to a contravention. On that ground, it might be argued against the pursuer herself, that her father had incurred such an irritancy of connivance, in not bringing an action in proper time against the late Sir Hew Dalrymple.

I also concur in the opinion given by some of your Lordships, that wherever an irritancy can be purged, an opportunity must be given for doing so.

LORD POLKEMMET.—As, from particular circumstances, I have not had an opportunity of perusing the papers with sufficient attention, I do not mean to give a vote in this cause. I continue of opinion as before, that the minority of the nearest substitute may be pleaded against prescription. As to the particular circumstances of the case, I think that Sir Hew Dalrymple was capable of contravening without entering as heir of entail. His intention plainly was to hold both estates, in contravention of the will of the entailer. His grandfather's plan, if he had followed it out, would have been a clear contravention. The plan which he actually adopted, by the advice, it is said, of Mr Craigie, (afterwards Lord President), was nothing more than a palpable cover for defeating the will of the entailer.

LORD PRESIDENT.—To understand the former judgments, as well as the present shape of the cause, we ought to consider how the question stood when it first came into Court, and what variation it has since undergone.

Mrs Fullarton brought her action for the purpose of setting aside the titles in the person of John Hamilton of Bargany, then in life, and likewise all right and title which might be claimed by Sir Hew Dalrymple, or his family, to the estate of Bargany, on account of certain alleged acts of contravention of the entail, and for having it found and declared, that the estate did now belong to the pursuer, Mrs Fullarton, who should be at liberty to make up titles to it by service or otherwise.

Mr Hamilton produced his charter and seisin in 1742, which, with more than forty years acknowledged possession, he insisted upon as an *exclusive title*, or, in other words, a special plea in bar of the action.

This is a species of defence well understood in our practice, founded on the direct enactment of a most important statute, viz. the act 1617, cap. 12, and which ought to have been better explained in the House of Lords, where we are told it was looked upon as an extraordinary thing, that when parties were ready to argue the merits of a cause, the Court should have allowed them to go away from the merits into a *collateral point*. I will take it upon me to say, that this form, so long established *with us*, of admitting an *exclusive plea*, founded upon the act 1617, is a most essential one to the land-rights of Scotland, highly expedient, so far as it abridges litigation, and to which no objection can lie in point of justice.

The answer made by Mrs Fullarton, and the only one that could possibly be suggested, was her *minority* during a part of the time; which minority she pleaded under the construction of a clause in that very statute. Her counsel admitted that there was a difficulty in applying that doctrine to the case of substitute heirs in a Scots entail, on account of certain decisions, in the cases of Mackerston, &c. But by way of answer to this difficulty, they resorted to a *distinction*, which, for the first time, was heard of in this cause, viz. between one substitute heir and another; and a majority of the Court thought, that if Mrs Fullarton could put herself into the situation of being *next* in succession to Mr Hamilton, the person actually in the fee, she might avail herself of her minority. Others of the Judges were clear that this could make no difference upon the question, that the decisions had made no such distinction, and that the principle was the same as to all. Such of us as were of this last opinion had no occasion to call upon Mrs Fullarton to make out that she was truly what she described herself to be, *i.e.* the next substitute to Mr Hamilton, and therefore in delivering our opinions we assumed nothing either in law or fact. But it must be confessed, that the interlocutor, which proceeded on the opinion given by the majority of the Court, did assume what required to be proved, viz. that the pursuer was the next substitute heir to Mr Hamilton in fact, or in construction of law; whereas *upon the face of the charter*, as well as of the original deed of entail, she certainly was not so, all the family of the late Sir Hew Dalrymple standing before her. The cause, therefore, went to the House of Lords in rather a perplexed situation, and I am not surprised that it has come back to us again.

Since the cause returned, I believe all or most of the writings called for have been produced, and the counsel on both sides have gone largely into the cause, in order that they may have the benefit of our opinion upon the whole merits, although it is said that the preliminary defence is not yet meant to be waived.

I shall therefore now take a view of the cause under two distinct heads ; 1st, The exclusive plea ; 2d, The merits of the competition, as arising upon the whole matter now pleaded.

As to the *first*, having formerly delivered my opinion at full length, which I observe has been put into print, I shall not resume what is there said, but shall only trouble the Court with a few additional suggestions.

In the case of a fee-simple estate the rule is plain and easy. If the person to whom the right of fee does truly and of right belong, and from whom it is unduly withheld, happens to be under age, the years of his minority are to be discounted ; and when he dies, if the next heir to him is also under age, there will be another deduction for this person's minority subsequent to his succession, and so on.— It is obvious that these successive minorities may keep open the prescription for a very considerable period of time. It cannot be limited to forty or to sixty years, or any other precise period. In the case of Wilson against Campbell, the action was brought at the distance of more than a century ; and proofs were adduced of *successive* minorities of the pursuer's ancestors, one after another, in order if possible to bring the period of possession, free of minority, within forty years. But if once a possession, free of minority, has taken place for forty years, at any period, without challenge, or joining of different periods together, it is no matter what minority may have taken place before or after, or during the intervals of that time ; and the pursuer cannot avail himself of his own minority, to open up a prescription which has otherwise been completed, any more than he can plead upon the minority of the first, or any particular heir, if, independent thereof, the prescription has taken place by forty years possession against majors.

The case of an entailed estate is, *in this respect*, no way different. Thus, if we suppose that the estate of Bargany had been taken up by some person who had no right to it under the entail, and that the true owner, who was unjustly excluded, lived forty years after that period, during twenty years of which he was under age, and that the next heir succeeding to this person lived twenty years longer, during ten of which he was under age, and was then succeeded by a person just born, who delayed his challenge till he attained thirty years of age, the action would still come in sufficient time in the nineteenth year after the first period of eviction ; because, deducting the years of the three successive minorities, there would remain only thirty-nine years of clear possession available for prescription ; but if the challenge was delayed one full year more, prescription would operate.

So far the matter is clear ; but the present case is entirely of a different nature, and the pursuer founds her plea of minority upon quite a different medium, namely, the *personal jus crediti*, which, by the nature of a Scots entail, is understood to belong to every heir called in the line of destination, whether the right of *fee* may have opened to one person or to another.

Mrs Fullarton, who pleads upon her own minority, cannot say that the right of succession to the fee ever opened to her by death, or by declarator, or in any manner of way. If she could say this, the rents would belong to her from the time that the succession thus opened, and her minority from that time would interrupt. But she has never yet got that length; all that she can possibly say is, that she, in common with all the other expectant heirs of entail, had a personal *jus crediti*, or right of challenge upon the contravention of prior owners, which, if prosecuted with effect, might have placed some person (perhaps herself) in the situation of heir *apparent* in the fee, *i. e.* heir to whom the fee *had actually opened*; for in this sense alone the word *apparency* is used in the law of Scotland. She maintains, that this right of challenge belonging to her is saved from prescription, not by the minority of any of her predecessors, though her father, who stood nearer, and had equally the right of challenge, was under age for a part of the time, but by her *own minority*, which she pleads, not during the whole period of it, but during the period that she stood *next*, as she alleges, to the late Mr Hamilton, after her father's death; Mr Hamilton having no issue, and Sir Hew Dalrymple and his family being, according to her hypothesis, out of the question by their supposed acts of contravention, though no declarator of irritancy ever was sued.

Many things are here taken for granted which remain to be proved; and after all, the rule which she contends for, of deducting *her own minority alone*, in order to preserve a right to herself, which she admits to be lost as to the other substitutes, would be of so anomalous a nature, that hitherto there has been no example of it in the law of Scotland. In order to make it apply, we must suppose that it never can belong but to one person out of perhaps a hundred, who are equally heirs of entail, *viz.* the person who has been so lucky as not only to be under age during a part of the time, but also to have been in the place of *nearest substitute*, and, moreover, to be now the pursuer of the action; for, without a concurrence of all these different requisites, the minority seems, according to the argument, not to be pleadable, and no other minority can be pleaded; and if that person should happen to die, although succeeded by an infant, yet the right is lost if the forty years be elapsed. Thus, if Mrs Fullarton were out of the question, it seems to be admitted, that her younger sister could neither plead her own minority, as she did not succeed to be the nearest substitute till after the forty years, nor the minority of any of her predecessors.

There must be some defect in a rule of law, which is so inadequate and so contrary to every other rule or principle which can be discovered upon this subject. Accordingly, one of my brethren, who formerly agreed to the pursuer's argument, has this day, in a great measure, though not entirely, given it up, by saying that it is not the person *next in succession* whose minority ought to be deducted, but the person who happens to be the *pursuer* of the action, to whom he says, in the language of the statute, the prescription is *objected*. This is entirely a new modification of the argument, different from any thing that has ever been suggested before, either within or without the bar; and it appears, with submission, to be founded upon a mistaken view of the statute, the words of which are, "that the years of minority are not to be *counted*, but only the years during which

“ the *parties* against whom the prescription *is used and objected*, were “ majors.” This does not mean the pursuer of the action, as is clear from the case above noticed of a fee-simple estate, but the person or party against whom the prescription is *running* at the time of its currency. The action may be brought at the distance of a century, and it is no matter that the pursuer of it has been under age during a part of that time, or whether he be now of age or not, if the prescription has taken place against others *who stood before him in the title to the estate*. What I mean, is the *positive* prescription, which alone we have occasion to speak of here; and I have all along taken it for granted, that minority is a deduction from the positive prescription; though this is a point which, were it entire, would admit of great doubt.

It has again and again been explained, that the personal *jus crediti* or *jus agendi*, which entitles every individual interested in the preservation of an entailed estate, to maintain actions for purging contravention, is entirely of a different nature from the right of fee, which last can never belong but to one person at a time, viz. the person to whom such right has opened by succession or otherwise, and to whom the rents of the estate do truly belong, in so much that they pass to his executors and nearest in kin, although he should happen to die without making up any formal title by service; and it is not disputed that the minority of this person will interrupt.

But the personal *jus crediti*, which, by the law of Scotland, is a mere faculty, see 29th January 1789, Wedderburn against Colville, does not carry along with it one particle of the fee, belongs, from the outset, equally without distinction, to all and every one of the heirs in the line of succession, whether remote or near; and if we allow minority here to be a deduction, we have no choice but to admit it as to every one of them, no matter in what place he stands, and either to allow the minority of any one to be available to the whole, or to reject it altogether.

It is said, that each of them has a distinct right of action, and that they cannot be compared to a body corporate, and that it is a mistake to consider the right as of an *indivisible* nature.

That heirs of entail are not a body corporate, may be admitted: No such idea ever was entertained; but the *jus crediti*, which belongs to the substitute heirs, by the nature of a Scots entail, is nevertheless a right which cannot be divided *into parts*, but belongs whole and entire to all and each of them. It is not like an estate falling to heirs-portioners, which is divisible, or a right of commony which each man may acquire and lose for his own share. It must either be *wholly* preserved or wholly cut off, because it cannot be parcelled out into halves, or thirds, or any number of parts, among a variety of different persons. No instance can be found of such a right being *partially* saved or partially lost. If any one of the heirs brings his challenge within the years of prescription, he will save the estate to the *whole*. If no such action is brought, it will be lost to the whole; and in no case of that kind was it ever thought, that the minority of one or more of the individuals would have an effect, *e. g.* in cases of nuisance. If it could, there would be no such thing as applying prescription, either positive or negative, to such a case.

It is said, That, by the rule which the pursuer contends for, the prescription will never exceed sixty-one years. It is very true, that,

giving up one-half, or more, of the plea formerly maintained in the cases of Mackerston, &c. the term of prescription has, in the present argument, been limited and confined in that manner; but this is introducing a new and an arbitrary rule, founded upon no principle whatever, and calculated merely to serve the purpose of the present question. It is giving up the *jus crediti* altogether as the foundation of it, and substituting another ground, viz. That of the succession having actually opened, although, in fact, no such opening has ever been either acknowledged or proved; and even if it had, the proposition must be wrong, as it limits the right of deducting minority within narrower bounds than would take place in a fee-simple estate. This is giving up the main point, and it also supposes that irritancies operate *ipso jure*, the contrary of which is true. It would be much more rational to say, that the minority of every substitute coming successively to be the nearest should be deducted, whoever is the pursuer of the action, *e. g.* Suppose, in the present case, Mrs Fullarton had been prevailed upon not to bring any action at all, but that her grand-aunt, Mrs Duff, had brought it, in order to preserve the succession, and bring it a step nearer to her, why should she not be allowed to plead Mrs Fullarton's minority, if the minority of any substitute at all can be pleaded in such a case?

But, after all that has been said, although I continue of opinion that the plea of exclusion, stated in defence for Mr Hamilton in the outset of this cause, was an important one, and ought to have been sustained in order to cut short the litigation, I am far from being clear that it is of the same consequence now since Mr Hamilton's death. The question of prescription upon the charter 1742 is still no doubt a point to be attended to in the cause; but Mr Hamilton being dead, the exclusive title is no longer of importance to him, and the shape of the question, so far as the present parties are concerned, comes in effect rather to this, who is entitled to succeed Mr Hamilton in the estate of Bargany? whether is it the pursuer, Mrs Fullarton, or is it the present Sir Hew Dalrymple, who stands before Mrs Fullarton in the line of succession pointed out by the entail, and by the charter? Whoever the person be who is now entitled to the succession, I am clear that the estate must be taken up by that person in the form of a service to Mr Hamilton; for Mr Hamilton's right, as fiar of the estate while he lived, can never now be vacated, as no irritancy to the effect of forfeiture can be allowed to take place against him after his death; and besides, his service as heir in the entailed estate, if originally questionable, became secured and validated by the act 1617, chap. 13, establishing the vicennial prescription of retours. The person, therefore, who now takes the estate, cannot pass him by, but must make up titles by service as heir of tailzie to Mr Hamilton.

The pursuer being sensible of this, and that she cannot prevail in obtaining declarator of irritancy against Mr Hamilton after his death, has not so much as transferred the action against his heirs, which, in point of form, would otherwise have been necessary: And this brings me to the second head, viz. To consider the cause upon its merits, independent of the exclusive plea stated as a preliminary defence.

A great deal has been said from the bar about Mr Hamilton's having committed an act of contravention, by taking the estate under

his brother, the late Sir Hew's deed of repudiation. But it is a mistake to consider this as an act of contravention. He could not force his brother to take the succession; and so far from doing any thing wrong, he strictly complied with the entail, by serving heir under it upon the narrative of his brother's deed of repudiation, and passing a charter in the literal terms of the entail, and taking the name and arms of Hamilton of Bargany.

Neither is it thought that he was guilty of contravention when he executed the disposition 1780, which was meant for the purpose of carrying the entail itself into effect, as appears from the narrative. He went upon the supposition, that Sir Hew and his family were not forfeited of their right merely because they had waved it for a time; and supposing him to have been mistaken in this, the Court would have allowed him to purify the contravention, by recalling that deed, if necessary. But it seems to have been thought proper to execute this deed, in order to prevent any argument of the positive prescription taking place against Sir Hew and his family upon the charter 1742, in respect that they were not therein called by name.

It is material to observe, in the *first place*, That nothing contained in the tailzie of Bargany could ever have been pleaded as a bar to the late Sir Hew Dalrymple's taking both estates, and assuming the names and arms of both families. The obstacle which occurred did not arise from the entail of Bargany, but from that of a different estate, viz. North Berwick.

2dly, Nothing contained in the entail of North Berwick, except the devolving clause, could ever have been pleaded as a bar to holding both estates, which devolving clause could not have been laid hold of by Mrs Fullarton, or any other heir in the Bargany estate, but could only have been founded on by the heirs in the North Berwick estate. But the effect of it is now entirely at an end by prescription, both positive and negative, Mrs Fullarton's minority having nothing to do with that question. The late Sir Hew made up titles to North Berwick, by special service to his father, Sir Robert, and infestment in November 1734, leaving out the devolving clause, which he did by permission of his grandfather, the maker of that entail, and continued to possess more than forty years upon that title, without challenge or interruption of any kind; for, although some other deeds of a contradictory nature were executed by his grandfather, President Dalrymple, in 1736, these remained latent and personal, and are now also gone by prescription, having never been made the title of possession. Sir Hew refused to comply with the last of these deeds, which was *ultra vires* of the maker, as it went beyond the powers reserved to him in his son's marriage settlement, if the meaning of it was to denude Sir Hew without any salvo, or clause of return, in case his family should come to be the only heirs-male of the marriage; which has since happened. This was strongly and explicitly provided for in the marriage-settlement, and no power was left to the President to make the condition of his son's family worse, by undoing so important a stipulation. Indeed it is probable, from a clause in his deed, 9th April 1736, page 38 of appendix, that he did not mean any such thing.

3dly, Although Sir Hew, in order to avoid a question with his brother John, upon this deed 9th April, agreed to waive taking the estate of Bargany, in order that his brother might make up a title to

it as heir of entail; this was cautiously done, under the express quality of reserving his own and his family's right of succeeding again to it, whenever they could with safety and propriety hold both estates: and John was satisfied to take it upon these terms, and not to pursue any declarator of irritancy against Sir Hew for not taking the name and arms, which, had he done, it might have been still in Sir Hew's power to re-assume the name and arms, and so to purge the irritancy *quoad* that estate, though still he might have been unable, on account of the deeds relative to the other estate, to hold possession of both.

4thly, Sir Hew having died without any declarator having been obtained, or even raised against him, all question about forfeiting him and his descendants came to be at an end; not that I think he was incapable, as an apparent heir, of incurring an irritancy, but because, in fact, he never was forfeited. Irritancies have often been allowed to be purged, even by the contravener himself, where the act of contravention is of a harmless nature, such as not taking the name and arms; or where the effect of it is done away, such as by redeeming an adjudication, especially where the enforcing it would be rigorous and penal, as in the case of descendants being included in the irritancy. But it would be still stronger to inflict such forfeiture after the death of the contravener, when his heirs have done no wrong; no instance of this is to be found. None of the cases referred to by the pursuer are to the point. In the case of Gordon of Carleton, the heir of the contravener is in possession to this day. A declarator of irritancy may be pursued after death, to the effect of annulling the acts of contravention, but not to the effect of forfeiting, although, *pro forma*, both clauses must be founded on.

It is said to be no more than a quality of the right, and giving effect to the destination of the entailer. But this is not a good answer. It is enough that a man is at liberty to chuse his heir and to lay him under the ordinary fetters of an entail;—even these are considered as unfavourable and strictly interpreted; but any hard conditions or forfeiting clauses are still more so.

5thly, The present defender holds the estates in a manner perfectly consistent with both entails—for even the devolving clause is now in his favour; and in these circumstances, how can any irritancy be declared against him? The present question relates to Bargany alone, and supposing an irritancy had been declared against his father as matters *then* stood, the question would still have remained, Whether, in the present state of matters, he would not have been entitled, under both entails, to hold both estates? As to North Berwick, it is clear that he would, under the clause of return, which his grandfather could not dispense with. As to Bargany, it often happens, that a remoter heir is served, because a nearer is not in existence at the time; but afterwards, upon his existence, the nearer is entitled to call on the remoter to denude. In particular circumstances, this has been a subject of controversy. See case of Mackinnon against Macdonald in 1766; but generally it is provided for by special clauses; *and in the case of North Berwick it is provided for*. But it is enough to say, that there never was any forfeiture here, and therefore no room for trying the question. The repudiation of the one brother, and service of the other, being *qualified*, this amounted to an agreement between them to that effect, to which

no good objection could lie, because it was agreeable to the real intention and spirit of both entails.

The methods followed were well devised to answer the views of all parties concerned at the time, and to give a proper effect to both entails. Mrs Fullarton therefore is truly not the next heir, and has no title in any point of view.

NOTES of the LORD CHANCELLOR'S Speech, 3d June 1801.

LORD CHANCELLOR.—This Cause, which has occupied much of your Lordships' time, arises on an appeal brought by the Honourable Mrs Fullarton, and Colonel Fullarton her husband, for his interest, against two interlocutors of the Court of Session, the first dated 23d, signed 27th November 1798, and the other dated 1st, signed 9th March 1799.

The first of these states, that the 'Lords having resumed consideration of the former proceedings, and having considered the remit from the House of Lords,' &c. (which remit I shall have occasion to state distinctly to your Lordships), 'sustain the title produced by the defenders, as sufficient to exclude the pursuer's title, assoilzie the defenders,' &c.

Thus your Lordships see, that the ground of absolvitor is *sustaining the defender's title to exclude*, without considering whether the pursuers had a title or not; but, *admitting* that the pursuers had *some* title, I shall have occasion to discuss this matter at some length, to make myself understood by your Lordships.

A petition had been previously presented to the Court, praying for a diligence to recover certain deeds, executed in 1736, which, by the pursuers, had been stated to be contraventions of the entail, and to conjoin the two actions then pending. The Court, having resumed consideration of this petition on the 11th December 1798, pronounced this interlocutor, (which his Lordship read.)

The second action then went before the Lord Armadale as Ordinary, and his Lordship pronounced the 2d interlocutor appealed from (here his Lordship read the interlocutor, 9th March 1799.) This interlocutor states, that the defenders had produced and referred to *preferable and exclusive titles to the lands claimed by the pursuers*. Whether this finding be well founded or not, I shall afterwards have occasion to discuss more particularly.

These interlocutors were pronounced in consequence of a remit by this House, made in a former appeal between the same parties. I shall state briefly the circumstances which led to that Appeal.

In 1688, John Lord Bargany, executed a settlement of his estate, by way of entail to his son, the Master of Bargany, and other substitute heirs, with clauses prohibitory, irritant and resolute. This was contained in the contract of marriage between the Master of Bargany and Janet Sinclair, to which his father was a party. I need not trouble you with a detail of the limitations of heirs contained in this deed, it is sufficient to say, that if the prior takers have contravened the entail, and, from the circumstances which took place, shall be held to have forfeited, for themselves and their descendants, then Mrs Fullarton has a good title to the estate.

The clauses, prohibitory, irritant and resolute, of this entail, have often been stated to your Lordships. I need only at present state, that they provide that it shall not be lawful 'to alter, innovate, or change the foresaid tailzie and order of succession above-mentioned,' &c. Upon contravention, the present persons contravening are to forfeit the estate *ipso facto* for themselves and their descendants. The words used are very strong, and in their common acceptation, it might be held, at first view, as a contravention to substitute a second son in the estate, instead of his elder brother, though this could be no prejudice to a third person interested in the succession.

This entail, though it appears to have been drawn with some care, did not make it incumbent upon the heir to take up the succession within any limited period, and not to lie out unentered;—in the meantime, he might draw the rents, and execute various other acts of property, but he had not the estate feudally vested in him.

I need not state to your Lordships what persons had entered to the possession of the estate, and died, before it descended to Sir Hew Dalrymple, the respondent's grandfather. It appears, that, in 1736, all those who were prior to him in the destination had expired without issue. The succession, then, devolved upon the eldest heir-female of the body of John Lord Bargany, which was Sir Hew Dalrymple, the eldest son of Joanna Hamilton, the only daughter of John, the Master of Bargany, before-mentioned.

In April 1736, Sir Hew assumed the name of Hamilton; and it is stated, from certain factories and deeds, which he executed, that he intromitted with the rents, and described himself as heir of entail under the deed of 1688. It is necessary to state, however, that, in point of fact, he was also heir of the old investiture 1687; and when the instruments in question were executed, he was engaged in an action of competition with various other persons, relative to this estate, from 1736 downwards to 1740, when a decision in his favour was given by your Lordships' house.

I shall not enter into several questions which have been here made:—Whether Sir Hew, by taking possession of the estate, was put under the fetters of the entail, while he was heir of the old investiture,—whether his intromission with the rents subjected him to the fetters,—whether an heir of entail may not retract every thing but an actual and feudal entry to the estate,—these points were most painfully and learnedly treated of in the Court below, as appears by the notes on your Lordships' table, and by the Counsel on the present occasion at the bar.

Sir Hew was likely soon to become entitled to another valuable estate, North Berwick, the ancient possession of his family. Some motives had induced his family to feel a disinclination that the two estates of Bargany and North Berwick should go to the same person. It was foreseen by his authors, that the Bargany estate might come to him; and therefore it was provided, in an entail created of the estate of North Berwick, that this estate should devolve upon the subsequent takers, if Sir Hew succeeded to the Bargany estate. His grandfather, however, had power to dispense with the condition in the entail of North Berwick, and he did accordingly dispense with it,—thinking it perhaps not improper that his grandson should enjoy one good estate, while he himself held another; but declaring, that if, at his, the grandfather's death, he did not denude himself of the

estate of Bargany, then he should not be entitled to take the estate of North Berwick. My mind had no reluctance to adopt the proposition, in which the Court below were clear, that if Sir Hew did not accordingly give up the estate of Bargany, no action upon the before-mentioned condition, could be maintained by the heirs of that estate, but only by the heirs of the estate of North Berwick. Of this deed, executed by the President in 1736, (of which you have heard a great deal, and the import of which I have just stated,) my construction is, that this was the only mode in which the President could enforce the non-co-enjoyment of both estates.

In 1637, the President died, and the competition already mentioned, with regard to the estate, was not then concluded. When Sir Hew found that, by the President's death, the North Berwick estate had opened to him, as well as the estate of Bargany, he could not say decisively how he should act till the suit was concluded in 1740.

He then executed a deed to the following effect—(Here his Lordship read the deed of repudiation.) Your Lordships will see, from the proviso now to be stated, annexed to this deed, that Sir Hew was very reluctant to do any thing that might bind his descendants, and he seems to have looked forward to the event in which they might hold both estates. (Here his Lordship read the proviso.)

After this, John Hamilton, the second brother, entered to possession of the estate: The effect of this transaction was merely the postponing the one brother to the other, and did not in any degree hurt Mrs Fullarton's place in the succession. If the transaction could not have been done away, it might have brought her place forward; and thus, so far from being injurious to her, in the one case, she might have been benefited, and in the other, her place was left the same as it had been before. The alleged contravention, therefore, is not stated as an injury done to her, but as an injury done to the will of the entailer.

John Dalrymple now assumed the name of Hamilton, and Sir Hew gave up intromission with the rents, and dropped the name and arms, though the clause in the entail required that the heir should keep and use them. John Hamilton then brought an action of declarator, setting out in his summons the entail of his estate—the competition relative to the succession—the above deed executed by his brother—and his summons concludes—(here the conclusions were read.) None of the defenders called in the action made appearance, and decret was pronounced in absence, as prayed for in the summons. As far as I could collect from Mr Erskine in his arguments, this decree was to be held as next to nothing. It may be well deemed as of high authority, as affecting the title to the estate, though not as having been well considered by the Court below.

John Hamilton was afterwards served and retoured heir of the entail, and thereupon passed a charter from the Crown, by virtue of the unexecuted procuratory contained in the entail, to himself and the heirs whatsoever of his body, 'quibus deficient aliis hæredibus quibuscunque ex corpore dict. Dominæ Joannæ Hamilton, pro creat,' &c. I mention this charter in the terms of it, because it has been argued from these, that it was a grant of the estate to John Hamilton, and the other heirs entitled to take after him, and then contending, that a deed to be afterwards mentioned, executed by John Hamilton in 1780, was a contravention by him of the entail 1688.

The right of John Hamilton to execute the procuratory of resignation is stated thus:—‘*Et quam procurationem,*’ &c.—(Here his Lordship read this, as stated in the cases.) Your Lordships see, therefore, that it puts his character of heir of tailzie upon this, that Sir Hew had ceased to be so, in operation of his deed of repudiation, followed by the decree of declarator. It is observable that this decree takes no notice of the reservation in favour of Sir Hew’s descendants, contained in the repudiation; the title to execute the procuratory also takes no notice of this, but treats Sir Hew as if he had been dead, and without issue.

Many points of great importance in the law of Scotland, upon the head of this transaction, were most elaborately discussed at the bar. It was contended that John Hamilton was accessory to a contravention, and that Sir Hew was guilty of a contravention;—that John Hamilton should have brought an action to preserve the succession to the estate in its due course. But it was stated on the other side, and the majority of the Court below have concurred with them in opinion, that there was no obligation upon Sir Hew to enter under the entail in a limited time;—that the repudiation was not a deed of conveyance, and that if, upon this legal juggle, (as it has been called) John Hamilton had brought an action to carry off the estate, Sir Hew might have said, I will take back the estate, and purge the contravention; but I am not bound to enter to the estate, or intromit with the rents till such period as I shall think proper;—and a great judicial authority, Lord President Campbell, gives it as his opinion, that this would have been a sufficient answer to the illegal contravention.

The same answer was made with regard to the dropping the name and arms. When Sir Hew possessed the estate, he assumed these, and when he relinquished possession, he also relinquished them, which also was stated to be no contravention.

Upon these titles, which I have mentioned, John Hamilton enjoyed the estate till 1780, when he executed a disposition of the estate of Bargany, in favour of 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 John Lord Bargany,’ &c. It was stated, that this was a contravention on the part of John Hamilton,—that Sir Hew had forfeited for himself and his descendants, who were thus discharged out of the succession by the entail, and any attempt to bring them back was a contravention. The appellant also insisted that this deed, in as far as it was to her prejudice, should be reduced and set aside.

This point, too, was argued deeply on some of the most abstruse points of the law of Scotland; and this answer was generally adopted by the Court of Session as sufficient, that Sir Hew had expressly reserved right to himself and his children to hold both estates, when they could do so without forfeiting either,—and that this deed might have proceeded in a mistake of John Hamilton, which he might have purged at any period of his life.

John Hamilton was also charged with having committed a contravention, in relation to certain adjudications which had been led against the estate, in consequence of which, it was also contended, that the appellant was entitled to take the estate. As to these adjudications, I have no hesitation in saying, that I think the argument of the appellant cannot be maintained with effect. It is a

satisfactory answer upon this point, that the entail gives an express power to sell part of the estate, to pay off the provisions for which these adjudications were led.

Under these circumstances, and the situation of the parties being as I have stated, the appellant brings her action of declarator, insisting, in her summons, that Sir Hew Dalrymple and his children, eight in number, who were before her in the estate, were gone;—that John Hamilton had also forfeited for himself and his heirs;—that the deeds to her prejudice should be reduced;—and that, either as nearest or a remote substitute in consequence of the contraventions arising from the execution of these deeds, she had right to the estate, as if all the heirs prior to her were dead.

The defender, in return, produced the Crown charter of 1742, and infeftment thereon, followed by 40 years' possession, insisting that this was a preferable right, sufficient to exclude any right the pursuer could set up. On the other side, it was contended that this was not a good title to exclude, because the appellant was entitled to deduct her minority from the currency of the 40 years' prescription.

This matter was very elaborately argued in the Court below, and your Lordships will recollect that it was treated at your bar most learnedly by the Counsel in the cause, and very laboriously by myself, who had the honour then to appear before you as one of the present appellant's Counsel. The majority of the Court thought that the appellant should be allowed to deduct her minority. Some of the Judges were of opinion that she had a right to deduct, being nearest substitute; others, that such right was competent, both to the nearest and most remote substitute,—some thought that no substitute was entitled to deduction of minority.

Thus the first decree came before your Lordships. You will recollect that it was necessary to state Mrs Fullarton's title, and it was stated such as I have represented it to you. It was alleged against her at that time that she had no title; but it was answered, on her part, that it was the practice in Scotland to assume both the facts and the law in such a case. It is true, that if her facts necessarily determined the law in her favour, she might be allowed to assume both. But Mrs Fullarton could not be allowed to say, because my facts are good, I am therefore entitled to make what assumptions in law I please.

This House at that time ventured to hold this language, that the parties had begun at the wrong end of the cause,—at least not at the English end. It was answered that such was the practice of the Court. No person is less able to speak of the practice of the Court than I am, and I have lived long enough to respect old practices, though I should not be able immediately to give a reason for them.

Two learned Lords agreed in opinion, that if the facts were true, and if the law, arising out of these facts, upheld the pursuer's title, it might then be necessary to enter into the defender's title. But it was very different to say, that it was a title not to be departed from, that we should not enter into the appellant's title. The defender should not be allowed, on any short or trivial point, to withhold the opening of his charter-chest. But if the title set out by the pursuer were, in fact, no title, it did not occur to me then (nor does it now), that there could be any inconvenience in going into a discussion of that title. If it appears that the pursuer has a title, then you may

go into the defender's title. But why is the defender to be obliged to argue a plea in bar for ten long years, as in this case, if the pursuer has not stated a title to enable him to maintain the action?

It often happens, in this country, that the plaintiff states facts (which may, however, be untrue), and the law founded necessarily on these, may be such, that the defender can only, perhaps, with propriety, rest his defence on a plea in bar. In the Court of Chancery here, what is termed a *fishing* bill, is often pled, where the plaintiff, stating himself to be an heir-at-law, claims to see the title-deeds by which the defendant holds the property which belonged to the plaintiff's ancestor. The Court must take this title to be good, in the first instance, and if an exclusive title—a deed, for instance, with 60 years' possession—be set up, the Court will then go into that exclusive title. But if the defender say to the plaintiff, your facts form no title against me, the defender, nor any body else, the defendant has a right to demur to the action; and if there be nothing in the plaintiff's case, of course the Court never comes to the defendant's. It becomes me to say, that such a practice is founded in reason, and was in your Lordships' view when you sent back the former appeal to the Court of Session.

The remit was in these words—(Here his Lordship read the same.)

The meaning of this was, that the Court of Session should consider how far the title to pursue, set out by the pursuer, was involved with the title to exclude, set out by the defender. If the pursuer's title was invalid, of course they were not involved; if there was a valid title in the pursuer, then they were involved. In that case, it was necessary to inquire into the pursuer's title, whether she was the nearest, or a more remote substitute, and whether she had a right to deduct her minority or not; and if a contravention had been committed by the defender's authors, the Court was to consider what was the title of the pursuer by such contravention at this day. It was thus your Lordships' intention, that the Court should first consider if the pursuer had a title, and afterwards, if necessary, consider the exclusive title under the prescription.

In this shape the cause went back to the Court, and I can scarcely find words to do justice to the elaborate consideration given to it in the Court below. Every question arising on this point has been searched to the bottom, and decided upon in fact; but the cause has been returned here, with an interlocutor saying no more than that the exclusive title is good, which seems to admit that the pursuer had a title of some kind or other.

But this is no answer to your Lordships' remit—no answer to the question, whether or not the pursuer has a title. You cannot imply, from this answer, whether a contravention has been committed or not—whether or not that contravention be purgeable—whether it can now be declared or not against the heirs of the alleged contraveners—whether the repudiation was a disposition or not—whether it was a contravention or not, and to be followed by forfeiture,—nor, whether any of the acts and deeds of Sir Hew or of John Hamilton were contraventions or not.

The Court were all of opinion, either that there had been no contravention,—that such contravention was purgeable, or that no declarator could be brought at this time of day, and that the change of situation between the two prior heirs was no injury to the appellant,

who stands precisely in the same situation as if no such change had taken place. They seem unanimous, with the exception of one Judge, who says nothing on the subject, that the pursuer had no title.

With respect to the question itself, Whether the pursuer has a title or not? I am free to state, that my mind is strongly impressed with this, that if a person takes benefit by a deed, he has no right to alter what is directed by the disponent—*cujus est dare, hujus est disponere*. I will not say even this, that it could be deemed a futile provision, if a father were to say, that a second son should take before the first;—there might be grave considerations which induced a person to make such a disposition of his estate. I think, if it were *res integra*, it might be difficult to establish many of the doctrines contained in this case.

After the most painful attention to this cause, and to the authority of the dead, as well as of the living, I cannot represent the pursuer to your Lordships as having a title. It has thus appeared to me, to be my duty to detail the circumstances of the case, to shew, in my opinion, how the Court has failed in giving a proper answer to the remit; as, after the most anxious attention, I cannot be induced to think that Mrs Fullarton has set out a sufficient title. I conceive it will be necessary that your Lordships should make some declaration upon the subject. I therefore submit to your Lordships, that the interlocutors complained of ought to be reversed, and a declaration made, that the premises set out in Mrs Fullarton's summonses do not sustain the conclusions of these summonses.

If I have mis-stated any points in this cause, I have this satisfaction, that I speak in the presence of those, some of whom can set me right upon the subject.* If I am of any use to my country, it is owing to those, more than to any other cause, that I am so.

* Lord Thurlow present, Lord Rosslyn not present.