to him, is not in the case of an apparent heir; he has no right to the subject, he has only the expectancy of a right, and his minority can no more be deduced than that of a person who has no concern in the matter. From all which it follows, that, if any minorities are to be deduced, it can only be the minorities of those who had the actual right to the subject, by virtue of the entail,—that is, the possessors, Thomas, and Harry the second; and, as there are no minorities of theirs to deduce, the prescription must be run and complete.

The Lords found that the minorities were not to be deduced, and that the prescription was run and completed. Some of their Lordships founded their judgment upon minority not interrupting positive prescription at all; others upon what was last pled for the defenders, viz. that the substitutes in the entail had not the right in their persons, and for that reason their minorities could not be deduced.

4. As to the question about the contract of marriage, whether, supposing the tailyie were not prescribed, it would annul the provisions in the marriage settlement?—the Lords found that it would not: that Mr Hay, as well for his children as for himself, is in the case of an onerous creditor, who, contracting *bona fide* with a person possessing a tailyied estate, without the clauses irritant inserted in the rights, by the Act of Parliament 1685, concerning tailyies, is safe: that supposing the Act of 1621 might strike against the settlement of the estate by Harry the second, upon his daughter, the defender, yet it could never affect Mr Hay, who was an onerous purchaser from the interposed person, and so, in terms of the statute, was safe: Therefore sustained the contract of marriage, both with respect to Mr Hay's liferent and the provisions for the children of the marriage.

N.B. As to the time from whence the prescription began to run, some of their Lordships thought it run from the date of the deed,—but the majority seemed to be of opinion that it only run from the death of Harry the maker, in the same manner as a latter will.

This affair was decided *in foro contentiosissimo*; for there were two interlocutors of the Inner-House upon it, and a hearing in presence.

1739. *December* 6. MAGISTRATES of —— *against* KIRK-SESSION.

[Elch., No. 1, *Kirk-session.*]

THE question here was about the explication of an Act of Council, by which the election of a precentor was to be by the Kirk-session, with advice and consent of the Council; whether these words, *with advice and consent*, imported a negative in the election, or only a simple power of consenting and reducing the election if an unfit person was chosen?

The Lords found, That these words implied a negative to the Council upon the election made by the Kirk-session, but that the latter could, by an action,

force the Council to consent, if they could not show reasonable grounds of their dissent; in the same way as a woman, when she is left a provision upon condition she marry with consent of certain persons, can force, by process, these persons to consent to her marriage, unless they can show good reasons for not consenting.

1739. *December* 8. DUKE of ARGYLE *against* SIR ALEXANDER MURRAY, &c.

[Elch., No. 1, *Regalia*; Kilk., *ibid.* No. 1.]

THE question here was, about the property of mines found in Sir Alexander's ground, whether they belonged to the Duke, the superior, or to Sir Alexander, the vassal?

Both of them had grants from the crown of all mines within their lands and heritages; but, as the extent of these grants was to be regulated by the Act of Parliament 1592, about mines, the whole question turned upon the meaning of that Act. By this Act, (which is among the unprinted Acts,) the mines, which, by the Act of James I., were the property of the crown, were dissolved from it, and the king was empowered to set in feu-farm to every *earl, lord, baron, and other freeholder*, all and whatsomever mines found, or to be found, within their own lands and heritages, with this proviso, that, if the lord of the ground, being advertised of mines in his lands, refused to work them, then it should be lawful to the king to set them to any body else.

For the Duke, it was argued that the word freeholder denoted the immediate vassal of the crown, not the sub-vassal of the crown: that this was the uniform language of our statutes: that, in the Acts imposing taxations, freeholders are expressly distinguished from feuars and sub-vassals,—Act 281, *anno* 1597; Act 2, *anno* 1621: that, not only in the Acts relating to levying of taxes and the constitution of Parliament, does freeholder denote an immediate tenant of the crown, but likewise in other Acts which have no concern with either of these two things; *e. g.* 71 Act. p. 14, Ja. II., whereby lords, barons, and freeholders are allowed to set their lands in feu-farm; and even in the year 1593, which was the year immediately after the Act in question was made, the word freeholder denotes the immediate vassal of the crown, and is used in contradistinction to a great baron. And lastly, as, by the Act 12th Ja. I., the mines were taken from the Lords of Parliament and given to the king, so it is most probable, and ought *in dubio* to be presumed, that, by the Act 1592, they were given back to those from whom they were taken, *viz.* the Lords of Parliament, *i. e.* the immediate tenants of the crown.

To this it was ANSWERED, That freeholder signified the same with heritor or proprietor of lands; which signification is established both by the authority of our most ancient law-books and lawyers; [see Skene (who lived at that time,) his annotation upon the word *Baro*, in cap. 1, b. 3, of Malcolm II. statutes. See likewise those statutes, cap. 8, § 7, and cap. 9, (with the *Quoniam Attach.*, cap. 45 and 46,)] and by the constant style of our statutes, Act 54, p. 8,