APPENDIX. I.

No. I.

NOTES OF THE OPINIONS OF THE JUDGES OF THE COURT OF SESSION, AT THE FIRST ADVISING OF THE PETITION FOR MRS FULLARTON AGAINST LORD JUSTICE CLERK'S INTERLOCUTORS, WITH ANSWERS FOR MR HAMILTON OF BARGANY.

Januiary 13, 1796.

LORD ESKGROVE.—I wish to be informed by my Lord Justice Clerk of the Meaning of the Reservation in his interlocutor. It is not fixed by the *first finding* of the interlocutor, that supposing *Mr Hamilton* did incur an irritancy by expeding the charter 1742, *that* is now cut off by the positive prescription? The reservation annexed appears to me to be an inconsistency.

LORD JUSTICE-CLERK.—The interlocutor, no doubt, finds, that, so far as the investiture 1742 innovates or alters the terms of the original entail 1688, the latter is now at an end, and the estate is secured by the present investiture: But it is alleged by the pursuer, that the charter 1742 is agreeable in its terms to the entail 1688, and therefore subsequent irritancies since the date of the last investiture, in contravention of the limitations in that investiture, and of course of those likewise in the old entail, may have been incurred and may still be declared: It is to such that the reservation is meant to apply.

LORD PRESIDENT.—I entirely approve, and would adopt the explanation which has been given; but to prevent ambiguity, I would, after the clause "*whether or not the defender has incurred any irritancy under that entail,*' insert the words '*as ingrossed in the charter and sasine* 1742."

I am clearly of the opinion delivered in this interlocutor: Mr Hamilton cannot now be disturbed in his right to this estate. He has possessed upon a regular investiture for upwards of *forty* years without interruption. This affords him a complete exclusive prescriptive title, and no challenge of his right under that investiture can now be listened to. If, however, he has committed subsequent deeds of contravention against the prohibitory clauses of the entail contained in his own charter 1742, these may still be challenged in a declarator of irritancy: The discussion of these will remain entire to the parties; they make no part of the present question, which

is only, Whether the defender has produced a title sufficient to exclude? This, I am of opinion, does not admit of a doubt, unless minorities are to be deducted; and that is a point now finally at rest, and which will not again be disputed. All questions relative to irritancies, or to the succession of the estate, must henceforth be regulated by the deed 1742.

Lord Eskgrove.—I entirely approve of the Lord Ordinary's interlocutor. The charter produced, as an exclusive title, bears no *ex facie* objection of nullity; it is therefore very clear, that *Mr Hamilton* must continue to hold the estate against all mankind, whether heirs or others. It makes no difference upon the question, whether he pleads an exclusive right upon a deed of his own, or upon that of another conveying the estate to him. This charter also affords a good prescriptive title to all the heirs, who are therein called to the succession. It is only to be enquired whether the course of prescription has been stopped by legal interruptions, or suspended by minorities; for minorities only suspend, but do not properly interrupt prescription. Now, upon general principles, it were, I think, to be wished, that minority did not, in any case, interrupt the *positive prescription*; but the decisions upon this point all bend the other way, and by them it has now become our duty to abide. Here, however, the case is different, and regards only heirs of entail. The decision in the case of *Kinaldy* proceeded upon this distinction: There the challenger had been all along major, and the House of Lords found that he was not entitled to deduct the minorities of prior heirs from the period of prescription. In the present case, as will usually happen, some substitute of full age must always have existed since 1742, who might have brought a challenge of the contravention against the entail.

Lord Swinton.—I also am for adhering to this interlocutor. To allow the deduction of minority in this case, would be at once to put an end to the act 1617.

Mr Solicitor-General (Counsel for *Mrs Fullarton.*)—If the pursuer shall be permitted to establish the declaratory conclusions of her libel, she will be able to shew that she was entitled to enter into immediate possession of the estate as next heir to *Mr Hamilton*, who had irritated, and lost all right to it by its contraventions. In that respect, her situation is very different, and vastly more favourable than that of the claimants in the case of *Whiteley*, and the other cases which have been quoted as precedents on the other side.

Lord President.—The case of *Whiteley* was decided upon general principles. By that decision it is established, that the minority of an heir of entail cannot, in any case, suspend the course of prescription; whether it be that of nearer, or of a more remote heir.

NOTES OF THE OPINIONS, ON ADVISING PETITION FOR MRS FULLARTON, AND ANSWERS FOR MR HAMILTON, FOLLOWED BY A HEARING OF COUNSEL.

February 9, 1796.

LORD ANKERVILLE—(was not heard.)—Of opinion that the pursuer's minority ought to be deducted.

LORD JUSTICE-CLERK.—The sole point to be determined at present is, whether the years of *Mrs Fullarton's* minority are to be deducted from the period of prescription. In ordinary cases of the positive prescription, the question as to deduction of minorities may be considered as now at rest. It has been decided, both here and in the House of Lords, that the exception in the act 1617, applies equally to the positive and negative prescriptions. At the same time, this statute is to be considered as one of the most valuable laws that exists in this or in any other country. The prescription it establishes is very different from the *usucapio* of the Roman law; for the period is so long that, without the grossest negligence, none can be hurt by it. Besides, in the case of an entail, such as the present, every substitute heir, however remote, is entitled to pursue an action of declarator; and the question comes thus to be, Whether a joint interest exists in a number of individuals, united in a sort of aggregate or corporate body, many of whom are always *major*, shall the minority of any one suspend the course of prescription? In some minute circumstances this case may be different from those of *Whiteley* or *Auchindachy*, but the principles upon which these cases were decided, extend to, and regulate this also. The principle of these decisions was, that it is not the minority of a person having a *contingent interest*, but that of the *verus dominus* only, which can be deducted from the positive prescription. On this ground, *Mrs Fullarton's* plea must be rejected. Her Counsel, indeed, have been at great pains to make out a distinction in her rights and interest under the entail, from those of the other substitutes; but, notwithstanding all that has been said, it is still true, that her right to this estate is merely contingent, and not essentially different from that of any other heir of entail, although the effects of a declarator of irritancy might prove more immediately beneficial to her. As she is not *vera domina*, she is not entitled to plead minority. Unless this rule was adopted, prescription could never run against an entail. Various cases have been put by *Mrs Fullarton's* Counsel to illustrate his argument, such as that of a challenge upon the head of death-bed, and that of a personal right to an estate, against which prescription does not run during the minority of the person entitled to pursue. These cases, however, are *toto cœlo* different from the present. In the first, one person alone, the apparent heir, is entitled to challenge *ex capite lecti*; and, accordingly, so exclusive is his right, that even without making up titles, he may discharge the action, and thereby bar the challenge of any subsequent heir. In like manner, in the case of a personal right to an estate of which another is in possession, it is only the apparent heir who can institute a chal-

lenge. Thus, both cases are in this respect materially different from the present. In both, the competitor may be feudally vested in the estate, yet the persons entitled to pursue, are not, on that account, the less to be considered as *veri domini*; and, accordingly, a disponee from them would take up the estate on the event of a reduction; whereas, on the other hand, the deeds of the competitor would fall, of course, along with his own right. *Mrs Fullarton* may certainly have a stronger or more immediate interest than the subsequent heirs, but still her right is merely contingent. A declarator is absolutely necessary to its constitution, and without it she cannot serve. Let us suppose in the case of an entail, which extends its irritancies to the descendants of the contravener, that the heir in possession has disponed to the next heir in prejudice of the heirs of his own body, a contravention has undoubtedly been committed, yet the children are entitled to plead, that they cannot be injured by an irritancy which was not declared against their father while he lived, and which cannot be declared against him after his death. Upon the same principles, securities granted upon an entailed estate, unless inconsistent with the restrictions of the entail, are valid in spite of previous irritancies, if these irritancies have not been previously declared. Thus it is, that declarator is necessary to resolve the right of a contravener, and establish that of the next substitute: And thus it is that *Mrs Fullarton's* right is merely contingent, and very different from that of an apparent heir. Her minority ought, therefore, not to be deducted.

Lord Eskgrove.—Resting upon the authority of former decisions, I was first of opinion that the present question was to be given against the pursuer. And, indeed, if these decisions are to be regarded as precedents, there is an end to this dispute, and we must yield to them as established law. But as a hearing in presence has been allowed for discussing the point, I am led to presume that it is considered by the Court as still open; and therefore, taking it up upon abstract and general principles, I am now inclined to be of a different opinion, and to hold that minority must in general be deducted from the positive, as well as from the negative prescription. I have considered all the cases which have been decided, downwards, to that of *Hamilton Blair*, and can find nothing done by this Court to shake its authority as a precedent. In this respect, the enactments of the statute 1617 have been followed out, though, perhaps, considering the matter in point of expediency, it might have been more beneficial for land-rights, if the statute had, in no instance, allowed the deduction of minority from the positive prescription. As there is no record of minorities, interruptions cannot easily be discovered; hence the security of purchasers is very sensibly affected, and a progress of titles, which does not extend very considerably beyond the prescriptive period of forty years, will scarcely be received as sufficient. But nothing less than an act of the legislature could, in this respect, cut out the rights of minors. And independent altogether of the authority of the exception in the act 1617, I am of opinion that upon general principles of equity, as well as on the principles of the civil and our own common law, the period of minority ought to be deducted.

Setting aside the authority of decisions, and applying the general

rules of law to this case, another point must be taken for granted, namely, that the facts alleged by the pursuer are true:—1*st*, That, during her minority, Mr *Hamilton* had incurred an irritancy by which he would have forfeited his right to the next heir. 2*d*, That this pursuer is herself next heir of entail, in whose favour Mr *Hamilton's* right would have been resolved. If she was only a remote heir, and if Sir *Hew Dalrymple's* family shall afterwards shew that they are nearer substitutes; then, upon the principles of the case of *Kinaldy*, the deduction of her minority must be refused; but, presuming, *in hoc statu*, that she was then the next heir, and that there is yet no authoritative decision on this precise point, I conceive that Mrs *Fullarton* is entitled to avail herself of her minority. [Quotes the words of the act 1617, relative to the exception of minorities.] The words of the act contain a general description of the effect of minority. In all such cases there must necessarily be two parties, one in whose favour prescription is running, another who is losing by it, and against whom, in the words of the act, it is *used and objected*. In the case which most frequently occurs, of a right to an estate in fee-simple, acquired *a non domino*, there must always exist some person entitled to challenge, of whose minority the statute allows deduction. The circumstances of an entail do not seem materially to alter the case, for the next heir who is in the right of claiming the estate in consequence of an irritancy, is equally the person against whom, in terms of the statute, prescription is used and objected. The minority of the heir of entail ought therefore, like that of any other true proprietor, to be deducted.

It is admitted, that in the case of death-bed deeds. and of personal rights to an estate, that minority must be deducted; but, at the same time it is pretended, that, in these cases, the person having a right to challenge is *verus dominus* of the estate; of this distinction, however, I cannot perceive the force. In some respects, and particularly in a feudal sense, it is not true that the challenger in these cases is *verus dominus*. The disponee under a death-bed is so much *verus dominus* in the eye of the law, that, until the deed under which he holds is reduced, he may alienate or burden the estate. It is a novelty to apply the term *verus dominus* to a person who is neither in possession, nor *in titulo*, and who, equally with an heir of entail, must bring an action for completing his right, and turning the usurper out of possession. Compared with these cases, I can see no justice in refusing the benefit of minority to an heir of entail, who is entitled to declare an irritancy against the possessor, and to assume the property. It is a thin distinction to say, that because he must bring a declarator similar to that competent to all the other heirs of entail, and because the minorities of all cannot be deducted, that therefore the minority of none can be admitted. This is contrary, in my opinion, to justice and reason. I can discover a good reason for disregarding the minorities of more remote heirs, and for not allowing majors to avail themselves of the minority of other heirs, as was decided in the case of *Kinaldy*; but it does not thence follow, that we are to consider the substitutes of an entail as forming a body corporate, like the trades of a burgh, and that minority should in no case be deducted, from prescription against an entail. The case of *Macker-*

ston is the only one which comes near the present, for there too there were irritant and resolutive clauses; these, however, do not appear to have been founded on; and, indeed, the circumstances of the case have not been sufficiently cleared up. In arguing the case of *Kinaldy*, that of *Mackerston* came under review; and I find a paper drawn by a very able lawyer in the cause, who was afterwards a most respectable Judge (Lord *Coalston*.) The principle of that decision is said to have been, that minority could in no case interrupt prescription against entails. [Quotes the words of Lord *Coalston's* paper.] I agree with what is here stated in point of fact; but, as I can see no law or reason for that decision, I must be of opinion that minorities suspend the course of prescription.

But it is said, that the rights of nearer and more remote heirs are all the same; that all of them are equally *contingent*, that is, liable in certain events to be defeated. Thus the contravener may happen to die before the declarator, or the irritancy may be purged. This contingency is a new doctrine, not known in the cases of *Mackerston* or *Kinaldy*. The argument comes to this, that, because a man's right may by certain accidents be defeated, he shall not be permitted to avail himself of the ordinary privileges of the law. I am of opinion, that such possibilities of defeat ought not to deprive heirs of their legal privileges. In the case of *Kinaldy*, President *Dundas* said, that an heir against whom prescription is objected, may in every case plead his own minority, though he cannot avail himself of that of another.

Much stress has been laid upon the circumstance of a declarator being necessary to bring the pursuer into possession. This, however, ought to make no distinction; and I am at a loss to discover the difference, in this respect, between the case of an heir of entail pursuing declarator of his right, and that of an apparent heir cut out by a death-bed deed, who is pursuing a reduction. Both are equally *in petitorio*, and to both an action is equally necessary to complete their rights and procure possession. In a technical sense, neither of them can be called *verus dominus*; and between the two operations necessary to complete that character there is no visible difference.

It is said there is no distinction between the rights and interests of the first, and of more remote heirs. Can it be seriously pretended, that Mrs *Fullarton's* situation is the same with that of the second, third, tenth, or most remote substitute. All of them, it is true, may bring an action of declarator, but she alone can claim immediate possession of the estate. The remoter heirs can only conclude to have the estate adjudged to the first heir. Against that heir, surely, in an eminent degree, is the prescription used and objected, and to him does the privilege of minority most justly belong. Nothing short of an act of Parliament can deprive him of this right; and when such an act is made, we shall be bound to respect it. In the mean time, though no friend to entails, I think they ought to have fair play, and the heirs of entail should not be deprived of the protection of this law. By refusing deduction of their minorities, very great hardships may often be suffered. Thus, let us suppose, as in the case of *Mackerston*, that a father, heir under an entail, takes up the estate in fee simple, and disposes of it in favour of a younger

son, perhaps by a second marriage, to the prejudice of the eldest son, the heir of entail, and a question of prescription and minority afterwards arises, would it be fair, or not rather most absurd and unjust, to contend, that because the eldest son was only an heir of entail, and had only a contingent right previous to declarator, his minority should not afford him a defence against the prescription? Here would be a son, the heir of an ancient family, defrauded of his estate, while under the power of his father, who was defrauding him. In the present case, this lady, since her father's death, has been in the right of claiming possession of the estate. It was a right *de presenti*, and not contingent, or that could have been defeated. To pretend the contrary, is, in fact, to charge your Lordships with injustice. This, however, was not the state of the fact in any of the late cases which have been quoted. In the case of *Auchindachy* there was no irritant clause, by virtue of which the lady would have taken the right from her brother. In the case of *Whiteley*, which is supposed most closely to resemble the present, the entail contained neither irritant nor resolutive clauses, by which the minor could have got into possession, and therefore it does not here apply. Indeed, in that case, I am surprised how minority came at all under consideration, as the estate had been possessed in fee-simple by the father downwards from 1724, and the son was certainly entitled to avail himself of his father's possession as well as of his own, which continued down to 1783.

I am for altering the interlocutor, reserving to the defender to shew that there was a nearer heir, not in *spe*, but in existence, who would have been entitled to claim possession of the estate.

Lord Dunsinnan.—The privilege of minority is granted for the protection of those who are incapable of doing justice to themselves; and as heirs of entail lie under the same natural incapacities, is there any reason in justice, for not allowing them the same privilege? There is a strong reason why it should not be extended to all the substitutes, who may often be numerous; for thus a large proportion of the property of the country would be withdrawn from prescription. But can the rule therefore apply to none of them? Is there no distinction among them? I think there is an evident and very strong one. I cannot consider the next heir to the contravener as in the same situation with the remoter substitutes. All of them may indeed bring an action, but not with the same effect. I was satisfied by Mr Solicitor's pleading, that the pursuer's interest is not merely casual and contingent, but substantial and immediate. A person under age is not to lose by the neglect of guardians. I am therefore for altering the interlocutor.

Lord Glenlee.—I at first thought that this case was decided by that of *Whiteley*; but, from what has since been pleaded, a shade of difference has been made out between them; yet I am still of opinion, that the solid reason on which the decisions in the cases of *Mackerston* and *Whiteley* were founded, as well as the true genuine principles of our law relative to prescription, all go to support the interlocutor. The law ought, no doubt, to protect minors from all damage which naturally befals persons in their situation; but, on the other hand minority ought not to be turned to their advantage, or

permitted to keep the rights and interests of others in suspense and embarrassment. When prescription is opposed by the plea of minority, it must be considered whether the loss was a consequence of minority, and was necessarily inherent in that situation. Founded very much upon this consideration is the principle, that those years only are to be deducted during which the right was in the person of the minor. While the right was not in him, he could neither he better nor worse for his minority. In like manner, when the right against which prescription has been running has existed in a numeric collective body, and might have been founded on by all of them equally, prescription is not suspended by minorities; for minority is not probably the cause that prescription has been allowed to run. All of them, whether nearer or more remote, are equally barred from pleading minority. The positive and negative prescriptions are founded upon quite different principles. The positive is a *præsumptio juris et de jure* of a good right in the possessor. And the only good reason for deducting minority is, that, when only one person exists who has a title to challenge the usurper's right, and that person is a minor, the presumption in favour of possession is thereby weakened. But when there exists a body of heirs, each of whom has the same title to challenge, and yet none of them take this step, there is no reason for diminishing or overturning the force of the presumption, that the possessor's right was unchallengeable. I am little affected by the circumstance of the nearest heir having a stronger or more immediate interest than the more remote. As to the right of pursuing a declarator, they are all *in pari casu;* all of them may equally enforce observance of the entail. The circumstance of afterwards getting possession is merely a consequence of vacating the fee, but adds nothing to the right of making it vacant. Until it becomes actually vacant by a decree of declarator, the right of the next heir is neither better nor worse than that of the most remote. The former indeed having a greater interest, it may be supposed that the rest will be more apt to neglect; but this is not in fact the case. Remoter heirs of entail may often very materially improve their chance of succession, by bringing a declarator of irritancy; which, in many cases, may have the effect of cutting off a whole line of nearer heirs. We often see applications made by remoter heirs, for having entails recorded; and if they rarely pursue declarators of irritancy, it is because contraventions are rare. When contraventions are committed, it may safely be presumed that some of them will not fail to interrupt the course of prescription. The case must always be very different from that where the sole right of challenge is vested in a minor; and, therefore, I am for adhering to Lord Justice Clerk's interlocutor.

Lord Craig.—When I read the petition and answers, I was of opinion that the interlocutor was right; but after hearing the Counsel for the pursuer, I had some doubts. I still entertain doubts, and deliver my opinion with great diffidence. I agree in general to the opinions which have been so well explained by Lord *Eskgrove*. The argument for the defenders rests upon this, that a number of persons in the same situation, and having the same rights, are to be considered as a collective or corporate body, none of whom can claim deduction of minority. I admit the principle to be solid, but

I doubt of its application to the present case; for all the substitutes under an entail are not *in pari casu*. The effects of success in a declarator are very different to the next and to remoter heirs. The right of the next substitute, I think, is immediate, not contingent or eventual. The case of heirs portioners, which has been mentioned, is not parallel, as there the deed of any one puts them all equally into immediate possession. It was said that there would be no prescription at all if the minorities of heirs of entail are to be deducted; but the argument is at an end when the privilege is only allowed to the first heir. As to the decisions, though they do favour the general opinion that minorities are not to be deducted, yet they are not exactly similar in their circumstances to the present case.

Lord Swinton.—We have heard much of contingent rights. I am not fond of contingent decisions. If the defender shall shew that Mrs *Fullarton* has suffered no hurt from her minority, what good can we do by settling this point? I am for altering the interlocutor. There are two extremes which I would equally avoid, the one that prescription should be deprived of its effect by the operation of minorities, the other that minorities should have no effect. I am for following a middle course, and for restricting the privilege to the nearest substitute. If every substitute may plead his minority, then there would be no prescription in the case of entails; but if you do not allow it to the next heir, then there is an end to the plea of minority. The words of the statute are express. [Reads the Act 1617.] If Mrs *Fullarton* does not fall directly under these words, I cannot read or understand them. Her right is immediate, not contingent, like that of the other substitutes, who perhaps may never be benefited. Put the case, that by a declarator the lands would have gone to another, then I would not allow deduction of her minority, for she might never reap any benefit from it. That point is settled by the decisions in the case of *Mackerston* and others; there there was only a *spes successionis*.

OPINIONS upon advising Petition, and Additional Petition, for Sir Hew Dalrymple, and Answers for Mrs Fullarton.

December 6, 1796.

Lord Meadowbank.—In order to succeed in her objection to the defender's prescriptive title, the pursuer must make out,

1*st*, That she would have been successful in declaring an irritancy, and obtaining access to the estate of *Bargany*, against both the late Sir *Hew Dalrymple* and his brother *John*, had the action been carried on *pendente minoritate*.

2*dly*, That an heir of entail having had such a right of action during minority, is entitled to deduct the years of minority from

those pleaded against him as a bar to the action, on the ground of prescription.

First Point.—In order to make out the first point, the pursuer seems to give her argument merely the character of a *postulatum*; but I think she is only entitled in the present shape of the process to assume as a *postulatum* the matter of fact that she chooses to aver; because she has no opportunity to prove before production is satisfied. She is by no means entitled to assume as a *postulatum* the relevancy of her statement of fact to have entitled her to the success which she ascribes to her action. She has, however, only given a glimpse of what she thinks may be offered on this head, instead of treating the subject fully and formally. But this I apprehend she was bound to do, in order to entitle her to claim a judgment of the Court on the second point, in which alone lies her objection to the exclusive title set up for the defender. This Court cannot listen to an averment that a claim is good in law. It can only listen to averment in fact, and must exercise its own judgment, whether that averment, if proved, would infer that the claim was good in law or not. Indeed, on the footing the pursuer argues, the remotest substitute as well as herself might maintain the objection to the exclusive title. For example: Her sister, Miss Mackay might insist in an action like the present, and aver that Mrs Fullarton had irritated, as well as Sir Hew Dalrymple and Mr Hamilton, and insist that this should be granted her as an admission, since an exclusive title was set up against her, instead of discussing her declarator. It is certainly very clear that the defender would be entitled to say to Miss Mackay, "you must go a little further, and shew how "your sister irritated, and satisfy the Court in point of law that "you are entitled, upon the facts you aver, to stand and claim, as if "she were out of the question."

As the relevancy, however, has not been fully argued, I shall mention my doubts only shortly, reserving myself open for a more full discussion.

1st, I doubt of the pursuer's interest to have founded a challenge. If an heir of entail in possession shall dispone to his next heir *alioqui successurus*, I understand it to be settled law, that no substitute heir can challenge the accelerated devolution of the succession. It is held that there is no legal interest to found such challenge. Now, in the present case, the late Sir Hew Dalrymple and Mr Hamilton, both prior substitutes and *prior stirpes*, in the destination to Mrs Fullarton, exchanged situations in the order of succession. It may therefore, I think, be questioned, whether Mrs Fullarton has a legal interest to challenge this exchange.

2d, I doubt whether the transactions which she ascribes to Sir Hew and Mr Hamilton, and maintains to be contraventions of the entail of Bargany, could, though proved, have entitled a substitute, having a competent interest to sue, to obtain a decree of declarator of contravention against them.

She says, Sir *Hew* irritated, because, after intromitting with rents, he repudiated; and that Mr *Hamilton* irritated, because he took a charter inverting the succession of the entail.

But intromission with the rents does not in a question *inter hære-*

des operate as a service, or render the heir *eadem persona cum defuncto.* It accordingly creates no obligation to fulfil the obligations which bound the deceased; but merely binds the intromitter to restore the property intromitted with, to those entitled to it. Anciently this passive title operated only *in valorem*, even in favour of creditors; and it never operated farther *inter hæredes. Pride, Nov.* 26, 1630. There seems to be nothing averred, therefore, sufficient to infer that an obligation lay upon Sir *Hew Dalrymple* to implement the entail: But though there had, I doubt if mere repudiation could produce an irritancy.

Repudiation does not infer even the passive title of *gestio*, and that too in a question with creditors; although the succession was repudiated in consideration of a sum of money received. (*Scott*, creditor of *Boswell of Auchinleck* v. *Boswell's* daughter, who had repudiated in favour of the heir-male, 5th *July* 1666, *Stair.*) And it is not alleged that there is any prohibition in the entail to found the pursuer in any argument upon this point.

As to Mr *Hamilton*, again; had he taken the estate as a fee-simple by a grant *a non domino*, it could not be maintained that this would have subjected him in an irritancy. Such a title laid him under no obligation to fulfil the entail. But if the right he reared is well fitted, it may perhaps appear to be as truly alien to the entail, and as incapable of subjecting him to its fetters, as if it had been such a grant in fee-simple. On the other hand, if Mr Hamilton only changed places with a nearer heir under the entail 1688, I must doubt, from ought I have yet heard, of that being a contravention.

3dly, I doubt extremely that, even though Sir *Hew* and his brother *John* had incurred irritancies, and Mrs *Fullarton* had been entitled to claim access, that this would have entitled her to the character of nearest substitute without declarator. And,

4thly, I doubt whether, after the death of Sir *Hew Dalrymple*, the pursuer can be entitled to declare an irritancy against him, or his descendants.

Why is declarator required at all, but because the acts of contravention are not in general conditions of descent, affording a complete *jus quæsitum* to the next heir called. Restraining clauses are securities for preserving the estate according to the will of the donor; and effect is only given to them for this purpose. But of this I must speak more fully under the second point, and therefore only observe at present, that it is difficult for me to figure a ground for doubting that, granting all the pursuer has said, it would have been competent to Sir *Hew* and Mr *Hamilton* to have purged the irritancies, had action been brought in their lifetime; and that, to admit an action of contravention now, when the first and primary object of such an action has become impracticable, is a matter that deserves great consideration. I will beg leave to ask, whether, to admit such an action would not be to defeat the intention of the donor, who certainly meant, that if the contravener purged the irritancy, he and his descendants should be preferred to the challenger. But though Sir *Hew* could have purged the alleged irritancies, his descendants cannot: so that if the pursuer is right, substitutes would be tempted only to bring challenges after the death of the contravener.

But though these difficulties were obviated, which I confess does not

appear to me a matter to be easily accomplished, it remains for the pursuer to make good her objection to the defender's prescriptive title, viz.

SECOND POINT.—The nearest substitute to whom the right of suing out a declarator of contravention has accrued, is entitled to deduct the years of minority elapsing after that event, in computing the years of prescription, pleaded in bar of the action.

And I acknowledge that I am extremely clear that the pursuer must fail in this attempt. The point is undoubtedly of much subtilety, but nevertheless I esteem it to be of very considerable importance to the law of *Scotland*;—indeed of such importance that I think the whole law with respect to entails must be thrown loose, if the pursuer's objection is ultimately sustained. I observe it is allowed, even on the part of the pursuer, that this consequence must ensue from her doctrine, that an entail may be effectual, with respect to certain substitutes of the destination, and not with respect to others;—and how the questions that may thence arise shall be extricated upon any known principles, I am unable even to conjecture.

In order to form a sound judgment upon the question, it is necessary to have a distinct conception of the difference between a declarator of contravention and a declarator of property, or a claim to an estate as *verus dominus*.—If there is no material distinction between the nature and object of these actions, the pursuer, in my humble opinion, must be in the right in her objection;—for if, during her minority, the right of the prior heirs and substitutes stood resolved, and the *verum dominium* was in her, and nothing was required but the interposition of Courts of Justice to give efficacy to the right, she ought not now to be prejudged of it on account of the incapacity incident to her youth, or the negligence of her guardians. But if the case stood otherwise, and she had only a title in common with other substitutes to compel the prior heirs to rectify contraventions, and to resolve their right to the property, only in case they failed to redress the wrongs complained of, then, it is plain, that having no legal title to the property, which still remained legally in the contraveners, she was vested with no separate or peculiar interest, differing in legal character from that of any other substitute, or entitled to privileges beyond what the law confers on the *jus actionis* of contravention, that belongs to all substitutes, however remote.—I am free, however, to admit, that the distinction between the right in the nearest substitute, which entitles to sue a declarator of contravention for his immediate behoof, and that of a *verus dominus* kept from the possession of his estate by a reducible title in the person enjoying it, is not at first sight obvious. At the same time, I apprehend that it may, by a little attention, be distinctly conceived, that it has accordingly been solemnly recognized, and that the greatest effect has been given to it.—I certainly for one, have long been taught to believe in it, nor shall I soon be induced to renounce that belief, or be led to think that Lord *Arniston*, President *Forbes*, President *Craigie*, Justice Clerk *Tinwald*, President *Dundas*, and President *Miller*, mistook a shadowy for a substantial distinction; or that Lords *Hardwicke* and *Mansfield* (the cool spectators of our

law, and therefore not, like disciples, liable to be seduced by its subtileties) were so misled as to fall into the same mistake.

Now it cannot be disputed, that such effect has been given to the distinction, that the minority of the nearest substitute cannot be deducted by a subsequent substitute.—Had Mrs *Fullarton* died, and Miss *Mackay* brought the present action, she could not have deducted her own minority, nor that of Mrs *Fullarton*:—Not her own, because not the nearest substitute.—Not Mrs *Fullarton's*, because she was not in the circumstances of a *vera domina*. It can admit of no controversy, that this point was fixed by the House of Lords, by the decision in the case of *Kinaldy*.—In many other cases, I think the distinction has been adopted specifically, and questions parallel to the present decided.—But I wish at present to assume nothing that can admit of the smallest doubt or dispute, and the case of *Kinaldy* is sufficient for my purpose. Now, no lawyer can doubt that if a minor heir, that had been hurt by a reducible deed, such as a deed on death-bed, dies, his heir, whether of entail or fee-simple, would be entitled to deduct the years of minority from the years of prescription pleaded by the grantee under the death-bed deed. If, therefore, Mrs *Fullarton*'s right had been the same with that of a minor hurt by a death-bed deed, it would have been palpable injustice, on the principles of the law of *Scotland*, to have prevented Miss *Mackay* from deducting Mrs *Fullarton*'s minority.—In the former case, the law intends the property for the heir excluded by a death-bed deed; and failing him, for the next heir, and so forth.—But let it be considered, whether the law intends the estate for the substitute, in the general case, when the heir of entail in possession commits an act of contravention.—I apprehend, that in the general case, the law has no such intention. The law means to carry into effect the will of the donor, by which the estate was conferred upon the contravener; but under restraints against spending it, or bequeathing it; and these restraints are created by conferring a *jus crediti* upon the whole substitute heirs, entitling them, *severally* and *equally*, to enforce the restraints by action of contravention; the first and direct object of which, accordingly, is, to compel the contravener to purge the irritancies he has committed. But if he is unable to purge them, then the action resolves his right of property in the estate, not from the date of the act of contravention, but from the date of the decree. The deeds of contravention would be effectual without the resolutive clauses. If the contravener was unable to get them cancelled, the will of the donor, without the resolutive clause, might be defeated; but then the resolutive clause does not operate till the contravener has failed to purge the irritancies. The true meaning, therefore, of a declarator of contravention, is an action to secure the estate agreeably to the will of the donor, by compelling the tenant in tail to cancel all deeds done in contravention of the will of the donor, by means of an impending resolution of the *dominium* or property conferred upon the tenant, in case of failure. Nothing can be more obviously different than this species of action from that of a declarator of property and other actions of a similar character; where, though the feudal title of the subject may be in the possessor, the just and legal right is in the claimant, which the possessor can neither dispute nor parry, and where, accordingly, when the feudal title is once rendered litigious, the parties must

join issue upon their rights as they stand. The declarators of property, again, belong only to one person, but any substitute may sue the declarator of contravention; and it is their interest to preserve the estate entire, not that of merely accelerating its descent, which founds the actions of the substitutes.

Farther, from the earliest times, and before the statute which sanctioned entails, it was understood by our lawyers, that the contrivance of the clause of entails was for the purpose of preserving the estate, according to the will of the donor.—The resolution of the property of a contravener in favour of a substitute was only the *remedium ultimum*, and recourse was therefore never had to it except in the extremity, when necessary to employ it for preserving the estate.—Accordingly, Sir *Thomas Hope* says, *ratio et fines provisionis* is to transmit the inheritance to the heirs of tailzie, unhurt and unprejudiced—and *he* was acquainted with the very invention of resolutive clauses. But if a *jus quæsitum* had accrued to the substitute by the mere act of contravention, so as to entitle the substitute to the *verum dominium*, there could be no reason for purging irritancies.—For the substitute heir could not be deprived of his *jus quæsitum* without his consent; yet irritancies have been purgeable from the very origin of entails, and of course nothing can be more different than the effect of irritancies, and of feudal delinquencies.—In the latter the rule is, *Jus acquisitum tolli potest nemini sine suo consensu ut in apperturia feudi per alienationem sine consensu superioris;* whereas, the consent of the pursuer of a declarator of irritancy was never once thought of as necessary, in order to make way for the purging of irritancies.

I observe that the pursuer has seized, with judgment and ability, the case of a clause of devolution which the defender had, in my opinion, both erroneously and imprudently attempted to assimilate to the ordinary prohibitory and irritant clauses. To me the case of a provision of devolution appears only a happy illustration of the distinction I contend for:—for example, if it is provided, that, upon the heir succeeding to a peerage, the estate should descend to the next substitute, I have no hesitation to consider such a clause as a condition regulating the descent of the estate, and that the retaining the estate after the condition takes place is a mere usurpation, the *verum dominium* passing instantly upon that event to the substitute favoured. But how different this from the retention of the estate by a contravener, which is by no means a usurpation, till after decree of declarator is actually pronounced.—The contravener may make provision for wives, husbands and children, and perform every act permitted by the entail after contravention, as well as before it. But after a condition of devolution has taken place, I apprehend every such act would be reducible, and I conceive there could be no forfeiture of the estate were the peer to commit treason; whereas, treason by the contravener before declarator, would infer forfeiture. I have no difficulty therefore in being of opinion, that in such cases of devolution, not only the first substitute may discount his minority, but that after-substitutes would be entitled to do the same, as in the ordinary case of the claimants of estates in fee-simple.

It does not appear to me material, whether such clauses of devolution are put in the shape of the ordinary restraining clauses or not. It is the legal interest created by the donor in the substitute

which I consider, and to that we are called to give effect. Now, the legal interest which founds the declarator, must, in the general case, be common to all the substitutes, *viz.* merely a right to see the will of the entailer fulfilled agreeably to law, by preserving the estate entire, and in the enjoyment of the more favoured persons, till it be necessary to deprive them of that enjoyment, for the sake of preserving the estate. But this common interest in all the substitutes may be united with separate and different interests, and these be attended with different effects. If, after declarator is obtained, the nearest substitute and his heirs, from minority or otherwise, neglect to make up titles and assume possession; or, if a precise clause of devolution renders the subsequent possessor, though no declarator be brought, a palpable usurpation, these circumstances must have their proper effects. The nearest substitute thereby acquires a direct right to the property, which requires nothing but the interposition of the authority of the magistrate to render effectual, by recognizing it and clothing it with possession; but in the ordinary process of contravention there is no such right conferred before declarator. The legal as well as the former right of property remains with the contravener till the declarator is actually pronounced; and the law understands, that it remains in his power to prevent its ever being pronounced by getting the acts of contravention timeously done away. The nearest substitute, therefore, cannot be *verus dominus*, so long as the contravener remains *verus dominus*. Nor can the nearest substitute claim with justice any interest of a legal defined character, different from that of other substitutes, till he becomes *verus dominus* by the contravener's ceasing to be so. Then, indeed, the contravener's possession is nothing but an usurpation, in the same manner as his possession, whose estate has terminated by the condition specified in a clause of devolution having taken place. An action brought against such an usurper, whether it bears the name of an action of contravention or not, is in substance and effect nowise different from a declarator of property, arising from a right in the pursuer which it perfects, not contingent, and not liable to be disappointed by any act or deed of the usurper, who cannot get quit of the effects of a condition by discharges, retrocessions, or renunciations, as is done where prohibitions *de non alienando et contrahendi debita* have been contravened.

But in the present case the pursuer has not alleged that she was called to the succession by any condition or clause of devolution. All she states is, that a contravention, by infringing the order of succession of the entail, was committed; and on this ground alone she concludes, that she was to be esteemed *vera domina* from the date of that contravention. But I am convinced from the grounds I have stated, that in the eye of the law of *Scotland*, the alleged contravener remains *verus dominus* till decree of declarator shall actually resolve his *dominium* in the estate; that the substantial right, as well as the formal title of *dominium*, remains with the contravener; and of course, that the pursuer was nothing more than any other substitute entitled to an action, competent equally to all and each of them, for preserving the estate in its integrity, agreeably to the will of the entailer, and securing its enjoyment and descent according to the legal and established rules of construction of that will. This action belongs to substitutes severally; and, as forming a nu-

merous body, minority cannot interrupt the prescription of such actions. It has not been contended, as far as I observe, on the part of the pursuer, that substitutes in general are entitled to be restored against the omission of bringing actions of contravention in their minority; and it could not be so contended, consistently either with the established doctrines of law pointing out to those to whom, and concerning what subjects this plea of restitution is competent, or with any one decision, so far as I know, regarding the rights of substitutes of entail.

On these grounds I incline at present to be of opinion, not only that the pursuer is not entitled to plead the objection to the exclusive title set up by the defender, but that the objection itself is ill-founded.

Lord Justice Clerk.—The sole question now to be considered is, whether the defender has produced a title sufficient to exclude? The answer to this question depends upon the fact, whether prescription has run upon the charter 1742; and that again hinges upon the point, whether *Mrs Fullarton's* minority is to be deducted.

The act 1617 of *prescription* is perhaps the most valuable that exists in our statute book, and has always been reputed the safeguard of land rights in *Scotland.* At the period of its enactment, entails, with irritant and resolutive clauses, were unknown; and their effect in regard to prescription could not possibly enter into the consideration of the legislature.

Prima facie of the statute, and regarding only its literal meaning, it would seem that every person *prosecuting any right* to which prescription was opposed, was entitled to a deduction of his minority; but when entails, with irritant and resolutive clauses came into fashion, and questions of prescription against them arose, it occurred, that if this rule was strictly and literally adhered to, estates in this situation would cease altogether to become subjects of prescription, as, in the long line of substitutes, it is probable that some minor must always exist. In this manner would a great proportion of the landed property of *Scotland* have been deprived of the benefit of this invaluable statute, and great inexpediency and absurdity have arisen. What, then, was here to be done? The point was somewhat puzzling; but our courts of law, upon a mature consideration of the whole case, adopted a modification of the act 1617. They found that the deduction of minority was to be allowed only to the *verus dominus*, or to the *heir apparent*, who are entitled immediately to *take up* the estate; but not to substitutes under an entail, whose interest is merely contingent.

This is a doctrine which has been adopted in many cases, and has been sanctioned by a long train of decisions. The pursuer indeed admits the principle, but resists the application of it. She contends that, in consequence of the contravention of *Sir Hew Dalrymple* and *Mr Hamilton*, an irritancy has, by the conception of the entail, been incurred *ipso facto*; and that she, as next substitute, is not only entitled to an Action of Declarator for preserving the estate, but is herself *vera domina*, and consequently entitled to a deduction of her minority.

This is a proposition to which I cannot subscribe. *Mrs Fullarton* is not *vera domina* of this estate, in any sense of the words recognized in law. Let us suppose the case that she is convicted of high treason, would the estate of *Bargany* be forfeited in consequence of her crime?

Certainly not; until she had come into the immediate right of it as an heir of remainder. On the other hand it is equally certain, that if *Mr Hamilton* had been guilty of high treason, this estate would have escheated to the crown during the lives of him and his descendants.

It is not true, as contended by the pursuer, that in the law of *Scotland*, penal irritancies, especially in questions respecting heritable right, are ever allowed to operate *ipso jure*; and surely the present is as *penal* in its nature as can be imagined. The former proprietor, in spite of his contraventions, remains so until his right is resolved by a decree of declarator; and at any time before extract, he is permitted to purge the irritancy if he can. Indeed the Court have always been disposed to make long arms, in order to allow the purgation of irritancies, which are in their nature odious. The case of *Hamilton* of *Raploch* is a remarkable instance.

Since, therefore, no declarator of irritancy was brought until the years of prescription had elapsed, it is impossible to consider the pursuer as having been *vera domina*. She was merely a substitute, with nothing more in her than a right of expectance until such declarator was obtained. I am unable to distinguish between her and the other substitutes. They, too, had equally a right of expectancy, only somewhat weaker, because more remote; and in its legal nature and effect precisely similar.

The pursuer has ingeniously endeavoured to draw a line of distinction between this and the cases quoted as precedents on the other side. But the differences which have been alleged do not affect the general principle, upon which, I am satisfied, all of them were decided; and that of *Auchindachy* is precise in point with the present.

My opinion upon the question at issue is perfectly decided, and I am clearly for altering the interlocutor.

Lord Eskgrove.—I still remain of the opinion I formerly delivered. At present I give no opinion on the merits or probable issue of the declarator; and when it comes to be regularly discussed, I may perhaps think it unfounded. In this stage of the cause we must take it for granted, that when she is at liberty, the pursuer will shew relevant grounds for her action; but if the plea to exclude is sustained, she never can have an opportunity of doing so. I feel a reluctance to prevent the party from being heard, and thus to stifle her cause in its very birth. At the same time I should be sorry that the law of prescription was frustrated; for I respect it as a most valuable security. It has been said, that at the date of the act 1617, entails were not known in *Scotland* in their present form, and that this statute was not meant to affect them. This is an idea which I by no means can go into. I will not say how far entails in their present form, as afterwards sanctioned by the act 1685, c. 22. were then known; but by the words of the statute 1617, it is expressly established, that all persons possessing lands upon a charter and sasine *ex facie* regular, shall not be disturbed; and it concludes with a general exception of minority.—(Quoted the words of the act.) It has been sometimes made a question whether the exception of minority was applicable to the positive as well as the negative prescription, but the Court has repeatedly found that it was equally so to both, and the question is now at rest. I was always of that opinion, for the reason of the thing holds equally as to both.

But this is a case of entail, and is on that account supposed to be different. A distinction, however, does not seem obvious. By the words of the entail it is expressly declared that contravention shall *ipso facto* be followed by forfeiture; and entails in this form are fully sanctioned by the act 1685. But the legislature in 1617 could not, it is said, have entails of this kind in view; and, in order to remedy supposed inconveniences which might ensue, our Court has assumed a legislative authority to modify the act in its application to cases of this nature: For it is contended, that otherwise no length of possession could secure against the effect of antiquated entails. And if this is admitted, what shall be said of the case which must then occur, of an heir in possession upon titles different from those of the entail, being saved altogether from the operation of minority. This would be truly a singularity, and different from the situation of every other possessor acquiring a prescriptive right to his estate. I entertain a very great respect for the authority of our great lawyers whose names have been mentioned, but must think they exceed the limit of their judicial powers; and I cannot adopt the doctrine which I have heard imputed to them; for in fact, its tendency is to repeal to a certain extent the act 1617. Against whom (to employ the words of the statute) is *prescription here used and objected?* Is it not against *Mrs Fullarton?* And what is there to distinguish her situation from that of other minors who have the benefit of this deduction? I can see no distinction by which her claim can be injured; and if the question had now occurred for the first time, I cannot help thinking that no Judge would have hesitated in forming the same opinion. But it is said that in the application of the act 1617 a new rule is requisite for the case of heirs of entail, who constitute a collective body, each member of which, even the most remote from immediate possession, had an equal right of challenge,—and some one of whom, in the ordinary course of things, must always be of age. If this is really an evil, and if any alteration or new regulation be here requisite, it must be the work of the legislature, and it is not within the competency of a court of law. At any rate, the remedy proposed goes by much too far. It is said that only the *verus dominus* shall be entitled to a deduction of minority, and it is held that an heir of entail claiming in consequence of a contravention, is not to be considered as a *verus dominus* until a decree of declarator has been obtained. What then is meant by *verus dominus*; and in what consists the *verum dominium*? It is not constituted by a feudal title, for it is admitted that a person claiming an estate, although his titles are not made up, may be the *verus dominus*; and it is contended, that so likewise may be a person whose titles stand unreduced until he be actually denuded. All this leads into a mere puzzle. The *verus dominus* in this case is the *dominus litis*. *Mrs Fullarton* is entitled to take the estate in preference to every other heir of the entail, and it is most extraordinary to say that she is not entitled to plead her minority, because she was not in possession; since, if she had once been fortunate enough to obtain previous possession, she had no further occasion to resort to the plea of minority. Her plea is rejected because she was destitute of that possession which it is the very object of her plea to obtain. The present case is very different from that of a remoter substitute pleading upon the minority of a nearer, as

in the case of *Kinaldy*. There the admission of such a plea would have been highly inexpedient. The heir of *Kinaldy* could not have taken the estate. He could only have pursued a declarator to preserve the estate; and there was no occasion to give him the advantage of another minority, as he alone might have pursued without the concurrence of the nearer substitutes, and had himself been of age for more than forty years. Here, on the contrary, *Mrs Fullarton* is claiming, as nearest heir of entail, immediate possession, and asks deduction of no minority but her own. She is pleading in the very words of the statute 1617.—Who else, during the period of prescription, was *verus dominus* to the effect of claiming a deduction of minority?—*Mr Hamilton* is said to be *verus dominus*; but was *Mr Hamilton* to challenge himself? In cases of death-bed deeds, which are good until reduced, the grantee may be called the *verus dominus*; yet the minority of the heir at law will be deducted from the positive prescription.—In what respect, as to the point before us, is a declarator of irritancy different? If there be any distinction, the latter is of the two the strongest case. If the plea of minority is here rejected, then no possible case of the application of the act 1617 to entails can ever exist. Upon the principle contended for, it must necessarily follow, that although an action of declarator is brought in the thirty-ninth year, yet if decree is not obtained till after the lapse of the fortieth, the plea of minority will not avail, to save the claim from the effect of prescription. Upon the whole, I am very clear for adhering to this interlocutor.

Lord Swinton.—I entirely agree in the opinion that has now been given, and am for adhering to the interlocutor. The question appears to me to lie within a very narrow compass. The act 1617 expressly requires minority to be deducted. *Mrs Fullarton* pleads, that, as the person entitled to possession, her minority ought to be deducted. To this it is answered by the defenders, "You are not the next heir, and your minority cannot be deducted." *Mrs Fullarton* replies to this, that, when permitted, she is willing to shew that she is.—Will you deny her the opportunity of doing so? This would be very hard indeed. Suppose a parallel case.—A person knocks at my door for admittance, and says he is my son.—I stand within and refuse to unbolt the door, until he has proved to my satisfaction that he really is so: He begs me only to open the door and peep out, and I will instantly recognize him. "No," says I, "I wont open the door, and wont look out; so get you gone."——Would this be fair? In my opinion *Mrs Fullarton's* case is just the same.

Lord Dreghorn.—I was not present in Court when this cause was formerly advised, but I am satisfied that the interlocutor then pronounced was perfectly right.

Lord Dunsinnan.—I have again considered the arguments on both sides in this cause, with all the attention in my power, but have found no reason to alter my former opinion. I am for adhering to the interlocutor.

Lord President.—The question is, Whether the period of *Mrs Fullarton's* minority ought to be deducted from the years of pre-

scription? This is one of these points which ought to have been considered as at rest in the Law of *Scotland*; all the decisions upon the subject, from the first starting of the question in 1739 down to the present day, being uniform against the deduction: and some of them ultimately settled in the House of Lords.

It was some time a doubt, whether, in the construction of the act 1617, minority could in any case be allowed as a deduction from the *positive* prescription, the clause relative thereto being introduced in the end of the act, after treating of the *negative* prescription; and somewhat contradictory to the strong declaration contained in the preceding part of it, that the positive prescription should be opened, "upon no other ground, reason, or argument competent of law, "except falsehood." It has, however, been settled by decisions, that the subsequent exception of minority applies to both; and upon these the Court ought to rest.

But the present point has been no less firmly fixed by authority of the same kind, and in a still greater number of instances, where the question was most deliberately considered, *viz* That in the cases of latent entails, the minority of substitute heirs, whether nearer to the succession or more remote, could have no effect, and the grounds are obvious. In the first place, as observed by *Lord Kilkerran* in the case of *Macdougall*, that if the minority or infancy of heirs in *spe* were to be considered, it would be impossible that precription could ever take place against a tailzie. *2dly*, That in the case of prescription running against a collective body of men, some of whom may be major, others minors, the exception cannot apply as in the case of an individual: And *3dly*, That the positive prescription must always in its nature suppose and imply two contending parties in a right of ownership, the *verus dominus* losing by prescription, and the *non dominus* acquiring; whereas substitute heirs who are only *in spe*, and who have only a personal right of challenge for the purpose of making an entail effectual, are not either in the one situation or the other.

The first of these reasons, having expediency for its basis, might not alone be sufficient, and therefore it is unnecessary to enlarge upon it.

As to the second, the words of the exception in the Act 1617 are, that only the years during which the parties against whom prescription is used and objected were majors, shall be counted. But in the case of an entail, it remains to be considered who is the party against whom the prescription is running. The person who is acquiring, is the heir in possession, who has made up a wrong title, in order to shake himself loose of the tailzie, or of some limitation or fetter contained in it; but the party who is losing, and against whom the prescription is to be pleaded, is not any individual. It is the substitute heirs of entail in a body, who have all and each of them the precise same right or challenge, and the precise same remedy, though the application of the remedy may operate more to the advantage of one than of another, as he happened to be more near to the succession, or more remote from it; and as it never can be said of this or of any collective body of men, that it is in a state of minority, so it is of no consequence in a question of prescription, either positive or negative, that some one or more of the individuals which compose this body may happen to be under age. Some of them are perhaps unborn when the prescription begins—some have only come into existence yesterday—some are of one age and some of another.

All this is nothing to the purpose. We cannot suppose prescription running against one individual of this mass, and not against another. The right belonging to the whole is of the same nature, it belongs to a *familia*, and either the prescription must run against the whole, or against none.

The interest which the substitute heirs of entail have in the estate, before the succession opens to them individually, is an undivided and *indivisible* right. If it were only undivided and not also indivisible, like the interest, which, by the Law of *Scotland*, different heritors of land have in a common, it might be said that *A. B.*'s right can be lost, while *C. D.*'s is preserved entire ;—but in the case of an indivisible right, the whole of which belongs equally to all, and does not admit of being separated into parts, the same consequence cannot follow.

Rights belonging to communities are of this nature, such as Corporations, Hospitals, &c. Rights belonging to the whole body of the people are of the same nature, *e. g.* the rights of a highway, or the right of freedom from tolls or customs of a market. A piece of ground which was formerly a highway, being inclosed and possessed as exclusive property for forty years, without interruption, will be acquired by prescription from the public, though many individuals have been under age during that time ; and if there has been a possession of levying certain tolls or customs at a fair or market, in consequence of some title which might have been challenged during the period of prescription, it will be too late to come afterwards with such a challenge, at the instance of any individual, upon a plea of minority. The right cannot be acquired as to some, and saved as to others. An express interruption will save it as to the whole, but the personal privilege of minority can be of no avail.

Neither can it be said, that any disadvantage arises to the public from this circumstance ; for the hardship on the one hand, is more than balanced by the chance on the other, that, when there are so many individuals concerned, acts of positive interruption will be used by some one or other among them, which, by the rules of prescription, must operate in favour of the whole. In short, the minority of individuals in such a case, is not that minority which the statute has in view.

But, *3dly*, The prescription here pleaded against the substitute heirs of entail in a body, including *Mrs Fullarton*, being the *positive prescription* upon charter and sasine, the same must be effectual against her, unless she can say that the right of property was truly in her, during the currency of prescription, in which case, but in no other, she would be entitled to plead that her minority must be deducted. It is clear, however, that the property neither was nor could be in her, unless either the whole prior heirs had failed by death, or a decree of declarator of reduction had been obtained by her in the Court of Session, setting aside the right of those prior heirs, and opening up the succession to her, so as to give her immediate access to claim the *possession*.

In such a case, she would have been the *vera domina*, or real owner, losing by prescription, while she neglected to make her right effectual ; and *Mr Hamilton* would have have been the *non dominus*, continuing to acquire by a title fundamentally bad.

And here we must attend to the principles which regulate a *Scots* entail ; these being essentially different from those of an *English* entail. With us not one particle of the *fee* is in the substitute heirs.

The whole vests in the heir in possession. Each substitute heir, whether called generally or specially, whether of the body of the tailzier, or not of his body, has in him nothing more than a personal right of maintaining actions to force implement of the tailzie, or to challenge contravention; and this is a right which equally vests in every existing heir, or who may exist so long as the estimation lasts. We have no such thing as an estate in remainder, the whole estate being in one person, *viz. the heir in possession*: and, upon the death of one such heir, it remains *in hæreditate jacente* till it is taken up by another heir. All this was fully explained and illustrated in the case of *Gordon of Park*; and any person not already informed of the principles which were there laid down and recognized upon all hands, may look at the correspondence which passed between Lord Chancellor *Hardwicke* and Lork *Kaimes* upon the subject.—See Lord *Kaimes's* Elucidations, Art. 42. respecting entails.

The estate can never open, nor the possession of it be claimed by the succeeding or subsequent heir, till one of two things happens; either 1st, That the preceding heir dies, in which case, the next heir can immediately enter into possession, even while he is in a state of apparency, *i. e.* before he expedes a title by service in the common form; or, 2dly, That the heir in possession is ousted and deprived of his right by a declarator of irritancy, and reduction obtained in the Court of Session, at the suit of some one or other of the other heirs called in the destination; for even the remotest heir, having exactly the same title with the nearest to force implement, and to challenge contravention, such heir, however remote, may insist in the suit, to the effect, however, not of bringing the estate immediately to himself, but of bringing it a step nearer to him, by making it devolve on the nearest in succession, who has not contravened. When this happens, the contravening heir is *civiliter mortuus*, and the next heir becomes the *verus dominus* of the estate. But, if he does not choose, after such declarator is obtained, to avail himself of his right, and the former heir is allowed, for another period of forty years, to continue his possession, upon his charter and sasine, however bad, without any new challenge, at the instance of any person, and if the *verus dominus* has not been minor during a part of that time, prescription will again take place, and the Act 1617 puts an end to all inquiry, whether the title is good or bad; nor will the minority of any one of the subsequent heirs, *i. e.* any of those who can only take after the heir in possession, and after the *verus dominus*, who was entitled to possession, be of any avail to stop the prescription; because the positive prescription stands entirely independent of that personal right of challenge, which they have lost by their negligence. If the *positive* prescription were out of the question, and if they had nothing but the negative to struggle with, the argument would be a great deal more plausible, *viz.* that the personal right of challenge could not be lost during their minority, more than any other demand of a personal nature, though even there they would meet with the difficulty already suggested under the second head, *viz.* that a collective body of men is never minor. But we are now speaking of the *positive* prescription, with respect to which the argument is still more conclusive against them, because we are not here to look to contingent interests of any kind, nor to mere personal ground of action, but singly to this, whether the property of the estate is carried from one person to another, from an alleged *verus dominus* to an alleged *quasi dominus*, upon a title by charter and sasine in the last, and possession continued

for forty years without challenge or interruption; against which it is a clear proposition that no minority, except that of the *verus dominus*, can be obtruded.

It is not enough to say, that *Mrs Fullarton* might have taken steps at an earlier period to put herself in the situation of *vera domina*. The answer is, that she did not: and in the mean time, the party in possession continued, in the sense of law, to have the character both of *verus dominus* and *non dominus*.

The positive prescription is much favoured by the law of *Scotland*. It is very different from the Roman *usucapio*, which required only one year in moveables, and two in immoveables, and required no other title but possession. Here we require a title by charter and sasine, confirmed by a possession of forty years without interruption. This we justly presume to be sound, and scarcely admit any thing to be stated to the contrary. The Act 1617 is the great charter of our properties, and ought not to be narrowed.

It is said that, in the case of a devolving clause, when the heir in possession is taken bound, in a certain event, to denude in favour of another, the party in whose favour such a clause operates, is to be considered as the *verus dominus*, whose minority would interrupt.

If this means, that the property becomes thereby transferred *ipso jure*, as soon as the event happens, without action or process to make it effectual, it is believed no such decision will be found. Neither will any instance be found, where minority was allowed as a deduction in the case of a devolving clause, more than a clause of irritancy before decreet of declarator actually obtained. At the same time, in the case of a devolving clause, there is only one individual against another, so that the circumstances are not exactly the same; but till the question occurs, and is formally tried, we can say very little about it.

It is said that *Mrs Fullarton*, having been the nearest heir to the late *Mr Hamilton* of *Bargany*; under the entail, the legal consequence of this contravention was, to give her a direct and immediate claim to the estate; and therefore she is in a better situation than any of the after heirs, and it ought to be held that she was the *vera domina* from the period of the actual contravention, and as the person or party against whom the prescription was running, while it is admitted that the other heirs, who were only *in spe*, could not be so held.

But the argument proceeds upon an evident mistake in point of law. No irritancy operates *ipso jure* without the aid of a decree of the proper Court; and no words, however strong, inserted in any deed of entail, can dispense with this legal and essential requisite. The party who alleges contravention must go to a Court of Law, and make out his proposition; and it happens every day that irritancies, even when incurred, are allowed to be purged. Every defence is allowed against the penal consequence of forfeiture. Thus, if the vassal neglects to pay his feu-duty for two years, or the tenant to pay his rent, the Superior or Landlord may pursue a declarator of irritancy, but he cannot turn out the contravener *brevi manu*, nor will even a simple process of removing be sufficient for the purpose.

In the case of an entail, no lawyer ever dreamt that even the most glaring and palpable contravention could operate without declarator; and even with declarator it is seldom easy to prevail in such a question.

If *Mrs Fullarton's* argument could be supported, she would, on the same grounds, be entitled to the rents of the estate of *Bargany*, from

the period that she says *Mr Hamilton* committed an act of contravention; but her counsel know that to claim these would be a very wild attempt.

Whether she would have been successful or not, in declaring an irritancy against *Mr Hamilton*, we have not at present sufficient materials before us to judge. There are many difficulties, independent of prescription, which might have then, and may still, stand in her way; and it is scarcely fair to take it for granted, before the case is tried, that independent of prescription, she must prevail. But it is no matter whether she would or would not. It is enough to say, no such declarator was brought, far less any decree obtained; and therefore, *Mrs Fullarton* was all along merely *in spe*, just as much as the remotest heir of entail; nor is it possible, in the present question, to distinguish between her and any other heir. The different heirs of entail have a *jus crediti* under it. The heir in possession may be considered as the debtor, and the subsequent heirs as the creditors; and it is to the case of debtor and creditor that the negative prescription applies. But the positive prescription does not apply to that case, but to quite a different one, viz. to that of owner and owner, two contending parties in a right of ownership; or, according to the usual phrase of our Lawyers upon this subject, to a *verus dominus* and a *non dominus*.

It seemed to be admitted, that it would be too much to allow the minority of every subsequent heir to be deducted; but it was said, Why not allow each heir to plead his minority, though he cannot plead that of another? Suppose, then, the heir next to the possession has lived forty years, and twenty of these in minority, he dies, and leaves a son, just born, who consequently must be minor for twenty-one years more, and the succession opens to this person in the eighteenth year; it must be found, according to this system, that he is barred by prescription, viz. the forty years which elapsed during his father's lifetime, whose minority he cannot plead. Yet, had the father happened to be then living, the prescription, according to the same system, would not have been good against him; so that here is a most extraordinary case, where one minority is good, and two minorities of no avail whatever.

But even if we could suppose that this question was originally attended with any doubt, is it not a most grievous circumstance, that a point of law, so firmly established by the most solemn decisions, both here and in the House of Lords, for half a century past, should now be pulled up by the roots? What right have we to set up our own wisdom against that of so many of our predecessors in office? It was said in my hearing, by the late President *Dundas*, that these decisions were approved of by President *Forbes*, old President *Arniston*, President *Craigie*, Justice Clerk *Erskine*, and other great Judges in this end of the Island; and by Lord *Hardwicke* and Lord *Mansfield* in the other.

In the case of *Macdougal* of *Mackerston*, in 1739, the first heir in succession next to the contravener, as well as the contravener himself, was under age, and so was the second heir; but these minorities were not regarded. In the case of *Aytoun* against *Monypenny*, in 1756, prescription was sustained in the House of Lords, and the minority of the substitute next to the heir in possession, though pleaded upon, does not seem to have been regarded.

In the case of *Gordon* of *Whiteley*, in 1784, the whole argument was again heard in presence, and the minority of the next substitute again disallowed. A distinction has been suggested between that case

and the present, *viz.* that there was no irritant clause there; and therefore, the next heir could not have got immediate possession. But this is nothing to the purpose: The argument, both at the Bar and upon the Bench, in that case, did not go upon any such specialty, which, it is believed, was not so much as mentioned. The whole discussion was upon the general topics already suggested; and it is clear that the heir, whose minority was objected, had the first and most immediate interest in the question, whether possession could immediately be attained or not? In the former case of *Macdougall*, there was no want of any of the clauses, and yet the judgment was the same.

Last of all followed the case of *Auchindachy* against *Grant*, in 1792, which was also in point to the present case; but the prescription was sustained, and the deduction of minority over-ruled, both here and in the House of Lords. The argument, indeed, was very slight upon either side in that case; but why was it so? Because it was considered as a point at rest.

[*N. B.*—Two sets of Notes of the two following Speeches were taken. Both are here given. No. I. on the part of the Respondent.—No. II. on the part of the Appellant.]

No. I.

NOTES of the SPEECHES of LORD THURLOW and the LORD CHANCELLOR, in the BARGANY CAUSE, 18th December 1797.

(Taken by a Person employed by Mrs Fullarton.)

LORD THURLOW.—I shall not need at present to enter into all the topics in this cause, which were discussed at the Bar; for there are some of the points nearer and more material to the merits.

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

I shall now state to your Lordships the subject of this cause, and the several points which it contains. I wish my health had permitted me to investigate them with more accuracy, and that it had not made

me forget some part of the argument which has been urged: but I believe I have not forgot any material part of it.

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

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

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

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

This deduction of minority, the respondent pleaded upon the act 1617. This statute introduced the *positive* prescription, as it is called, into the law of Scotland; and it enlarged and corrected the *negative* prescription. The negative prescription is a title, in bar of all action for claiming a right after the lapse of forty years. This is the only sort of prescription known in this country; and it is the only sort known in the Roman Law; the *positive* prescription then introduced into the Law of Scotland, was novel in that country, and is unknown in all others. This, instead of applying the prescription to the *person*, applied it to the *possession*, whether upon a good or bad title, and made the lapse of forty years a sufficient confirmation of it. I have considered this act 1617, with as much attention as I could; and, if it had fallen upon me to decide the question, I should

have held, that the last clause in the act relative to the deduction of minority, had a reference only to the *negative* prescription; not only because the grammatical construction required such an interpretation, but because the exception is contrary to the nature of the *positive* prescription. But this point was decided differently a long time ago. It is not impossible to interpret the statute so as to justify that decision; and it would be dangerous to bring the matter into question now.

What is the effect of this decision when applied to entails? Mr Erskine said at the bar, that they were excepted from this rule, otherwise they would never prescribe; but all difficulty is cleared by this, that every heir of entail has an independent right of action; and thus prescription will apply to him, as well as to a stranger; and so I think it does. It was insisted, that it would be inconvenient to allow deduction of minority to all the substitutes in an entail: for, on account of their number, the prescription would never run. This reasoning, however, proceeds upon a mistake; for no case could occur where the prescription could run to more than sixty-one years, as every substitute has an independent cause of action; and as he must come within forty years of the original cause of action, it is not worse to allow the deduction of minority to all the substitutes than to one individual, against whom the prescription could only run for 61 years. If not in existence at the time of the contravention, the prescription would begin to run till his existence. It would then be suspended during his minority: and, by the statute, it is only the years of minority that fall to be deducted, which would still keep it within the limits I have mentioned.

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

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

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

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

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

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

But what can your Lordships do here? Several material questions, it appears to me, must be solved before we can do any thing. 1*st*, Whether the present action be not *jus tertii* to the respondent, whose right, under the original entail, was not prejudiced by the alleged contraventions.—2*d*, Whether it be possible to qualify a forfeiture against Sir Hew, for himself and his children, after his own death; there is a great difference between the competency of an action for replacing an estate under an entail, and the forfeiture of that estate for contravention.—3*d*, Whether the renunciation by Sir Hew could amount to a forfeiture for himself and his issue. In the summons in the present action, that deed is called a disposition of the estate to John Hamilton, *a stranger;* and the summons afterwards states the transactions of John to amount to a forfeiture, because he was *not a stranger* in the estate. If I were to agree with the majority of the Court in the present question, that the respondent is in the situation of a person who could obtain a decree to serve heir, I could not learn how this conclusion was to be drawn. This plea, which was set up by the defender, goes to a bar of the pursuer's action; and if the summons, and what is there stated, do not bear out the action, the plea is nonsense. According to the interpretation of the majority of the Judges, Mrs Fullarton is only entitled to deduct her minority *hac ratione*, because she is first substitute; but how do they know this? what *termini habiles* have they for their opinion? It was said, if I understood the argument aright, that what she has alleged as to her title to call for production of the papers, must be considered as waved; and that the defender, by putting in his plea, must be considered as an *actor pro hac vice*. But there was no way to learn whether she was first substitute or not, but because she had stated so in her summons; and, no doubt, if she had stated a sufficient title, she would have a right to call for production. But all this remains as I have already stated it; and the Court must have pronounced that she is first substitute, in order to apply *termini habiles* to their judgment; and, at same time, it appears from the judgment itself, that the consideration of that matter has hitherto been rejected.

But I am not prepared to pronounce that the respondent is first substitute, without first pronouncing that the matter of her libel makes her so. The consideration of this point has hitherto been much waved, as I said before. Mr Erskine contended at the Bar, that we must take the judgment as it stood, and that we might go to the consideration of that proposition, whether she be first substitute or not. I, however, remember a rule upon that subject, which was laid down by these eminent characters, Lord Hardwicke and Lord Mansfield, when they sat in this House. They would not pronounce judgment on any point not already discussed in the Court below; and they considered the province of a Court of Appeal to be, to say whether the judgment was right or wrong, upon what had passed in the cause.

I should think it wrong, in the present case, for a Court of Appeal to enter into this point, especially as it relates to the law of Scot-

land, with which your Lordships are not so intimately acquainted. I should think it the safest mode, to remit the matter to the Court of Session, to have it fairly stated and discussed, before being drawn to a determination upon it.

LORD CHANCELLOR.—The Noble and Learned Lord has so effectually disentangled this cause from the difficulty in which it was involved, that nothing remains for me, but to express my acknowledgments for his accuracy in resolving my doubts.

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

In an action of declarator, it is not, in general, necessary to enter further into the title of the pursuer, than was done in the present case. There, if it be contended that the title of the pursuer is bad, because a possession of forty years has run against it, the only question will be, whether or not such possession has been had? But the case is different, where the action arises between *privies* in blood, where the pursuer sets forth the entail, and certain acts of the other party, which are stated to be contraventions: and the conclusion is thence drawn, that she is heir of entail entitled to take possession. In the present cause, that point is nowhere determined; but, according to the printed opinions of the Judges, there is not one who does not go to the full extent; that if Mrs Fullarton be a remote substitute, she would not be entitled to deduction of her minority.

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

No. II.

NOTES of the OPINIONS of Lord Thurlow and the Lord Chancellor, in the Bargany Cause, December 18, 1797.

(As taken by the Appellant's Solicitor.)

Lord Thurlow said—He had never attended a cause with more dissatisfaction. It was involved in the practice of the Court, and the course of the pleading there adopted. The merits seem to be gone off from, and the decision is rested on a point collateral.

He then stated the facts alleged;—the entail 1688;—the pursuer was the tenth substitute under that entail; for Sir Hew Dalrymple, the appellant, and all his children, and Mr Hamilton, were before her by the entail;—mentions her action, the first object of which is to compel production of certain writings. In her summons, after stating the entail, and Sir Hew Dalrymple's (father of the appellant) succession, a deed he had granted is mentioned,—a renunciation or repudiation of the succession, but under a quality or condition which his Lordship desired might be particularly noticed;—mentions Mr John Hamilton's title:—all this charge relates to the mode of succession, or of the estate being taken by the persons who stood beforet he pursuer;—her interest was not at all affected by these transactions;—she stood in the same degree as before.

By virtue of this transaction, Mr Hamilton enjoys the estate peaceably, till 1794, when the pursuer brings her action, after the years of prescription had apparently run. The defence is, investiture 1742, and possession under it, form a prescriptive title. The reply is, minority; and the interlocutors appealed from allow this plea.

In considering whether this plea ought to have been allowed, it is necessary to attend to the terms of the act 1617. That was a law correctory of, or enlarging the former law, as to the negative prescription; it introduced a novelty in the law of Scotland—the positive prescription, which he believes is still unknown to the law of any country but Scotland.

Were the question entire, his Lordship said, he would be strongly inclined to the opinion, that the exception respecting minority, only applied to the negative prescription. In forming that opinion, he did not go merely on the grammatical construction, but on the reason of the thing; it is repugnant to the principles on which the positive prescription rests, to allow it to be cut down or suspended by minorities; but that has been otherwise settled. It would be dangerous to allow it to be questioned now, at the same time there is great inconvenience from the construction adopted.

Much has been said of heirs having only *spes successionis*; he understood by a *spes successionis*, something that gave no right of action; it does not apply to the case of estates tailzie. Quotes passage from Erskine's Institutes, as to that sort of right, which is in every heir essential. Agrees with Mr Erskine.

As a reason for not allowing substitutes to plead minority, it has been said, in that way prescription might never run, because there

might be always minors. How this has been alleged, he could not say, for to him it appeared, that the utmost time in any case could not go beyond sixty years.

If the case were new, he would have no difficulty in saying, that the respondent's minority must be allowed, even considering her as a remote substitute; but this seems contrary to the opinion of all the Judges; for, even those favourable to her, avow it, that the favour is merely as the next substitute. Those of the Judges who were against her, thought it of no consequence, whether she was the nearest or a remote substitute.

His Lordship then referred to the case of Sir Samuel Maclellan's children, and said, he could not assent to that decision, or think it bore much on the present case.

The right to sue in substitutes has been said to belong to a body, and one might suffer by the neglect of others; he could not assent to this, or go into the idea of the heirs of entail being a *familia*.

The real question seemed to be, how far it was settled by the decisions, that minority could not be pleaded in such a case as the present? He confessed himself at a loss to know the grounds of those decisions. The reports were defective, particularly in not stating dates, to shew the births and minorities of the several heirs.

His Lordship then went into a long account of the Mackerston case.

The case of Kinaldie seemed to have no relation to the present.

Made some observations on the Whitely and Kincraigie cases. Seemed to lay little stress on the last, as the decision was well grounded on separate points.

In this singular way in which this cause has been taken up in the Court below, what can this House do?

What has Mrs Fullarton to complain of? Whether Sir Hew Dalrymple and his family, or Mr Hamilton, took first or last, seems *jus tertii* to her.

Sir Hew, she says, forfeited. It is necessary that this should be judicially declared. Can it be declared, now that he is dead? Professes to have great doubts if it could.

Entertains much doubt if the repudiation can infer a forfeiture. Mrs Fullarton calls it a disposition to John Hamilton, an extraneous person; and next, when she wants to be rid of him, she says he forfeited, because he was an heir who accepted of the repudiation.

Her plea must be referred to her summons. The decree finds her entitled to deduct her minority, because she became next substitute. How did the Judges who were for this decree find out that she was next substitute? They assumed it, it is said. If she had stated facts from whence that necessarily followed, he would have understood them; but as it is not a necessary inference from the facts alleged,—as it is a point yet to be discussed,—a point in law not decided by the Court below, his Lordship said he was not prepared to pronounce,—nor did he think this House could pronounce, or hold her to be the nearest substitute. Before doing so, their Lordships must be satisfied, that she has stated enough to prove it, and as this has not been decided upon yet by the Court below, the appellate jurisdiction cannot interfere. Every thing in law has been waved or assumed by the Judges who were for Mrs Fullarton, when they ought to have assumed nothing except facts.

He therefore concluded by proposing, that the cause should be remitted, in order that the Judges might boldly and plainly state the legal principles applicable to the facts stated, on which the decision of it should be ultimately rested.

Lord Chancellor said, he agreed with Lord Thurlow, who had left little for him to add. Professes he has not been able to distinguish the principles, or even the grounds of the decision. The cause had been taken up as a simple abstract question, all the *data* being taken as granted or assumed. On the contrary, it appeared to him a very complicated question. The Judges who were against the interlocutor, say, that no substitute heir is entitled to deduct the period of minority; the others conceive, that the nearest substitute is entitled, and then they assume, that Mrs Fullarton was the nearest; but her summons of declarator does not show her to be the nearest,—at least the Court has not decided that this has been shown. It is not determined that the contravention alleged had the effect to make her the nearest substitute.

On the whole, therefore, he concurred in thinking it necessary that the Court below should review the interlocutor, and, if they continued of the opinion that the decision was right, that they should set forth the grounds, deciding upon, and not assuming them.