ceive it expedient to propose to your Lordships as a fit judgment in this case."

It was ordered and adjudged, that all the interlocutors complained of in the appeal, so far as the same relate to the lands and subjects contained in the charter of 1774, or in any similar titles, be, and the same are hereby affirmed; and it is further ordered that the cause be remitted back to the Court of Session to review all the interlocutors, so far as they respect the effect of the service of Earl David in 1776, with regard to the lands of Enoch and Little Enoch, the lands of Portmark and Polmeadow, the tenements of Maybole, and teinds conveyed by Craufurd of Ardmillan, or any other lands or subjects, the title to which is in dispute in this cause, if any such there be, not ruled by the foresaid affirmance; and to hear the parties again as to the effect of the said service as to the said lands and teinds, and as to the right to the said lands and subjects, and to do thereupon as the Court shall seem meet.

For Appellant, *Sir Samuel Romilly, Cha. Hay, Math. Ross, John Clerk.*

For Respondents, *Wm. Adam, Ad. Rolland, H. Erskine, D. Cathcart.*

NOTE.—For subsequent appeal in same case, vide infra. Two later decisions are reported by Baron Hume, Ogilvy *v.* Ogilvy, 5th June 1817, Hume, p. 724, and the Duke of Queensberry *v.* The Earl of Wemyss, 21st Jan. 1819, Hume, p. 727, of great importance in this branch of law. The recent act 10 and 11 Vict. c. 47, regarding services, provides, that persons who claim to be served heir of provision in general or in special, the deed under which they so claim must be distinctly mentioned.

[Fac. Coll. Vol. xii. p. 408.]

JAMES ROCHEID of Inverleith, - - *Appellant;*

SIR ALEX. KINLOCH, Bart., and Others, - *Respondents.*

(*Et e contra.*)

House of Lords, 28th May 1805.

OBLIGATION TO ENTAIL—PRESCRIPTION—INTERRUPTION—MINORITY.—In executing a settlement in the form of an entail, a certain portion of the lady's estate was directed to be sold, and, after paying debts

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and legacies, the surplus ordered to be laid out in the purchase of other parts of the land to be entailed. The disponees, under this deed, uplifted the funds, a great proportion of which consisted of heritable debts and houses, but the money was never applied in the purchase of land as directed. The forty years' prescription elapsed. In an action brought to compel fulfilment of this obligation, Held that prescription of forty years had extinguished the obligation, except as to part of the heritable estate, to which a title had been made up within the forty years, and the debts, of which it was composed, paid.

Sir James Rocheid of Inverleith died, leaving one son and four daughters, Magdaline, Janet, Mary, and Elizabeth. On his son's death, without issue, the estate descended to his four daughters equally, share and share alike. Magdaline was married to Colonel Cathcart, and Janet to Sir David Dalrymple of Hailes, and their shares descended to their sons. Mary, one of the daughters, was married to Sir Francis Kinloch of Gilmerton, by whom there was numerous issue—three sons—of whom the appellant's father, Alexander Kinloch, afterwards Rocheid, was the third son.

Elizabeth, the youngest daughter of Sir James Rocheid, never married; and having, besides her one-fourth share of the estate of Inverleith, acquired, by purchase, right to another fourth of the estate, she was feudal proprietor of the Inverleith estate to the extent of one half.

In these circumstances, and anxious to perpetuate the name of Rocheid of Inverleith, she executed a settlement
Jan. 14, 1749. and deed of entail, by which she conveyed to Alexander Kinloch, third son of Sir Francis Kinloch of Gilmerton, and father to the respondent, and the heirs whatsoever of his body, whom failing, to a series of substitutes, (being the issue of her sister Mary's marriage with Sir Francis Kinloch). The entail contained the conditions of bearing the name and arms of Rocheid of Inverleith, and was fortified with prohibitory, irritant, and resolutive clauses.

By a separate clause in the same deed, out of which the present question arises, she did "assign, transfer, and dis-
"pone to and in favour of the said Alexander Kinloch, and
"the heirs whatsoever of his body; whom failing, to the
"other heirs of tailzie and provision above specified, ac-
"cording to the order and rules of succession above ex-
"pressed; whom all failing, to my own nearest heirs and
"their assignees, with and under the conditions, provisions,
"reservations, power and faculty after mentioned, all and

" whole those two dwelling houses and cellars lying in " Merlin wynd, with their pertinents; as also all and whole " my other lands and real estate, heritable and moveable " debts and sums of money, &c. resting pertaining to me, or " that shall be resting owing to me at the time of my de- " cease, with all dispositions, &c., dispensing with the gene- " rality hereof." Declaring he and they should " be bound " and obliged *to pay all the debts, legacies, and other dona-* " *tions* which shall be due and bequeathed by me at the " time of my death; *and, after payment thereof*, shall be " bound and obliged to bestow and employ THE SURPLUS of " the said heritable and moveable debts before disponed, " and the price of the said house, so far as belongs to them, " when sold, for purchasing and acquiring the remainder of " the said estate of Inverleith and Darnchester, with the " pertinents above specified, from those who shall have right " thereto for the time (in case they shall incline to dispose " of the same), and that to the value and extent of such " surplus."

On Mrs. Elizabeth Rocheid's death, which happened on 8th Dec. 1753, Alexander Kinloch succeeded, as institute in the entail of the Inverleith estate; and also to the other heritable and moveable estates above disponed, the most valuable part of which consisted of heritable bonds to the amount of £6000 and upwards. Dec. 8, 1753.

It was conceived that the conveyance of this part of the estate to Sir Alexander was absolute—that he had unlimited power over it, being only bound to account to the substitutes in the entail, if called on to do so in due time. Alexander, the appellant's father, therefore, completed titles to the entailed estates separately. He confirmed to the moveable estate, and had recovered several of the bonds, and had paid off her debts, legacies, and donations, when he died, without having made up any feudal title to the heritable subjects generally, conveyed by Mrs. Elizabeth Rocheid's disposition. He left a settlement, assigning and disponing to the appellant, " and the heirs of his body; " whom failing, to his second and third sons, and the heirs " of their bodies; whom failing, to his own nearest heirs " and assignees whatsoever, all and sundry lands, heritages, " annual rents, liferents, woods, fishings, adjudications, " debts, sums of money, &c., both heritable and moveable, " which should pertain and belong to him at the time of his " death." The appellant was confirmed, and gave up in his May 14, 1755.

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tutorial inventory the debts due to the late Mrs. Elizabeth Rocheid, amounting to £6000 nearly.

The appellant's father, as already said, had a complete personal right to the heritable part of Mrs. Rocheid's estate, which he effectually transferred by the above general disposition to the appellant. In February and July 1756 his tutors completed his title to this estate by adjudication in implement, against Mrs. Rocheid's heirs, adjudging from them the said subjects. The subjects so adjudged from the heirs of Mrs. Rocheid were, 1. An heritable bond for £3000 due by the Earl of Kinnoul. 2. An heritable bond of £6000 Scots, of which there was due £125 by the Earl of Home. 3. The half of a dwelling house in Craig's close, Edinburgh. The house in Merlin's wynd was specially conveyed to the appellant's father, so that no adjudication was necessary as to it. The decree in the above adjudication bore special reference to the entail, and to the purpose for which these debts were to be applied.

With regard to Mr. Baird of Newbyth's debt, it was the only debt unuplifted by his father at his death. In 1772 this debt was paid to the appellant, as executor of his father, not as disponee of Mrs. Rocheid. The debt due by the Earl of Kinnoul, the appellant's tutors, after expeding a crown charter under the above adjudication, received payment, and discharged the debt in 1757. The Earl of Home's debt stood in the same situation, and was paid to the appellant in 1771. A feudal title had been made up by his father to the house in Craig's close, but, in February 1754, he concurred with the proprietor of the other half in selling that house for £800, and having made up his titles by adjudication as above, the price was paid to the appellant's tutors in 1758. The appellant's father had a complete *personal* right to the house in Merlin's wynd, which he effectually conveyed by his general disposition, but no steps were yet taken to complete the feudal right until 1787, when that

May 24, 1787. house requiring to be sold, he granted a disposition, after attaining age, of the three-fourths of the said house to Kinloch's trustees, to be applied under the purposes of the deed of entail.

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Nov. 23 and 25, 1796. Of this date, and more than ten years after the death of Mrs. Elizabeth Rocheid, the respondents, substitute heirs of entail under her tailzie, brought the present action against the appellant to account for his own and his father's intromissions with her effects, and to compel him to lay out the

surplus thereof in the purchase of lands, as directed by her settlement. The defence stated was, that the respondents' right of action was cut off by the negative prescription of forty years, which operated as a discharge of the personal obligation contained in the tailzie. Three questions were thus debated, 1. Whether there was in this case *termini habiles* for the plea of prescription; 2d. Whether the prescription was interrupted as to all or any of the funds in question by the acts of administration had; and, 3. Whether the respondents were entitled to insist that their alleged minorities should be deducted.

In regard to the first point, the respondents contended that tailzies existed before the statute 1685, and were recognized as a part of the common law. That this act only imposed certain restrictions and regulations on the common law as previously existing. And, assuming that this part of Elizabeth Rocheid's estate must be viewed as moveable, there was nothing to prevent a person from making a tailzie of his moveable estate. It may be more difficult to make tailzies of moveables effectual against third parties, or even *inter hæredes*. This, however, arises, not from want of power in the disponer, but in the nature of the subject. It was not essential to the nature of an entail, that it should be effectual against third parties; and though an heir of entail, in possession of a moveable estate, may *de facto* contrive to dilapidate or spend it, he is no more entitled *de jure* to do so, or to divert it from the order of succession among the different substitutes, than if it were a tailzied land estate. When Mrs. Rocheid's settlement is considered in this light, it will be seen at once that it is a virtual entail of the funds in question, by which these funds are conveyed, in the first place, to the appellant's father, who was not Mrs. Rocheid's heir *alioquin successurus*, and, after his death, they are destined to a series of substitutes, who were not his heirs *alioqui successuri*. Besides, the appellant's father was positively directed to execute an entail of the lands so to be purchased with the surplus fund; and this direction to purchase and entail lands upon a certain series of heirs, was not merely a personal obligation upon the appellant's father; but it was the condition upon which the funds were conveyed to him. And the general disposition which the appellant's father executed in his favour cannot affect this fund, nor alter the right of parties. The settlement of Mrs. Rocheid was his father's sole right to these funds, as well as his

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own, and he cannot plead a prescription of that title. *Second*, Even if prescription applied, it has been interrupted in two ways. 1. As to some of the funds, by the titles which the appellant made up, and the infeftment of the house in Craig's close, &c., within the forty years. 2. As to others of the funds, by the circumstance of his tutors having uplifted them within the years of prescription. Besides, he completed his title to the moveable estate beyond the forty years, and also made up title by adjudication in implement, which bears date beyond the forty years. It was therefore argued that these titles were an interruption of prescription, because they acknowledged the original obligation to entail these funds, and amounted to a renewal of the obligation. Besides, there is a second kind of interruption, within the forty years, namely, the uplifting the debt of Baird of Newbyth and Earl of Home. *Third*, And supposing interruption not made out, prescription still did not apply, because of the respondents' minorities—the general rule being, that every creditor in a personal obligation is entitled to have his minority deducted; and it is no answer to this to say, that the respondents are an aggregate body, and heirs substitutes merely, because minority is a bar as much in the one case as the other. To this the appellant answered,—*First*, On attending to the nature of the funds in question, and to Mrs. Rocheid's settlement, it is evident that these funds, including the price which might be obtained for the house directed to be sold, were not capable of being entailed; and that, in point of fact, she did not execute, nor intend to execute any such entail of these funds. Tailzies, besides, of moveable funds are unknown in the law of Scotland, and are confined solely to heritable subjects, and generally to landed estate. *Second*, This necessarily reduces the obligation contained in her settlement to a mere personal obligation, which being prescribed by the negative prescription of forty years, is no longer binding on the appellant. There has been no interruption of this prescription, neither by the completing title and infeftments alluded to, nor the uplifting certain funds within the forty years. These can never be construed, under the statute, as amounting to taking of document by the creditor upon his obligation of debt. These were mere titles made up to different debts, and the making up of these titles is rather to be ascribed to the appellant's absolute right than to prove that the obligation in this deed of entail and settle-

ment is a subsisting obligation. And it cannot be maintained, that because certain debts were uplifted, that this is equivalent to a document taken in favour of the respondents. *Third*, Nor can the minorities pleaded form a deduction from the prescription, because substitute heirs of entail are not entitled to have their minorities deducted, which, if otherwise the case, and allowed to them as a body, such obligations could never prescribe. And, in support of this plea, he refers to the cases of Mackerston, Kinnaldie, Whiteley, Auchindachy.

The Lords pronounced this interlocutor: "Sustain the defence of prescription pleaded by the defender *against a general accounting*; but repel the defence of prescription so far as concerns the debts *originally* due by Mr. Baird of Newbyth and Earl of Home, and the price received from the trustees for building the South Bridge for the house in Merlin's wynd: Find the defender bound to account and to apply these sums in terms of Mrs. Elizabeth Rocheid's settlement, and remit to the Lord Ordinary to proceed accordingly." Dec. 18, 1799. On reclaiming petition, the Court May 27, 1800. adhered to their former interlocutor, but remit to the Lord Ordinary "to hear parties further on the defence of prescription, in so far as concerns the debt due by the Earl of Kinnoul, the price of the house in Craig's close; and also so far as concerns any other debts in *pari casu*, reserving always to Mr. Rocheid his objections to being liable to such debts as accords, and with power to his Lordship to determine therein as to his Lordship shall seem just."*

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* Opinions of the Judges.

Lord President Campbell said:—"According to the principle of the last judgment, it is now pretty clear that Lord Kinnoul's debt, and the price of the house in Craig's close, stand in the same situation with the particulars mentioned in the interlocutor. As to the bank shares, &c., the circumstances are not explained, and no sufficient evidence appears about them, and therefore the question, as to them, seems to depend on the general count and reckoning, namely, Whether the general accounting is barred by the negative prescription? This again may depend on another point, viz. Whether there was here a partial interruption, sufficient to keep open the prescription as to the whole? In certain cases partial interruption has such effect. But partial payments or acknowledgments of debt may or may not, according to circumstances, have that effect, see Kilkerran, *Voce* Prescription. In the present case, the settlement has, in numerous par-

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Against these interlocutors, in which these opinions were given, the present appeal was brought by the appellant, in so far as they repel the defence of prescription in regard

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ticulars, been homologated and implemented within the years of prescription; but I doubt if it can be inferred from thence, that in other particulars it was not already satisfied, especially as general sums have actually been applied, and debts and legacies were to be paid. In short, a more general count and reckoning seems to come too late, unless it can be barred by minorities, as to which, see the argument in the Bargany cause.

"This argument supposes a tailzied succession, and a *jus agendi* arising out of it, which being not of the nature of a specific demand for payment, or for possession, belonging to an individual, but a remedy given by the law to a class or description of men, does not admit of the deduction of minority, otherwise it would be unprescriptable.

"As to the particular subjects which have been traced as falling under the settlement, and which continued to be possessed or enjoyed in the express terms of it, by the late Mr. Rocheid and the defender himself, till within the years of prescription, and some of which may still be in his possession, it is thought the action does not come too late.

"The houses in Merlin's wynd were specially conveyed. The other subjects by general description. But the house in Craig's close, and the two heritable debts, were taken up by adjudication in implement, upon the title of a service to Mrs. Elizabeth Rocheid, and the adjudication was expressly in terms of the settlement. All these subjects, therefore, were taken and possessed under the destination contained in the settlement, and with a reference to the clauses and conditions therein. They were, therefore, held as tailzied subjects, and as the defender was not limited in point of time with regard to the power of disposing of them, and purchasing lands in their place, to be added to the entail, so, while he continued to hold them in that manner, upon the original securities, and upon the titles made up by himself as heir of entail, it cannot be said that he, in any shape, counteracted (contravened?) the entail, or did any thing which should have given rise to an action against him, at the instance of after heirs, for a more full and complete implement.

Earl of Dalhousie *v.* Maul, 1 Mar. 1782. Mor. 10963.

"In the case of Lord Panmure's settlement, and particularly on the question regarding the leases (1st March 1782,) Earl of Dalhousie, it was laid down that the law did not require an action merely to interrupt prescription, when nothing beneficial could be taken from it. That an action was no doubt competent to oblige the heir in possession to make up titles under the tailzie; but if the heir had already made up such titles, or if it was a subject which did not require any title to be made up, such as a lease, the action

to Baird of Newbyth's debt, &c. And a cross appeal was brought by the respondent, in so far as it sustained the defence of prescription to a general accounting.

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became unnecessary ; and there was no occasion to make any claim till the succession opened, or till something was done by the heir in possession contrary to the tailzie.

" In the present case, the respondent and his father did every thing in implement of the tailzie, and did nothing contrary to it, so far as regards the particular subjects thus taken up by them, unless in so far as some of them may have been misapplied, or made away with, within the years of prescription.

" The defender succeeded to, and held these subjects as heir of entail, and, by the nature of the settlement, he could not dispose of them without re-employing the money in the same terms, or in purchasing land to be added to the entailed estate. In so far as he lay under these obligations, he, in effect, was a trustee for all concerned in the succession ; and as we find him in possession of the individual subjects within the years of prescription, so, if he did any thing contrary to his trust, it must have been within that period, and he is still open to challenge.

" In the case of Lady Crauford against Mr. Lockhart of Lee, 28th Jan. 1778, the period when the trust was supposed to have been counteracted, and the succession frustrated, was held as the *terminus a quo*, and it was not supposed to be necessary to go back to any former period.

Pollock (Lady Crauford) *v.* Porterfield, Widow of Lockhart of Lee, Jan. 28, 1778, Mor. 10702

" The death of Mrs. Elizabeth Rocheid in 1753, is the period when the trust commenced, and from which time there was no doubt a possibility of the trust being abused, and therefore it is said we must date the prescription from that period. In one sense this is true ; but it supposes that there was a non-implement from the beginning, or that something was done which should have given rise to an action for implement ; but what room is there for such an action, when the heir has, in fact, proceeded in due course of carrying the settlement into full execution, when he makes up his titles accordingly, while he continues to possess under it, and so long as he takes no step whatever to the contrary ?

" It is said in the petition for Mr. Rocheid, p. 8, 10, 23, &c., that Mrs. Elizabeth's subjects were vested in the late Mr. Rocheid and his son, the defender, absolutely, that their creditors were entitled to attach them, and that there was nothing more in the heirs of entail than a mere personal claim of debt, or damages founded on the settlement. But this is a mistaken view of the case. The subjects never were vested in them absolutely, but under titles qualified and limited by the clauses in the settlement, and, so long as they continued to have only a personal right to these subjects, their creditors could not, by adjudication or otherwise, take any better right out of them, this being a general rule as to personal rights. It is

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On appeal the same argument was repeated.

After hearing counsel,

THE LORD CHANCELLOR (ELDON) said,

" My Lords,

" This is an appeal against certain interlocutors of the Court of Session, in a question, whether the appellant, Mr. Rocheid, should be obliged to account for certain sums of money received by him, in terms of a trust deed executed by Mrs. Elizabeth Rocheid in 1749?

" The matters at issue in this cause are comprehended in the following interlocutor. The respondents having presented a petition to the Court, praying for exhibition of the Sederunt Book of the appellant's tutors and curators, to ascertain the extent, receipt, and application of Mrs. Elizabeth Rocheid's funds, the Court, on 17th December 1799, 'refused the desire' of that petition '*hoc statu.*'

" On the 18th December 1799, the Court pronounced this interlocutor on the whole cause. (Here his Lordship read the same.)

" Both parties reclaimed against this interlocutor; the prayers of their several petitions were, &c. (Here his Lordship read same and subsequent interlocutor, 27th May 1800.)

" The original appeal is brought against the interlocutor of 18th

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true, that after completing the feudal rights by charter and sasine, the defender might have disposed of it, and a creditor or purchaser dealing with him upon the faith of the record, would have been safe, if the tailzie was not completed in proper terms, and duly recorded in the register of tailzies. But there was no such feudal right completed till within the years of prescription, the sasine upon the charter of adjudication having been expede no earlier than 29th Dec. 1756, and the present action commenced 20th Nov. 1796. This also would be an objection to the positive prescription, to the effect of working off any of the limitations of the tailzie, but no such thing is pleaded by the defender, and there does not seem to be any room for it.

" The negative prescription does not even commence so early as the date of that infeftment, nothing having been done contrary to the tailzie; but, on the contrary, a step taken in implement of it. There was truly therefore a *non valentia agere*, or, which is the same thing, the action would have been nugatory and useless."

LORD HERMAND —" I think the whole right of action lost in this case."

LORD MEADOWBANK.—" I think the minority interrupts the prescription here."

LORD CRAIG.—I doubt if there be any prescription pleadable."

LORD CULLEN.—" I am of opinion that the negative prescription has run against the obligation."

LORD METHVEN.—" There is no prescription run here."

Lord President Campbell's Session Papers, vol. 97.

December 1799 and 27th May 1800, in so far as they do not sustain the defence of prescription against the whole accounting, and the respondents, in due time, presented their cross appeal against the interlocutors of 17th December 1799, which refused to order production of the Sederunt Book, and against the interlocutors of 18th December 1799 and 27th May 1800, in so far as prescription was thereby sustained to any extent.

"To explain this case to your Lordships, I must begin with stating the deed executed by Mrs. Elizabeth Rocheid in 14th January 1749. The first part of this deed contained a strict entail of certain shares which she had of an estate in Scotland, in which the appellant's father, Alexander Kinloch, was named first institute. In the next place, she conveyed her money, houses, and other property, to Alexander Kinloch, and the other heirs of tailzie and provision mentioned in the first part of the deed, with this proviso. (Here his Lordship read the whole of the proviso contained in this deed, stated in the appellant's case, p. 2.)

"In an infeftment of this kind, in this country, no doubt the person first mentioned would take the whole trust property; but he would hold the whole as a trustee, and every time he transacted as to any part of the trust property, he would be held as acknowledging the trust *in the whole.*

"By the law of Scotland, tailzies, with prohibitory, irritant, and resolutive clauses, are so guarded as to be almost impossible to break them; but if not expressly so guarded, nothing is prohibited by implication. The question that arises here is, in my opinion, very little like any that has hitherto been decided upon entails; it is an attempt to place in the hands of a Scotch executor, for his own private use, a sum of money, directed to be laid out in lands, to be settled under a tailzie. As far as this case has been discussed in the Court of Session, it appears to have been discussed with little reference to what the law of that country may furnish with regard to trusts, or what might have been furnished by analogy from the law of this country.

"Instead of treating this question directly, as one of trust, they go into the law of prescription, and they say Mr. Rocheid's character of executor enabled him to take the funds into his hands, and that the substitutes had a claim against him to have them laid out in terms of the deed; but that, if he did not deal with these funds, so as to acknowlege a trust, the claim of the substitutes was cut off by prescription. The principle laid down in this interlocutor is, that as to every sum the respondents can prove that the appellant uplifted within the forty years, he was bound to account, but that he was not bound to show, by the production of his tutor's books, any account as to payments beyond the forty years, whether he did lay out the money in securities, in terms of this deed, or not. The effect therefore, on the whole is, that the Court has sustained the defence

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of prescription generally, but if a right accrued to the claimants within the forty years, they have said that they had a right to an account as to such right so accruing, and have directed the Lord Ordinary to take such account.

"It appears to an English lawyer extremely difficult to sustain all the parts of this judgment. It appears a most singular proposition, that if a large personal estate is given to be laid out in land, and a long period of time elapses in recovering the different items, and, till the whole is collected, no demand is made that any part of this should be cut off by the statute of limitations, and that the accounting should be confined to that uplifted within the forty years.

"The view, therefore, which I have taken of the case, is to affirm those parts of the judgment which respect the accounting within the forty years. On the other branches of the cause several points occur, which to me seem of very great importance.

"One of these is, Whether you are entitled to call for papers and books to see if the trust was admitted, and if the new securities did not bear in *græmio* an acknowledgment of this trust? The Court of Session has not formally and finally decided as to this, but only in *hoc statu* refused to order production. The judgment appears to me to be clearly right as to the items within the forty years; as to the other items, if the parties have a right to see the papers, it is impossible to say if the appellant shall be assoilzied from a general accounting or not. If I were to speak my own opinion on this, (which I should do with great reserve,) it appears to me that the party had a right to see the papers; but I wish this to be examined by those whose means of information on the law are better than mine.

"If it be necessary to remit as to this, it will also be necessary that the Court have an opportunity of reviewing as to the general accounting.

"I pass over, at present, those other very difficult and important questions, if the prescription ought or ought not to have been overruled; and if there are any grounds for discounting the years of minority? This point, of the deduction of the years of minority, has lately been much considered by your Lordships. I allude to the late case of Bargany, in which some of your Lordships' House, now no more, and others now absent, took much interest. It would ill become me to express my opinion here upon this point; and I never shall decide it till it comes before me directly decided by the Court below."

His Lordship hereupon moved the remit to the Court of Session to review the different interlocutors under appeal.

It was ordered and adjudged, that so much of the interlocutor of the 18th Dec. 1799 as repels the defence of prescription pleaded by the defender, in so far as concerns the debts originally due by Mr. Baird of Newbyth

and the Earl of Home; and the price received from the trustees for building the South Bridge for the house in Merlin's wynd; and finds the defender liable to account, and apply these sums in terms of Mrs. Elizabeth Rocheid's settlement; and so much of the interlocutor of the 27th May 1800, as remits to the Lord Ordinary to hear parties farther on the defence of prescription in so far as concerns the debt due by the Earl of Kinnoul, the price of the house in Craig's close, and also in so far as concerns any other debts in *pari casu*, reserving to Mr. Rocheid his objections as in the said interlocutors is mentioned, and with power to the said Lord Ordinary to determine therein as to him should seem just, be, and the same are hereby *affirmed;* and it is further ordered that the cause be remitted back to the Court of Session to review their interlocutor of 17th Dec. 1799, and also to review as much of their interlocutor of 18th Dec. 1799 as sustains the defence of prescription pleaded by the defender against a general accounting, and so much of their interlocutor of the 27th May 1800 as adheres to their interlocutor reclaimed against, so far as such adherence sustains such defence against a general accounting, and to do what, upon such review of the said interlocutors of 18th Dec. 1799, and so much of the said interlocutors of 18th Dec. 1799 and the 27th May 1800, as shall to the said Court seem just.

For Appellant, *Wm. Adam, Ad. Gillies.*
For Respondents, *C. Hope, John Clerk.*

Under this remit of the House of Lords, the Court of Session pronounced this interlocutor (1st March 1808), 'Sustain the defence 'of the negative prescription against the general accounting demand-'ed by the pursuers, and adhere to their interlocutors, in so far as 'the same have been submitted to review, in terms of the order of 'the House of Lords.' And, on further argument, this judgment was adhered to. Fac. Coll. et M. App. 1, Prescription No. 7.