administration, he had that equality in view, as well as to answer his own obligation. No. 39.

The Lords adhered.

C. Home, No. 17. p. 39.

1736. *December* 17. GREENOCK *against* GREENOCK.

No. 40.

A proprietor, who had his estate by inheritance, made a purchase of the teinds of his lands, and was infeft in the teinds by charter and sasine. After his death, the question occurred, Whether this subject should go to the heir of line, or of conquest? The Lords preferred the heir of line, who, in this case also, succeeded to the land-estate.

Fol. Dic. v. 2. p. 401. C. Home.

*** This case is No. 8. p. 5612. *voce* HERITAGE AND CONQUEST.

1740. *January* 8. DUKE of HAMILTON *against* EARL of SELKIRK.

No. 41.

The late Earl of Selkirk, superior of the lands of Balgray, having made a purchase of the property, but without completing the same by a resignation *ad remanentiam*, the Duke of Hamilton, his heir of conquest, claimed the same, as being a separate subject, not consolidated with the superiority. The Lords found, That they belonged to the Earl of Rutherglen, who was heir of investiture of the superiority; and the same was found with regard to the teinds of Crawford, purchased in by the defunct, the lands being entailed upon the Earl of Rutherglen.

Fol. Dic. v. 2. p. 401. Kilkerran.

*** This case is No. 10. p. 5615. *voce* HERITAGE AND CONQUEST.

1742. *February* 5.

Mr. GEORGE AYTON *against* The CREDITORS of ALISON of Birkhill.

No. 42.
An heir expressly excluded cannot succeed even on the failure of all the substitutes nominated.

February 25, 1675, Sir John Leslie, proprietor of the lands of Newton, &c. resigned the same to himself, in life-rent, and to John Leslie his son, &c. which failing, to Clara Leslie his daughter, and the heirs of her body; which failing, to Helen Leslie his youngest daughter, and the heirs of her body; and failing all, to his nearest and lawful heirs and assignees whatsoever, &c. At this time Sir John had two other daughters, than the two called by the above substitution, viz.

No. 42. Elizabeth his eldest, and Mary his second daughter; and, in the procuratory, he excluded Alexander Leslie of Balchrome, and Mary, then spouse to Mr. Andrew Bruce, and the heirs or successors procreated, or to be procreated of their bodies, from all right of succession to the said lands; and declared, that it should be altogether unlawful to them, to serve as heir to him, or to any of his heirs of tailzie and provision above written. Upon this procuratory, a charter and infeftment were expede. Thereafter Sir John died, and then John Leslie, and Clara and Helen Leslies, all without issue; so that there remained only to succeed to Sir John, as his nearest heirs whatsover, his daughters Elizabeth and Mary. Elizabeth died likewise, leaving two daughters, Ann and Janet Dicks, who served themselves heirs portioners to their uncle John. Thereafter Mary died, leaving a son of a second marriage, Mr. George Ayton, who brought a declarator of his right to one half of the said lands against the creditors of Alison of Birkhill, who had a right to Janet Dick's share, by virtue of a disposition from her, and to Ann's in virtue of an adjudication. And the points in debate resolved into two questions, whether the above exclusive clause was in law effectual, to debar the pursuer from the succession, as one of the heirs of line to his grandfather and uncle; *2do*, How far the challenge brought by the pursuer against the defender's titles, is excluded by the long prescription, or even by the twenty years prescription of retours?

Argued for the creditors, That a proprietor of lands could settle his succession in favours of whatever persons he thought proper. And as this was a fundamental maxim, so Mary and her descendants being excluded by Sir John, of consequence Elizabeth and her descendants were preferable by the investiture. Further, it was said, that the import of the settlement was the same as if Sir John had called his heir-general, secluding or excepting Mary and her descendants; in which case his whole heirs at law would have succeeded in their order, preferably to Mary; because they were called to the succession, and not Mary or her descendants; and that it was tantamount, as if, failing his daughters named in the investiture and their issue, he had called his heirs whatsoever, the eldest excluding the younger: And there is really here no difference, except that Mary is *nominatim* excluded with her descendants, which cannot make the preference given to Elizabeth less effectual. Besides, supposing the exclusion out of the question, Mary is not called by the settlement, therefore she can only claim under the description of Sir John's heir whatsoever; now it is expressly declared, that she shall not take under that description, so that she cannot claim under this settlement; she is neither *nominatim* called, nor under the description of his heirs whatsoever. Besides, Elizabeth and her heirs do not take the succession, in respect of the exclusion of Mary; they do not take *ab intestato*, but by the will of Sir John, who, upon the failure of his daughters *nominatim* substitute, calls his heirs-general in their order, preferably to, and in exclusion of Mary; so that they take as heirs of tailzie and provision, though under the character of heirs-general. *2dly*. It was said, That the defenders were preferable, as the special service and retour of their authors, Janet and Ann Dicks, had stood unquarrelled, not only for 20, but for 40 years.

Pleaded for the pursuer, that the exclusive clause does not affect him. Sir John, it would seem, was displeased with his daughter for marrying Mr. Andrew Bruce, a Minister; therefore he excludes her from the succession, at the same time that he excludes Alexander Leslie of Balchrome, and the heirs procreated or to be procreated of their bodies: Now as Mary is, in that clause, designed spouse to Mr. Andrew Bruce, it is natural to suppose he meant only heirs procreated or to be procreated betwixt her and Mr. Andrew Bruce, her then husband. But granting the pursuer were included under the seclusive clause; yet, according to our law, heirs must be called to the succession of lands, by a direct substitution in the investiture, and the heirs who are so called, cannot be debarred from the succession by an exclusion or exheredation, which go for nothing, if the right is not vested in another; nor is it believed, there is any instance where an inquest passed by the nearest heir, because of such exclusion, and retoured another. None of the heirs, who are now in competition, are *nominatim* called by Sir John's destination: Elizabeth, it would seem, had fallen under her father's displeasure as well as Mary the pursuer's mother, and therefore he prefers their younger sisters. Neither of the two eldest can come in, but under the last substitution of heirs whatsoever. Under that character, both are equally comprehended; consequently the succession by the failure of the preceding substitutes, devolved equally upon both of them, if it is not for the effect of this exheredating clause In the next place, where the termination is upon heirs whatsoever, or the heirs at law, the law must have its full operation and effect without distinction or bias. The succession is, by the inevitable necessity of the thing, cast upon all the heirs whom the law calls, and consequently must operate as well in favours of Mary as Elizabeth; for though there is added, "with seclusion of the said Mary," yet that can have no effect, being what the law calls *protestatio contraria facto.* It is inconsistent and incompatible, that heirs whatsoever should be called to the succession; and yet that any one of them should be debarred. The rule of law is, that it is by positive institution, and not by exclusion, that heirs are called to the succession; whereas, here, if Elizabeth's heirs are preferred, it is by the exclusion only, and not by any positive institution; the descriptive words under which they are called being equally applicable to both; nor does any thing occur in this part of the clause, but what is implied in every exclusive clause whatever. *Lastly,* As to the objection to Ann and Janet Dick's retour, it was answered, That the positive prescription could not run until the death of Sir John's lady, who had a right of life-rent provided to her, and who lived down to the year 1706. And, with respect to the negative prescription of the reduction or retours in twenty years, it was said, that there was no occasion in this case for a reduction; nothing being more certain, than that an heir of line may serve to his predecessors, even at the distance of 100 years, if he is able to prove his propinquity, seeing no length of time can cut off the right of blood. It is true, if another heir produce a valid retour, that will exclude him, unless the same is reduced within twenty years; but, if the retour is null *ex facie,* there is no occasion for

No. 42.

No. 42. a reduction; a distinction approved of in all our law books. Now, as the exclusive clause is recited in the retour itself, as the reason why Mary was not served heir-portioner to her brother, as well as her two nieces, and that the said clause is inept and ineffectual; it is just the same as if an inquest had served a second son heir of line to his father, in respect that his elder brother had renounced to be heir in a process at the instance of one of his father's creditors, which, it is believed, is a nullity that could be objected at any time.

The Lords found, that the exclusion of Mary was effectual, and that the service of the grand-daughters could not now be quarrelled.

Fol. Dic. v. 4. *p.* 304. *C. Home, No.* 188. *p.* 313.

1742. *June* 2. ROBERTSON *against* KER.

No. 43.

A father having left his whole moveable estate to his son, and the heirs of his body; whom failing, to his own wife; upon the death of the son, an uncle, as heir *in mobilibus*, was found to have a right to the son's legitim in preference to the substitute in the testament.

Fol. Dic. v. 4. *p.* 304. *Rem. Dec. Kilkerran. C. Home.*

*** This case is No. 34. p. 8202. *voce* LEGITIM.

1756. *June* 16. MACKINNON *against* MACKINNON.

No. 44.

The estate of Mackinnon stood disponed to John Mackinnon younger, and the heirs-male of his body; whom failing, to any other son of the body of John Mackinnon elder; whom failing, to John Mackinnon, tacksman of Mishinish. On the death of John Mackinnon younger, without issue-male, Mishinish served as nearest and lawful heir-male of provision, and was infeft. Afterwards a son being born to old Mackinnon, the tutors of the child brought an action against Mishinish, to denude of the estate in favour of their pupil. Pleaded for Mishinish, That he being nearest heir to the deceased at the time, the possibility of a nearer heir's existence was no bar to his service; and as the entering heir is a *modus acquirendi dominii*, it must be perpetual in its effects, and no contingency happening afterwards will overturn it. The Lords found, That the heir-male of old Mackinnon had right to the estate from the time of his birth, and decerned the defender to denude in his favour.

Fol. Dic. v. 4. *p.* 304. *Fac. Coll. Sel. Dec.*

*** This case is No. 20. p. 6566. *voce* IMPLIED OBLIGATION.