session to his own heritable title only. And, 3*tio*, The act 1695 is correctory; but this case falls under both the intent and words of it. The fair construction of the statute is, that where an apparent heir possesses his predecessor's estate for more than three years, his onerous debts and deeds are effectual against the succeeding heir, unless it is proved, that the apparent heir did not possess under his heritable title, but under a singular title derived from some other person, preferable to and exclusive of his apparency, and to which separate title he openly ascribed his possession. There is no difference between the courtesy and any other right competent to exclude the apparency; and a third party having such right, but lying by, can never be said to exclude the apparent heir from possessing properly as such, merely because if that third party had used his right, the heir would not have had access to possess. Neither can an apparent heir's acquiring any singular title, keep him from falling under the act 1695, when that title is latent; far less when he expressly ascribes his possession to his heritable title.—The case of Pitcairn does not apply; for there Lundin, who contracted the debt, not only possessed under a singular title, but truly was not *in potestate* to possess as apparent heir to his mother, because no such title was known to belong to him at the time. No 33.

The Court gave different interlocutors in this case; which seemed to be attended with difficulty.——It was *observed* on the Bench, That here the apparent heir did in fact possess; and that third parties were *in bona fide* to contract with him, as supposing him to possess under that character.

'THE LORDS repelled the defence on the courtesy; and found, that William Knox possessed three years as apparent heir; and also found, that the tack, notwithstanding of its endurance, is good against Janet Knox, the heir passing by.' See TACK.

Act. *Miller, Advocatus.* Alt. *Montgomery, Hew Dalrymple.* Clerk, *Kirkpatrick.*
D. R. *Fac. Col. No* 224. *p.* 413.

1765. *February* 14.

CHARLES M'KINNON of M'Kinnon *against* SIR JAMES M'DONALD.

No 34.
Where a fee becomes void by the death of the proprietor, the next heir in existence may serve, tho' there be a nearer in hope. And this heir who may be termed heir ex-

THE lands of M'Kinnon having, *anno* 1715, been forfeited to the Crown by the attainder of the deceased John M'Kinnon, were purchased from the Crown by Sir James Grant, who conveyed the same '. to John M'Kinnon, *junior*, eld-' est son to the said John M'Kinnon the attainted person, and the heirs-male of ' his body; whom failing, to the heirs-male of the body of the said John M'-' Kinnon elder; whom failing, to John M'Kinnon tacksman of Missinish, and ' the heirs-male of his body; whom failing, &c.' And, upon the procuratory of resignation contained in the disposition, the said John M'Kinnon, *junior*, expede a charter under the Great Seal, and was infeft. John M'Kinnon, *junior*,

No 34. pectant, may sell land for payment of the family debts.

died in the year 1737 without issue-male, whereby the estate would, according to the said settlement, have devolved upon the male-issue of his father, had any such existed at that time; but none existing, the said John M'Kinnon tacksman of Missinish was served heir in special to the said John M'Kinnon, *junior*, his grand-nephew, and was infeft.

John M'Kinnon elder, the attainted person, having, in the year 1743, married a second wife, had of that marriage two sons, Charles M'Kinnon born in the 1753, and a younger son born 1756. Charles, who was the nearest heir in terms of the destination, brought a process against Missinish, for declaring his own right, and for setting aside Missinish's service; and obtained a decree of the Court of Session; finding, 'That, upon the pursuer's birth, the defender's right to the estate of M'Kinnon resolved and became void; that the pursuer has right to the said estate from the time of his birth; and that he may make up his titles to the estate as if the defender had never been entered.'

As the estate was much burdened with debt, Missinish, in the year 1751, at which time John M'Kinnon elder had no children, nor much prospect of any, sold part of the estate to Sir James M'Donald, at the price of L. 7300 Sterling; which sum was wholly or nearly applied for payment of the family-debts. This price was reckoned adequate at the time of the sale; but as land in the Isle of Sky came soon after to rise in its value, Charles M'Kinnon, in the year 1758, found it his interest to bring a reduction of this sale against Sir James, upon the following ground, That Missinish's right to the land was temporary only, and not such as to empower him to alien any part. Sir James, on the other hand, *insisted*, 1*mo*, That Missinish was proprietor, and consequently entitled to alien. 2*do*, Supposing him no more than a *curator bonorum*, the sale was necessary for payment of the family-debts, and therefore ought to be found effectual.

'THE COURT sustained the sale to Sir James M'Donald, and assoilzied him from the reduction.'

Instead of stating the pleadings *pro* and *con*, which were drawn out to an enormous length, it will probably give more satisfaction to set forth the chain of reasoning that arises from this case and leads to the judgment given.

By the common law of this land, no man can serve as heir to a predecessor, but he who can qualify himself to be the nearest heir, and who in that character excludes all others, which is the precise definition of an heir apparent. It is not sufficient that he can qualify himself the nearest heir for the time; for that circumstance can only entitle him to be termed heir expectant, but does not constitute him heir apparent. And it is for that reason that when a man dies without children, leaving a wife, his brother cannot serve for nine months, because of the possibility that the relict may produce a child.

The only exception to this rule, is the succession of the father, where the son dies without nearer relations. But the reason is obvious, that if the father

were to delay his entry while there is a possibility of his having children, who would be nearer heirs, he never could enter at all. No 34.

This necessary exception from the general rule of succession, has drawn along with it another exception not altogether so necessary. The proprietor of a land-estate dies leaving a father and a sister. The sister may take up the succession, though, by the possibility of her father's male issue, she cannot qualify herself heir apparent. For it would be absurd, that she can bar her father, and yet not be entitled herself to enter. So stands the common law, without indulging any other exceptions.

The case is still more clear against an heir expectant, when we take under consideration the present settlement. The destination is 'to John M'Kinnon, '*junior*, and the heirs-male of his body; whom failing, to the male-issue of 'John M'Kinnon elder; whom failing, to Missinish,' &c. Here there is no place for Missinish until he can qualify that the male issue of John M'Kinnon elder have failed, which in this case he never could do, because *de facto* they have not failed.

In cases of this nature, the practice of the Roman law was to name a *curator bonorum*, who managed the estate till time made it certain who was the heir; and that this was formerly our practice, appears from a decision observed by Stair, 12th Feb. 1677, Bruce *contra* Melville, *voce* SUCCESSION. This was considered as law down to the 1708, when on the 2d Jan. 1708, Lord Monstuart against Dame Eliz. M'Kenzie, *voce* SUCCESSION, the nearest heir for the time, was admitted to serve, though there was a possibility of a nearer heir. This was a new exertion of the *nobile officium*, in order to remedy many hardships, and even injustice that must arise n this case, from the aforesaid rule of succession established at common law. For if the succession be suspended, and the estate be put under the management of a curator, two consequences must follow among many that break in upon the principles of justice. The first respects the creditors of the deceased proprietor, who during this interval are deprived of every legal remedy for making their debts effectual. A charge to enter heir is the first step of diligence, which is indispensable; and yet there can be no charge, if there be no heir to be charged. The next respects the heir expectant, who is also heir apparent, if no nearer heir shall happen to exist; and if this man cannot enter heir, the superior, who must have a vassal, is entitled to sweep away the whole rents by a declarator of non-entry. Now supposing the heir expectant to be also heir apparent, though this cannot be known at the time, he is entitled to the rents as heir apparent, from the very moment of the predecessor's death, and yet these rents are levied by the superior upon a good title in law, who upon that account can never be bound to restore them. Here is another wrong or act of injustice: And as it is a rule in equity, that there cannot be a wrong without a remedy, it is the duty of the Court of Session to provide a remedy, which is done by authorising the heir for the time to enter.

No 34. It being now established that the expectant heir may enter, the important question is, What ought to be the effect of such entry? The following answer is founded clearly upon the principles of law and justice; that such entry ought to have the effect to remedy the unjust consequences above stated, and not to have any further effect, particularly not to have the effect of forfeiting the nearer heir afterwards born; which forfeiture would be an act of injustice, no less violent than those above mentioned, to remedy which the service is authorised. This would not only be a flagrant wrong in the Court, but plainly *ultra vires*. For though the Court has power to remedy the injustice of common law, they have not power arbitrarily to alter the common law; and still less to alter it in order to commit injustice. Hence it clearly follows, that the service of an heir expectant cannot have the effect of an ordinary service to transfer to him the property, so as totally to exclude the nearer heir afterward existing; for this would be forfeiting an innocent man of his property, an injustice which cannot be authorised by any court.

The effect of such a service being thus limited upon equitable principles, the only remaining question is, What ought to be held the nature of such a service, in order to make it correspond to the limited effect above mentioned. If held to be of the nature of an ordinary service, and that the heir apparent is sufficiently secure, if the heir expectant be obliged to denude in his favours; I answer that this remedy is far from being effectual. For if the land be transferred to the heir expectant in property, it must be affected by his debts and deeds. He is upon the supposition similar to an heir of entail at common law, who even, after incurring an irritancy, can alien the estate before a declarator is raised against him. The heir expectant continues proprietor till he be decerned to denude; in the mean time, as proprietor, he must have the power of disposal.

The counsel for the heir apparent, sensible, for the reason above given, that an action against the heir expectant to oblige him to denude, is no security to the heir apparent, unwarily yielded that the property is transferred by the service, but that the right of the heir expectant is resolved *ipso facto* upon the existence of the nearer heir; which must bar the debts and deeds of the heir expectant, according to the rule *quod resoluto jure dantis resolvitur jus accipientis*. But this construction of the service lies open to many objections. In the *first* place, That a pure infeftment, once legally established, should resolve *ipso facto*, is a novelty in the law of Scotland, and contradictory to the maxim, That one infeftment of property cannot be taken away but by another. *2do*, Supposing the nearer heir to exist a week only or a day, what becomes of the heir expectant? His infeftment is voided. Is it necessary that he be infeft a second time? And if his first infeftment continue in force, it is not voided *ipso facto* by the existence of a nearer heir. But *3tio*, Supposing these objections to be capable of a satisfactory answer, the great difficulty remains that the maxim urged is not applicable to this case. It is evident, indeed, from prin-

ciples, that a man who has a limited right cannot convey one that is unlimited; and it is equally evident, that when a man's right is reduced *a principio*, all the rights derived from him must fall of consequence. But I see not that the maxim can be carried further. A case resembling the present is a feu reduced *ob non solutum canonem*. Here the right of the author is resolved. But will this resolve an adjudication led against the feuar before he incurred the irritancy? By no means. In general, it is necessarily inherent in property, that the subject should be at the disposal of the proprietor; and therefore, if I have the full property in me this day, my deeds and debts must affect it; and if these be once legally established upon the land, no subsequent event can render them ineffectual either in law or equity. And whatever may have been the practice of the feudal law, I see no foundation in common law that recognition should forfeit those rights derived from the ward-vassal, which he could lawfully grant as being within the half of his feu. Tacks indeed are not effectual against the superior while the land is under ward; but the reason is, that a tack, being a personal contract, is not in its nature effectual against any but the contractors; and the act 18th, Parl. 1449, makes them only good against a purchaser, not against the superior. No 34.

Abandoning, therefore, this plan, I suggest another that seems liable to no legal objection, and at the same time does justice to all concerned, which is, to hold the service of the heir expectant with the infeftment following upon it, to be a conveyance of the property *sub conditione*, to be purified in case a nearer heir exist not, and to be void *a principio* if a nearer heir exist. Such conditional infeftments are no strangers to our law. An infeftment *a me* is good from its date, if it be confirmed by the superior at whatever distance of time; and null from its date if it never be confirmed. An infeftment in warrandice is equally conditional, depending on the event of eviction or not eviction.

This construction of the service, will, on the other hand, prevent all the hardships that ensue if the entry of the heir expectant be barred; and on the other, will prevent the injustice done to the heir apparent if the service be held pure and not conditional. The creditors of the deceased proprietor have an heir whom they can charge to enter in order to adjudge the estate; and the diligence will be effectual, even against the nearer heir afterwards existing; because the heir expectant was the only person who could be charged. The heir expectant, by being admitted to enter, bars the superior and levies the rents; and if a nearer heir be afterwards born, he is not liable either for the debts or deeds of the heir expectant.

At the same time the heir expectant, though a conditional proprietor only, must have powers of administration equal at least to those of a *curator bonis*. Therefore he can do every act of ordinary adminstration, such as entering vassals, paying family-debts, &c. nay, he can do acts of extraordinary administration, such as granting real securities to the predecessor's creditors, and even selling land, if such acts be found necessary.

No 34. With respect to the rents arising after the predecessor's death, the question is, To whom these ought to belong? The common law undoubtedly bestows these rents upon the heir apparent, however late his existence be. But to the heir expectant who is permitted to enter, there is a clear defence in equity against the heir apparent claiming these rents *retro* from the death of his predecessor; which is, that as, on the one hand, he is not to suffer by the entry of the heir expectant, so, on the other, he is not to have any benefit from it. Now, supposing the heir expectant had abstained from entering, the rents would have been sweeped away by the superior upon a declarator of non-entry. And therefore, as this evil is prevented by the entry of the heir expectant, it is just and equitable that he alone should have the benefit.

The President, who opposed this plan, urged the only argument that had any weight against it. He yielded that the definition of an heir apparent in the Roman law is that mentioned above; and hence the necessity of a *curator bonis* while there is a possibility of a nearer heir; but observed, that the connection betwixt a superior and his vassal has occasioned a different idea of an heir to be adopted in the feudal law; that the superior being entitled to have a vassal, and not being bound to accept for his vassal any person but the heir apparent, these two circumstances conjoined, determined the next heir for the time to be the heir apparent; that for this reason a father serves to his son; and a sister to her brother even during the life of the father; that the only exception is where a proprietor dies leaving a wife and no children, in which case his brother cannot serve for nine months, upon the favourable presumption that a child may be conceived *et qui in utero est pro jam nato habetur*.

Against this argument two things were urged, 1*mo*, That it establishes the property in Missinish, not as heir expectant, but as heir apparent in the most proper sense; which of course vests the absolute property in him, descendible to his own heirs; contrary to what is agreed to be law, and contrary to what is found to be law in this very case, viz. That Charles had right to the estate the moment of his existence; and he accordingly, by authority of this Court, is served heir and infeft. 2*do*, Supposing the next heir in existence at the death of the predecessor to be the heir apparent by the feudal law, yet this cannot hold in the present case. For, by the settlement above mentioned, Missinish is not called to the succession but upon the failure of the heirs-male of John M'Kinnon elder; and as they have not failed, Missinish can have no title to the succession by this settlement.

The plurality of the Judges came into the opinion that the infeftment of Missinish was conditional only. But there was no occasion to give an explicit interlocutor upon that point; for, by a great plurality, it was found, That the sale to Sir James M'Donald, though an extraordinary act of administration, was yet a necessary act to save the family estate from being torn to pieces by the creditors; of which they were satisfied from evidence produced in Court.

The only difficulty upon this point was, That, to empower Missinish to sell, he ought to have obtained a decree of the Court of Session, finding the sale necessary. But, with respect to this difficulty, I suggested, That even a sale by a tutor *sine decreto* will not be reduced if it be found advantageous; because a reduction, upon that supposition, would be hurtful to the pupil instead of beneficial. This argument concludes *a fortiori* to the case of an heir expectant; because it is not established in law, otherwise than by analogy, that an heir expectant ought to have a decree of this Court in order to sell. Had Missinish applied to this Court for power to sell, the circumstances of the case were such as that he must have obtained it; and equity will not suffer the neglect of this precaution to be laid hold of for voiding the sale, when the pursuer by that neglect is not *in damno evitando*, but *in lucro captando*. No 34.

We have upon record Sir George Lockhart's opinion, that the heir expectant serving is not bound to denude upon existence of a nearer heir. And to give a specimen of a sort of reasoning that found countenance in the last century, Sir George founds his opinion upon *L.* 85. *De regulis juris*, 'non est novum ut 'quæ semel utiliter constituta sunt, durent, licet ille casus extiterit a quo ini-'tium capere non potuerunt.'

About the same time Missinish's widow brought a process against Charles M'-Kinnon for payment of 400 merks yearly of jointure provided to her in her contract of marriage. The obvious objection to this claim was, that it is not like the former, a necessary act of administration for preserving the family estate; and that it ought not to be sustained, because Missinish in effect never was proprietor. It carried, however, by a plurality to sustain this claim; in which, as it appeared to me, the Judges were swayed more by compassion than by law. See No 35, *infra*.

Sel. Dec. No 229. *p.* 298.

*** This case is reported in the Faculty Collection:

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 Mis-'hinish.'

Upon the death of John Mackinnon younger, without issue male, Mishinish served as nearest and lawful heir-male of provision, and was infeft.

Some years after, a son, Charles, was born to old Mackinnon.

Charles insisted in a process against Mishinish, as stated, 16th June 1756, *voce* SUCCESSION; and the LORDS found, 'That the pursuer had right to the estate of Mackinnon from the time of his birth; and that the defender is obliged to denude thereof in his favour.'

Having thus prevailed against Mishinish, Charles Mackinnon obtained himself served heir of provision in special to John Mackinnon younger, his bro-

No 34. ther, and brought an action of reduction-improbation for setting aside the sale of the lands of Strath, part of the estate of Mackinnon, which Mishinish, during his possession, had sold to John M'Kenzie, writer to the signet, for behoof of Sir James Macdonald of Macdonald, who was already infeft.

Pleaded in defence; *1mo*, The petitioner is bound by the judgment in the case of Mishinish, being his only title in the present action. But that judgment implied, that titles were properly made up by Mishinish: It does not find his right to have been *void*; but, on the contrary, decerns him to *denude*, and finds that the right of the pursuer commenced from his birth.

2do, As Mishinish was rightly served, so all his onerous acts and deeds must be effectual against the estate.

3tio, The obligation to denude was merely personal, and cannot affect the right of a third party, who purchased, *bona fide*, upon the faith of the records, while the right of Mishinish subsisted.

Answered, to the *1st*; No solid argument can be drawn from a critical interpretation of the words of the interlocutor in the case of Mishinish, pronounced betwixt different parties, where the only question was, whether the remoter heir was bound to denude upon the birth of the nearer? and where the validity of purchases from the heir in possession did not come to be disputed.

To the *2d*; *Esto*, that Mishinish was rightly served, still his right was conditional merely, and defeasible in a certain event; and *that* intrinsically, from the very nature of the right; like a right to excambed lands, or a right to lands gifted by a donation *inter virum et uxorem*, which, though indefeasible *ex facie*, are affected by an implied condition, upon the existence of which they become void, as if they had never existed.

Or perhaps the right of Mishinish may more properly be considered as containing a *suspensive* condition; and, since the condition failed, the right must be held to have been void from the first; like an infeftment *a me*, which is pendent on the condition of the superior's confirmation; or an infeftment in warrandice, pendent on the condition of eviction.

In this view of the case, Mishinish must be held to have been a trustee for behoof of the nearer heir, when he should exist. And an implied trust is equally effectual, as if it had been expressed: Thus, where a sum of money is provided to husband and wife for their liferent-use allenarly, and to the children to be procreated of the marriage in fee, the husband is understood to be fiar; but it is only as trustee for the children *nascituri*.

But, allowing the condition of the existence of male issue of Mackinnon elder not to have been suspensive of the right of Mishinish, but *resolutive* merely; still, it will not follow, that his acts and deeds could affect the fee of the estate.

A putative heir, served upon the supposition that the nearer heir does not exist, possesses under a similar condition; and the consequence is, that, as soon

No 34.

as the true heir appears, his infeftment becomes void, and every burden flies off, which he has imposed upon the estate. In the same way, in the case of the protestant heir, who has made up titles upon the act 1700, c. 3. by service and infeftment; if the popish heir shall take the formula within ten years, the former infeftment is resolved; and every deed, by which the estate might have been affected, is resolved with it.

To the 3*d*, There is no ground for saying that Mishinish was under a *personal* obligation to denude upon the existence of the nearer heir. On the contrary, the condition was inherent in his right. Nor has this doctrine any tendency to weaken the security of the records. Except in the case of an entail, the law promises no security to a purchaser from looking into the last infeftment, whether it proceeded upon a charter or a retour. If it proceeded upon a retour, as in this case, it is incumbent upon him to look into the destination in the charter, and he cannot be secure, if the service be not agreeable to that destination, or if any of the heirs preferably called do or may exist.

Replied; It is inconsistent with what has been admitted by the pursuer, to hold that the right of Mishinish was pendent upon a *suspensive* condition. It is an agreed point, that the pursuer has no right to the rents prior to his birth; and the instances of resolutive conditions inherent, *vi legis*, appear to be mistaken. For, with respect to a right of excambed lands, the contract of excambion points out the nature of the right, and puts the purchaser on his guard. With respect to lands gifted by a husband to his wife, the designation of the disponer is a sufficient warning; and, as to purchases from the protestant heir, he is always served *virtute actus parliamenti*, which is equivalent to a recital of the whole statute.

THE LORDS "sustained the minute of sale entered into between John Mackinnon of Mishinish, and John Mackenzie writer to the signet, with the sasine thereon, and disposition in implement of the said minute, by the said John Mackinnon, in favour of the said John Mackenzie, as sufficient to exclude the pursuer's title; and, therefore, assoilzied from the whole conclusions of the pursuer's libel."

Afterwards, Charles Mackinnon raised a new summons, in which he subsumed, that the service of Mishinish was erroneous, and contrary to law; and concluded, that it should be declared to have been null and void *ab initio*. This action having been remitted to the former, which was kept in dependence by a petition, introduced a new field of argument.

Pleaded for the pursuer; By the Roman law, he is heir 'Quem nemo præ-'cedit, aut præcedere potest.' This was the rule in intestate succession, which depends upon the implied will of the defunct; much more ought it to hold in succession by destination, which is founded upon his express will; and, it is a clear contradiction to that will, if a person, who is called *after* another, be allowed to enter to the succession before that other has failed.

In like manner, the substitute was never admitted, so long as there was a possibility that the institute might exist. Accordingly, in our settlements, the

No 34. clause, *quibus deficientibus*, has always been understood to denote *quandocunque deficientibus*. The case must often have occurred in tailzied succession; yet there is no example of a remoter heir attempting to serve till Bruce against Melville in 1677, *voce* SUCCESSION, where the claim was rejected. And though afterwards, in Mountstewart against M'Kenzie in 1708, IBIDEM, the remoter heir was admitted to serve, it was only with a view of avoiding the inconveniencies of a vacant fee, not that he was considered as the true heir; for he was found obliged to denude, as soon as the true heir existed.

If Mishinish shall be considered as having been the true heir at the time of his service, the consequence is, that, though he had not served till after the pursuer's birth, he must still have been preferred: The right could not depend upon the *time* of the service; nay, if he was regularly served at all, he could not have been obliged to denude. *Semel hæres semper hæres;* if the right was once vested in him, it could not determine upon a future contingency.

Such is the doctrine of the Roman law; and, though the *forms* of feudal conveyances cannot be regulated by that law, yet there is no inconsistency in supposing that the effect of the right, after it is constituted, may be determined by it.

And the inconveniencies which may be said to arise from keeping the fee vacant, are not to be put in the balance with the injustice of allowing the remoter heirs to enter, and squander or sell the estate. But all those inconveniencies may be obviated, by vesting the estate in a *curator bonis*, with powers similar to those of a trustee in an English contract of marriage, who may hold the estate for many years, for behoof of heirs unborn, without any inconvenience.

Indeed the end may be attained in a different way, by allowing the heir existing to serve in the mean time, and to make up feudal titles; but so as, upon the existence of the nearer heir, his service and infeftment may become null and void, *ab initio*.

And so it is in the conditional institutions of the Roman law. If the condition exists, the institute is heir, and was heir from the death of the testator; if the condition fails, he is not heir, nor ever was heir from the beginning. Again, if the institute will find caution, he is admitted to possess, and there is no place for a *curator bonis; l.* 12. *D. qui satisd. cog.* Upon this authority, the pursuer may admit that Mishinish was entitled to possess, nay, that he was entitled to make up feudal titles: But that possession, and those titles, will not invert the nature of his right, or make it absolute and indefeasible, when it was plainly conditional, by the very titles upon which he was admitted to the possession, and defeasible upon the existence of the heir who was called before him.

Answered; The doctrine of the pursuer would be attended with the most extraordinary consequences. In a settlement like the present, there might be a possibility of the existence of a nearer heir, for half a century or more.

During all that period, the vassals of the defunct would have no superior; his superior no vassal; his creditors could do no diligence against the estate; his debtors could not make payment; his heir-ship-moveables would perish without any to use them. No 34.

To remedy these inconveniencies, by allowing the fee to fall into the hands of the superior, would certainly be contrary to the will of the defunct. The expedient of appointing a *curator bonis* would be but a partial remedy, supposing it to be competent; and the pernicious effect of it to the country in general is obvious.

The ingenious subtleties of the Roman law do not enter into this question.

The maxim, that an heir is *quem nemo præcedere potest*, is not received with us. On the contrary, a father may serve heir to his son, though there is always a possibility of the existence of issue of his own body, by whom he would be excluded; Stair, III. 5. 50. In the same manner, a sister may serve heir to her brother; a brother consanguinean may also serve, though in both these cases, there is a possibility of a nearer heir. The chancery is bound to issue brieves in favour of the *actual* heir; and the question is, *quis* sit propinquior hæres, not *an* sit, or quis esse *possit?*

The question, whether the actual heir should be allowed to serve, appears to have occurred for the first time in the case of Corehouse, *anno* 1647,* and was adjusted by the Lords upon a reference. In stating that case, Lord Stair, III. 5. 50. gives his opinion, that the person ought to be served who, at the time of the decease, is nearest heir.

It is true, that in the competition about the succession of the estate of Leven, 12th February 1677, Bruce *contra* Melvill, *voce* SUCCESSION, the Court, by a plurality, refused to allow the actual heir to serve, and left the estate to be administrated by a *curator bonis;* but, upon looking into that decision, reason will be found for not holding it as a precedent.

Accordingly, the next time the question came to trial, in the succession of Sir George Mackenzie, (Mountstewart against M'Kenzie) the actual heir was allowed to serve, observed by Dalrymple and Fountainhall, both of whom remark, that the judgment proceeded upon no speciality, but upon the abstract point, as to which the Lords were unanimous.

Soon after, an opportunity occurred of again giving judgment upon the same point. For, the possible heir having existed, an action was brought in his name, and the heir served decerned to denude; 6th and 13th December 1709, *voce* SUCCESSION; and the same judgment was given in the original question with Mishinish in 1756.

"THE LORDS sustained the defence, and assoilzied from the reduction of the service." See No 35. *infra.*

Act. *Ferguson, Burnet, John Campbell,* jun. *H. Dundas.* Alt. *Lockhart, Garden, Sir D. Dalrymple.*

G. F. *Fac. Col. No 2. p. 194.*

* See APPENDIX.