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So the point was determined, The Younger Children of Sir Samuel Maclellan, No 358. p. 11160. Indeed, where the executor confirmed is one of the nearest in kin, it cannot be said, until the rest enter their claim, that any right is vested in them. In case of their dying without issue, the whole succession would remain with the executor confirmed.

Answered, It is to the right of debt or obligation that the long prescription is applied, without any regard to the form in which it is constituted. A decree, therefore, on which no proceedings have been held for 40 years, becomes ineffectual, in the same manner as if the claim giving rise to it had never existed.

If, in the present case, the right of debt had been vested in the executor confirmed, before the years of prescription had been completed, there might have been room for arguing, on the authority of the decision quoted on the other side, that the claim was still unimpaired, the person having the *jus exigendi* being so long under a legal disability. But one of several nearest of kin cannot, by confirming, communicate to the rest the privilege of her minority.

But the principle of the decision quoted has been departed from in several instances; it being now more justly held, that it is not the minority of the trustee, but that of those who are to reap the benefit of the trust, by which every question of this kind ought to be regulated. And, as in virtue of even a partial confirmation obtained by one of many nearest in kin, the whole moveable estate is transmitted in succession, it does not seem to admit of dispute, that the shares belonging to every one of the nearest in kin having been previously divided by the operation of the law, must run a separate course of prescription, in the same manner as if the debtor had come under so many separate obligations.

THE LORD ORDINARY repelled the plea of prescription.

But after advising a reclaiming petition, with answers,

THE COURT altered that interlocutor, and found, 'That the minority of Elisabeth Cuming can only save from the negative prescription her own proper interest and share of the debt that is now claimed, and that of such of her brothers and sisters as could have pleaded their minorities when she produced her claim.'

Lord Ordinary, *Monboddo*. Act. *Wolfe Murray*. Alt. *Honyman*. Clerk, *Colquhoun*.

C. *Fol. Dic. v. 4. p.* 112. *Fac. Col. No* 158. *p.* 316.

1798. *November* 23.

The Honourable MRS MARIANNA MACKAY, and COLONEL FULLARTON, her Husband, for his interest, *against* SIR HEW DALRYMPLE, and Others.

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A charter and sasine, followed by forty years posses-

IN 1688, John, Lord Bargany, in the marriage contract of his son John, Master of Bargany, resigned certain lands to him, and the heirs-male of the

No 361. sion, being produced as a prescriptive title, in defence against a declarator of irritancy, brought by the next substitute of an entail after the alleged contravener and his descendants; is the minority of the pursuer to be deducted from the period of prescription?

marriage; whom failing, to the other heirs-male of his son's body; whom failing, to William Hamilton, his (the Master of Bargany's) brother-german, and the heirs-male of his body; whom failing, to the other heirs-male of the body of Lord Bargany; whom failing, to the eldest heir-female of the body of the said Lord Bargany, and the descendants of her body, without division, and to other substitutes.

The heirs were enjoined to bear the name and arms of Hamilton of Bargany, under a forfeiture, and they were prohibited 'to alter, innovate, or change the 'foresaid tailzie and order of succession above-mentioned, or to do any other 'deed, directly or indirectly, in any sort, whereby the samen may be anywise 'altered, innovate or changed;' and also to 'sell, dispone, wadset, or impignorate the said lands and others foresaid, or any part or portion thereof, or 'to grant infeftments of annualrents, &c., or to contract debts, or do any other 'deed of commission or omission, either civil or criminal, whereby the said 'lands and others foresaid, or any part of the samen, may be apprized, adjudg- 'ed, or otherwise evicted,' &c.

The deed contained irritant and resolutive clauses; and the heir taking advantage of them, was to make up titles, passing by the contravener and his descendants, or in any other mode known in law.

Lord Bargany reserved his own liferent, and power to burden the lands to a certain extent.

The entail was recorded in 1694. John, Master of Bargany died before his father, without male issue, leaving an only daughter, Joanna Hamilton.

In 1707, she married Sir Robert Dalrymple.

In their marriage-contract, his father, Sir Hew Dalrymple, Lord President of the Court of Session, entailed the lands of North Berwick, on the heirs-male of the marriage, and others. And it was provided, that while there should be more heirs-male of the marriage than one, and the succession to Bargany should open to one of them, and he should accept of it, he should, for himself and his descendants, forfeit North Berwick, which should, *ipso facto*, devolve to the next heir.

But Sir Hew reserved to himself power to alter and renew this condition at pleasure.

Of this marriage there were three sons, Hew, John, and Robert; the last of whom died before his brothers, without issue; and two daughters, the eldest of whom married the Master of Reay. Her son George, Lord Reay, died in 1768, without male issue, but left two daughters, the eldest of whom, Mrs Marianne Mackay, born in 1763, was afterwards married to Colonel Fullarton.

Upon the death of John, Master of Bargany, the estate devolved on his brother William, who first served nearest heir-male in special to his father under older investitures, and was infeft, but afterwards expede a general service, as heir of tailzie and provision to his brother under the entail 1688, on which no infeftment had followed.

Wiliam, Lord Bargany, was succeeded by his only son James, who, in 1712, was served heir in general to his father.

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James died in 1736, without children.

The male issue of John, Lord Bargany, being now extinct, the succession opened to the representative of the eldest heir-female.

A competition for this character ensued, among Sir Alexander Hope, son of the only daughter of John, Lord Bargany; Mary Buchan, daughter of Grizel Hamilton, only sister of James, Lord Bargany; and Hew (afterwards Sir Hew) Dalrymple, eldest son of Joanna Hamilton.

The Court of Session, in 1736, preferred Sir Alexander Hope; but the House of Lords, in 1739, found, that the estate descended to Sir Hew Dalrymple, 'and he ought to be served heir of tailzie and provision to the said 'James, Lord Bargany.'

Sir Hew had, from the beginning of the competition, assumed the name of Hamilton, and designation of apparent heir of tailzie of Bargany, and appointed a factor, who levied the rents of it.

In 1734, Sir Robert Dalrymple died, and Sir Hew (the Lord President), revoked the clause in the contract 1707, which prohibited the heir of the marriage from holding both estates, by a deed, which narrated his faculty to alter and renew it; and his grand-son made up his titles to North Berwick accordingly.

On the 8th April 1736, the Lord President executed a deed, discharging that clause, only so far as to enable his grandson, Hew, to make up titles to Bargany, without forfeiting North Berwick, and continue in right of the former so long as he should allow him.

Next day, he executed another deed, allowing his grandson, Hew, to possess Bargany only during his (the Lord President's) life, and under sanction of forfeiting North Berwick, if he did not denude of the other within six months after his death, in favour of his brother John Dalrymple, and the heirs of his body; whom failing, in favour of his brother Robert, and the heirs of his body; whom failing, in favour of the other heirs of Bargany.

Both these deeds were referred to, in an assignation to the rents of Bargany, executed by Sir Hew, the grandson, in 1736.

Sir Hew, the Lord President, died in 1737.

In 1740, Sir Hew, the grandson, who had about this time laid aside the name of Hamilton, executed a repudiation of Bargany, in favour of his brother John, which narrated the entail 1688 and contract 1707, and consented that he should be served heir to James, Lord Bargany, and make up titles to the estate, providing that this deed should not prejudge the right of the granter, or his descendants, to the estate, on the failure of his brothers John and Robert, and their descendants, or in case any event should take place, which should enable them to hold it consistently with the entail of North Berwick.

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John Dalrymple now assumed the name of Hamilton, entered into possession of Bargany, and raised a declarator of his right, to be served heir of tailzie and provision to James, Lord Bargany, which narrated the repudiation at length. George, afterwards Lord Reay, was called as a defender.

Mr Hamilton, in 1741, took decree in absence, in terms of the libel, and expede a general service accordingly.

In 1742, he obtained a charter from the Prince, to himself, and the heirs whatsoever of his own body; whom failing, to the other heirs whatsoever of the body of Joanna Hamilton; whom failing, to the heirs-female of John, Lord Bargany, and other substitutes under the entail 1688, on the conditions introduced by it.

Infeftment immediately followed.

In 1780, Mr Hamilton executed, under the same conditions, a disposition of the lands in favour of himself, and the heirs of his body; whom failing, to Sir Hew Dalrymple and the heirs of his body, and the other substitutes under the entail 1788, and infeftment was taken on it.

In 1756, Sir Hew conveyed some adjudications affecting Bargany, (which had been led in 1706 and 1709, for certain provisions to which his mother was entitled by the entail 1688), to a trustee, who obtained an adjudication in implement against him; and part of the estate was, by authority of the Court of Session, sold for payment of them, and reconveyed to Mr Hamilton, who made up titles to it in fee-simple.

Sir Hew died in 1790, and was succeeded by his son of the same name.

In 1793, Mrs Marianna Mackay, with concurrence of her husband Colonel Fullarton, brought an action of reduction and declarator against Mr Hamilton and Sir Hew Dalrymple, and his children, narrating the entail 1688, and other circumstances above-mentioned; calling for production of the deed 1740, declarator 1741, and service of Mr Hamilton, with the titles expede by him in 1742 and 1780; and concluding, that these deeds should be reduced; that it should be found that old Sir Hew and Mr Hamilton had incurred an irritancy for themselves and their descendants; and that she, as next substitute after them, had right to the lands.

The pursuers afterwards brought a supplementary action, calling for production of other writings, and particularly of those in consequence of which part of the entailed estate was sold, and concluding that an irritancy should likewise be declared on that account.

Old Sir Hew's laying aside the name of Hamilton, was likewise stated as a separate ground of forfeiture against him and his children.

In the original action, the defenders produced the charter and infeftment 1742, which, with uninterrupted possession, following on them, they held to be a sufficient title by prescription, to exclude the claim of the pursuers.

The pursuers contended, that the prescription had been interrupted by Mrs Fullarton's minority.

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The LORD ORDINARY found, that in "computing the period of prescription, the years of the pursuer's minority are not to be deducted; and in respect that the charter and sasine 1742 are *ex facie* unexceptionable, and that no nullity or objection does from thence appear to lie against them, and that it is averred by the defender, and not denied by the pursuers, that the defender has, in virtue of that investiture, possessed the estate of Bargany, from the date thereof, to the commencement of the present action, without any challenge or interruption, found, that the defender's right to the estate is secured to him by the positive prescription, and that he is entitled to hold and possess the estate under the foresaid investiture in time coming, and that the same is sufficient to exclude the title of the pursuers in this reduction; therefore assoilzied from the reduction; reserving to the pursuers to insist in the declaratory conclusions of their libel, and particularly how far the tailzie 1688 is affected by the investiture 1742, and whether or not the defender has incurred any irritancy under that entail."

After a petition against this interlocutor had been appointed to be answered, the pursuers craved the judgment of the Lord Ordinary on the declaratory conclusions. This was opposed by the defenders, and the Lord Ordinary sisted procedure, till the judgment of the Court should be obtained on the exclusive title.

The Court ordered a hearing in presence on the petition and answers, when the general point argued was, Whether, supposing that Mr Hamilton and old Sir Hew Dalrymple had incurred an irritancy for themselves and their descendants, and that the pursuer, as next substitute, would have been entitled to possession of the estate, if a declarator had been brought in due time, the prescription pleaded by the defenders was interrupted by her minority during part of the period?

The defenders

Pleaded; The act 1617, cap. 12, introducing prescription in heritable rights, was meant to secure possession against the claims of persons who had a present right to the subject; it had not in view those whose interest is remote or contingent, and does not open the possession to them till the present proprietor be dead, or divested of his right. The exception of minority contained in it, (if it at all apply to the positive prescription,*) being equally extensive with the enactment, can operate only in favour of the person against whom the prescription was running, as the true owner of the estate. If the exception had applied, wherever there was a minor alive, who had a remote interest, the enactment would have been nugatory, as few cases would occur where such person would not be found.

In the present case, the repudiation by Sir Hew Dalrymple, gave Mr Hamilton no right to take up the estate. He is therefore to be considered as a stran-

* This was at first disputed by the defenders, but the point was considered as settled by the decision, 6th December 1754, Hamilton Blair *contra* Shedden and others, No 357. p. 11156.

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ger usurping the possession upon a title *a non domino*, and Sir Hew remained the *verus dominus*, against whom the prescription was current. For, supposing him to have incurred an irritancy, a contravener till declarator remains proprietor, and his deeds alone affect the estate. The next substitute is a mere expectant, who has not even a personal right to the subject. In this respect, he differs from an heir-apparent, or a purchaser on a disposition without procuracuratory or precept, and others, who have a personal right, which requires only some form to complete it. He has merely a faculty of bringing an action, a necree in which would make him proprietor, but nothing less can have this effect.

Besides, the substitutes under an entail, may be considered as a sort of corporate body, who have all an interest to preserve the will of the tailzier, and the same action for enforcing it. The Legislature could not mean that the prescription should be stopt by the minority of every one of them, and if it had been intended to make a distinction in favour of the nearest substitute, it would have been so expressed. The contrary has indeed been repeatedly found; 10th July 1739, Macdougal, No 172. p. 10947.; 31st July 1756, Aiton, No 174. p. 10956.; 21st December 1784, Gordon, No 176. p. 10968.

Answered; The pursuer's right to possession of the estate was neither remote nor contingent, but already vested in her, though the form of an action was necessary to make it effectual. She was in this respect in the same situation with a purchaser founding on a disposition without procuratory or precept; an heir claiming under a clause of devolution, or who is excluded by a death-bed deed; and of an heirs apparent in every case where the ancestor did not die in possession. This ground of action is liable to prescription, as the act 1617 cuts off not merely feudal rights, but every claim competent against the party in possession. It makes no distinction between entailed property and that held in fee-simple. A right vested in a person of full age, is not the less liable to prescription that it is entailed; and the exception of minority is admitted to be equally extensive.

The situation of substitutes under an entail, cannot with propriety be compared to that of a subject held by a body corporate. The substitutes have no common property, but each is proprietor in his order, and entitled to do every thing not expressly prohibited; and so far from having a common interest, they strive to preserve the entail, while it is the object of the heir, to whom the succession has opened, to get quit of the fetters of it. The postponed heirs in the present case could indeed have brought a declarator of irritancy, but it would not have enabled them to be, like the pursuer, served heir to the person last infeft, who had not contravened, and enter into possession of the subject. The pursuer's right was not in itself different from what it would have been if she had been the last substitute, and cannot be affected by the extrinsic circumstance of their being other substitutes postponed to her.

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The defender's doctrine would make entails, which were meant to secure the succession, and the limitations of which are personal to the heirs, operate in favour of a stranger, for the purpose of defeating it.

The cases quoted related to the minority of remote substitutes; and it was admitted in the argument in them, that they would have been materially different, if the deduction had been claimed by a party entitled to possession on delarator.

When the cause came to be advised, the Court were much divided in opinion.

Several of the Judges thought that the exception of minority did not at all apply to entails which (it was said) were but imperfectly understood at the date of the act 1617. The substitutes may be considered as a collective body, having an indivisible interest to support the will of the tailzier; some of whom will generally be of full age. If a public road should be shut up by an individual, and remain so for forty years, the minority even of the person most hurt by the measure, would not interrupt the prescription. There is no room for distinction between the next and remote substitutes; all have the same right of action, though the benefit to be derived from it may be different; and till decree be obtained, the contravener remains sole proprietor of the subject.

But a majority were of an opposite opinion, which they rested partly on the ground, that every substitute in an entail is entitled, though not to found on the minority of prior substitutes, to have his own minority deducted from the currency of prescription against it, but chiefly on this, that the pursuer was, *hoc statu*, entitled to assume, that she would have prevailed in her action of declarator, and got possession of the estate, if her claim had been made in proper time; a circumstance which, (it was observed,) put her in a situation quite different from that of the other substitutes, and constituted her in reality *vera domina*, though the form of an action was necessary to complete her right.

The Court, (9th February 1796) found, " That in this case, in computing the period of prescription, the years of the pursuer's minority are to be deducted; and therefore, that the defender has not produced a sufficient title to exclude."

Mr Hamilton died, without issue, a few days after this interlocutor was pronounced; but, on advising a petition for Sir Hew Dalrymple, with answers, the Lords, (6th December 1796,) " adhered."

Upon appeal, the cause was, 18th December 1797, remitted to the Court of Session, " 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 cause involved with each other, that they do pronounce

No 361. an interlocutor for or against that title, and also on the effect which such judgment may have upon the interlocutors to be reviewed."

A hearing in presence again took place, and afterwards, (6th July 1798) a petition was presented, craving, that the two actions should be conjoined, and a diligence granted for recovery of the writings therein mentioned. A diligence was accordingly granted, in consequence of which the two deeds executed by Sir Hew, the Lord President, in 1736, were produced; but the consideration of the other prayer of the petition was superseded till the issue of the cause.

In the memorials, parties, without departing from their former argument, as to the exclusive title, entered chiefly into the declaratory conclusions of the original summons.

The defender

Pleaded; 1*mo*, As the entail of Bargany did not declare it necessary for the heirs to make up titles under it, Sir Hew's neglecting to enter, was not of itself an irritancy; and no act of his, as apparent heir, could forfeit his own, or his children's right to the estate; 18th November 1766, Ross against Monro, No 99. p. 7289. Accordingly, although the act 1685, c. 22, declares, that "if the provisions and irritant clauses shall not be repeated in the rights and conveyances, whereby any of the heirs of tailzie shall bruik or enjoy the tailzied estate, the said omissions shall import a contravention of the irritant and resolutive clauses;" yet it is established law, that it is not necessary to insert the restrictions in a general service, which can only be founded on the ground, that such service does not, of itself, make the restrictions applicable to the person obtaining it; House of Lords, 17th February 1736, Denham, *voce* TAILZIE; and so little danger is there of an entail being defeated by an apparent heir, that his debts do not affect it; 13th May 1795, Graham, IBIDEM.

2*do*, At any rate, no forfeiture was incurred, by granting the deed of repudiation. If Sir Hew had simply abandoned the succession, it would have devolved to the superior, and not to the next heir of entail; Dictionary, *voce* SUCCESSION. Now, the deed executed by him, contained no conveyance to the estate, and it did not bind the heirs of the granter. It merely waved his own right for a time, which the entail did not expressly prohibit him from doing.—See November 1763, Scott Nisbet, *voce* TAILZIE; 17th June 1746, Heirs of Campbell against Wightman, IBIDEM. It was not a greater exertion of power than assigning the rents, or contracting debt, to the effect of allowing them to be adjudged during his own lifetime; matters with which the substitutes in an entail have no concern, and which cannot be considered as an alteration of the succession.

Although the repudiation were held to be so, as Mr Hamilton was a prior substitute to the pursuer, she can qualify no prejudice from it. An heir of entail may convey the estate to his eldest son, if the restrictions of the entail be

engrossed; and if he do so to his heir presumptive, the right can be challenged only by a nearer heir afterwards existing.

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Taking advantage of the repudiation could not forfeit Mr Hamilton's right, because it legally gave him no title to take up the succession; and if, by forfeiting Sir Hew's right, it had opened the succession to Mr Hamilton, he completed his titles in a manner recognised by the entail.

3tio, In declarators of irritancy, which are clearly of a penal nature, the defender is always allowed a reasonable time to undo the act complained of;—Bank. b. 2. tit. 3. § 143.; Ersk. b. 2. tit. 8. § 14. This alleged irritancy is already purged, as matters are now in the same situation as if it had never been incurred; and even if Mr Hamilton had left children, the titles made up by him might have been reduced before prescription had run on them.

4to, The forfeitures in an entail can be made effectual only by declarator; Stair, b. 4. tit. 18. § 7.; and, like other penal actions, they cannot be prosecuted after the death of the contravener, though the deed complained of, may still be reduced; the legal presumption being, that the deceased would have had good defences against it, if the action had been brought against himself.

Answered; *1mo*, An apparent heir of entail, is entitled to draw the rents of the estate; and as the conditions of it are good, even against his creditors, they must be still more so against himself; see 21st November 1753, Creditors of Gordon, No 75. p. 10258. If, therefore, he counteracts them, he must be subject to any forfeiture thence arising. According to the opposite doctrine, an heir-apparent might continue in possession, although he had incurred an irritancy, which was not purgeable, such as succeeding to a peerage, or cutting timber on the estate, when such restrictions appear in the entail, a doctrine which cannot be supported.

2do, The repudiation had the same effects, as if Sir Hew had made up titles under the entail of Bargany, and afterwards denuded in favour of his brother. It was, therefore, struck at by the entail, and act 1685, which apply to any means used directly or indirectly, for altering the succession, the precise order of which the entailer is entitled to dictate and to have enforced, so that it is of no consequence, whether the alteration made by a substitute be temporary or perpetual. As it enabled Mr Hamilton to take up the estate out of his proper order, and was, *de facto*, made the ground of evicting it, it is immaterial to inquire, how far the titles made up by him were, in all respects, unexceptionable. A substitute may incur an irritancy, by selling the estate, or allowing an adjudication to go against it, although the deeds complained of, be liable to reduction, at the instance of the next heir. Both parties concurring in the measure, therefore, incurred a forfeiture for themselves and their descendants.

3tio, Gratuitous entails may be considered as conditional substitutions, and each substitute as independent of the rest, and direct heir of the entailer in

No 361. certain events. The irritancies are made effectual, not as punishments on the contravener, but as the condition of the favour bestowed.

The act of contravention complained of, may arise, either from the heir omitting to do something enjoined by the entail, or his doing something forbidden by it. In the former case, it may sometimes be difficult to fix the period when the contravention begins, unless it be expressly done in the entail. But, in those of the latter class, the right is forfeited on the commission of the act prohibited, such as altering the succession, or marrying into a forbidden family, and the irritancy cannot be purged; Stair, b. 4. tit. 18. § 3.; Ersk. b. 2. tit. 5. § 25.; Bank. b. 2. tit. 3. § 143.; see 1st January 1725, Stirling against Gray, No 93. p. 7273. Sir Hew could not have recalled the effects of the repudiation without Mr Hamilton's consent, and he would not have wished to have done so, as he would thereby have lost the more valuable estate of North Berwick.

Nor is it of any moment, that, owing to the death of Mr Hamilton and his brother Robert, the succession is now in the same situation as if the repudiation had never taken place. The substitutes of an entail are the guardians of the will of the entailer, and are entitled to enforce restrictions in which they have no other interest than that which the entail creates, such as bearing the name and arms of the entailer, and, by having an irritancy declared, on account of which, they may either bring themselves nearer to the succession, or, as in the present case, actually acquire possession of the estate.

4to, The pursuer's right of action arises from the conditional substitution in the entail; the declarator is necessary only to establish the fact. Its object is not to inflict a punishment, but to acquire possession of property wrongfully withheld, and therefore it cannot be affected by the death of the contravener, any more than if it had arisen from natural events wholly independent of him; 18th July 1722, Scot of Gala, *voce* Tailzie; 1st February 1726, Stewart against Denham, Ibidem, (reversed, but on other grounds); 14th November 1749, Gordon of Carleton, Ibidem.

On advising memorials, similar opinions as formerly were given, as to the effect of the pursuer's minority. But the Judges, in consequence of the terms of the remit from the House of Lords, considered themselves as called on to determine, whether the pursuer was entitled to the character of nearest substitute, which, in the former shape of the cause, she had been allowed to assume.

They were clear, that the pursuer's claim was ill founded, either on the ground of Sir Hew's having laid aside the name and arms of Hamilton, or on the adjudications and sale of part of the estate in 1756 *.

And, one Judge excepted, they considered the claim arising from the deed of repudiation to be equally so. The general opinion was placed on all the

* These points were shortly urged in the memorials.

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four branches of the defender's argument. At the same time, a doubt was expressed as to the propriety of laying it down as a general rule, that an heir-apparent can, in no case, incur an irritancy, where neglecting to make up titles is not declared one by the entail; and much weight was laid on the circumstance, that in this case, the effects of the repudiation were at an end. An irritancy, it was observed, could not be declared against an heir for having granted a longer lease than that allowed by the entail, after he had outlived the duration of it, or for having granted too large a jointure to his wife, who had afterwards died before him.

THE LORDS altered the former interlocutor, and sustained the title produced by the defenders, as sufficient to exclude the pursuer's title, and assoilzied.

And, of the same date, on resuming consideration of the petition for the conjunction of the two actions, the LORDS refused to conjoin them *hoc statu*, but found it entire to the petitioners to insist in the separate action of reduction, and remitted to Lord Armadale to proceed accordingly.

His Lordship (8th December 1798) found, That the defenders have in this and the other action, produced preferable and exclusive titles to the lands claimed, and therefore assoilzied.

Lord Ordinary, *Justice-Clerk Braxfield.* Act. *Solicitor-General Blair, Tait, Hope,* et alii.
Alt. *Geo. Fergusson. H. Erskine, Hay, Thomson,* et alii. Clerk, *Sinclair.*

D. D. *Fac. Col. No 94. p. 215.*

*** These three interlocutors were appealed from, and the House of Lords reversed the interlocutors complained of; but declared and found, that the matters in the appellants summonses complained of, are not sufficient to sustain the conclusions in those summonses, or any of the said conclusions, and therefore assoilzied the defenders. See APPENDIX. See No 7. p. 5239.