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(Bargany Cause, M. 11171.)

The Hon. MARIANNE MACKAY, otherwise FULLERTON, Wife of Colonel WM. FULLERTON of Fullerton, and the said WM. FULLERTON for his interest, . . } *Appellants;*

SIR HEW DALRYMPLE HAMILTON of North Berwick and Bargany, Bart., Eldest Son and Heir of SIR HEW HAMILTON DALRYMPLE, Bart., lately deceased, } *Respondent.*

FULLERTON, &c. *v.* HAMILTON.

House of Lords, 3d June 1801.

ENTAIL—CONTRAVENTION—HEIR-APPARENT—DECLARATOR OF IRRITANCY—PRESCRIPTION—MINORITY—PROCESS.—A reduction of the title, and a declarator of irritancy of an entail, were brought fifty years after the alleged irritancy and contravention, founded on the allegation that the order of succession of the entail had been inverted and changed by an heir substitute of entail, who had possessed the estate on apparency for many years, and had then denuded in favour of the next heir of entail, in order to comply with the conditions of another tailzied estate to which he had succeeded. The defence stated to the action, *inter alia*, was, that the defender held a prescriptive title, which excluded the action. The Court of Session, on resuming the remit from the House of Lords, altered their former interlocutor,* and found, that the defender had produced a sufficient prescriptive title to exclude. In pronouncing this judgment, the Court were unanimous on the first point, viz.—1. That no contravention had been committed, and consequently, that she was not the nearest heir-substitute of entail. 2. A majority found, that if the acts of contravention alleged by her had amounted to a contravention, it was purgeable, and had been purged. 3. That an heir-apparent in possession, was not legally capable of committing an act of contravention. 4. That an action of declarator of irritancy was necessary, but not competent after the contravener's death; and, 5. As to the plea of minority, as an exception to the positive prescription, six of their Lordships held, that the minority of an heir-substitute of entail, whether the nearest or most remote, could not be deducted. Others were for de-

* In pronouncing this previous interlocutor, there were eight judges against five; and, from the notes of the opinions taken by one of the judges in the Compiler's possession, they decided the question of minority, upon this hypothesis, that if Mrs. Fullerton was *next substitute of entail*, she was entitled to deduct her minority. Among the judges who dissented from this proposition, that a first substitute heir of entail is entitled to deduct minority, were Lord Justice Clerk M'Queen, Lord Meadowbank, Lord President Campbell, and Lord Glenlee.

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ducting the minority of the *first* heir substitute, and some for deducting the minority of the whole heirs-substitute of entail. In the House of Lords, the interlocutor was reversed, to the effect of substituting another, specially stating the grounds upon which the reversal proceeded, namely, that the matters stated by the pursuer in her summonses were not relevant to support the conclusions therein, and assoilzing the defenders. The second summons, which had in view to declare the irritancy, and which was raised at the same time with the other, had been allowed to stand over; but, after the decision in the Court of Session, and the former appeal to the House of Lords, it was sought to be conjoined with that case remitted for consideration. This was refused, as incompetent *in hoc statu.*

In the report at p. 631 of vol. iii. the circumstances which gave rise to this case are fully detailed.

It is there seen how, by the marriage of Sir Robert Dalrymple, Bart. of Castletown, (eldest son of Sir Hew Dalrymple of North Berwick, Lord President of the Court of Session), with Joanna Hamilton, the only daughter of John, Master of Bargany, who was eldest son of the second Lord Bargany, the estates of the latter came to merge in the Dalrymples of North Berwick.

1688. It was there stated, that in 1688 Lord Bargany had made a tailzie, by which he limited the estate of Bargany to his eldest son, John Master of Bargany, and the heirs male of his body; whom failing to William, his second son, and the heirs male of his body; whom failing to the heirs male to be procreated of his own body; whom failing, to the eldest heir female of his own body, and the descendants of her body without division.

It has also been seen that this entail contained a prohibition, secured by clauses irritant and resolutive, against alienation of the estate, and alteration, innovation, or change of the order and course of succession which is there prescribed; and an injunction that the heir in possession should assume the surname, addition, and armorial bearings of Hamilton of Bargany.

Under this tailzie, no feudal investiture was ever made up by John Master of Bargany. He died before his father, leaving an only daughter, Joanna Hamilton, married, as above mentioned, to Sir Robert Dalrymple of Castletown.

In consequence of the death of John, Master of Bargany, William, the second son of Lord John Bargany, succeeded, in virtue of the above limitation in the entail, and became third Lord Bargany. Disregarding the entail of 1688,

he made up titles to the estate, by retour, precept, and sasine, as *nearest and lawful heir male to his father*, in terms of and by the older investiture of 1632, which was conceived in favour of heirs male, which failing; to the nearest lawful heirs and assignees whatsoever. Afterwards, however, and in 1709, he was also served and retoured heir of provision under the tailzie of 1688; but he did not proceed to obtain any new investiture of the estate.

He died in 1712, leaving one son, James, who became the fourth Lord Bargany, and a daughter, Grizzel, who was married to Thomas Buchan of Cairnbulg. James, Lord Bargany, was served and retoured heir of tailzie and provision in general to his father; but no feudal investiture followed in his person.

By the mode of making up their titles to the estate, which had thus been adopted by the descendants of John, *first* Lord Bargany, the investiture, deriving from the destination of 1632, which had existed in his person, remained undefeased, although defeasible under the personal deed of tailzie executed in 1688 by his son, the *second* Lord Bargany.

In 1736, James Lord Bargany died without issue; and in him ended the line of male succession, both under the destination of 1632 and under the tailzie of 1688.

Under the destination of 1632, by which a tailzied fee had been created, the estate, according to the law and usage of Scotland, would have now devolved on the heir general, not of him last infeft in the estate, but of John, the first Lord Bargany. This was Hew Dalrymple, the eldest son and representative of Joanna Hamilton, by her marriage with Sir Robert Dalrymple of Castletown.

But the tailzie of 1688, as yet no more than a personal deed, was of force, and must be held to have regulated the succession, and, on the death of James, Lord Bargany, a question of law arose, to whom the succession had opened under the description in the tailzie of "eldest heir female," of the body of John, the second Lord Bargany.

It has been seen, that of his marriage with Joanna Hamilton, Sir Robert Dalrymple of Castletown had three sons, Hew, John, and Robert, and two daughters, Marion (married to the Master of Reay), and Elizabeth, (married to Sir Wm. Duff of Crombie.) Sir Robert died in 1734, before either the Bargany estate had devolved on his lady, or the North Berwick estate had devolved on himself,—his father,

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Sir Hew Dalrymple, Lord President, having survived him many years.

In these circumstances, the competition which arose, was between the following parties: 1. Hew Dalrymple, afterwards Sir Hew Dalrymple of North Berwick. 2. Sir Alexander Hope of Kerse, Bart., eldest son of Nicholson Hamilton, the only daughter of John, the second Lord Bargany; and, 3. Mary Buchan, daughter of Grizzel Hamilton, the only daughter of William, Lord Bargany; and it has been seen that this question was finally settled by an appeal to the House of Lords, declaring that the estate descended to Sir Hew Dalrymple, eldest son of the daughter, and only child, of John, Master of Bargany.

Mar. 27, 1739. Ante vol. I., p. 237.

In the meantime, the possession of the estate of Bargany had been assumed by him on apparency. It was also stated, that he made up no titles, nor proceeded to invest himself in the estate of Bargany; and therefore that he might be held as one who *had not accepted of the succession*, and consequently, was not placed under the compulsory operation of the clauses irritant and resolutive in the *entail of North Berwick*, which related to the succession of Bargany.

In this situation the deed of 1740 was executed, called the deed of repudiation, by which he denuded himself of the estate of Bargany in favour of his next younger brother, John Dalrymple, otherwise Hamilton, in terms of the provisions and conditions mentioned in the entail of the North Berwick estate. This deed adopted the same terms of destination, and called the same heirs, as the deed of tailzie 1688. Under it John Dalrymple or Hamilton completed his titles to the Bargany estate, by expeding charter in 1742, upon which he was infeft. And in 1780 the deed, which was executed, and alleged to have been also a contravention of the Bargany entail, followed.

The appellant, Marianne Mackay or Fullerton, is eldest daughter of George Lord Reay, eldest son of Donald, Master of Reay, who was married to Marion Dalrymple, eldest daughter of the marriage between Joanna Hamilton and Sir Robert Dalrymple of Castletown.

On failure, therefore, of male issue of Joanna Hamilton and their descendants, the appellant would be nearest heir of line of that lady, and in that rank she stood as a substitute under all the subsequent investitures, as well as under the original tailzie of the estate of Bargany.

Her action was brought against John Hamilton or Dal-

rymple, who died in the course of the action, also against Sir Hew, lately deceased, and his children, Hew (now Sir Hew Dalrymple), and his brothers and sisters, John, James, Robert, Peter, Margaret, Janet, and Anne Dalrymple. She was therefore the ninth substitute under the entail.

It has been, on the other hand, seen that Sir Hew Dalrymple, the respondent's father, and the eldest son of Sir Robert Dalrymple and Joanna Hamilton, died without making up any title to the estate of Bargany, but that, in order to comply with the condition in the North Berwick entail, he had executed the deed of repudiation above mentioned, which was alleged to have inverted the order of succession prescribed in the Bargany entail, so as to make it diverge from the line of succession therein chalked out. And in the second summons of reduction which was raised, an additional ground of contravention was set forth, namely, the adjudication of the estate for debt due by John, Lord Bargany, by which a valuable part of the estate was sold, in payment of this debt, by Sir Hew Dalrymple and John Hamilton, but which had been purchased back by the latter.

The interlocutor of the Court of Session, which sustained her title to insist in the action, and had declared that the defender had not produced sufficient to exclude, being appealed to the House of Lords, that honourable House remitted the case back 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 defender, was in this case involved with the title set up by the pursuer to sustain her action of reduction and declarator, as having become the nearest heir substitute under the deed of entail.

This second action of reduction and declarator had been raised, but never conjoined, and was allowed to be superseded in the meantime. At this stage, the pursuer presented a petition to the Court, to have this action conjoined.

The Court of Session, on resuming consideration of the remit, with this petition, ordered memorials. It was maintained by the appellant, that every substitute in an entail was entitled, in a question of prescription, to deduct her own minority, whether she was the first substitute entitled to take or not; but that, at all events, in consequence of the contravention, both of Sir Hew Dalrymple and his brother, Mr. John Hamilton of Bargany, by the deeds of 1740 and 1780 respectively, they had not only forfeited for themselves, but also for their children, and, consequent-

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ly, if they were all removed from the succession by this forfeiture, that she was not only the first substitute, but also the party on whom the estate had actually devolved as the *vera domina* thereof. On the other hand, the defender (respondent) contended that the appellant neither was nor could be the first substitute, because not only the respondent himself, but also his whole family, were heirs of entail prior to her. That his father, Sir Hew, had never been in a situation in which he could contravene, because, having only been apparent heir, and never having made up any titles to the entailed estate, he was not in a situation to do so; that, in point of fact, he did not contravene; and even if it could be shown he had done so, no declarator of irritancy was competent after his death.

In reply, the appellant maintained five distinct propositions. 1. That the late Sir Hew Dalrymple, the first heir under the entail of Bargany, was in a legal capacity to contravene and to incur an irritancy under the entail. 2. That he did actually contravene, and incur an irritancy fatal to the rights of himself and his descendants. 3. That notwithstanding his death, an action of declarator of irritancy may still be maintained, to the effect of resolving the right of his descendants. 4. That the irritancy could not have been purged; and, 5. That the late Mr. Hamilton, the substitute next in the order of succession to Sir Hew Dalrymple and his descendants, was likewise in a legal capacity to incur an irritancy, and did actually contravene and incur an irritancy which could not have been purged.

Nov. 2 and 27, 1798.

The Court, of this date, pronounced the following interlocutor:—"Having resumed consideration of the former "proceedings in the cause, and having considered the remit "from the House of Lords, and heard counsel in their own "presence, upon the said remit; and also advised the me-"morials for the parties, they alter their former interlocu-"tor, sustain the title produced by the defenders, as suffi-"cient to exclude the pursuer's title, assoilzie the defender "from the conclusions of the reduction, and decern."

In regard to the petition, praying to conjoin the two ac-

Dec. 11, 1798.

tions, the Court, of this date, refused to "conjoin the two "processes *in hoc statu*. But find that it is still entire to "the petitioners to insist in the separate action of reduction "and declarator; and remit to Lord Armadale, in absence "of Lord Justice Clerk, to hear the counsel for the parties, "and to determine therein as to his Lordship shall seem "just."

Lord Armadale pronounced, in terms of the remit to him, this interlocutor, "having heard parties upon the conclusions of this action, finds that the defenders have in this, and in the previous action to which the present has reference, produced and referred to preferable and exclusive titles to the lands claimed by the pursuer, and therefore assoilzies the defender from the conclusions of this action, and decerns."*

Against these interlocutors, two separate appeals were brought to the House of Lords; the one in the case remitted for reconsideration, and the other as to the second action of reduction sought to be conjoined.

Pleaded for the Appellants.—1st Point. That Sir Hew Dalrymple was bound by the entail 1688. Sir Hew Dalrymple was bound by the entail of Bargany, and subject to all the conditions and limitations therein contained. In

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* The opinions of the judges, in pronouncing the first of these three interlocutors, are to be found, printed at length, in Wilson and Shaw's Appeal Cases, Vol. I, Appendix III. An analysis of these opinions will give the following result. 1. The Court were unanimous in finding that no contravention had been committed, and, consequently, that Mrs. Fullerton was neither the *vera domina*, which was the position assumed by her, nor the nearest heir substitute of entail; her argument being, that if she could show she was the *vera domina*, or the next heir entitled to the possession of the estate, she was no longer in the rank of a mere heir substitute of entail, but advanced in the order of succession to the situation of one who was legally entitled to plead her minority. 2. A majority of the Court found, that if the acts of contravention alleged by her, had amounted to a contravention of the Bargany entail, these were purgeable, and had in this case been purged. 3. That an heir apparent, in possession of the entailed estate for several years, without making up titles under the entail, was not legally capable of committing an act of contravention of the entail. 4. That an action of declarator of irritancy was necessary, but not competent after the alleged contravener's death; and, 5. As to the plea of minority, as an exception to the positive prescription, six of their Lordships held, that the minority of an heir substitute of entail, whether the nearest or most remote, could not be deducted from the period of the positive prescription. The other judges were some for deducting the minority of the first heir substitute, and others for deducting the minority of the whole heirs substitute; but the decision of this last point, it was said, was unnecessary, and was superseded by the decision on the first point.

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1736, after the succession opened to him by the death of James, Lord Bargany, he immediately entered into possession of the estate of Bargany as heir of entail, and in that character enjoyed the same for upwards of four years and a half, until the 13th of August 1740, when he executed the deed of repudiation in favour of his brother John Dalrymple. Upon the succession opening to him, Sir Hew not only assumed the name of Hamilton of Bargany, in terms of the entail, but, in the deeds which he executed, designed himself apparent heir of tailzie to the estate of Bargany; and one of his first acts of his administration was, to grant an assignation of the rents of that estate to Mr. James Craig, for the purpose of paying certain debts, and paying himself £250 sterling yearly. This assignation expressly states, that his grandfather Sir Hew, the President, has authorized "and allowed me to be served and retoured heir of the "tailzied estate of Bargany, according to the provisions and "conditions contained in the tailzie of the estate of Bar-"gany;" and thereafter it narrates the clause in the Lord President's deed of settlement, requiring him and his heirs to denude themselves of the estate of Bargany in favour of his brothers John and Robert, "which failing, to the other "heirs appointed to succeed to the estate of Bargany by "the tailzie thereof." In short, every word of this assignation proceeds upon the fact of his being heir of tailzie to the estate of Bargany. The factory which he granted to John Kennedy for uplifting the rents is still more explicit; for in that he expressly designs himself "apparent heir of tailzie "to the deceased James Lord Bargany and his predeces-"sors; and it mentions "the estate of Bargany which be-"longed to the deceased James Lord Bargany and his pre-"decessors, and which has now devolved to me, as heir of "tailzie."

Indeed, the competition which arose after the death of Lord James, was to determine the question which of the competitors was entitled to be admitted heir of tailzie to the said James Lord Bargany. And in the very deed of repudiation Sir Hew specially recites the judgment of the House of Lords, adjudging the estate to him in that character, and "that he ought to be served heir of tailzie and provision to "the said James Lord Bargany." Thus, even if it had been possible to impute Sir Hew's possession of this estate to any other title than as that of apparent heir of entail, he took care, by every act of possession and administration, to

demonstrate that he possessed it alone in that character. But it is impossible to impute Sir Hew's possession *to any other title* than that of apparent heir of tailzie, because he had no other character or title whatever in his person. For if Sir Hew had not possessed the estate upon the entail, then he had not the smallest pretence for possessing it, especially in a competition with Sir Alexander Hope and Miss Mary Buchan, claiming as heirs of entail, because he was neither the heir of line nor the heir of the standing investiture. Miss Mary Buchan was unquestionably the sister and heir of line of James Lord Bargany, the last possessor; but what is more, she was the heir of the last investiture, being also heir of line to William Lord Bargany, who was the person last infeft. For William Lord Bargany had made up titles to the estate of Bargany independent of the entail, as nearest heir male of John Lord Bargany his father, in terms of the ancient investitures of the estate; and upon a retour in these terms, he obtained a precept in chancery, upon which he was infeft in Dec. 1693, and his sasine duly recorded in the same year. He obtained a precept of clare constat of another part of the estate held of the Earl of Cassilis, upon which he was infeft, and his sasine in like manner recorded. These sasines incontestably proved that if the entail 1688 had not regulated the succession upon the failure of heirs male by the death of James Lord Bargany in 1736, Miss Mary Buchan was both heir of line and of the last investiture. Sir Hew had no claim whatever to the estate but as heir under the entail 1688. And the House of Lords preferred him as such, and every act of his, both before and after the judgment, demonstrates his desire to impute his possession to that entail alone. Having, therefore, taken the benefit of the entail, and possessed as heir of entail, and uplifted the rents of the estate—to the amount of many thousands—in the character of heir of entail alone, it is impossible to hold that the entail was not binding on him, or that he was not subject to all its provisions, limitations, and irritancies. But, further, his apparency did not prevent contravention. It is perfectly absurd to suppose, that a person, as apparent heir of entail, is entitled to reap the whole emoluments of the estate, and to take advantage of the tailzie in every respect, without submitting to all the conditions and irritancies which it contains. There are certain things which, as apparent heir, he cannot do, such as removing tenants. This, however, arises from the

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peculiarity of the feudal system, and is not confined to apparent heirs of tailzie, but is common to an apparent heir, or to a disponee in a fee simple, under a deed remaining personal. An apparent heir of tailzie, like other proprietors possessing under a personal right, is still proprietor of the estate, and the only person who can reap the rents and profits of it; and any other particular powers and faculties which depend upon infeftment, he may also secure to himself by taking infeftment. But a person possessing an estate as apparent heir of tailzie, must be bound in terms thereof, just in the same way as if he had been infeft, because he cannot be suffered to enjoy an estate which he holds under a particular settlement, except according to the conditions of that settlement; and, therefore, after enjoying the rents and profits of the estate conferred by that entail, every condition and irritancy which it contains must be directly applicable to him. As apparent heir, therefore, he was in a situation legally to contravene the entail in its most essential parts, and to commit irritancies which, from their nature, could not be purgeable. But, further, he might also have affected the estate with burdens. The entail allows very liberal provisions to be settled by heirs of entail upon their wives; and it seems clear, that although Sir Hew never made up titles to the estate, that he might have burdened it with the jointure allowed by the entail to his widow; for if he had either entered into a contract of marriage, by which he had become bound to grant his widow the jointure authorized by the entail of Bargany, or granted a bond of provision for that purpose, these would have been effectual against the estate, and would have affected the next heirs of entail, even though he had died in apparency. By the act 1695, c. 24, it is enacted, "that considering the "frequent frauds and disappointments that creditors do "suffer from the decease of their debtors, and through the "contrivance of apparent heirs in their prejudice, for re-"meid thereof, and also for facilitating the transmission of "heritage in favour of both heirs and creditors," it is ordained that if any one shall serve himself heir, not to his immediate predecessor, but to one more remote, "he shall "be liable for the *debts* and *deeds* of the person interjected "to whom he was apparent heir, and who was in possession "of the lands and estate to which he is served, for the space "of three years." Although it has been found, in the case of Lord Dundonald, that this statute did not apply to the

Kaimes, p. 44.

case of gratuitous deeds, such as an entail, or alteration of the destination of the estate, made by an apparent heir, yet, nevertheless, it has been held to apply to the case of an heir apparent making a provision for his wife, in terms of the contract of marriage, or even to an apparent heir settling a voluntary provision upon his grand child. The last of these cases was finally decided in the House of Lords upon appeal, M'Lean *v.* M'Lean, 8th Feb. 1765. There can be no doubt then, that if Sir Hew had died in a state of apparency, his widow might have been entitled to claim the provisions settled upon her by the contract of marriage; or by any bond of provision granted by him, if within the limits of the entail. There can be no distinction whether the estate is *entailed* or *not* in the application of the statute 1695. For, at all events, where the heir was allowed to burden the estate, or to contract debts, the estate, to that extent, was not entailed. It would be most extraordinary, therefore, if Sir Hew, by his enjoying this estate for no less than five years, and being in a situation so far to affect the estate with those debts, was not in a situation to contravene the entail.

Kaimes, p. 44.

Vide ante vol. II. p. 95.

But, further, the estate of an apparent heir may be adjudged by creditors, and this very estate of Bargany was not only adjudged during the time it was possessed by an apparent heir of entail, for payment of his debts; but the fact is, that a great part of the estate has been sold in virtue of that adjudication. For Joanna Hamilton, afterwards married to Sir Robert Dalrymple of Castletown, the respondent's grandmother, having brought an action against William Lord Bargany, then apparent heir of entail, to make payment to her of a suitable aliment of 900 merks Scots yearly, from her birth, until she was twelve years of age; and 1200 merks from that time until she was sixteen years of age, when her portion became due; and having obtained decreet for these sums, she afterwards adjudged the estate for payment of them. And the estate was afterwards adjudged for payment of 30,000 merks, as the portion provided to Joanna Hamilton in the contract of marriage contained in the entail of Bargany. But, at this period, William Lord Bargany was only *apparent heir of entail*, and had not even served himself heir of tailzie. Indeed he died without ever having made up his titles upon the entail, although part of the estate was afterwards sold in virtue of the adjudications led against him by Joanna Hamilton. It surely could

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hardly be maintained that William Lord Bargany could not have contravened the entail, when the estate was thus adjudged, on account of his not having paid a proper aliment to Joanna Hamilton, his brother's daughter, which he certainly ought to have done out of the rents of the estate. An apparent heir, therefore, may not only burden the estate, but it may actually be adjudged for payment of his debts; and this very estate of Bargany was adjudged on account of the debt of an apparent heir. In short, such absurdities as necessarily result from the plea, that an heir apparent of entail cannot incur an irritancy, cannot be founded in law; and, accordingly, the Court of Session have frequently decided that apparent heirs of entail can incur irritancies, just as much as they had been infeft. This was in effect decided in the case of *Denham.** In that case, the declarator was founded upon an irritancy committed by an apparent heir of entail. And the irritancy was said to consist "in Sir Robert Denham having retoured himself heir of provision to "Sir William Denham, maker of the tailzie, without repeating in the retour the provisions and irritant clauses in the "tailzie, and by bruiking and enjoying the tailzied estate "by virtue of the retour." It was not even argued, that as he was only apparent heir, and had not made up titles, he could not incur an irritancy. And the Court found that this was an irritancy of the entail. But, on appeal to the House of Lords, (17th February 1736, Craigie and Stewart's Appeal Cases, ante vol. i. p. 113), that House was of opinion, that, in point of fact, the omission of the irritant clauses in the retour was not an irritancy. Not only so, but the Court of Session have found that the same limitations and irritancies are binding against creditors. This was found in the case of Gordon of Carleton. But afterwards, in another question upon the entail of Carleton, this point was again decided in the most solemn manner. William Gordon, the last successful competitor, having died, the succession opened to Sir Thomas Gordon of Carleton, his elder brother. He was opposed by a new party, Mr. Murray of Broughton, who was not only a creditor, but a purchaser from one of the former *apparent heirs.* The summons sought to declare an irritancy against Alexander Gordon, the heir of Nathaniel and Alexander Gordons, who possessed this estate only as apparent heirs of entail. But although the papers were in that case drawn most fully and ably by the late Lord Justice Clerk (M'Queen) upon the part of the creditors and pur-

* Kaimes, Feb. 21, 1726; Mor. 7275.

Kaimes, Nov 21, 1753. Mor. 10258.

chaser, yet the Court sustained the objections to Mr. Murray's title, and preferred Sir Thomas Gordon, thereby establishing, in the most solemn manner, that an apparent heir may incur an irritancy in the same manner as if he had entered and made up a feudal title. This was even in a question with creditors, who are generally more favoured than when the question occurs with heirs. Having thus shown that Sir Hew was bound by the entail, and was in capacity to incur an irritancy, the next point is, to show that he did actually contravene.

Contravention.

2d Point.—Contravention of the entail by Sir Hew. From the absolute and unlimited power of disposal which a person is allowed to exercise over his own property by the law of Scotland, he has not only the right of using and enjoying it as he pleases, but of settling its destination after his death, in any manner, and under whatever conditions he shall think proper. A person may therefore either settle his estate upon his natural heir, under such conditions and burdens as he shall think proper to prescribe, or he may call any series of heirs, or strangers, as he shall think fit, to his succession. Upon these principles, entails with conditions, have been known from the earliest period of the law of Scotland. And there can be no doubt that these conditions were strictly effectual against the heirs called to the succession by the entail. And it has been found in the case of Stormont, decided so early as 1662, that these clauses were effectual against purchasers and creditors. And the statute 1685, regarding entails, put this beyond all question. First, then, in regard to the contraventions of the conditions in the Bargany entail, Sir Hew Dalrymple contravened the entail in three distinct ways. 1. He contravened by the deed of repudiation which he executed in 1740, in favour of his brother, John Dalrymple, by which, after having been in possession of the estate of Bargany for upwards of four years as heir of entail, he directly, in the face of the tailzie, gave up this estate to his brother John. No matter by what cause, and under what necessity, this took place. It is indisputable that he not only allowed another to succeed, who might not have succeeded, but actually conveyed the estate to him. Sir Hew Dalrymple, by his son's contract of marriage with Joanna Hamilton, settled the estate of North Berwick on his son, Sir Robert Dalrymple of Castletown, expressly providing that the estate of North Berwick and Bargany should never be united, except in the event of there only

Stair's Decisions. Feb. 26, 1662. Mor. 13994.

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being one son of the marriage; and it was therefore expressly declared in that settlement, that if the heir of the estate of North Berwick should take up the estate of Bargany, he should lose his right to North Berwick estate. There was a power, however, reserved by the President, to discharge altogether, or to modify this condition, and to revise it again in any manner of way he thought fit. Accordingly, when, in 1736, the late Sir Hew, who, by the death of his father, was at that time in the fee of the estate of North Berwick, succeeded, as heir of entail, to the estate of Bargany by the death of James Lord Bargany, as he could not take up that estate by the condition of the entail, without losing the estate of North Berwick, the President then exercised the power thus reserved by him, in modifying

April 8, 1736. that condition, "so far (to allow him) to accept of the succession to the estate of Bargany, as to be served and retoured heir of tailzie to that estate, and thereby to be in a condition to denude himself thereof in favours of the next person after him, called to the succession by the tailzie of the said estate of Bargany, which is the most regular and effectual manner of conveying the said estate in favours of the next person in the line of succession to the tailzie of the said estate of Bargany."

For this purpose, he allowed him to assume the name and arms of Hamilton of Bargany, and to enjoy the rents of the estate of Bargany as long as he should be allowed to enjoy both estates, but no longer. And, the very next day, the

April 9, 1736. President executes the other deed, by which he ordains the said Sir Hew Dalrymple, "to divest and denude himself *omni habili modo* of his right and title to the estate of Bargany, in favour of John Dalrymple, his second brother, and the heirs of his body; which failing, to Robert Dalrymple, now his third brother, and the heirs of his body; which failing, to the other heirs appointed to succeed to the estate of Bargany by the tailzie thereof." Then followed the deed of repudiation in 1740, executed by Sir Hew in favour of his brother John Dalrymple, and the heirs of his body, &c. In considering, therefore, the question, Whether Sir Hew contravened the entail of Bargany by altering the order of succession? the reason which induced him so to do cannot enter into the question. The proper question is, Whether the entail of Bargany was contravened or not? and this question must be determined independent of the entail relating to another estate. That this deed of repudiation

was an act of contravention, by which the order of succession in the entail of Bargany was frustrated and interrupted, and was altered, innovated, and changed, the appellant apprehends there can be no doubt. By the entail of Bargany, Sir Hew, and the whole heirs of his body, are called before John, and the heirs of his body, so that there is an inversion of the order of succession, to the effect of passing over Sir Hew, and the whole heirs of his body, and giving the estate to John Dalrymple. This is both "*frustrating* and *interrupting*" the order of succession. It is introducing one substitute, and his heirs, before another prior to him in the entail, which is as much an alteration of the order of succession as if a stranger was so preferred. The entail act of Parliament 1685, c. 22, uses the words "*frustrate* and *interrupt*." And the words used in the North Berwick deed are, "any way innovated, altered, or changed. But the meaning of these latter words is certainly precisely the same with the terms frustrate and interrupt used in the statute; and they could only be introduced for the purpose of preventing the heir of entail in possession from bringing B before A, or D before C. It is no matter therefore what the deed is, or what it is called; whether it is a regular conveyance, a repudiation, or any other deed that can be conceived; provided it has the effect directly or indirectly to alter the order of succession. And if the deed of 1740, which has been called a deed of repudiation, has this effect, there can be no doubt Sir Hew Dalrymple has contravened the entail. It is equally clear, that it was by this deed alone that John Dalrymple was enabled to serve himself heir of entail to the estate of Bargany, and no jury could have found that he was next heir of entail but for that deed. Accordingly, the service proceeds upon the judgment of the House of Lords finding Sir Hew entitled to succeed. But it is quite evident that John Dalrymple could not be the next heir of tailzie to James Lord Bargany, so long as his elder brother Sir Hew, and the heirs of his body, were alive. But by this service he completed a feudal title to the estate; and an irritancy of the entail was thereby incurred.

2. An irritancy or contravention was further incurred, by his relinquishing the name and arms of Hamilton, after having assumed these for four years. But, 3. It has been seen by the appellant's second summons, which the Court of Session has refused to conjoin with the first summons, that a contravention has been incurred, by allowing adjudication to be

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led on the estate, and a valuable part of it to be sold for the payment of debt. The maker of the entail of Bargany only allowed contractions to a limited extent, for provisions to widows and daughters, and declared, that if any "adju- "dication or other diligence led for these against the lands "and estate, or any part thereof, for the said sum of 40,000 "pounds Scots, then, and in that case, the heirs of tailzie shall "be bound and obliged to purge the said diligences three "years before the expiry of the legal at the least, within "six months after their succession;" and the person "so "contravening, and the descendants of his body, shall, "*ipso facto*, amitt, lose, and tyne their right of the said "lands, and the same shall pertain and belong immediately to "the person who would have succeeded as next heir of "tailzie." He has therefore contravened on this ground alone.

Irritancies not purgeable.

3d Point.—Irritancies not purgeable. The respondent has maintained, in regard to these contraventions, that even supposing Sir Hew had committed an irritancy, he was entitled to purge that irritancy. But, in considering this point, it is necessary to draw a distinction between irritancies in general, and to confine the argument to irritancies of entails in particular. The latter are perfectly different from the irritancies in onerous deeds. Irritancies from omission may be purged. But, in an irritancy of the other kind, that of commission, where the heir actually does something which the entail forbids, at any time, or in any shape, the condition is violated the moment the forbidden act is done. The forbidden act, once done, cannot, in the law of Scotland, be undone, even although the consequences of it may be so far prevented. A person who is forbid to marry a particular lady, and, notwithstanding, marries that lady, does not surely the less contravene the condition of that entail, that his wife dies in a short time, and leaves no issue. He had no right to the estate but in virtue of the entail, the express condition of which was, that he should not marry that lady. The condition here is absolutely the same, the condition being, that he should not alter the order of succession, even for a period however short, without incurring an irritancy. And therefore the deed which conveyed the estate back from John Hamilton to Sir Hew Dalrymple, cannot save from that consequence.

Lord Bankton, without marking by name the distinction between irritancies of *commission* and *omission*, clearly

points out the difference in their nature, and lays down the rule of law upon the subject thus: "The Lords of Session, "in declarators of irritancy for contracting debts, allow "some time to the contravener to purge the irritancy, by "payment of the debts. But where the irritancy is incur- "red by the heir's not engrossing the clauses in his right "to the estate, they will not allow it to be purged. This "last is a complete deed of contravention, which subjects "the estate to the payment of the heir's debts, *et factum* "*infectum fieri nequit.* The titles made up in contraven- "tion of the entail cannot *be undone*, but the other only "becomes such a contravention by the estate being adjudg- "ed." Neither are these irritancies properly penal; they are merely conditions and provisions qualifying the gratuitous grant, and without which it cannot be enjoyed by the heir called to the succession. This doctrine is laid down by all the authorities. Lord Stair states: "These clauses ir- "ritant in tailzies, are not properly penal, because it was "in the power of the constituent to assume or not to as- "sume these heirs of tailzie to be his heirs." Mr. Erskine on the subject also says:—"Hence irritancies are most "strictly observed against the grantee of gratuitous deeds; "for as that sort proceeds from the liberality of the grant- "or, who had full power over the subject to dispose of it "as he pleased, the grantee, who paid no valuable consid- "eration for the grant, truly suffers nothing though it be "irritated or annulled." And the whole train of decisions is in exact conformity with these principles laid down by Lord Stair, Lord Bankton, and Mr. Erskine. Indeed, were irritancies of commission purgeable, there might soon be an end to every entail, as every heir of entail would make up his title directly contrary to the positive instructions of the entail, or commit any other irritancy he thought fit, with the hope of freeing himself altogether from the fetters, if the fact escaped detection for the period of forty years. While, if he was discovered, he ran no risk if he was allowed to purge the irritancy at any time. It is scarcely necessary, however, in this case, to contend that Sir Hew was not entitled to purge the irritancy arising from the deed of repudiation. The irritancy committed by that deed was not capable of being purged. He could not purge it, from the situation in which he was placed with reference to the North Berwick estate, without the consent of another. And no one, in such a situation, is entitled to plead that the irritan-

B. 2, tit. 3, p. 143.

B. 4, tit. 18, p. 3.

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cy he has committed is purgeable. But, even if Sir Hew could have prevailed on his brother John to resign the estate of Bargany, of at least £5000 a-year, even both of them could not have purged this irritancy. The descendants of *John*, or the heirs of entail called by the tailzie 1688, after the descendants of *John*, had a *jus quæsitum*, fortified even by prescription, in a question with Sir Hew Dalrymple and his descendants, that could not be defeated, and therefore the irritancy could not be purged by the joint consent both of Sir Hew and his brother. Besides, they could not do away the fact, nor remove the feudal title which had been completed in the person of John Dalrymple, upon which he had enjoyed the estate, contrary to the express will of the entailer, for a period of nearly fifty years. They could not do away with the title which John had made up; —his service as heir of entail to James Lord Bargany;—his decreet of declarator against his brother,—and his charter and infeftment in 1742. In short, whatever attempt they might have made at *reparation*, they could never do away with the contravention which had actually taken place. The deed, therefore, of 1780 cannot remedy matters. It made matters worse instead of better.

Declarator of irritancy is not necessary, and is competent after the death of the contravener.

4th Point.—But it is said that an irritancy cannot be established, except by an action of declarator before the Court of Session, and that it is impossible now to obtain decreet in such an action, after the death of Sir Hew Dalrymple, even if he had actually contravened. The foundation of this plea is the maxim in the Roman law, *quod actio penalis non transit contra hæredes.* But this maxim, however just it is, if confined to actions properly penal, that is, founded upon crimes or delicts, cannot apply to the conditions contained in gratuitous settlements, although these conditions carry some hardship along with them. Accordingly, it never was supposed that actions for the recovery of the property depending upon conditions in testaments, such as *sine liberis decesserit, si navis non pervenerit, si hæres uxorem ducat, si servum Getam manumittat,* were in the Roman law *penal actions,* which did not pass against heirs. The present action of declarator is precisely of the same nature, and it is absurd to call it a penal action. Sir Hew is not charged with having committed any crime or delict when he contravened this entail, nor did he truly commit any. It will no doubt be a hardship to either the one party or the other to lose this estate, but there is surely a great

difference between this result, and an action purely penal in its nature. The action brought by the appellant is no doubt called a declarator of irritancy, but is in reality an action *rei persecutoria*, the object of which is, to obtain possession. And this idea is agreeable to all the writers on the law. Lord Stair, b. iv. tit. 18. § 3 and 6, and Mr. Erskine, b. ii. tit. 5, § 25, declare that irritant clauses in entails are not penal, and, consequently, actions declaring them, must transmit against heirs of entail in the same way with any other action whatever. Vide case of Cassil of Kirkhouse (not collected) decided in 1719; Scott of Galla, 18th June 1722, (Mor. 3673); Stewart *v.* Denham of Westhall, 1st Feb. 1726, (Mor. 7275); House of Lords, 17th Feb. 1736, Craigie & Stewart's App. Cases, vol. i. p. 113; Gordon of Carleton, Kilkerran, 14th Nov. 1749, (Mor. 15384); Little Gilmour *v.* Hunter, 27th Feb. 1800, Mor. App. Tailzie, No. 9.

No declarator necessary.

5th Point.—But even no action of declarator is necessary to declare such an irritancy against Sir Hew Dalrymple, because the appellant conceives that his voluntary deed of repudiation superseded the necessity of all such. If Sir Hew has voluntarily resigned the estate, any action of declarator of irritancy against him is perfectly unnecessary, as, by means of this repudiation, and the decree of declarator thereon, the estate was completely vested in John, his brother. John being thus vested with the estate, as heir of entail, the estate must have descended after him to the heirs called by the entail 1688, upon his failure. Upon his natural failure it must have been taken up by the descendants of his body, if he had any, and, upon their failure, by his brother *Robert*, the next heir of entail, and the heirs of his body; and, upon their failure, by the appellant, as the descendant of Marion Dalrymple, his eldest sister. As, therefore, John Hamilton had no children, and his brother Robert predeceased him without issue, the appellant was, in point of fact and law, the next heir of entail entitled to this estate; and therefore the party entitled to raise an action after John Hamilton's death. And it was only by a further act of contravention on the part of Mr. Hamilton in executing the deed of 1780, that she was obliged to raise an action of declarator at all, whereby the disponees in that deed were brought into the field.

Prescription and minority.

6th Point.—Having thus shown, by the contraventions of Sir Hew Dalrymple, and his brother Mr. Hamilton, that she

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is the next heir substitute entitled to succeed, because the former had forfeited for himself and his descendants, as already explained, and the latter had equally forfeited, not only by expeding the charter 1742, "calling himself and "the heirs whatsoever of his body, whom failing, to the other heirs whatsoever of the body of Joanna Hamilton," in so far as "by the other heirs whatsoever of the body of "Joanna Hamilton," he intended to call Sir Hew Dalrymple, who had contravened for himself and his descendants; but also by selling a part of the entailed estate, in consequence of adjudications which his brother raised and kept up against it, by which both his brother and he had incurred an irritancy, by not redeeming these adjudications, as provided for in the entail 1688. And likewise by executing the disposition in 1780, in which he clearly altered the order of succession, by calling Sir Hew to succeed after him to the estate, who, by the entail of 1688, was appointed to succeed before him; the appellant trusts she has made out that she was the next heir substitute, and that the defender had not produced a title to exclude. In so far, therefore, as the respondent founds upon the charter 1742, as a title to exclude the appellant's plea, and affording a prescriptive title in his favour, she maintains that there is no prescription run upon that deed, because, in terms of the act 1617, c. 12, introducing the positive prescription, it is expressly declared, "That in the course of the said forty years' prescription, "the years of minority and less age shall nowise be counted, but only the years during which the parties against "whom the prescription is used and objected, were majors, "and past twenty-one years of age." And, accordingly, it is laid down by all the first authorities in the law of Scotland, and by repeated judgments of the Court of Session, affirmed in the House of Lords, that the years of minority are to be deducted from the positive prescription. The appellant does not require to repeat all the arguments formerly advanced on this head of prescription; but will conclude by contending, that as against this plea of prescription, whether she was first substitute or not, she was entitled, by the words of the statute, to insist that the years of her minority shall not be counted, *as being the party against whom the prescription was used and objected.*

But even supposing prescription did apply to her, yet, in so far as the respondent founds upon the charter and sasine 1742, as a complete prescriptive right, she maintains that no

prescription has taken place, on account of her minority. And further, even though the charter and sasine had been fortified by prescription, she is still, according to the conclusions of her declarator, entitled to maintain that she alone has the proper right under that charter. For as it is taken "to John Dalrymple *alias* Hamilton himself, and the heirs "whatsoever of his body, whom failing, to the other heirs "whatsoever of the body of the said Mrs. Joanna Hamilton "procreate betwixt her and the said Sir Robert Dalrymple, "without division," in a matter of construction as to the party meant by these terms, they must be construed with reference to the warrant of the charter, and conformably to the tailzie 1688. These terms, therefore, must be taken to mean the appellant, as being now the next heir of entail after the death of Mr. Hamilton.

Pleaded for the Respondent.—(1.) The facts alleged by the appellants do not amount to a contravention of the entail of Bargany, and cannot be made the ground of resolving the respondent's right under that entail. The deed of repudiation was neither a disposition, conveyance, nor alteration of the order of succession. The effect of that deed was only to permit his brother, John Hamilton, to intromit with the rents of the estate, until such times as he could conveniently take it up; and as an heir of entail may dispose of the rents of his estate in any way he pleases, and as there was a reservation to resume possession of the estate again, and as in point of fact he did resume it by the deed 1780, this repudiation could in no view be held as a contravention of the entail, or the order of succession therein. Besides, it was *jus tertii* in the appellant to object to this alteration, because her place in the succession, under the entail, was in no degree affected by that deed of repudiation; nor her interests in any way injured. She still retains her place in the order of succession marked out in the entail. And as to those lands sold under the adjudications, it was clear, by the entail itself, that the heirs of entail were allowed "to wadset or "to sell and dispone heritably, as much of the lands and "others foresaid, as will pay a sum of 40,000," for debts or for provisions to daughters; and this debt, under which part of the estate was sold, was a provision to Joanna Hamilton. Looking, therefore, to his charter and sasine of the estate of Bargany in 1742, followed by possession for forty years, it is quite indisputable that he has acquired a prescriptive title under the statute 1617, sufficient to ex-

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clude the present action; and no minority could interrupt this prescription, 1st. Because the minority of a substitute heir of entail cannot be deducted from prescription; and also, 2. Because minority is not pleadable against the positive prescription, but only against the negative; but, (2.) Even supposing the exception in the statute was held to relate to the positive as well as the negative prescription, it can only be pleaded by the true proprietor of the estate, not by a substitute heir of entail; and the appellant's interest is only as heir substitute of entail. (3.) Among heirs substitute in an entail, whether immediate or remote, the law has recognized no distinction of legal character and legal right. Until the succession, or the right to present, and actual enjoyment, has devolved on the substitute, either by the failure of prior heirs, or by a judicial sentence, resolving their right under the entail, the substitute does not become vested in that character of ownership which would bring him within the benefit of the statutory exceptions, and therefore the allegation of the appellant, that contraventions against the entail were committed by prior heirs and substitutes, upon which an action of declarator of irritancy *might* have been founded, is irrelevant in law to sustain the plea of minority against the force of the positive prescription. (4.) The allegation of the appellant is not only irrelevant in law, but is unfounded in fact. She never was possessed of a right of action against the prior substitutes under the entail of Bargany, which could have brought her into the property of the estate; 1. because the prior substitutes were not legally capable of incurring an irritancy which could have injured their right under the entail; 2. because, although they had been legally capable, the facts alleged would not have amounted to a contravention; 3. Although they had, yet the facts alleged having been done away, and purged by the deed 1780, before any declarator of irritancy and decreet was obtained, no contravention is now pleadable; and, further, after the death of the alleged contravener, action could not lie against his descendants for resolving their right under the entail. (5.) The attempt to conjoin the second action of declarator with the original action, after the latter had been fully discussed in the Court of Session, after an appeal to the House of Lords, and when the Court was acting on a remit from that House, was most justly rejected.

After hearing counsel,

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LORD CHANCELLOR ELDON said,*—

" My Lords,

" This cause, which has occupied so much of your Lordships' time, and has had, very deservedly, so much of your attention, arises from an appeal brought by the Honourable Mrs. Hamilton Fullerton of Bargany, wife of Colonel William Fullerton of Fullerton, and the said Colonel William Fullerton for his interest, against two interlocutors of the Court of Session, the one dated the 27th November 1798, the other the 9th March 1799. The first of these, the 27th November 1798, states: ' That the Lords of Session, having resumed con-' sideration of the former proceedings in this cause, (which I am afraid I shall be obliged to state in some detail to your Lordships,) ' and having considered the remit from the House of Lords, (the terms of which it will be my duty to state very distinctly to your Lordships,) ' and heard counsel in their own presence, upon the said ' remit, and also advised the memorial for the parties, they alter ' their former interlocutor, sustain the title produced by the defen-' der as sufficient to exclude the pursuer's title, assoilzie the defen-' der from the conclusion of the reduction, and decern.'

" So that your Lordships see, that the grounds upon which they assoilzie the defender from the conclusion of the reduction, and decern, is this, that they sustain the title produced by the defender, as sufficient to exclude the pursuer's title, not stating whether they conceive the pursuer had a title to pursue or not, but using terms which certainly, in their ordinary exposition, do imply that the pursuer had some title.

" My Lords, a petition had been presented for a diligence for recovery of certain writings therein mentioned, particularly two deeds executed in the year 1736, by Lord President Dalrymple, and further praying the Court to conjoin the two processes.

" Upon the 11th December 1798 the Lords, having resumed consideration of this petition, and advised the same, and particularly having considered their deliverance therein, dated the 10th July last, which was granting the diligence prayed for, but superseding the determination upon the other prayer of the petition until the 1st day in November, ' and having considered their interlocutor,' which I have just had the honour of stating in the other process of reduction, signed upon the 27th of November last, they refuse to conjoin the two processes in that state; but find that it is still entire to the petitioners to insist in the separate action of reduction and declarator, and remit to Lord Armadale, in the absence of the Lord Justice Clerk, to hear the counsel for the parties, and to proceed and determine therein as to his Lordship shall seem just.

" This cause was then heard before Lord Armadale, and his Lordship was pleased to pronounce the following interlocutor on the

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* Mr. Gurney's short hand notes.

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9th March 1799:—'The Lord Ordinary having heard parties upon 'the conclusions of this action, finds that the defenders have, in this 'and in the previous action, to which the present has reference, pro- 'duced and referred to preferable and exclusive titles, to the lands 'claimed by the pursuer, and therefore assoilzies the defender from 'the conclusions of this action, and decerns, superseding extract 'until the third sederunt day in May next.'

"This interlocutor, your Lordships will observe, in the terms of it, asserts that the defenders had produced and referred to preferable and exclusive titles to the lands claimed by the pursuer. The language of which, according to the ordinary acceptation of the terms in which it is conceived, certainly means to assert, that there was some title to be excluded in the pursuer. Whether that observation shall be said to be justly founded, attending to the technical proceedings in the law of Scotland, will be matter of observation, which I shall have to submit to your Lordships hereafter.

"Meantime, it is for me now to state to your Lordships, that these interlocutors have been founded (pronounced ?) in consequence of a remit made by your Lordships to the Court of Session, and, with a view to render myself intelligible, in what I humbly submit to your Lordships' attention, I will, with your Lordships' leave, as shortly as I can, state the circumstances of this case. It appears, that in the year 1688, John Lord Bargany executed a settlement of his estate of Bargany, in the county of Ayr, in the form of a strict entail, in favour of his son, John, Master of Bargany, and the other heirs therein mentioned, under the usual limitations, and guarded with clauses prohibitive, irritant, and resolutive, in common form. This entail is contained in the marriage contract which was executed betwixt John Master of Bargany, eldest son of the said John Lord Bargany, and Jean Sinclair, daughter of Sir Robert Sinclair of Longformacus, baronet, to which contract Lord Bargany was a party.

"It is not necessary, in order to render intelligible what I have the honour to submit to your Lordships, to detail the several limitations in this instrument of 1688; it is enough, perhaps, at present to say, that if the prior takers, by whom, I mean Sir Hew, and John Dalrymple, called throughout this cause John Hamilton, had been guilty of contravention against this entail; and if those contraventions, under the view of the Court of Session, were to be held as bringing the event of forfeiture of each of them, there could be no doubt Mrs. Fullerton's title would come forward, so as to enable her to take possession and enjoyment of the whole estate.

"The prohibitory, irritant, and resolutive clauses of this entail, have been frequently stated to your Lordships, and it is enough to state so much of them as prohibit John Master of Bargany, or the heirs male of his body, or any other, the members of tailzie above mentioned, to alter, innovate, or change the foresaid tailzie, and order of succession above mentioned, or to do any other deed, direct-

ly or indirectly, in any sort, whereby the same may be in any wise altered, innovated, or changed: And the persons so contravening are to forfeit *ipso facto*, for themselves and their heirs. To be sure, the words are very strong, attending to the ordinary import of them, and they are words which, perhaps, at first view, one should feel it difficult to say, might not be taken to prohibit any innovation in the enjoyment of an estate which is other than the subsisting destination. Innovation, or change, can hardly be said to operate any prejudice in fact against the person who would thereby take under the limitation, whoever might be the party who would first take.

"It is fit to mention here, that this deed of entail, though drawn with great care and accuracy, as far as I am able to judge upon the subject, certainly has not made it incumbent upon the person who was to take under the limitation, to lye out, as they call it, unentered. That is to say, he might take possession; he might intromit with the rents, and yet would not have the estate vested in him. This is a remarkable circumstance, because a great deal of argument in this case proceeded upon that subject. I need not trouble your Lordships with stating at what period the several persons entered into possession of the estate and died, who had the enjoyment and possession of the estate previous to Sir Hew Dalrymple, of whose acts your Lordships have heard so much in this cause.

"It appears that, in 1736, those who were entitled to a prior possession of the estate expired. James Lord Bargany died in 1736, without leaving children; and, by his death, the issue male of John Lord Bargany, the maker of the entail, became extinct; so that the right of succession to the estate of Bargany devolved, in terms of the entail, upon the branch of substitution immediately next to the heirs male of the granter's body, which was the eldest heir female of the body of the said John Lord Bargany, and the descendants of her body without division. The person entitled to succeed under the above description was Hew Dalrymple, (afterwards Sir Hew Dalrymple of North Berwick), the eldest son of Joanna Hamilton, who was the only daughter of John Master of Bargany, the eldest son of John Lord Bargany, the maker of the entail; and that gentleman, as has been very truly represented, as heir of entail to the estate of Bargany in April 1736, assumed the name of Hamilton, as directed by that entail. He likewise is stated, and that statement is founded in consequence of his having executed a factory to John Kennedy, and to other persons whom he is stated to have constituted, for the purpose of receiving, or at least put them in the faculty and power of receiving the rents of the estate, to have described himself in certain instruments, other than those which have been stated as forming the contravention, as well as those which are stated as amounting to acts of contravention, as an heir of tailzie, under the deed of 1780 (1688?)

"It is here necessary to state, that he was in fact heir of the old investiture in 1632, it is also necessary to take notice, that, in fact,

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from 1736 down to near the period when he executed that deed, which throughout is called a deed of repudiation, he was in truth engaged in a suit, which was first decided in the Court of Session, and afterwards decided in his favour in this House, previous to the year 1740; that law suit was determined in his favour, and it was then adjudged by your Lordships that he was entitled to the estate in question.

"My Lords, several questions have arisen in the argument, upon which it is not my present intention to enter, because I do not think them useful for the purpose for which I now rise. Several questions have arisen upon this part of the case; Whether, for instance, the taking possession, subjected him to the fetters of the entail? Whether, if his interpositions are to be imputed to his character of heir in tail, *that* would subject him? Another question has been, Whether an heir may not retract everything but an actual entry? Whether taking possession intimated anything more than an intention of entering?—and, if his intention should be altered, Whether the deed of repudiation itself amounts to a contravention? That is a point, which has been very painfully, very learnedly, and very ably discussed at your Lordships' bar, as well as treated of by the Court below.

"It appears that Sir Hew Dalrymple was likely to become entitled to another very considerable estate in Scotland, the estate of North Berwick; and some motive, the nature of which it is not necessary to discuss, had induced that part of the family to whom the property belonged, and who had the control over it, to manifest a disinclination that the estate of North Berwick should devolve to the same person. It was perceived that, according to the entail of Bargany, Sir Hew Dalrymple must take that estate; his grandfather did not think it fit that he should have the estate of North Berwick, if he thought proper to take the estate of Bargany, and therefore the entail of North Berwick was reserved under limitations, which made that estate devolve upon the subsequent taker, which Sir Hew Dalrymple held for the possession of Bargany, according to the entail of that estate, when his right to accept the estate of North Berwick, relinquishing Bargany, ensued. But his grandfather had a power of dispensing, to the extent which he thought fit to dispense, with that intention, with respect to the estate of North Berwick; and the grandfather, thinking it might not be an imprudent thing for his grandson to have a very good estate, while he himself had another very good estate, does permit his grandson to take the estate of Bargany during the life of himself, the grandfather, but he provides, that if, at his death, he does not, according to the expression which he here uses, denude himself of the estate of Bargany, he should not take the estate of North Berwick; and I pass over this part of the case with barely stating, that my mind has never felt the least inclination not to adopt that proposition, in which the judges of the Court of Scot-

land appear to have been quite clear, and that is this, that if the subsequent takers of the estate of *North Berwick* had chosen to let Sir Hew Dalrymple enjoy both the estate of Bargany and North Berwick, then the *subsequent taker* of the *estate of Bargany* could not have quarrelled with that, because there was no clause whatever in the entail of Bargany that prohibited any heir of tailzie of Bargany from holding the estate of North Berwick.

"Under these circumstances, Sir Hew Dalrymple executed the deed of April 1736, of which your Lordships have heard a great deal in the course of the argument which has been addressed from the bar; and the result of these deeds appears to me to be little more or less than that which I have stated. I hope, in a very few words, to express my construction of these instruments to be the mode, and the only mode, which the Lord President could take to secure the full enjoyment of the two estates, to exercise his power over the North Berwick estate, and not to exercise any power he had not, or to prescribe any thing relative to the enjoyment of the Bargany estate.

"The Lord President died in the year 1737. At that period your Lordships will have observed, from what I before stated, that the suit and title to the Bargany estate was not concluded, and therefore Sir Hew Dalrymple, the son, by the death of the President, came to this situation, that the Bargany estate opened to him if he was entitled to it, and the North Berwick estate, if he was entitled to that; —he was put at least under the difficulty, that he could not very well state in what manner he was decisively to act, till the suit relative to the Bargany estate should be concluded, and that being so, his intermediate acts may in some degree be accounted for by that circumstance. That suit concluded in 1739 or 40, and in the year 1740 Sir Hew Dalrymple executed a deed, of the 13th August, to the following intent. (Recites the principal clauses of the deed as follows:)

"That having duly considered the foresaid tailzie of the estate of North Berwick, contained in the aforesaid contract of marriage, and also the tailzie of the estate of Bargany above mentioned, dated the 19th day of June 1688, and that it appears to have been intended by the parties to the contract of marriage betwixt the said Sir Robert Dalrymple and Mrs. Joanna Hamilton, my father and mother, that the said two estates of North Berwick and Bargany should be separately taken and possessed by the heirs of the marriage betwixt the said Robert Dalrymple and Mrs. Joanna Hamilton, except in the cases therein excepted, and that in case I should now take the succession of the estate of Bargany, I would thereby forfeit the right to the estate of North Berwick, for myself and my descendants, in favour of John Dalrymple, counsellor at law, my brother german; and I being fully resolved to take and hold the estate of North Berwick, and to allow the estate of Bargany to de-

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scend to and to be taken by the said John Dalrymple or Hamilton, in terms of the entail of the estate of Bargany, therefore, and for the love and respect which I have and bear to the said John Dalrymple, and in consideration of the settlements of the estates of North Berwick and Bargany above recited, wit ye me with and under the provisions after mentioned, to have repudiated, like as I by these presents do repudiate, and refuse to accept of the succession of the said estate of Bargany, and that to and in favour of the said John Dalrymple, the next heir of tailzie in the said estate of Bargany, and I consent that the said John Dalrymple shall, in respect of my repudiation aforesaid, serve himself heir of tailzie and provision to the said James Lord Bargany, and otherwise make up titles in his person to the said estate of Bargany, in such manner as is competent to the law, and as he shall be advised, and that the said John Dalrymple do instantly take possession of the said estate of Bargany, and uplift the rents thereof in the tenants' hands fallen due since the death of the said James Lord Bargany, and in time coming.

" Your Lordships will perceive, by a proviso I am now about to state, that he was extremely reluctant to do any act, which, if it could bind himself, should bind his descendants; he seems to have looked first to those events in which it would be possible either for him or his issue to hold both estates, and he concludes this instrument with this proviso: ' Providing always that these presents shall ' no ways prejudice my own or my descendants' own right to take ' the succession of the said estate of Bargany upon failure of the said ' John Dalrymple, and Dr. Robert Dalrymple, my third brother, or ' in case any event shall exist in which I, or my descendants, can ' take the said succession, consistent with the foresaid tailzie of the ' estate of North Berwick, with which express provision these pre- ' sents are granted by me, and accepted by the said John Dal- ' rymple.'

" Your Lordships observe the effect of this act was preferring one brother to another. It might certainly have brought forward a period at which the appellant would be entitled to enjoy, provided it happened that Sir Hew Dalrymple's issue could never reinstate themselves, but if they could, in another order, I now consider this act, so far from being injurious, that it would have brought forward her (Mrs. Fullerton's) title to enjoy the estate; and, on the other hand, would have left it to commence precisely at the same period as if these acts had never been done; the contravention, therefore, which Mrs. Fullerton alleges, is not a contravention by which injury is done to her, but an injury done to the intention of the author of the gift of the whole.

" After this John Dalrymple, the second brother, assumed the name of Hamilton. Here I should take notice that Sir Hew Dalrymple, as he then was, when he drops the possession of the estate,

ceasing that pre-exemption of the estates, and giving them to John Dalrymple, he likewise drops the name and arms; and one of the clauses in the entail was this, that he was to take, and use and keep the name and arms. John took the name and arms, and he took the possession of the estate of Bargany as heir; and, in order to pave the way for making up a feudal title thereto, he brought a summons of declarator in the Court of Session, which, after setting forth the entail of Bargany, the competition relative to the succession, with the judgment of the House of Lords, and particularly the above mentioned deed executed by Sir Hew Dalrymple, and then the summons concluded that it should be found and declared, by decreet of the Lords of Council and Session, that the said John Hamilton, pursuer, hath the only right and title to the succession of the estate of Bargany, and that he ought to be served heir of tailzie and provision to the said James Lord Bargany in the said lands and estate of Bargany, comprehending the several lands, baronies, and others contained in the tailzie made by John Lord Bargany, in the contract of marriage betwixt the said John, Master of Bargany, and Mrs. Jean Sinclair, after the form and tenor of the writs before narrated, and laws and practice of this realm, used and observed in the like cases in all points.

" No defender called in this action made any appearance; a decree was pronounced in absence, and this decree having been pronounced in absence, as far as I collected from the language of Mr. Erskine, in his argument referring to it at the bar, was to be taken as next to nothing, though it was certainly a judicial proceeding in the cause of high authority in this respect, I mean high authority as affecting the title to the estate,—I do not mean a proceeding of high authority, as conducted with the view and judgment of the Court, industriously called for, and elaborately bestowed upon it, but the Court found the points and articles of the foresaid summons relevant and proven by the writs aforesaid produced, and found and decerned and declared, conform to the conclusions of the libel.

" After this Mr. Hamilton expeded a general service, as heir of tailzie and provision to James Lord Bargany, and thereafter resigned the estate of Bargany, by virtue of the procuratory of resignation contained in the entail of 1688, which had not yet been executed, and thereupon obtained a crown charter, granting and confirming the estate of Bargany to him, the second son of the deceased Robert Dalrymple, the counsellor, by the only daughter of the deceased John, Master of Bargany. It runs in these words :—' Dilecto nos-
' tro Joanni Hamilton de Barganie jurisconsulto filio secundo de-
' mortui domini Roberti Dalrymple de Castletown procreato inter
' illum et demortuam dominam Joannam Hamilton amicam filiam
' demortui Joannis magistri de Barganie et sic hæredem fæmellam
' demortui Joannis domini Barganie ejus avi et hæredibus quibus-
' cunque ex corpore dicti Joannis Hamilton quibus deficientibus aliis

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'hæredibus quibuscunque ex corpore dictæ dominæ Joannæ Hamil-
'ton procreatis inter illam et dictum dominum Robertum Dalrymple
'absque divisione; quibus deficientibus aliis hæredibus fæmellis ex
'corpore dicti demortui Joannis Domini Barganie absque divisione
'hæres fæmella natu. maxima et descendentes ex ejus corpore omnes
'alias hæredes portionarias semper excludentes, et absque divisione
'succedentes, quibus deficientibus hæredibus masculis ex corpore
'nunc demortui domini Joannis Houston,' &c. I have taken this in the very terms of it, because the argument proceeded upon an assertion that this was in truth a grant to John, and the heirs proceeding from him, and then a grant to the other heirs of tailzie, they meaning by the words, other heirs of tailzie, those other heirs who are to take subsequent to John, and upon this conclusion, that the deed of 1780, the contents of which I must state shortly presently, was a contravention on the part of John of the old entail of 1688.

" Mr. Hamilton's title to execute the procuratory in the entail of 1688, upon which the charter proceeded, is stated thus, 'Et ad 'quam procuratoriam resignationis et terras aliaque inibi contenta 'demortuus Jacobus dominus Barganie postea jus habuit tanquam 'hæres talliæ et provisionis in generali cum beneficio inventarii ser-'vit. et retornat. dicto demortuo Gulielmo domino Barganie ejus patri 'secundum ejus servitium de data duodecimo die mensis Julii 'anno domini 1712 ad cancellariam debite retornat Et ad quam 'procuratoriam resignationis terras aliaque inibi contenta dictu 'Joannes Hamilton de Barganie nunc jus habet tanquam hæres 'talliæ et provisionis in generalis servit et retornat. dicto demortuo 'Jacobo Domino de Barganie secundum ejus generale servitium 'coram balivos vici canonicorum de data duodecimo die mensis Sep-'tembris anno domino millesimo septengentesimo quadragesimo primo 'ad canellariam debite retornat. Et quod generali servitium dict. 'Joannis Hamilton constabilitur. et auctoritate munitur per judicium 'dominorum cum spiritualium et temporalium in parliamento convo-'catorum de data vigesimo septimo die mensis Martii anno domini '1739 (here the judgment of the House of Lords is recited) Et per 'quoddam scriptum die deed per dictum dominum Hugonem Dal-'rymple concessum de data decimo tertio die mensis Augusti et 'registratum in libris Concilii et Sessionis undecimo die mensis 'Novembris anno domini 1740 et per quod repudiavit et recusavit 'accipere successionem dict. status de Barganie et hoc ad et in favo-'rem dicti Joannis Hamilton proximi hæredis talliæ in dicto statu de 'Barganie concordavit quod dict. Joannes Hamilton (in respectu ejus 'repudationis prædict.) seipsum hæredem talliæ et provisionis dicto 'Jacobo domino Barganie inserviet eo modoquo de lege com-'petit.' &c. So that it puts his character of heir of tailzie upon the circumstance, that he is heir of tailzie, because Sir Hew Dalrymple ceased to be connected with the estate, and because that connection ceased in the operation of the deed which Sir Hew Dalrymple had

executed. It is observeable, that this decree in absence proceeds upon a state of things which certainly takes no manner of notice of the reservation of Sir Hew Dalrymple himself, and the heirs of his body. In the cases put in the deed, it is observable, that it does not take any notice of that proviso, by way of reservation, and though Sir Hew Dalrymple was in life, it treats him as if he were dead, and dead without issue of his body.

" Upon this part of the case, your Lordships will recollect that a great many very considerable questions, as affecting the law of Scotland, have been made in argument, and have been very elaborately treated at the bar. In the first place, it has been insisted that John Dalrymple, thus treated by Sir Hew Dalrymple, his brother, in this disposition of the estate, was accessory to a contravention, and that his brother Robert Dalrymple and he ought to have taken some step to compel Sir Hew Dalrymple either to abide by the terms of the entail, or quit any benefit under the terms of the entail. On the other hand, it has been insisted (and that opinion has been adopted by the majority, if not all the Lords of Session), that no such obligation rested upon Sir Hew Dalrymple; that there was no proviso in this deed against Sir Hew's lying out unentered; that this deed of repudiation is not a deed of disposition, and that if John Dalrymple had taken any step whatever against Sir Hew Dalrymple, even after he had executed the deed, and after John, under the effect of this deed, and by his cooperation to effect this legal juggle, as it has been aptly enough called, if John had instituted any suit in Scotland to compel Sir Hew at any period of his life, to do any act, that it would have been competent to Sir Hew on the one hand to have said, I will take the estate notwithstanding the repudiation. If it is a contravention, it has been purged of that contravention, and that I will take the estate. But he might have said, in as much as I have a right to decline the possession, in as much as I am an heir of entail, not called upon by the terms of the entail to enter, I am not bound to enter by the terms of the entail, and I will not intromit with the rents of the estate, but during such period of my life, if in any period of my life, I shall think proper to intromit with the rents of the estate. And it has been sanctioned by very strong and judicial authority, that this on his part would have been a sufficient answer to any charge against John, of committing contravention, in the not calling on Sir Hew Dalrymple to do an act, because it is said Sir Hew would not have been bound to answer that call, or to have made good any claim which John would have made upon him.

" The same sort of answer has been given to the circumstances of Sir Hew Dalrymple's dropping the name and arms, that he had a right with the possession, (that possession not being perfected with an entry)—he had a right with the possession, if he thought proper, to use the name and arms; and when he relinquished the use of the

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name and arms together with the possession, to do so without contravening; and if the relinquishing the latter was not a contravention, the ceasing to use the name and arms also was not a contravention. Infeftment followed upon the proceedings I have last mentioned, so that the title seems to have stood in actual enjoyment till the year 1780. And in the year 1780, John Hamilton, probably foreseeing he was likely to leave the world without any issue of his own, executes a settlement of his estate of Bargany, by which that estate was limited to himself and the heirs male of his body; whom failing, to Sir Hew Dalrymple, Bart., and the heirs of his body without division; whom failing, to the next heir of the body of the said John Lord Bargany, and the other heirs of tailzie contained in the said deed of entail, executed by the said John Lord Bargany in his son's contract of marriage, of date the 19th June 1688, in the order therein expressed, and which heirs of tailzie are hereinafter inserted. And upon this disposition, infeftment was taken; and upon this deed it is said that this was a contravention on the part of John, Sir Hew having forfeited by his contravention, Sir Hew forfeited for himself and for the heirs of his body. John's titles were made up in the year 1742, under instruments which bound John to take care of the interests of all the subsequent takers in the entail of 1688; for conceiving Sir Hew and the heirs of his body to be discharged out of that entail as if they had never therein been named, and, therefore, that the introduction of Sir Hew upon the failure of the issue of the body of John in this deed of 1780, is a contravention on which Mrs. Fullerton has a right to found the present action as against John, and, therefore, it has been contended, that in the present action, *that deed* may be considered as a contravention, and insisting, as to it, for having it reduced as far as there is any title in Sir Hew, and the heirs of his body.

"That has been strongly contended for upon many grounds and principles, your Lordships have heard—laying the foundation of the argument deep in some of the most abstruse points in the law of Scotland—and this answer seems, on the other hand, generally adopted by the Lords of Session, That the deed of 1740 having reserved to Sir Hew Dalrymple, and the heirs of his body, a right to claim, if there should ever hereafter arise a set of circumstances under which he, or they, could enjoy both estates, that this deed might have proceeded upon mistake. In the first place, it did not proceed upon a mistake, but they say, it might have proceeded upon a mistake, on the part of John Dalrymple accepting the succession under it; and if it was founded in mistake on the part of John, it was a contravention purgeable, because founded on that mistake, and which contravention John might have got rid of, by setting the mistake right at any period of his life.

"These being the circumstances of the case, with the addition, that John Dalrymple was charged with having been guilty of contraventions of the limitations of this estate, by certain adjudications

in reference to his proceedings, upon which he had sold and disposed of that part of the estate, it was contended upon these several grounds that Mrs. Fullerton was entitled to take the estate. I will just hint a single word to your Lordships upon the matter of the adjudications. That it appears to me that the contravention alleged to have taken place, with reference to these adjudications, cannot be sustained. The answer I see was given in the Court below, and I believe none of your Lordships will have any doubt but it was satisfactory, as far as the objections were founded.

"Under these circumstances, and stating this sort of title, Mrs. Fullerton brought her summons in Scotland, and your Lordships will recollect that she insisted, under these circumstances, that Sir Hew Dalrymple, and his children, being, I think, *eight* in number, were to be considered as not standing as the substitutes in this entail. She insists that she had a right to have John's forfeiture declared, and his forfeiture, for himself and his heirs, adjudged by the Court,—to have all these deeds reduced; and under some title, accruing out of the old entail, and the effect of all these transactions accumulated, to have a right asserted in her to take the immediate possession of the estate, as if Sir Hew Dalrymple and John Dalrymple, and their natural descendants, were actually dead. This being the prayer of her summons, the defender, Mr. Hamilton, produced the crown charter which was expede in the year 1742, with the infeftment that followed upon that crown charter; and he asserted that, upon these, he had been more than forty years in possession,—that this therefore was a preferable right sufficient to exclude the title of the pursuer, and that he was not bound to make any further productions.

"In answer to this, it was contended on the part of the pursuer, that let the effect of the infeftment and the forty years' possession be what it might, it could not be a good title to exclude the title of the pursuer, if the pursuer had any title, because the pursuer, by law, was authorized to deduct from the years of possession the years of her minority. This appears to have been very elaborately considered in the Court of Session. It will be in your Lordships' recollection, that it was most ably argued by all the counsel at the bar, myself excepted; but I argued it, with what industry I could—that it was very painfully considered by some of your Lordships, particularly the learned law Lords then in the House,—and that the Court of Session were of opinion, at least the majority of them were of opinion, that, under the circumstances, Mrs. Fullerton was entitled to deduct her years of minority. Some were of opinion that she was entitled to deduct her years of minority, assuming her to be the nearest substitute. Others were of opinion that she was entitled to deduct her years of minority, whether she was to be considered as the nearest substitute, or as a remote substitute. Some thought that the years of minority could not be deducted. Others thought that the near-

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est substitute might deduct them. Others thought that the nearest might, but the remote might not. Others thought that both the nearest and remotest might; and, under these circumstances, the first decree of the Court of Session came before your Lordships.

"It will be in your Lordships' recollection, that when the case came for argument upon the appeal from that decree, that it was necessary, at least in some degree, in order to make the case intelligible, to state at your Lordships' bar, what was the title insisted on by Mrs. Fullerton, and that title was stated to be such as I have had the honour of representing it to be to your Lordships to-day, and it was asserted at the bar by those who were counsel against Mrs. Fullerton, that it was no title; but it was alleged to be the course of proceeding in Scotland to assume the facts as proved, and to assume the law. I should have thought certainly, that no law was to be assumed but such law as was the result of the facts that were to be assumed; that it was one thing to say this, that if your facts be true, the law of the land is so and so; and another thing to state, if your facts be true, the law shall be just what you please to represent it to be, we knowing that the law is directly other than you represent it to be; but, indulging you in the assumption you were pleased to make, instead of stating anything as to the law which you assume, we, in the first instance, will address ourselves to consider the title to exclude, founded on prescription by the defender; and instead of beginning, at what I dare not presume to call the right end, but at the English end of the cause, that is, with the plaintiff's title, to begin at the latter end of the cause, and to dispose of the latter end of the cause first, though it may be that in the beginning of the cause there is nothing alleged to be disposed of. It was, however, stated that such was the practice of the Court; and I am sure there is no person less able to inform your Lordships what the practice of the Court is than I am, and no person less disposed than I am to observe upon the practice of any Court; because I have lived long enough to know that it is not in the reason of individuals that you are sure that you get to a right conclusion, when you are arguing upon the propriety or impropriety of measures that are taken, if you are disposed to acquiesce in an opinion that *that* which has been found in past ages to be convenient and right, may be convenient and right though you cannot immediately see the grounds upon which it is founded. But I observe here, that the two noble and learned Lords agreed in opinion at that time, which opinion they submitted to your Lordships, and which opinion your Lordships, as I understand, distinctly adopted; namely, that there might be a great difference between a case in which, if the facts were true, and the law arising out of those facts were such as, grounding reasons upon those facts, the pursuer had a right to the relief which she prayed in her summons; and though that statement, entitling her, if her facts were true, and entitling her if her facts were not true, but facts furnishing

law which she propounded, to call for the production of title deeds, and so on, that there is a wide difference between saying it is extremely convenient and absolutely necessary, and never to be departed from.

"If you were then to enter first into the question of the defender's title, and say this, This defender, if he can state a short exclusive title, shall not be called upon to open his charter chest, and indulge the pursuer in any investigation of all his title deeds, in that sort of case, one can easily see why the prescriptive period stated in a defender's title should first be gone into. But if there should happen to be a case, in which the pursuer really states no title, in short, in which he states, *that* which I say is no title, if the law will say it is no title, then the pursuer, stating that set of facts, and raising an assumption of law which belongs only to that state of facts, ought to have her title first considered. It did not occur to me, I own, at that time, and I humbly state to your Lordships that it does not occur to me now, that it is possible that any of that inconvenience can follow, which it was supposed by the Court below would follow, if you did not go first into the exclusive title. I am ready to state this, that if it shall appear, upon the examination of the pursuer's title, that the pursuer has a title, as she states it, then the shortest way in which the defender can plead, in bar, as we should say in our Courts in this country, is the best way for the administration of justice, and you shall dispose of that plea in bar; *i. e.* you shall affirm that this exclusive title, so pleaded in bar, is bad, before you shall give the pursuer leave to see a single paper of the title of the defender. But why is the defender to be put to the necessity of pleading in bar, and arguing his plea in bar, or exclusive title, through ten long years? for such is the case here, if, upon calling the judicial eye of the Court to the statement made by the pursuer, it is found the pursuer has not stated a title, whether there be a title in the defender or not.

"This is a very familiar practice to my mind. It does often happen in the courts of this country, that a plaintiff in a suit states a set of facts, where there is not a single word of truth at the bottom of his statement; but a set of facts, which, if taken to be true, raise propositions which the law of the country require you to apply to that statement of facts, and a defendant can get rid of that false statement no other way with convenience, than by pleading something in bar, if he has anything upon which he can rest a plea in bar. For instance, a man files in the Court of Chancery here (which in some respects is like the Court of Session), what is called a fishing bill. He states a very handsome title to himself, deriving the estate to him, and then insisting that, being heir in the manner he has mentioned, he has a right to the estate. That he has all the rights of an heir, and craving to see the title deeds, whether he is

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divested of those rights which belong to him as the heir; but the court must take it to be true in the first instance, and then the defender must deal with it as he can. If he has any title which he can say is exclusive, this is a plea in bar; because, supposing all that to be true, here is a fine levied—here is a deed of sixty years. If he cannot do that, he is obliged to answer the whole.

"But put the case the other way. Suppose he stated a title, as consisting of facts which a judge, throwing his eye upon it, would say, 'Well, if this is all true, it is irrelevant—it forms no title against 'the defendant—it forms no title against anybody'; the defendant has a right to call upon that judge to exercise his judicial mind upon that state of facts, by a process which we call a demurrer. You examine the case of the plaintiff first, and if there is nothing in it, you never take the trouble of examining the case of the defender, because *his possession* is against a man who shows himself to have no right to possession. I hope I am correct in saying, that whether this be right in reason or wrong, it becomes me to say, that it is right in reason, for I feel that, according to my view of your Lordships' remit, *that* was the view of the case when you made the remit.

"Now, what is the remit? It is this, That it is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, that the cause be remitted back to the Court of Session in Scotland, to review the interlocutor 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 in her behalf. And if the Court shall hold these questions to be in this case involved with each other, that they do pronounce an interlocutor for or against that title, that is, for or against the pursuer's title, and also on the effect that such judgment may have upon the interlocutor to be reviewed.

"The meaning of your Lordships' remit, I take to be this, That the Court of Session were 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, that is, be the title to exclude valid or not valid, if that title is not involved with the title alleged by the pursuer—that is, if the title alleged by the pursuer be no title, then the title to exclude is not involved in it. If, on the other hand, the title of the pursuer be a title, then the title to exclude is involved in it, and you will order an interlocutor accordingly. If you find the pursuer has no title, you have no further duty with respect to the defender's title. If you find the pursuer has a title, then you are to enquire into the validity of the obligation of the defender, which will include all this, and whether, in that case, Mrs. Fullerton is the nearest substitute, or the most remote substitute,—whether, if the nearest, she has the title to deduct her years of minority

and also a title*

and then, if you find there has been a contravention on the part of the pursuer (defender?) you will say, what is the effect of the title of the defender, regard being had to the years of minority, as allowable or not allowable, upon the title arising out of the contravention at this day? And this interlocutor, most undoubtedly understood, (if I am wrong in this, the learned Lord who sits by me will set me right; but as I understood this interlocutor at the time, and have understood it ever since, it was your Lordships' meaning), that the Court of Session should decide whether the pursuer has a title or not. If they decided that the pursuer had a title, then they were further to decide, whether, under the circumstances of the case, the exclusive title was good to exclude, attending to the contravention as applying to the circumstances of these persons.

"Under this remit, the cause went back to the Court of Session; and I really hardly know in what terms I shall do justice to that Court, with respect to the great attention which they have given to the subject. The cause has been most elaborately argued, most patiently heard, and diligently considered by their Lordships; and in the consideration of it every question relative to the point, whether the pursuer had a title or not, has been investigated, as far as I can judge, to the bottom, decided upon in fact, but yet the interlocutor came back, not saying a word upon the pursuer's title, but still saying that the defender has an exclusive title, and a preferable title. The language of the interlocutor, therefore, unless it can be sustained by a reference to a practice which I am not master of, is language which seems to admit (though the majority of the Court deny that) that the pursuer had a title. But whether the language of this interlocutor be right or wrong, I feel it my duty to state, that it is not an answer to your Lordships' remit, as I construe your remit, because, whether it may be proper that *that* remit should be made or not, is one question; but a remit having been made, your Lordships will expect it to be answered. Then there is no answer to the question, Whether the pursuer had a title? This answer implies, that if the pursuer had a title, there is an exclusive title on the part of the defender. You cannot imply, as it appears to me, from this answer, that there was a contravention, or that there was not a contravention; or that, if there was a contravention, that contravention was purged; or that, if there was a contravention, it ought not to have been proceeded upon to the length of declaring it.

"You cannot imply in this interlocutor what the Court held about the deed of repudiation, whether they held it to be a deed of disposition or not;—whether, if a deed of disposition, they held it to be an act of contravention; and whether, if they held it an act of

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* The blank occurring in this speech arises from the short-hand writer not hearing the words spoken.

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contravention, they held it to be an act of forfeiture. You cannot collect any conclusion of that sort with respect to the deed of 1780, nor with respect to any one of the acts or deeds of Sir Hew Dalrymple, John Dalrymple; and the Lords of Session have been all of opinion, from what we know of the judgment, that, under the circumstances, there either was no contravention, or if there was any contravention, that it was purgeable, and if purgeable, there ought to have been a precise declaration upon it after the death of Sir Hew Dalrymple; and the Court of Session were, upon the whole, of opinion that the putting of the one before the other was no injury to Mrs. Fullerton, and that her interest, standing at the moment in which she comes for a judgment, in point of enjoyment and in point of benefit, precisely and exactly as it would have stood, if none of these acts had been done. They seemed, I think, unanimously of opinion, with the exception of a single Lord, who did not give his opinion upon the subject, that the pursuer, at the time she is pursuing, has no title, therefore the interlocutor does not do justice upon your Lordships' idea upon that subject; and, with respect to this particular case, it does not do justice to what I take to have been the ideas of your Lordships, when you addressed this remit to them.

"With respect to the question itself, Whether Mrs. Fullerton has or has not, a title? I am very free to state to your Lordships, that my mind is impressed, very strongly impressed, with this idea, that when the author of a deed, be it a deed or will, has prohibited any particular act to be done, that it belongs to the disponee in that deed to take the property as it has been given to him, and that he has no right to alter, innovate, or change, (if the fact done be an alteration, innovation, or change prohibited), merely because he had reason to think it was more or less injurious to those who are to take behind. It is the duty of those who take under a deed, to observe the terms of the deed. And I will not state to your Lordships, that if these things had been *res integra*, being, in my opinion, a positive prohibition by the author of this deed, that the second son of his family, and his descendants, should not take his estate before the first son of his family and descendants; there are many considerations that may fairly influence the heart of a parent to make a limitation of that sort in a deed beyond that; but, beyond that, there are many considerations of policy, and I do not know that it is possible to reason, according to the notion of an English lawyer, that an eldest and second son shall say, that they are not defeating the will of the parent, when they are making the eldest the second son, and the second son the eldest. If this had been *res integra*, many of the doctrines contained in this case are doctrines which it would be difficult to sanction.

"But, having given the most painful attention which I could to this cause, and to all the law which I can find upon this subject, and had recourse to the authority of those who are dead and those who

are living, upon the subject, it does not appear to me that I should act faithfully to your Lordships, or according to my own feelings, if I presume to say that, under all the circumstances of the case, I could represent the pursuer to your Lordships as having a title. Under these circumstances, it has appeared to me to be my duty to state the facts of the case in detail to your Lordships, rather for the purpose of stating why I think the interlocutor must be *altered*, in order to make it a compliance with the terms of your Lordships' remit, than to intimate that I can, however anxiously I have thought upon this subject, induce myself to think, that as the law of Scotland has been settled, Mrs. Fullerton had a title to pursue, which she has stated in her summons. In order to make that interlocutor consistent with what I take to be the meaning of your Lordships, I should conceive that it would be necessary that your Lordships should make some declaration with respect to the pursuer's title, and, for that purpose, I shall beg leave to submit it to your Lordships.

"That this interlocutor be reversed, and that your Lordships should find, that the matters in Mrs. Fullerton's summons are not sufficient to sustain the conclusions in those summonses, or any of them. If I have mistaken the views of your Lordships in any former periods in this cause, I am sure I shall be set right by those to whom I have the honour of addressing my humble conceptions. It is a satisfaction to me that I speak in the presence of those,* of some of whom I am bound to say, that if I have any opinions which will be serviceable to the country, I owe it more to them than to any other cause."

The question put and carried.

Whereupon it was

Ordered and adjudged that the interlocutors complained of in the appeals be reversed. And it is 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 said conclusions; and therefore assoilzie defenders.†

For the Appellants, *Wm. Grant, Robt. Blair, Wm. Adam, David Cathcart.*

For the Respondent, *Henry Erskine, Thomas Thomson.*

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* Lord Thurlow present, Lord Rosslyn absent.

† Mr. Napier, in his recent work on Prescription, has some comments on this case, as disposed of in the House of Lords, p. 507, last edition. But, on more mature consideration, perhaps, the "confusion" which he alleges to have occurred may be found to disappear. In regard to Lord Thurlow's remit back to the Court of Session to re-