

upon the event of the heir of entail not committing an irritancy, as the right of Missinish was upon the event of M'Kinnon not having a son.

It must be confessed that, upon the other scheme of Missinish's right being resolved, the case of the heir of entail pinches a little; and it is somewhat difficult to say why the heir of entail's right should be resolved in a way different from the right of Missinish, as the irritant clauses make a part of the constitution of the right of the heir of entail. The feudal irritancies, we see, resolve the right of the vassal in the same manner as Missinish's right is resolved; and why should not the irritancies of the tailyie have the same effect, as they are made part of the feudal right, *provisione hominis*, in the same manner as the other make part of it *provisione legis*? There does not occur to me any other answer to this, except that, as both the Act of Parliament and our practice upon it have limited and ascertained tailyies, we do not give the same force to the irritancies adjoined to them by the will of the maker that we do to the legal irritancies of a vassal's right. It is for the same reason that we require that the irritancies shall be engrossed, not only in the charter, but likewise in the sasine; and that they shall be seen upon record, not only in these two, but in the register of tailyies. And it is for the same reason that though the tailyie declares, that, upon the irritancies being incurred, the estate shall be *ipso facto* forfeited, and devolve to the next heir, yet not only is a declarator necessary, but all the deeds of the forfeiting person, till declarator be obtained, are valid and effectual if not prohibited by the entail. In short, by a favourable construction for commerce, those irritancies are understood to resolve the right only from the time of commission, and even not from that, but from the time of declarator. But should it be expressly provided in the entail, that the irritancies should operate so as to resolve the right *ab initio*, I should think in that case the judges could not avoid giving force to so express a provision.—See *infra*, 14th February, 1765.

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1762. December 9. M'LELLAN against CUTLER.

The Lords, in this case, were all unanimous, that, upon a charter of adjudication, prescription of the absolute irredeemable property could not run, except from the expiration of the legal. If the prescription had been pleaded against any other than the debtor, or his heir, it would, I imagine, have run from the date of the sasine, because the possession of the adjudger, in such a case, would have been considered as the possession of the debtor; and, in a question with any body, if the adjudger claimed no more by prescription than the redeemable right, the prescription would run from the date of the sasine.

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1763. March 9. ——— against ———.

In this case the Lords found, by one vote, that the Justices of Peace were not competent judges to any civil action upon a contract, notwithstanding the constant

practice to the contrary in every shire in Scotland; because their jurisdiction is limited by the statute which gives them being, no earlier than the days of Charles II., and no jurisdiction can be acquired by prescription: there is nothing can give it but immemorial use, to such judges of whom we do not know the origin, as sheriffs, barons, commissaries; because such use, with respect to them, presumes that the jurisdiction was originally annexed to the office.

1763. June 16. M'KINNON against M'DONALD.

[*Fac. Coll. III.* 105, No. 705.]

IN a Highland contract of marriage the wife was provided to an annuity of L.100 Scots, and to a third of moveables; and, in case the husband survived the wife, and that there were more than one son of the marriage, they were to be provided to an half of the husband's moveables; and, in case there was more than one daughter, they were to be provided to a third of the husband's moveables. The case happened that the wife predeceased the husband, and a claim was brought by her nearest of kin for her legal provision of her half of the moveables, (she having died without children,) which she had not discharged nor accepted her conventional provisions in place of.

Lord Alemore was of opinion, that they should find directly, that where conventional provisions are settled upon a wife, the *jus relictæ* is thereby virtually discharged, as well as the terce of lands; contrary to the opinion of all our lawyers, the constant tract of our decisions, and the implied meaning of the 10th Act of 1681; because, he said, this practice was most ruinous in the country, among farmers whose whole stocks consist of moveables, and where contracts of marriage were commonly drawn by persons of no skill; and, therefore, he was for reviving the old law, by which a wife never could have a right to both legal and conventional provisions, and not even to the whole conventional if it exceeded the legal;—R. M. L. 2, C. 16; Sir T. Craig, L. 2, *Diag.* 22. Par. 25; Balfour, title *Wife's Dowry and Terce*. The rest of the Lords did not carry the matter so far; but they were of opinion that the wife, by getting a share of the moveables for her provision, did tacitly renounce her legal share of them, and, by the children being provided to a share of the moveables, without any exception or deduction of the wife's share, it appeared to be understood by the parties that she had no share of the moveables; and the like decision had been pronounced in other cases, as in the case of *Boys*, 12th July 1701, observed by Fountainhall; *Crawford*, 3d January 1747, observed by Falconer.

June 29.—Refused a reclaiming petition against this interlocutor, by which they seem to establish a rule, that, where the moveables are burthened in a contract of marriage with a provision either to wife or children, the wife will not have her legal share of the remainder; contrary to what was decided in the case of the *legitim*, observed by Lord Kaimes, 1726, case of *Dirleton's Executors*.