1762. *November* 26. M'KINNON *against* SIR JAMES M'DONALD.

The pleading in this cause was this day concluded, and memorials appointed. It was argued for M'Kinnon by the Dean of Faculty, that the effect of Missinish's right being resolved depended upon the nature of Missinish's right. If, by his service and infeftment, he acquired an absolute right of fee, no doubt the resolution of his right would operate only from the time of the resolution, not *retro*; if, on the contrary, the right by its nature was temporary and resolveable, the resolution of it will operate *retro*, and the right will be considered as if it had never existed. The characteristics of an absolute, complete, and perpetual right to a subject, are,—1*mo*, That the proprietor may dispose of it at his pleasure; and if Missinish's right was such, there was nothing to hinder him to dispose of the subject even gratuitously. 2*do*, The proprietor of such a right can never be defeated of it except by his own proper fact and deed. And, lastly, no other person can acquire a right to this subject, except by connecting titles with him, either in the way of representation, or by voluntary or legal conveyance from him. Now the right of Missinish has none of these characters, for the gentlemen on the other side have not hitherto maintained that Missinish could have made a gift of the estate: he was defeated of it without any act or deed of his own, and the pursuer possesses it without connecting titles with him; and this being the case, it follows, of necessary consequence, that it must be a temporary and resolveable right, and, therefore, the resolution, arising from the nature of the right, must operate *retro*, as it does in all such rights: for example, lands excambed; lands gifted by a man to his wife; the case of the protestant heir; the right of holding of the immediate superior, which the vassal acquires by the contumacy of the mediate superior; the right of the vassals of the forfeited estates before the superiorities were sold in the Exchequer; and, to give one example from the Roman law, among many others, the case of a thing legated under condition; till the condition exist, the heir or proprietor of the thing legated, as well as of the other things in the heritage, reaps the fruits of it, but his right being only temporary and resolveable, upon the existence of the condition, it is *ab initio* void and null: *L.* 69, § 1, *De leg.* 1*mo*. *L.* 105, *de Condit. et Demonst.* On the contrary, when the other kind of rights are resolved, the resolution operates only from the time that it happens: thus every man's right is resolved by death, and likewise by forfeiture; but as neither of these resolutions arise from the nature of the rights, but are extrinsic, supervening accidents, they operate only from the date. Of the same kind is the right of an heir of entail, which, of its nature, is an absolute right of property; but there are certain extrinsic conditions annexed to it by the will of the tailyier, which being incurred, the right is resolved, but only from the date; and though, when such irritancy of the right happens, the succeeding heir can take it up without connecting titles with the forfeiting person, yet that is by special provision of the statute, and not by the common law; according to which the forfeiting person should be obliged to denude himself, and to convey in favour of the next heir, or, in case of his refusal, he should be denuded by a sentence of declarator.

As to the faith of the records, which is pleaded in this case on behalf of the defender, the use of them is only to secure a man who purchases a feudal right to lands against personal latent deeds. I say a feudal right to lands; for, if a man pur-

chases only a personal right to lands, he will not have the benefit of the records, and his purchase will be affected by the latent personal deeds of his author; as was decided in the last resort in the case of *Denham* of *Westshiels*. Neither will it alter the nature of a right, that it is completed by infeftment, and put upon record; and, therefore, the purchaser must take his hazard of every flaw or defect arising from the nature of the right: if, for example, the right is redeemable, he must take his hazard of its being extinguished by payment, which is a fact that can appear from no record; and it very often happens that the nature of the right does not appear from the sasine of the person from whom I purchase, but I must search farther back to find it out. Thus, it may happen that the person from whom I purchase has a right *ex facie* irredeemable; but if his author's right was only a redeemable one, I will not be safe to purchase unless there has been forty years' possession upon the irredeemable title; and if it were otherwise, and that, as the gentlemen on the other side contend, it was sufficient that my immediate author stood infeft, simply and absolutely, all searches into the register for forty years back would be vain, prescription would be useless, and all inquiry into the nature and progress of the right, and the condition of the persons from whom it was acquired; in short, the records used in this way would overturn the whole system of our law, alter the nature of our rights, and, instead of securing *bona fide* purchasers, for which they were intended, they would be often a cover to the grossest frauds. All, therefore, that the records do, or ought to secure against, is latent deeds; but they will not dispense with your inquiring into the nature of your author's right, from whom he acquired it, and upon what title; and for this purpose, as was just now said, it will be often necessary to carry the search much beyond the right of the immediate author. For example, the person from whom I want to purchase, stands infeft in the lands, upon a disposition, I shall suppose, from A, who also was infeft. To know this is not sufficient, but I must further inquire what was A's title to the lands; and if it was a service as heir to his predecessor, then I must inquire whether there be a possibility of a nearer heir existing. If I find, upon this inquiry, that he was the first-born son of his father, to whom he served, then I am perfectly safe; but if he was the second or younger son, then I must be sure to be well informed that the eldest son was dead at the time of the service. These are facts that the record cannot inform a man of; it is sufficient that they may set him upon inquiry. Again, if A's title was a disposition from his wife, then I must inquire whether she be alive, so that she can still revoke; or, if she be dead, whether she has revoked. Again, if A's title is a contract of excambion, I must take my chance of the other excambed lands being evicted. Thus it is apparent that in all those cases a search is absolutely necessary, and a man must not content himself with what appears upon the face of his author's sasine; and there is but one exception from this rule, introduced by particular statute, in the case of entails, for a purchaser is secure against all the fetters of an entail if they are not engrossed in the seller's sasine; he needs not even go to the warrant of that sasine,—the charter or service. But this must not be extended beyond the case of an entail; and in other cases it must be considered that the charter, or whatever else is the warrant of the sasine, is the principal part of the feudal investiture, being that which regulates the descent of the lands and the tenure, and besides contains any conditions or qualities of the fee; whereas an instrument of sasine is no more than the attestation of a notary that sasine was given to such a person by virtue of such a charter, of which sometimes more and sometimes

less is recited in the sasine, but there is no necessity that it should bear more than the date, the lands, the person by whom it is granted, and to whom. If therefore there is no entail constituted by the charter, but only a quality annexed to the grant, or a burthen imposed upon the lands, it is sufficient that it be in the charter, though it be not in the infeftment, as was decided, 16*th July*, 1737, *Creditors of Smith*; 1*st December*, 1664, *Earl Sutherland*; and, in the last resort, in the year 1730, in the case of *The Creditors of Barbreck*; in which last case there were prohibitory and irritant clauses, but, then, as these were solely intended to secure a right of reversion, which the granter of the feu reserved to himself in case of the failure of the feuar's male issue, they were understood to make only a condition or quality of the grant, and therefore the House of Peers found it was not necessary they should be inserted in the sasine. In that case there was in the sasine a general reference to the provisions in the charter; but I imagine that had no influence upon the decision. In this case there is nothing like clauses irritant and resolutive; and therefore there is no doubt but the purchaser was obliged to look farther than Missinish's sasine, and go to the charter, from which it clearly appeared that there was a nearer heir *in spe*.

It was ARGUED by Mr Lockhart, on the other side, that there was vested in Missinish's person, by the service and infeftment, an absolute right of fee; that it is still entire for this defender to plead that this right would not be resolved by the existence of a nearer heir; and for this there is the authority of my Lord Stair, who says that, in the case of the intestate succession, if a father succeeds to his son, he will not be obliged to give up the lands to a brother that shall afterwards exist. But, supposing Missinish's right to be resolved, as is found by the interlocutor, the question is, in what manner it is resolved,—whether it is so resolved as to be void *ab initio*, or so as to be void only from the time of the resolution, like the right of an heir of entail incurring an irritancy, or laid under an obligation to denude upon a certain event happening; and it was found, in the case of *Sir George M'Kenzie's Succession*, 13*th December*, 1709, that the resolution was in the last way; for there the decree was conceived in these terms, that the remoter heir, say Lord Mountstewart, was under an obligation to denude in favour of the nearer heir then existing; and the principle upon which the decree was founded was, that there was an implied fideicommiss upon the remoter heir to make over the succession to the nearer when he should appear. And, in like manner here, there may be supposed a fideicommiss upon Missinish to give up the estate to M'Kinnon when he existed; and if so, the necessary consequence will be, that all the debts and deeds of Missinish, before the fideicommiss took place, will be effectual. But to this it may be answered, that Mr Lockhart argues the case as if Missinish had been instituted before the pursuer, with an obligation upon him to denude in favour of the pursuer when he should exist. If that were the case, it might no doubt be pleaded, that though such a destination might imply a prohibition upon Missinish to sell, and thereby defeat the obligation to denude, yet by our law there can be no implied entail, but the prohibitions and irritant clauses must be expressed and inserted in every step of the conveyance.

But the case is far otherwise. The pursuer is expressly preferred by the will of the testator; according to which he (Missinish,) never could in any event succeed but upon the failure of the pursuer. Now how is it possible from this to infer that Missinish, by the testator, was allowed to succeed before the pursuer had failed, under the implied condition of a fideicommiss, when it is clear that he was no heir at all named by

the testator, but created *pro tempore* by the decisions of the Court, in order to avoid the inconveniences of keeping the succession too long vacant. Mr Lockhart might as well suppose that in all the instances above mentioned, of temporary and resolveable rights, the rights were absolute in their own nature, but only qualified with an implied obligation to denude in a certain event; so that a right to excambed lands, a right to lands gifted by a man to his wife, &c., are all absolute rights, only qualified with an implied obligation to denude in a certain event. But the contrary of this is certain, as is evident from the effect of the event when it happens, which is to void the right altogether as if it had never existed. Again, in the case of a putative heir, the pursuer is as much called to the succession of this estate, in preference to Missinish, by the will of the testator, as a man's eldest son is called to the succession by the law in preference to the second son. But suppose the eldest to be out of the way, and believed to be dead, and thereupon the second son is served heir, Mr Lockhart might as well maintain that such second son had an absolute right of fee in him, only qualified with an implied obligation to denude in case of the appearance of the eldest son. This is truly creating fictitious rights and supposed obligations which have no existence, and it is not distinguishing betwixt what is essential to a right, and belongs to its nature and its original constitution, and what is adjected to it by paction. Missinish's right is, in its nature and original constitution, a temporary and resolveable right, like those others above mentioned, without any particular paction or provision; and it is, both in law and common apprehension, altogether different from a right constituted by the will of the testator, with an obligation to denude in a certain event. Such obligation is undoubtedly a quality adjected to the right which is no wise essential to it, and without which it could very well have been; whereas Missinish's right, and the other rights above mentioned, are all, in their nature and original constitution, temporary and resolveable rights, not by the force of any paction or provision adjected to them.

It is very true that Missinish's right, if old M'Kinnon had died without children, would have been an absolute indefeasible right; but this is the case of several of those other rights above mentioned, particularly the right of the heir to a conditional legacy, which becomes absolute and indefeasible if the condition fails. In like manner, lands gifted by a wife to an husband become his absolute property if the wife dies without revocation; and there may be still stronger cases figured of infeftments which have no validity or force at all, but in certain contingencies; for example, if a vassal gives infeftment in his lands holding of a superior, it depends entirely upon the accident of this infeftment being confirmed by the superior, whether it is of any validity or not. Another common example is the case of warrandice lands: if the warrandice is not incurred, the infeftment is good for nothing. All such infeftments are therefore to be considered as conditional, or pendent upon the condition that such an event happen; and in like manner this infeftment of Missinish is to be considered as conditional,—valid if M'Kinnon died without a son, good for nothing if a son was born to him; and perhaps it may be better to consider the right in that way suspended upon an event, than once existing and then resolved upon the existence of the contrary event; for by this means all intricate questions about the different ways of resolving rights and the effects of those resolutions will be avoided; and the best answer may be made this way to the argument from the case of entails, for the right of an heir of entail cannot possibly be said to be pendent

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 adjected 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.

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.

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