No 398. It does not follow from the statute 1681, that the government then did not think grants after James II. reducible, but only they chose that as the more eligible method; on the contrary, there was a reduction raised in that very Parliament of the Earl of Argyle's jurisdictions. And the articles of Union only save such rights as were duly constituted; as the present act appoints a satisfaction to be paid for the same.

For the claimants, it is denied that the annexed property is not subject to prescription. M'Kenzie does not say so, but only that it should not prescribe. Dirleton says, the positive prescription is good against the King, and only doubts of the negative. But whether it be or not, the case is different with regard to the subjects in question, which are not *extra commercium*, but alienable *certo modo*; and the effect of prescription is to supply that, and introduce a presumption that it was really adhibited.

The claimants did not insist for an interlocutor on the effect of the ratifications of heritable Sheriffships; depending on their defence of prescription, as the possession was clear.

The Lords found, That grants of regality ratified in Parliament, though the same were posterior to the act 43d, Parl. 11. of King James II. founded on by his Majesty's Advocate, were legal and valid, notwithstanding that there was no deliverance in Parliament previous to the said grants; and therefore repelled the objection to such regalities founded on the said statute; and found, that the claimants upon such grants were entitled to a just recompence and satisfaction, in terms of the statute claimed on; and *separatim* found, That grants of regalities and Sheriffships, whereupon infeftment had followed, and whereupon the grantees and their heirs had been in peaceable and uninterrupted possession for the space of 40 years, were valid and sufficient rights, notwithstanding the said 43d and 44th acts of James II. also founded on; and found, that the claimants upon such grants were likewise entitled to compensation and satisfaction as aforesaid.

Fol. Dic. v. 3. *p.* 566. *D. Falconer, v.* 1. *No* 227. *p.* 311.

1748. *January* 20.

The Earl of Findlater *against* The King's Advocate.

No 399. Recompence due for a Bailiary over part of a church regality.

The Earl of Findlater claimed, as heritable Bailie of Regality over the barony of Strathilay, upon a grant from the Abbot of Kinloss, appointing his predecessor to be his Bailie within that barony, lying within the said regality; which was said to make him Bailie of Regality, as the barony was part of one; and this being a church regality, the Bailie's right, though not over the whole, was confirmed by the act of annexation; which plea was sustained.

Fol. Dic. v. 1. *p.* 504. *D. Falconer, v.* 1. *No* 228. *p.* 317.

1748. *January* 22. The Earl of Morton *against* The King's Advocate.

No 340.
Recompence not due for the Justiciary of Orkney, as a distinct jurisdiction from the Stewartry or Sheriffship.

The Earldom of Orkney and Lordship of Zetland were granted to the Earl of Morton in 1743, by charter proceeding on a British act of Parliament, 'Una 'cum hereditariis officiis justiciarii vicecomitatus vel senescallatus infra, &c. et 'cum omnibus et singulis privilegiis, &c. ad dicta offiica justiciarii vicecomita-'tus, vel senescallatus, vel aliquem eorum spectan. cum plenaria potestate sta-'tuendi, &c. curias justiciarii vicecomitatus aut senescallatus apud quemcumque 'locum, &c. et faciendi, &c. justiciarios, vicecomites vel senescallos, &c. pro 'tentione dicti justiciarii vicecomitatus, vel senescallatus curiarum, &c. simili 'modo adeoque libere in omnibus respectibus quam quivis alius justiciarius vice-'comes senescallus infra Scotiam, aut insulas de Orkney et Zetland, fecerunt 'aut virtute eorum officiorum quocunque tempore præterito, vel futuro fecerunt, 'vel facere potuerunt.'

The Earl claimed for the right of justiciary, as a separate office distinct from, and of a higher nature than either the Sheriffship or Stewarty, and not subordinate to the High Court of Justiciary, with which he claimed a cumulative jurisdiction; though some part of his argument went the length of making it exclusive, if it had not been for the possession of using jurisdiction by the High Court within his territory. On the other hand, it was *contended*, That no other right was granted him than the criminal jurisdiction competent to a Sheriff or Stewart, as it is usual to grant Justiciary with Regalities, which is no more than the criminal jurisdiction incident to them, the courts whereof, when held for that purpose, are entitled Courts of Justiciary of the Regality; at least, if any more was granted, his right was still subordinate to the High Court of Justiciary.

Pleaded for the claimant, The terms of Justiciar and Justiciary are technical, and constantly in the law denote the highest criminal jurisdiction; as throughout the *iter justiciarii*, the Laws of Malcolm II. c. 3. and 8.; act 35th, Parl. 2d, James I.; act 5th, Parl. 3d, James II. It is known the family of Argyle were possessed of the heritable justiciary over all Scotland, which by contract between King Charles I. and Lord Lorn was resigned; reserving the justiciary within the bounds of the Sheriffdom of Argyle and Tarbot, and of the hail Isles, excepting Orkney and Zetland; and on this contract a charter was expede, confirming to the Lord Lorn his right of his said office of Justice-General within Scotland, allenarly in so far as concerned the heritable office of justiciary above recited. It is not disputed the family of Argyle have a supreme justiciary, and it is confirmed to them in the same terms in which the claimant has his grant within Orkney and Zetland. In the same terms the family of Hamilton have a grant 1629, confirmed in Parliament 1633, of justiciary within the Earldom of Arran; and the five Judges, who, by the regulations 1672, were joined to the Justice-General and Justice-Clerk, are called Commissioners of Justiciary in the re-

No 340. cords of the courts they hold, and the laws that mention them, as act 22d, Parl. 1681.

The manner how this high jurisdiction came to be established, is accounted for from the history of these Islands; which, having been long possessed by the Kings of Denmark and Norway, were conveyed to King James III. on his marriage with the King of Denmark's daughter,* and so being a new acquisition, fell not under the jurisdiction of the Justice-General; for which reason it has been, that after they were granted by Queen Mary 1565, to Robert her natural brother, with the office of Sheriffship, the grant was ratified in Parliament 1581; and because of the insufficiency of the Sheriff's powers to protect the inhabitants, and the distance of the place, the office of Justiciary was added. Earl Patrick, the son of Robert, was forfeited in Parliament 1612, and his estate annexed, which was dissolved in 1643. and granted to the Earl of Morton; and another grant, in which the justiciary is contained, being made 1662, in trust for that family to the Viscount Grandison, both these grants were reduced 1669, for a defect of the dissolution, and the islands again annexed and erected into a Stewartry, the Sheriffship being suppressed, but not the justiciary, which reverted to the Crown, and was occasonally exercised by commissions issued for that purpose, particularly in 1672 and 1702; the acts of annexation were repelled 1707, and the islands granted to the Earl of Morton, with the office under a power of redemption; and 1743, the redemption was discharged, and a new grant was made in virtue of an act of Parliament, which is now claimed upon.

Pleaded for the King's Advocate, The high jurisdiction now claimed is not supported either by the grants, or by any possession; it is not said to be a Justiciary-General, which denotes the highest degree, and therefore can be no more than that criminal power which is competent to a Lord of Regality, that being ordinarily expressed by the term of Justiciary; notwithstanding whereof, M'Kenzie reckons courts of regality amongst inferior courts: And it plainly appears, a power exclusive of the Justice-General was not intended to be granted to Earl Robert 1581, from the act 82d, Parl. 11th, James VI. 1587, of the form how Justice Airs should be held twice yearly, which appoints that commissioners should be named in the several parts of the kingdom, particularly in Orkney and Zetland, for the uptaking of dittay, in order to the holding these Airs; and by an act in Parl. 10th, James VI. 1585, it is provided in favour of the inhabitants of Orkney, that they should be summoned before the Court of Justiciary on 40 days. Besides, the claimant connects no title to the grant to Earl Robert, which by forfeiture fell to the Crown, and was sunk in the King's general jurisdiction; the estate was given to his predecessor 1643, which right being reduced 1669, for want of a dissolution, it continued with the Crown till the dissolution 1707; but the grant then made, after the Court of Justiciary was

* Torfeu's History of the Orkneys, p. 191. and Buchanan.

established by the regulations in Parliament 1672, can never be thought to confer an exclusive right; and in fact, since then that court has in several cases exercised jurisdiction over the Orkneys. No 340.

Replied, The term of Justice-General used for signifying the Justice over the whole kingdom, denotes not any greater power, but extent of territory. The regulations 1672 only appointed the office of Justiciar-General to be exercised by commissioners, without impinging on the King's power of granting other particular rights, either heritable, or for a special occasion. The argument would equally exclude both. But by act 39th, Parl. 1693, it is declared that their Majesties might grant Commissions of Justiciary for such times as they should think fit, and there appears such a commission in the records of Chancery, dated 4th July 1682. There are no expressions in the act 1672 importing a limitation of the prerogative; nor can it be supposed any such thing was intended in that reign, wherein an act past, 1681, declaring that the King might by himself, or any commissioned by him, take cognizance of any cause he pleased.

The Lords found, That the office of Justiciary was subordinate to the High Court of Justiciary, and not a separate or distinct jurisdiction from the Stewartry or Sheriffship entitled to any separate recompence.

Fol. Dic. v. 3. p. 364. D. Falconer, v. 1. No 229. p. 316.

1748. *January* 23.

The Duke of Gordon and Carmichael of Balmedy, *against* The King's Advocate.

No 341.

Upon the claim of David Carmichael of Balmedy, heritable Bailie of the regality of Abernethy, by grant from the family of Douglas; and, on the claim of the Duke of Gordon, Bailie of regality of Spynie, by grant from the bishop of Murray; the Lords found, That a Lord of regality might lawfully make an heritable Bailie, and also that a bishop might make an heritable Bailie, subsequent to the act of annexation, by which bailiaries of church regalities prior to it were made valid. Whereas it was pleaded, churchmen who were liferenters could not make heritable Bailies.

Fol. Dic. v. 3. p. 364. D. Falcoder, v. 1. No 231. p. 319.

1748. *January* 27. The Duke of Gordon *against* The King's Advocate.

No 342.

Upon the claim of the Duke of Gordon for the heritable bailiary of Kinloss, which had been validly constituted by the abbot, and having fallen into the King's hands by forfeiture after the act of annexation, had been again granted