1756. *June* 16. M'KINNON *against* M'KINNON.

[Kaimes, No. 108; *Fac. Coll.* No. 204.]

THE estate of M'Kinnon was settled upon John M'Kinnon, younger, and the heirs-male of his body; which failing, upon the heir-male of John MacKinnon, elder, his body; which failing, upon John M'Kinnon of Missinish and the heirs-male of his body. Upon this destination, John M'Kinnon, younger, the first institute, made up his titles and possessed the estate, but died without heirs-male of his body. At this time there was no heir-male of the body of John M'Kinnon, elder, and therefore Missinish, the next substitute, was served heir of provision to John M'Kinnon, younger, retoured, and infeft.

After he had possessed the estate for several years upon this title, there was a son born to John M'Kinnon, elder, who now claims the estate as the nearest heir.

Missinish DEFENDS and SAYS,—1*mo*, That, as there was no nearer heir at the time of young M'Kinnon's death, he had a right to be served; 2*do*, That being once served, and the right by this means vested in him, he could not be divested of it by the supervenience of a nearer heir; because there is no such thing as a temporary service among us, and the maxim, *semel hæres semper hæres*, obtains in our law as much as in the Roman.

As to the *first* point, the President, and all the rest of the Lords, were of opinion that Missinish was rightly served, as there was no nearer heir at the time, because the inconveniencies would be very great both to the superior and the vassal, if the lands were kept in nonentry till the nearer heir should exist: it is to avoid these inconveniencies, and out of a kind of necessity, that our law will not admit pendent fees, but always vests them in somebody or another,—even such as, by the conception of the right, are plainly no more than liferenters; for the same reason it is that the fee of the lands in this case was properly enough vested in the nearer heir for the time, rather than that it should be *in pendente*, waiting for the existence of a future heir. But, 2*do*, as this was only *ex necessitate*, as soon as the nearer heir existed, the fee in the person of the remoter became void and null; because it was only a fiduciary fee, which could last no longer than the existence of the person for whose behoof it was held: and this the President said was the case of all those fees *ex necessitate legis*, which ceased as soon as the person existed in whom the fee was lodged by the conception of the deed: this was the case of *Frogg*, which was determined by the Lords with great deliberation, and without any bias or partiality to either side. There it was found that though the fee was in Robert Frogg for the time, yet upon the existence of his children he was obliged to denude in their favours: the same in the case of *Hallyeards*. The President further said, if a man should give away his estate from himself or his children, without mention of his or their children, the law would supply the defect, and the condition, *si sine liberis*, would be found to be implied; and upon the existence of children the fee in the disponees would be resolved and at an end. And how much more ought

this to be the case when the condition is not implied but expressed. As to the maxim, *qui semel hæres semper hæres*, it did not obtain in our law; for, besides the examples above given of fiduciary fees, there is, in the case of the Act 1700, commonly called the Popish Act,—first, a Papist who succeeds if he be under the age of fifteen; then, if after that age he does not renounce Popery, he ceases to be heir, and the Protestant heir succeeds; and thereafter again, if within ten years the Popish heir abjures Popery, the Protestant heir ceases to be heir, and the Papist succeeds. And with the President all the rest of the Lords agreed. Some of the Lords made a distinction betwixt the succession *ab intestato* and the tailyied succession; but others, particularly Prestongrange, made none. They had no occasion to determine whether the debts of the fiduciary heir affected the estate; but the President gave it as his opinion, and with him a great majority of the Lords seemed to agree, that they would not; because the fee, being of its nature temporary and resolvable, could not be affected with any burthens to continue after it was resolved and at an end; no more than wadset lands or excambed lands could be burthened with debts, to remain after the wadset is redeemed, or the lands given in exchange for the excambed lands evicted.

1756. *June* 24. Sir Kenneth M'Kenzie *against* Stewart of Farnese.

In the year 1688, George, Viscount of Tarbert, afterwards Earl of Cromarty, made a tailyie of his estate, with prohibitive, irritant, and resolutive clauses, in favour of himself in liferent, and his third son, Lord Royston, in fee, and other heirs substituted, not necessary to be mentioned; and upon this deed of tailyie a charter was expeded and sasine taken, and the charter recorded in the Register of Tailyies; and at this time Lord Royston was sixteen years of age. In the year 1707, the Earl of Cromarty, and his son, Lord Royston, wanting to get free of this entail, fell upon the following device: Lord Royston disponed the estate to the Earl, and he disponed it back again to his son, my Lord Royston, —to him, his heirs and executors, without any limitation or restriction: and upon this disposition infeftment followed; and thereafter, in the year 1714, the Viscount of Tarbert, and his son, my Lord Royston, executed a formal revocation of the tailyie 1688.

In the year 1739 my Lord Royston made an application to Parliament, setting forth the facts above stated, concerning the making of the entail in the year 1688, and the attempts to alter it in the year 1707 and the year 1714; and also that the estate was burthened with debts of the tailyier to a certain extent; and therefore craving leave to sell the estate for payment of these debts; the residue of the price, if any, was to be settled upon the heirs of the entail. Upon which petition an Act of Parliament was passed, allowing the estate to be sold, by certain trustees therein named, for payment of certain sums to certain creditors therein named, and the residue of the price to be settled, in terms of the entail, upon the heirs of entail: This Act of Parliament was obtained by my Lord Royston, in concurrence with the heirs of entail then in life, and was pro-