1765. *February* 14. MR MIDDLETON *against* TOWN of OLD ABERDEEN.

THE Town had a right, for the use of their Town, to some water running through the grounds of Mr Middleton. This water, which formerly was spread through a piece of swampy ground, Mr Middleton's father, about thirty years ago, collected into a channel made by art. The Lords found that the Town, in consequence of their servitude upon the water, had a right to enter Mr Middleton's grounds and clean this channel as often as it was obstructed.

1765. *February* 14. MRS ANN M'DONALD *against* M'KINNON.

[*Fac. Coll.* IV. p. 198.]

IN this case the Lords found that a liferent infeftment, granted to a wife in consequence of a bond of liferent annuity, was valid, though the bond was lost; because there was a disposition of liferent extant, pretty much in the same terms, but without any precept of sasine. This, with the instrument of sasine, they thought would be sufficient to prove the tenor; but upon the authority of two decisions, one observed by Durie, and another by my Lord Stair, *Clapperton* against *Hume*, 22*d November* 1628, the other, *Norval* against *Hunter*, 29*th June* 1665, they found that a proving of the tenor was not necessary. In a late case they found that, with respect to a bond of cautionry, the strongest evidence could not supply the want of a bond of cautionry.

1765. *February* 14. M'KINNON *against* SIR JAMES M'DONALD.

[*Fac. Coll.* IV. p. 194; Kaimes, No. 229.]

THIS day the Lords sustained the sale made by Missinish in favour of Sir James. Some of the Lords, such as the President and Lord Auchinleck, who were for the interlocutor, put their opinion upon the nature of Missinish's right, which they thought was an absolute right of property. Lord Auchinleck said, that he was the proper heir-at-law, and that it was only by equity that he was obliged to denude in favour of the nearer when he existed; and the President said that even his gratuitous deeds, if they were not fraudulent, would be valid. Lord Coalston said that it was a trust-right in the person of Missinish, for the behoof of the nearer heir, when he should exist: he could not therefore dispose of the estate gratuitously; nay, he could not give a liferent of it to his wife; and, therefore, he was for setting aside the liferent provision to Mrs Ann M'Donald above-mentioned, who was Missinish's widow; but he thought that Missinish had a power to sell a part of the estate, in order to save the whole, and he judged the sale in

this case to be of that kind. Lord Kaimes and Lord Kennet thought Missinish's right was of a temporary and resolveable kind, but they thought that he had a power to sell for necessary causes, and they judged the sale he had made to be necessary; and, therefore, both were for sustaining the sale. Lord Gardenston put his opinion both upon the necessity of the sale and the words of the interlocutor, in the cause betwixt M'Kinnon and Missinish, obliging Missinish to denude; by which means it happened that there were only two who voted for reducing the sale, *viz.* Lords Pitfour and Stonefield.

N.B. The whole cause, so far as concerned the point of law, seemed to turn upon this, Whether Missinish was the true legal heir, and M'Kinnon only the heir by equity and favour? or if, on the contrary, M'Kinnon was the true heir-at-law, and Missinish only an heir *sub conditione*, who, in the mean time, for the sake of expediency, was allowed to serve? If this last was the case, it is clear that Missinish had no more than a temporary and resolveable right: now that the remoter heir is not the heir-at-law, while there is a nearer heir *in spe*, was certainly the opinion of the Court in the case of *Leven*, when they would not so much as allow the remoter heir to serve; and though he was allowed to serve afterwards, it was not upon the supposition that he was the true heir-at-law, which was not so much as argued, but in order to avoid the inconveniencies of a vacant succession. And besides, it is a thing unheard of, that a man should be once heir and then should cease to be heir, or that it should depend upon the time when he makes up his titles whether he is heir or not. As to the service of Missinish, it could not alter the nature of his right, because a temporary and resolveable right, such as a wadset, may be the subject of service as well as an absolute right of property. As to Lord Coalston's opinion, if Missinish was at all a trustee, he was so only to the effect of holding and possessing the estate for the benefit of the nearer heir; but it exceeds the power of any such trustee, or of any trustee that is not specially empowered to sell the estate. Suppose a man, by a particular deed of trust, empowered to hold an estate for another till he comes of a certain age, Could it be pretended that, in the mean time, he could sell the estate upon any pretence of necessity? No man, by the law of Scotland, can sell an estate, unless he be either absolute proprietor, or by virtue of his office as a tutor, or, lastly, by virtue of some particular deed of settlement giving him such a power; and it is really more expedient, in cases like this, to keep to the rule of law, and not to allow an interim heir to sell, than to allow him to sell and then enter into a discussion whether the sale is necessary. For the same reason that such an heir is allowed to sell, a factor may be allowed, or a tutor, without the authority of the Court.

M'Kinnon therefore says that no necessity can give a man a power to sell, who, by the nature of his right, has not such a power. And, 2*do*, That supposing Missinish had such a power, yet he has not shown that the exercise of it was necessary; for, upon this point, a proof had been allowed, and long papers written, but the Court had determined nothing, and, for some time past, had put the matter entirely upon the point of law; so that, as some of the Lords confessed, they had forgot how the fact stood as to the alleged necessity.