1752. *January* 9. JANET SIMPSON *against* ROBERT BARCLAY.

[Elch. No. 12, *Testament.*]

ROBERT Barclay, now deceased, having in the year 1732 made a tailyie of his estate, with a power to alter at any time, *etiam in articulo mortis*, did in the year 1734 execute a testament at Buenos-Ayres in America, whereby he bequeathed to his father William Barclay all his estate, lands as well as money, for his use during his natural life, and after his decease to his sister Jean Barclay and her heirs, and in this deed he revokes all former wills, codicils, or bequests made by him. Some days after executing this deed he subjoined to it a declaration, importing that the disposition which he had granted in favour of his sister Jean Barclay was made with the real intent that she should have his lands, and as he had no lawyer there to apply to for advice, and to make a formal disposition in favour of his sister, he thought proper to annex this declaration, that his intention might not be frustrated or diverted by any ignorance or mistake in the writing. The Lords found, 1*mo*, That by the testament the tailyie in the year 1732 was revoked. 2*do*, They found that the declaration subjoined to this testament was a proper deed of conveyance of the land estate in favour of Jean Barclay and her heir Robert Barclay, the defender, to the effect of obliging the heir-at-law of the testator to make up titles and denude in favour of the defender. This last point carried with more difficulty; Lord Elchies being of opinion that the first deed being clearly a testament, and the last deed relating to it, and consequently not being a separate deed, but only a part of the first, no heritage could be conveyed by it.

In support of the decision, the case of *Henderson*, observed by my Lord Stair, 31st January 1667, was quoted.

1752. *January* 29. LANDALE *against* BURNS.

[Elch. No. 6, *Service, &c.*; Kaimes, No. 128 and 129; *Fac. Col.* No. 10.]

IN the year 1677 Andrew Landale got a charter of the lands of ——— to him and to his heirs, and thereafter, in the year —— he disponed these lands to his son David Landale, with procuratory of resignation, but which procuratory never was executed, for the son, David, continued to possess upon the personal right after his father's death till the year 1719. In that year he made a transaction with the superior, by which the superior, for certain considerations, particularly a privilege of carrying off some water from David Landale's lands to his own, consented to a change of the holding from ward to feu, and granted a feu-charter to David in liferent, and his son Andrew in fee, and his heirs. Upon this charter infeftment followed, and thereafter Andrew, the grandson, conveyed the lands in favour of his sisters, Ann and Margaret Burns, in prejudice of the

heir of the investiture 1677, betwixt whom and the sisters a competition now arises for those lands.

It was PLEADED for the heir,—That these lands were yet *in hæreditate jacente* of Andrew the grandfather; for that the charter 1719 was neither a charter of resignation, because there was no resignation in the superior's hands, neither could it be construed a precept of *clare constat*, because it was not in favour of the heir of the investiture, David, but of his son, Andrew: there was therefore no feudal right in the person of Andrew; neither could David's simple acceptance of the charter 1719 be construed a conveyance of the personal right he had to the lands, by virtue of the disposition from his father in favour of his son Andrew; so that Andrew, having neither the feudal nor the personal right to these lands, could not convey them to his sisters.

It was ANSWERED for the sisters,—That as to the feudal right, it was sufficiently vested in the person of Andrew by the charter 1719, for the lands being then in the hands of the superior by the death of the former vassal, he was to be considered as absolute proprietor of them, only under an obligation to give them back to the heir of the last vassal under certain conditions. This obligation the heir might discharge altogether, or he might agree to have it fulfilled in such manner as he pleased; and in this case David chose that the superior should give back the lands not to himself in fee, but to his son in fee, and to himself only in liferent, which, accordingly, the superior did in the simplest manner, by granting a charter to the father in liferent, and to the son in fee, without that long circuit of unnecessary forms which later custom has introduced, and which were unknown to the ancient simplicity of the feudal law, when the single act of the superior introducing the vassal into possession was sufficient either to constitute or to transmit a feudal right.

LORD ELCHIES said upon this occasion, that he believed in ancient times feudal rights were constituted and transmitted with very little form, and without writing; and he knows certainly, that ever after writing came in use, the *breve testatum*, or charter, as it was afterwards called, was not signed by the superior, but only sealed; he believes also that written instruments of seasine were not used in ancient times, and he knows that when they came to be used they were not signed, neither by the bailie nor by any notary or witnesses, but were only sealed by the bailie, and were appended to the charter in form of a tag or scrip, and were called *cauda secunda;* the tag with the superior's seal being called *cauda prima*: but as this method of conveyance was found not to be so secure, and the science of law improving, other and more accurate forms were invented, and things were at last brought to the standard they have now continued at for some hundred of years. According to this form a feudal right is constituted by a charter, a precept of seasine, and an instrument of seasine, bearing that the precept was read, and seasine in consequence of it given by the superior or his bailie to the vassal or his attorney, by delivery of earth and stone, which are the symbols of tradition in lands. These forms might, perhaps, at first, have been otherwise devised; but being once established, the Lords, by their Act of Sederunt, have declared that they would not suffer them to be altered. even in so small a matter as the symbols of resignation or tradition; for by Act of Sederunt, *anno* 1708, they have declared that a seasine within burgh is null and void, proceeding upon a resignation by the symbols of earth and stone in place

of staff and baton. But in this case there is no resignation at all, and consequently the superior could grant no charter of resignation in 1719; and the contrary doctrine tends to the subversion of all the feudal forms, none of which is more necessary than this, by which the superior, having once given away the fee, must be reinvested in it before he can give it away a second time. The charter, therefore, 1719, was not a charter of resignation, both because there was no resignation, the procuratory never having been executed, and because the charter was not in favour of him who had right to the procuratory, but of his son; though, perhaps, if the procuratory had been executed, this last objection might have been got over, and taking the right in this manner to the son might have been construed equivalent to an assignation of the procuratory in his favour: and as to this charter being equivalent to a precept of *clare constat*, that cannot be neither, for this plain reason, that it is not in favour of the heir of the investiture, but of his son; and it might as well have been in favour of anybody else. This feudal right, therefore, was not transmitted by any of the forms established and known in our law; it was not transmitted by resignation and charter following thereupon, which is the only form known in our law for transmission of feus *inter vivos*; nor by service and infeftment, by precept of *clare constat*, or, by infeftment by hasp and staple within burgh; which three forms are the only forms known for the transmission of feudal rights from the dead to the living. There was therefore no feudal right in the person of Andrew the grandson; and as to the personal right that was in David the son, there was certainly no express conveyance of it by David to Andrew; and as to the conveyance of rights to lands, which was to be inferred from circumstances, presumptions, and conjectures, he did not well understand that: All that could be inferred, he thought, from David's accepting of the charter in this case, (granting the toleration as the price of it,) and receiving the seasine *propriis manibus*, was a *non repugnantia*, which would bar his challenging the son's right but could not make a conveyance in his favour. And according to Elchies' opinion the Lords determined; *dissent*. Dun and Drummore.

1752. *February 5.* KINCAID *against* GABRIEL NAPIER.

[Elch. No. 14, *Superior and Vassal.*]

THE question here was, How a vassal holding of a subject-superior, who himself also held of a subject, should be entered? What made the difficulty was, that the immediate superior was an apparent heir, who being charged by the vassal to enter him, in terms of the late statute, renounced to be heir. The question was, What was next to be done, and whether upon the forementioned statute a charge could be directed against the next superior? Lord Elchies was of opinion that the statute related only to the case where the immediate superior was himself entered, and was intended to supply the place of the former practice of running precepts; and he thought if the immediate superior, in such a case, refused, there was no remedy by the statute other than to denounce and