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

apprehend the person of such superior, because he thought the statute only gave warrant for a charge against one superior; but he said the Lords might supply this defect in the statute, and upon the immediate superior's refusal might authorise a second charge against the next superior, in the same manner as their predecessors were in use, in the case of apprisings, to grant a second charge against the mediate superior upon the disobedience of the first: but he said he thought the act did not at all relate to the case where the immediate superior was not entered, which still stood upon the foot of the Act 57, *anno* 1474, which directed a charge in such a case against the superior to enter himself within forty days, and in case of his disobedience the practice has been to bring a declarator of tinsel of the superiority against him, in which the next superior was called, and a conclusion against him to enter the vassal. That this being the case, if their Lordships had a mind so far to enlarge the benefit of the late statute, as to extend it to a case to which it did not at all belong, he thought they ought to do it by way of regulation and act of sederunt, not by way of judgment betwixt the present parties.

The Lords, however, by plurality of votes, allowed the charge against the mediate superior to go out.

1752. *February* 13. ——— *against* ———.

[Elch. No. 18, *Tack.*]

THE Lords found that a tack for 400 years, set by an heir of an entail, with irritant and resolutive clauses, but not recorded, was valid against the subsequent heir of entail. If the entail had been recorded, it is likely they would have found the tack not valid against the heir, for two reasons: 1*mo*, Because the setting of a tack for so long a term is a species of alienation not competent to an heir of entail under irritant and resolutive clauses, nay, even a tack for nineteen years, is, according to Craig, an alienation; and therefore Dirleton, being under the fetters of an entail, though he was laid under no particular restriction with respect to tacks, was obliged to apply to Parliament for a liberty to set tacks for nineteen years, without which it is thought he could not have set a tack that would have lasted longer than his life. 2*do*, An heir of a strict entail duly recorded, is considered, with respect to his predecessor, as a singular successor: now all the Lords were of opinion that such a tack had not the benefit of the statute, nor was a real right that would have been valid against singular successors. Lord Elchies* went so far as privately to declare his opinion that a tack above three nineteen years would hardly have this privilege; and I know it is generally held by lawyers that a tack above 100 years would not; and it is fit it should be so, otherwise those two species of rights, tacks and feus, would be confounded.

* Elchies said from the bench that seasine should be taken upon such tacks to make them real, which he said he had known examples of.