præsentes? It was so in the Roman law by a particular ordinance; but there is no such ordinance with us.

On the 14th December 1776, "The Lords sustained the defence of prescription;" adhering to Lord Alva's interlocutor.

Act. A. Wight. *Alt.* H. Erskine.

Diss. Kaimes.

1776. *December* 14. JOHN CHRISTIE of Sheriffmuirlands *against* The TRUSTEES of the EARL of DUNMORE.

SUPERIOR AND VASSAL.

Construction of the Act 1474, c. 57.

[*Supp. V.* 608.]

PRESIDENT. I thought that the Act of Parliament related to the heirs of superiors. Mr Erskine says the contrary, but Sir Thomas Hope, in his Minor Practicks, understood the statute as I do.

BRAXFIELD. I am surprised that, in this case, the party did not proceed against Lord Elphinstone: he was the proper person, as being the apparent heir of the investiture. Lord Dunmore's trustees were infeft base on the superiority. This carries nothing: there ought to have been a procuratory of resignation instead of a precept in a declarator of nonentry. Lord Elphinstone ought to have been called, not Lord Dunmore's trustees, for action must always lie against the apparent heir of investiture. Inconveniencies are objected; but the only inconveniency arises from the method chosen of attacking one who has only a personal right: If the party had come against Lord Elphinstone, a proper right would have been established, and it would have been no excuse for Lord Elphinstone to have pleaded, that he had given away the personal right: he was still bound to make up titles, and if he did not, a declarator of tinsel of superiority would have followed. If Lord Elphinstone should, at this day, make up titles, and dispone, and if the disponee should be infeft, the right of the trustees would be totally excluded. Suppose the late Lord Elphinstone to have been alive, he could have been charged on the statute 20th Geo. II. The trustees saw Lord Elphinstone in the right, and they did not see him denuded on record: therefore, they should have supposed that the right was *in hæreditate jacente* of the late Lord Elphinstone, and have conducted themselves accordingly.

MONBODDO. I prefer the authority of Sir Thomas Hope to that of Mr Erskine: this base infeftment on a precept would signify nothing against a procuratory of resignation. The apparent heir is the person to be charged; for he is certain. There may be twenty disponees, but there can be but one apparent heir.

KAIMES. My difficulty is from the terms of the statute. In it the penalty is, that the superior shall lose his vassal for life. What is that to Lord Elphin-

stone? He is willing to lose his vassal altogether. The statute seems only to have in view the case of persons possessing an estate and not entering.

PRESIDENT. By the feudal law, there must be an investiture. Personal rights it regards not, but supposes to be erroneous: as long as a man continues in the feudal right or investiture, he is the vassal of the Crown, and every sub-vassal must go to him. Should Lord Dunmore's trustees give up their bargain at this day, Lord Elphinstone would come to have the total right, and no new infeftment would be necessary to complete his title. [This supposes Lord Elphinstone to be alive; that however does not vary the argument.] Should the Court of Exchequer have occasion to do diligence for feu-duties, the diligence would go against Lord Elphinstone. With respect to the opinion of lawyers, I have only to add, that Sir George M'Kenzie speaks of charging superiors: that is proper, because that term implies the king's vassal in the feu-right.

ALVA. My difficulty is, that here there is a decreet of tinsel of superiority extracted.

PRESIDENT. The case was not explained to the Lord Ordinary, (Covington,) who pronounced that decreet. Now, the parties themselves have told us enough to show that the decreet is good for nothing; and as we are not here interponing our authority of course, but in a new case, of which the clerk to the bills has seen no example, we are not bound by an erroneous decreet.

On the 14th December 1776, "The Lords refused the bill."

Act. J. M'Laurin. *Alt.* Absent. *Reporter*, Alva.

1776. *December* 18. JAMES STEEL *against* JAMES THOMSON.

ADVOCATION.

Advocation found competent, although the sum sued for was under L.12, as the matter involved a question of right.

[*Fac. Coll. VII*, 339; *Dict., App. No. I, Advocation, No.* 1.]

GARDENSTON. The advocation is competent, because it is not for a sum, but for a removing, that the action was brought. At the same time, there is, as to the merits, no ground to complain as to the removing; for there was no completed bargain.

On the 18th December 1776, "The Lords found the advocation competent;" altering Lord Elliock's interlocutor.

Act. Mat. Ross. *Alt.* A. Wight.