No. 4. 1744, Nov. 6. MR WILLIAM STEEL *against* WEIR.

WEIR raised brieves for serving heir before the Magistrates. Steel presented a bill of advocation, which Balmerino passed. Weir presented a bill consenting to advocate from the Magistrates, and praying remit to the macers, and to name assessors,—which the Lords granted Saturday last. Steel this day reclaimed, and said it was against form, which we all agreed to refuse; but we granted him a diligence to recover his writs to be reported before the macers.

No. 5. 1749, June 9. MRS SETON of Touch *against* SIR HENRY SETON.

SETON of Touch's estate being by the investitures to heirs-male, Archibald Seton, in his contract of marriage 1721, devised it to the heirs whatsoever of that marriage, and died leaving a son and daughter. His son's tutors served him heir of the ancient investitures, on which he was infeft and died. His sister could not serve heir of the investitures; and her lawyers doubted whether the father's procuratory of resignation could lawfully be executed after the fee was vested in the son by the service, and therefore raised reduction of the son's service and infeftment on minority and lesion against Sir Henry Seton the heir-male, which Dun reported to us for advice, though he declared he had no difficulty to reduce. I thought, though the procuratory could not be executed, and that the pursuer should be forced to adjudge in implement from the heir-male, that was no sufficient qualification of lesion to the minor, to induce us to reduce his infeftment, and make him die in the state of apparency. The President was of my opinion, but said further, that it was no question at all that the procuratory might be yet executed, as was done every day, and particularly by himself, and that judging otherwise would make a great confusion in numbers of land-rights in Scotland. There was but a short memorial given in to us, and we agreed not to receive it in that shape for advice, nor at all, if the pursuer should insist for it without full informations; and the President advised Mr Ferguson for the pursuer not to insist for it.

No. 6, 1752, June 12. ANN, &c. LANDALES *against* LANDALES.

ANDREW LANDALES held his land ward of Gibson of Durie, and in 1667 was infeft in them to him and his heirs of his then marriage, whom failing, to his heirs and assignees. In 1686 he disponed them to his eldest son David, and in 1719 David bargained with his superior to change the ward into feu, and at the same time he gave Durie the benefit of some water in his ground to serve Durie's coal; but instead of getting either a charter of resignation or a precept of *clare constat*, he got a charter reciting the agreement to change the holding, that David was eldest son to Andrew, and that he had got the disposition 1686, and therefore grants the lands to be held feu, to David in liferent, and to Andrew his son in fee, but reserving power to David to sell, annailzie, or contract debt, &c.—and of the same date he grants the obligation to Durie concerning the water, written by the writer of the charter, at least by the inserter of the date, witnesses names and designations, (it being written by his servant,) and signed before the same witnesses;

which obligation was afterwards the subject of a process betwixt David and Durie; and David was the person to whom sasine was delivered. In 1726 Andrew disponed the subject to two full sisters, and died before his father David, who died some time after, leaving Thomas, a son of a second marriage. The sisters took infeftment on their brother's disposition, and Thomas, the brother-consanguinean, served heir to his grandfather Andrew of the investiture 1667, and entered to possession. The sisters pursue him to remove, and he repeats a reduction of the infeftment 1719, and disposition and infeftment by his brother Andrew to his sisters;—and the case being reported to us 6th December last, we appointed a hearing in presence, and we heard it two days. Two questions occurred; first, touching the feudal or real right; the second, touching the personal right by the disposition by the first Andrew to David in 1686. With respect to the first, it was observed, that the feudal right was undoubtedly *in hæreditate jacente* of Andrew till 1719, and as that was neither a charter of resignation, though it mentioned the disposition 1686, nor a precept of *clare*, though it mentioned David being Andrew's eldest son, it could not transmit the feudal right to David; that not only no resignation was made, but it does not appear from the charter that the disposition contained any procuratory; and resignation is necessary; that till the 35th act 1693, even the procuratory could not be executed after the death of the granter or receiver, and to this day a singular successor cannot be infeft by the superior on a disposition without a procuratory, unless he adjudge in implement,—not even by the late act of Parliament that authorizes summary hornings at a purchaser's instance;—and as to the second, the charter does not bear that David was heir of the last investiture to his father, though it calls him eldest son, which did not make him heir in these lands, without adding that he was the eldest son of that marriage; and supposing it had called him heir of that marriage, however it might have been sustained as a precept of *clare constat* had it been only in favour of David, agreeably to the case 20th January 1666, Lord Renton against Feuars of Coldingham, (DICT. No. 15, p. 16,473,) but here the fee is not given to David the heir, but to Andrew, who was not heir; and no authority could enable the superior to give the fee that was *in hæreditate jacente* of old Andrew to his grandson young Andrew, who was not heir, nor ever could have been, having died before his father David; that David's express consent, even though it had been in writing, could not do it, (though a charter *a non domino* may be good if given with the consent of the *verus dominus*) because David never had the fee established in him. Craig affirms that in these precepts of *clare*, even the destination of succession from heirs-male to heirs of line, *aut vice versa*, cannot be altered, and much less the immediate property; and it cannot be maintained, that a charter by a superior of lands *in hæreditate jacente* of his deceased vassal to a stranger, though with consent of the apparent-heir, will transmit the *hæreditas jacens* to such third party; and whereas the case 30th December 1724, Cubbieson against Cubbieson, was quoted for the sisters, where one having purchased lands to himself, his heirs and assignees, to be held of the disponer, afterwards took the charter to himself in liferent, and to one of his son's in fee, which the Lords sustained, the difference was observed, that there no objection could be made to the feudal right in the son, because notwithstanding the personal disposition, the property remained with the disponer till the charter was granted, and sasine upon it, and all the question was, Whether the charter could be reduced as contrary to his obligation

to the father, and without his consent, and as there was undoubted evidence given of the father's consent, who might have destroyed the personal disposition, and the charter and sasine would still have been good, the charter could not justly be reduced; whereas here the objection is, that neither David the apparent-heir, nor Durie the superior, had the feudal right that was in Andrew the father, or could convey it to any third party till it was first established in David as heir to his father; and with respect to the personal disposition 1686, though David might have conveyed it to Andrew his son, yet he could not do it without some writing under his hand, and his acceptance of the charter from Durie never could have the effect of conveying to Andrew that disposition, or enable him as assignee to it, or now his sisters to resign it in the superior's hands; that the act 1693 requires the notary in his instrument of resignation to set furth the resigner's right to the procuratory, whether heir or assignee, and no notary could do so upon these implied conveyances. Two several questions were put. First, it was found that Andrew the son had no feudal or real right to the lands;—and next, that the disposition 1686 was not conveyed to him. Some of the Lords were of very different opinions in both;—particularly Drummore. He spoke against both, and voted against the first, and at last agreed to the second, in which lay my greatest difficulty. Murkle was clear for the first, but was against the last,—29th January. 12th June Adhered. The President clear. *Renit.* Drummore, Kilkerran, *et* Kames.

SERVITUDE.

No. 1. 1734, Nov. 27. GARDEN *against* THE EARL OF ABOYNE.

THE Lords found the servitude upon the woods a predial servitude, and may be constituted by a personal declarator with possession even against a singular successor; and remitted to the Ordinary to hear upon the other points, Whether Huntly, the Crown's ward vassal, could constitute a servitude so as to prejudge the Crown when the lands returned by forfeiture? 2dly, Whether immemorial possession will prefer *retro?*

No. 2. 1741, Dec. 11. BRUCE *against* COLONEL DALRYMPLE.

THE Colonel had a gathered dam for draining his coal, whereof a part, as well as of the dike that kept up the water, was on Mr Bruce's grounds, and had been so more than 40 years, only the dike was then but three feet high, and covered little of his ground; but as the caul to the dip required a greater force of water, the Colonel at different times within the 40 years, brought in water from different grounds, and raised the dike, so that it is now three ells high, and stretches much further on Bruce's ground, as the dam also covers much more of it, but I believe he does not yet lose an acre, and the ground I suppose not very valuable. Mutual declarators of immunity and servitude being pursued, the proof was now advised. There was little question that a servitude was constituted by prescription. The question was only as to the *modus,* Whether the dike