curator of the said sums, for which he had the procuratory, whereby to pursue, and so it was not revocable, even though he had been living.

No 3.
was pursuing debts, had already paid the sum to the constituent.

Clerk, *Gibson.*

Fol. Dic. v. 1. *p.* 209. *Durie, p.* 452.

SECT. II.

Procuratories and Precepts.

1611. *February* 6. GILBERT ROBERTSON *against* The BAILIE of BURNTISLAND.

No 4.
A sasine was decerned to be given by the superior upon a procuratory of resignation after the resigner's death, upon instrument taken against the superior for refusing before the resigner died.

GILBERT ROBERTSON having obtained a procuratory of resignation of a tenement of land, in Burntisland, from a woman who was heritable proprietor thereof, and having required the Bailie of the town to receive the resignation, and give him infeftment conform thereto; and taking instrument upon the Bailie's refusal, the woman who made the resignation thereafter deceasing, Gilbert pursued the Bailie, and the woman's heir, for his interest, to hear the Bailie decerned to give him sasine upon the foresaid resignation, and to hear the same found as lawful as if the sasine had been given in the resigner's lifetime, which reason the LORDS found relevant, and decerned conform thereto.

Fol. Dic. v. 1. *p.* 209. *Haddington, MS. No* 2144.

1707. *March* 28. LADY MARY BRUCE *against* The EARL of KINCARDINE.

No 5.
A procuratory of resignation of a title of honour, found not to fall under the act 1693, so as to become void by the death of the granter.

THE said Lady Mary, eldest sister to the last Earl of Kincardine, and William Cochran of Ochiltree, her husband, pursue Sir Alexander Bruce of Broomhall, now Earl of Kincardine, on this ground, that the last Earl subscribed two procuratories of resignation in favour of the said Lady Mary, for resigning the title, dignity and honour in the Queen's hands in her favours; and therefore, the said Sir Alexander, as heir-male, had no right to assume the title of Earl of Kincardine, his predecessor being denuded; and therefore, should be prohibit and discharged from using the same; and that Lady Mary had right to obtain from the Queen a patent on her brother's procuratories, notwithstanding the same were never resigned before his death, if the Queen please to confer the same. *Alleged* for the Earl, That titles of honour not being *in commercio*, they

No 5. can never be assigned, disponed, conveyed, nor transmitted, except in the lineal succession of blood. 2*do*, Whatever may be said of procuratories, where resignation has been actually made in the granter's lifetime, and accepted by the Sovereign, who is the fountain of honour, yet no such thing can be pleaded here, seeing these procuratories were only an inchoate incomplete deed, and never perfected in the last Earl, the granter's lifetime, and so fell and perished with him, seeing *morte mandatoris expirat mandatum;* neither can it be supported by the act of Parliament 1693, allowing procuratories to be expede after the granter's death, seeing it is plain, that act only concerns the property of lands, and not titles of honour; so they still, under the old rule of law, extinguish and die with the granter, if not perfected before his death, according to the brocard, *Nil censetur actum quandiu quid restat agendum.* 3*tio*, He resigns only as heir-male to Earl Edward, passing by Earl Alexander, his father, who was last *in tenemento* and in possession of the title, which he could not do, and so *quod voluit non potuit, et quod potuit nec voluit nec fecit*, but resigns a non-entity, seeing he could not pass by his father, and ascend to Earl Edward his uncle. 4*to*, The defender's *jus quæsitum* cannot be taken from him, being admitted to sit and vote by authority of Parliament; and, though it reserves Lady Mary's declarator, yet that pre-supposes a right in her person, which can never be pretended, seeing a procuratory *in favorem* confers no positive right till it be accepted, and is no more but a purpose and resolution alterable at pleasure, and an embrio till the prince ripen it by acceptance, till which time resignation of honours is wholly pendulous; and if the Queen shut the sluice and refuse it, then the patent's current runs in its natural channel to Broomhall, the heir-male, and the retrogade motion designed is broke off; and such procuratories signify no more without the Sovereign's consent, than a minor's obligement without his curators, and an interdicted person without his interdictors, or a beneficed person setting tacks without consent of his patron and chapter, or a decreet-arbitral pronounced after the submitter's death; and the predecessor's deed cannot prejudge his successor in the dignity; as Sir George Mackenzie, in his precedency, page 82. &c. thinks from Antonius Faber, and other eminent lawyers, that a nobleman, by learning a mechanic, or other mean employment, does not derogate from, nor lose the dignity to his successor. See *Tiraquel. de nobilitate;* and in the book called Parliamentary Cases, it was found in the action of the Viscount of Purbeck in England, that the assuming the peerage absorbs all other inferior degrees of nobility; neither can the last Earl of Kincardine be said to be divested, till another be invested in the dignity, which is not here pretended, but only an imaginary capability; for a right cannot be lost to one till it be acquired by another, as Dirleton, Craig, and all our lawyers agree. And seeing all confess that Lady Mary can have no right to this honour, till the Queen please to give it, then at present the right which cannot hang in the air, must remain with Broomhall, the heir-male; and the tincture of blood cannot be taken from him, nor his privilege of a born coun-

sellor; the bench of the nobility having an interest not to be deprived of one of their number. *Answered* for Lady Mary Bruce, That it is true, titles of honour are not transmissible by assignation, nor are they the subject of commerce; yet it is of undeniable notoriety, that they go with us by resignation, if the prince consent, as many titles in Scotland are now possessed; and within this month, on the Lord Gray's resignation in favour of Gray of Crichie, he was admitted on the Queen's patent to sit with the precedency of Lord Gray in Parliament. It is acknowledged, in the old Roman Government, dignities were not hereditary, but annexed to offices, and called *comites sacri palatii;* but the feudal law altered this quite, and annexed it to lands and fees, but so as they were still capable of extinction by dismission, resignation in the sovereign's hands, or refutation; and so it was found in that famous case, 11th July 1633, Douglas and the Lord Oliphant, *voce* PEER, where King Charles I. himself was present, and a procuratory was sustained to denude the granter of his title; and here, the last Earl of Kincardine reserved no power to alter, but gave it with a clause *de rato*, obliging him to hold firm and stable; so this divesting him, his heir-male can have no claim, and his possession in Parliament was qualified and limited, till the declarator were discussed, and so was only temporary till the point of right was tried. And his mentioning Earl Edward in the procuratory, was only because he was the first original with whom the honour began, and from whom it descended to him. THE LORDS, by plurality, found the procuratories did not become void and null by the death of Earl Alexander, the granter, but that they may be yet perfected in favour of Lady Mary, and her heirs, if the Queen please to accept of the same, and confer the title on her. Then Broomhall *contended*, That no regard could be had to the procuratories, because the said last Earl, the time he was signing them, was notourly fatuous, furious and mad; and condescended on several passages of blasphemy and folly to a high degree. And further *alleged*, That he was circumvened, imposed upon, and cheated, in so far as he being blind, one paper was presented to him for another, and it was never read to him; and that he frequently protested he would never wrong Broomhall, his cousin. *Answered* for Lady Mary, Whatever infirmities he laboured under, yet at the time of these procuratories he was sober, and sat and voted in Parliament, being in July 1703. THE LORDS, before answer, allowed a conjunct probation of his condition at and about that time, both of the deeds of fatuity, and his sober and rational deportment. The Lady Ochiltree's main design, was, if she could not get the title and dignity to herself and her son, that at least it might be sunk and extinct, and Broomhall prohibited to use it before the union should commence in May next; but the allegeance of fatuity was so pregnantly circumstantiate, such as his fancies, that he could fly in the air, and ought to marry his sister, and his fasting forty days with Peter Poiret the Burignionist, *&c.* that it was impossible for any judicatory in the Christian world to repel them. No 5.

No 5.

On the 29th March 1707, Lord Kincardine gave in a protestation for remeid of law against the foresaid interlocutor to the Queen and Parliament, and after the union to their next competent judicatory for determining such appeals. But the LORDS finding some indecent expressions, and matters of fact wrong narrated, they refused to admit it; whereupon he presented another rectified in these particulars, which the LORDS allowed the clerk to take in, but not to insert in the decreet, seeing the article in the claim of right speaks of sentences, but not of interlocutors; though our Parliament, in Sir Thomas Dalziel of Bin's case, against the Heiress of Caldwall, admitted an appeal from an interlocutor.

THE LORDS would not determine whether appeals now to the Parliament of Great Britain are legal or not; for our article could have no such meaning nor prospect; and the House of Commons have long debated if the Peers have such a jurisdiction and power, but left it wholly undecided and entire. And some thought Broomhall might continue his possession of the title as Earl of Kincardine, ay till the Queen accepted of the resignation on the last Earl's procuratory, and that he could not be fully divested till then.

Fol. Dic. v. 1. p. 209. Fountainhall, v. 2. p. 367.

1716. *July* 4. JOHNSTON of Corehead, *against* JOHNSTON of Newton.

No 6.
Found that precepts of sasine became void by the death of the granter, whether issued from the chancery, or by subjects superior.

IN a process of reduction and improbation, and also a declarator of non-entry, at the instance of Corehead against Newton his vassal, the title produced by the pursuer being a charter under the Great Seal in anno 1648, with a precept out of the Chancery that same year, but without any infeftment till the year 1714, that Corehead is served heir to his grand-father, the obtainer of the charter; and, upon this general service, as giving right to the precept of sasine, having infeft himself upon the act of Parliament 1693, giving force to precepts of sasine after the granter and receiver's death.

Compearance was made for Newton's creditors, who *objected* against the pursuer's title: That the act 1693 concerns only procuratories of resignation and precepts of sasine granted by subjects among themselves; and that, both from the words and intent of the act, and that the words being (considering that procuratories of resignation and precepts of sasine became void by the death of granters, as well as by the death of those in whose favours they were granted) granters here, is not applicable in stile to precepts issued forth of the Chancery, and then it was not the intent of this act to derogate from the rules in Exchequer.

Answered for the pursuer: That the act 1693 makes no distinction betwixt precepts of sasine by subjects, and those by the sovereign; but statutes in general, without any exception, unless of precepts of *clare constat;* and, since the law has not distinguished, no person is warranted to make a difference,