

No. 15. son, she being acknowledged heir to David, albeit it be upon her own resignation, *utile per inutile non vitiatur*.

The defenders further alleged, Absolvitor, because by several acts of Parliament, infeftments of kirk-lands before the Reformation, are required to be confirmed by the Pope, or the King thereafter : *Ita est*, this is confirmed by neither before the feuers right. And by another act of Parliament, it is declared, that the first confirmation, with the last feu, shall be preferred : *Ita est*, the defenders has the first confirmation. It was answered, that no law, nor act of Parliament, required confirmation of an office, neither was any confirmation absolutely necessary before that act of Parliament ; but the kirk-men might always have feued without diminution of the rental of the lands, as they were the time of the feu ; but that act was made, in regard that at the time of Reformation, the kirk-men being out of hopes of preserving of monasteries and kirk-lands, did feu them to their nearest friends ; and therefore the foresaid act, as being correctory of the common law, ought not to be extended to any thing but what is expressed in the act, which is only feus of kirk-lands, and so would neither extend to an office, as a Bailiery, Forrestry, &c. nor yet to a pension or annual-rent ; neither would it extend to infeftments by kirk-men, ward, such as most of the infeftments of this Abbacy, and many others are ; and seeing confirmation was not requisite, but the feu itself was sufficient alone, the last act preferring the first confirmation, takes no place, which can only be understood where confirmations are necessary. It was answered for the defenders, that albeit an office requires no confirmation, where there is nothing given but the office, and casualties ; yet where there is a burden upon lands given therewith, such as this threave of oats out of every husband-land, being far above the proportion of a suitable fee for the office, there being above 111 husband-lands in the Abbacy, and some forrester-lands following the office, besides other casualties, confirmation is necessary, or else the Abbots might have eluded the law, and exhausted the benefice. It was answered for the pursuer, that he oppones the acts of Parliament, requiring only confirmations of kirk-lands ; and albeit the duties of this office affects the lands, *nihil est*, for if the Abbacy had thirled the lands of the Abbacy to a mill without the Abbacy, for a thirled duty of a far greater value than the duties of this office, the constitution of that thirlage required no confirmation.

Stair, v. 1. p. 341.

1726. January 26.

MARQUIS OF CLYDESDALE *against* EARL OF DUNDONALD.

No. 16.

A father having infeft his son base, and after the son's decease having directly disposed the same lands to his grandson apparent heir therein ; this was

found not equivalent to a precept of *clare*, to carry the right that was in the son's person.

No. 16.

Fol. Dic. v. 2. p. 505.

* * This case is No. 3. p. 1275. *voce* BASE INFECTMENT.

* * See Landale, 12th June, 1752, No. 30. p. 14465. *voce* SERVICE of HEIRS.

SECT. V.

Virtual Procuratory.

1708. July 16. WILLIAMSON *against* THOMSON.

Thomas Williamson in Peebles disposes a tenement lying there to one Thomson, bearing love and favour, but afterwards he makes another disposition of it for onerous causes to Williamson of Cardrona, and, in regard he was only apparent heir, he gives a procuratory to serve him, which the first disposition wanted; and on this, Cardrona entered to the possession, and the house being burnt down, he rebuilt it. Thomson resolving to perfect his right, applies to John Frier, one of the Bailies, to cognosce his author heir, and then to infest them both; which he refusing, as seeing no warrant, Thomson protests against him, and that his offer may be equivalent to an infestment. Sometime thereafter, Cardrona produces to the same Bailie his disposition, containing not only a procuratory of resignation, but also to serve his author heir, which the Bailie obeys, and infests him. Upon this follow mutual reductions of one another's rights, and Thomson claims preference to Cardrona, though first infest, because he had done all that law required of him, viz. to instrument the Bailie on his refusal, for his partial gratification in preferring one before another. Answered, *1mo*, Your right is gratuitous, mine is onerous; *2do*, Was not obliged to infest you, because you wanted a necessary mid-couple, viz. a procuratory to serve your author; *3tio*, If one Bailie refused you, you might have applied to another; and though in Exchequer, the presenting the first signature prefers to a posterior one first past, yet that is not the case here, for the Bailie could not cognosce a man without a warrant from him. Replied, My disposition bore a sufficient warrant to serve him by that general clause, "to do all that was necessary in the premisses for perfecting my right;" likeas, I had the writs and evidents of the lands to instruct the progress, and showed them to the Bailie. The Lords neither went on the latency of Thomson's disposition being kept up for many years, nor on its being gratuitous; for if he had got the first infestment, he would have been clearly preferable; but the Lords fixed on this point, that his disposition was defective, wanting a procuratory.

No. 17.

A general clause, "to do all that is necessary" found not to supply a procuratory to infest.