

his bond granted thereon ; and the defender alleging, That the pursuer, since the date of this bond, accepted a posterior security, in satisfaction of the said sum in the prior bond ; the Lords found this-allegiance relevant to elide and exclude all action which might be moved upon the said prior bond, which they found satisfied and taken away by the said posterior security, the same bearing the tenor foresaid, viz. " That it was given and accepted in satisfaction of the said prior security ; " neither was it found necessary that the defender should be compelled to say, that the said prior bond was expressly renounced and discharged ; for in effect, by accepting of the said posterior security, in satisfaction, as said is, the same was discharged.

Act. Baird.

Alt. Barclay.

Clerk, Hay.

*Durie, p. 656.*

**No. 14:**  
acceptance  
of a posterior  
security in sa-  
tisfaction of  
it.

## SECT. IV.

## Virtual Precept of CLARE CONSTAT.

1666. January 20. LORD RENTON *against* FEWERS OF COLDINGHAME.

The Lord Renton insisting in the declarator of his right of the office of Forrestry, and of a threave of corn with the fodder, whereof mention is made, No. 73. p. 2840 ; the defenders proponed a second defence, viz. That the pursuer showed no sufficient progress from Ellen, but only an infestment granted by Janet Ellen, David's daughter, and so the pursuer's goodsir, upon Janet's own resignation ; and albeit there was a precept of *clare constat*, produced by the Abbot in favours of Janet, yet no sasine followed thereupon ; so that David's infestment was not established in the person of Janet ; and consequently could not belong to this pursuer ; and the defenders having gotten their feus immediately after David's right free of this burden, the right could not be declared, till it were established in the pursuer's person ; and if he should now infest himself, the interruption on the act of prescription upon the summons, libelling upon David's right, and the progress produced from David would fall. It was answered, That the Abbot having granted the infestment to Janet, upon her own resignation, yet bearing to be expressly to her, as heir to David, it was equivalent to a precept of *clare constat*, which does not necessarily require the ordinary form, but a charter infesting such a person as heir to such another, who was before infest, would be as valid ; so that in this infestment of Janet's, all being materially included to establish David's right in her per-

**No. 15.**  
Instance of  
this.

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.*

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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