

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.

- No. 17. to serve, which Cardrona's had, and therefore preferred him; otherwise, the requiring the Bailie would have been equivalent to any infeftment, had it not been for want of that step in the progress.

Fountainhall, v. 2. p. 454.

SECT. VI.

Virtual Substitution.

- No. 18. 1722. July 13. KENNEDY *against* ARBUTHNOT.

Any declaration of a defunct's intention is sufficient to establish a substitution in a tailzie, to have, at least, the force of a *fidei commis*. so as to obligē the heirs at law to make the substitution effectual, by granting a direct conveyance.

Rem. Dec.

* * This case is No. 22. p. 1681. *voce* BLANK WRIT.

SECT. VII.

Virtual Tack.

- No. 19. 1625. July 5. LD. AYTON *against* TENANTS.

In a process of removing at the instance of a singular successor, the tenant accepted upon the former proprietor's holograph rental book, wherein he was inserted as rented during his life, and offered to prove, that, by the custom of the barony, this was understood to be equivalent to a formal rental. The defence was repelled, for though this might bind the master, it was no obligation upon the tenant to continue in his farm for life; and so, not being a real right, could not be good against singular successors.

Durie. Kerse.

* * Durie's report of this case is No. 24. p. 7191. *voce* IRVITANCY.

* * Kerse's report is No. 44. p. 15187. *voce* TACK.