

monition did not bear the procuratory was shown or offered; the cause being favourable, and it was not alleged that the procuratory was called for.

*Page 242, No. 849.*

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1685. *March.* LADY ANNE GORDON *against* The EARL of ABOYN.

THE Earl of Aboyn being pursued by Lady Anne Gordon, as representing his father, who was factor for the pursuer, and so liable to do ordinary diligence for uplifting the rents of her locality, which are now become desperate by the poverty of tenants, seeing *mandatarius tenetur ad talem fidem et diligentiam in rebus mandatis qualem præstare solet in suis*;—Answered for the defender, That, by the quality of the factory, he was liable for actual intromissions allenary, and could not be obliged to intromit; and his service was gratuitous. The Lords sustained the answer for the defender.

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1685. *March 12.* GENERAL DALZIEL *against* The EARL of MARR.

IN a competition between a prior infeftment of relief, without possession or confirmation, and a posterior public infeftment confirmed,—Alleged for the infeftment of relief, That, seeing the same was not a title of possession till after distress, it must be reputed public *ab initio*, unless, after distress, the party had been *in mora* to possess: just as an infeftment of annualrent would be preferred to a posterior voluntary [right] clothed with possession before the term of payment of the annualrent, seeing the annualrenter could not possess till the term; and the want of possession cannot infer simulation. Answered, The infeftment of relief might have been made public, *ab initio*, by confirmation; and, as a confirmation, prior to another right attaining possession, will make the first preferable right, so an infeftment of relief should be made public by confirmation or declarator. The Lords inclined to prefer the infeftment of relief for the reason above mentioned; but the point was not voted.

In this competition, it was further alleged, That the confirmation of the infeftment of relief was of a date posterior to the other's confirmation; yet that can only be considered from the date of the superior's delivery of it to the party, and not from the date of his subscription, otherwise it might be in the power of superiors to let confirmations be subscribed several years by them, and prefer creditors as they think fit. Answered, Seeing the superior's confirmation requires not to be published, but may be kept private by the obtainer, and the design thereof is only to have the superior's consent, after the charter is signed and the composition paid, it is looked upon as the party's evident from the date of the subscription; and the priority and preference of confirmations in exchequer is ruled according to the date and sealing, without respect to the delivery. The Lords found the allegiance of not-delivery relevant; and that confirmations granted by private superiors are to be considered from the date of delivery to the party, or some to his behoof, and not from the date of subscribing. Which