

1664. June 24. Laird of PRESTON *against* NATHANIEL EBRED.

No 47.

Kirk lands having been annexed to the Crown by act 1633, a Lord of Erection was found not entitled to insist as superior, in an action of reduction and improbation, against vassals, even with concurrence of the King's Advocate.

THE Laird of Preston pursues reduction and improbation against Nathaniel Ebred of all his rights of certain lands. The defender *alleged* absolutor, because the lands in question are Abbay lands, erected in a temporal holding in favour of Preston; and therefore, by the act 10th Parliament 1633, all such lands are annexed to the Crown, and the feu-duties are only found due to the Lords of Erection ay and while they be redeemed, which is repeated in the 30th act of Parliament 1661, and therefore the pursuer not being superior, but the King, he has no interest to improve or reduce. The pursuer *answered*, That he opposed his infestment of the lands holden of the King with the King's advocate's concurrence. The defender *answered*, That the advocate's concurrence was but *ex stilo curiæ*, and he could make no concurrence sufficient for any improbation and reduction without the King's special order.

THE LORDS found the defence relevant, and assolizied. At which time it was remembered, that Sir Thomas Hope insisting in an improbation of his good-son, the same was not sustained, because it wanted the King's express order.

Fol. Dic. v. 1. p. 530. Stair, v. 1. p. 204.

1669. July 14. Duke of HAMILTON *against* The Laird of BLACKWOOD.

No 48.

A right of superiority of Kirk-lands found good, granted any how, tho' not *legitimo modo* by dissolution, because, although the consent of the vassal be necessary, dissolution would be valid without the vassal's consent.

The taking infestment from a Lord of Erection, was found not to import a consent to become his vassal for ever. The

THE Duke of Hamilton pursues the Laird of Blackwood, that it may be declared that he is his vassal in his lands of Blackwood, on this ground, that the late Marquis of Hamilton having disposed to the King the Abbacy of Arbroath, did, in consideration thereof, in *anno* 1636, get a charter from the King of the barony of Leshmahago, a part of the Abbacy of Kelso, of which the lands of Blackwood were holden ward; which lands having been appraised, and the appraisers infest holden of the King, the Laird of Blackwood having thereafter disposed them to Major Ballantine by his contract of marriage with Blackwood's daughter, and the Major having purchased a right from the appraisers, both upon Blackwood's procuratory of resignation and the appraisers, he resigned the lands in the Marquis's hand and did take his infestment holding ward of him; likeas, this Blackwood, who is heir of provision to the Major, as procreate by Marion Weir, Blackwood's daughter, with William Lowrie, hath no other right but as heir of provision to the Major, and yet he hath taken infestment holding of the King; likeas, the said William Lowrie his father, as lawful administrator, and taking burden for him, has obliged himself by his bond, that so soon as the Marquis should obtain a right to the superiority, he should take his infestment from him ward; and by the act 30th Parliament 1661 ratifying the act of annexation 1633, it is expressly provided, That any right

to the superiority of kirk-lands granted by the King, yet notwithstanding the annexation shall be valid as to such vassals who have or shall consent to the rights of the persons obtainers of the said superiorities; so that Major Ballantine having consented, by taking infeftment in manner foresaid, he and his successors must continue the Duke's vassals. The defender *alleged* absolvitor, because any right the Duke has, or the Marquis had to the superiority, is absolutely null by the said acts of Parliament, annexing the superiority of kirk-lands to the Crown, so that unless there had been a dissolution in Parliament, no right of these superiorities is valid but null, and the exception of the said act 1661 is only in the case of the vassal's consenting to a right of superiority, *ita est* there can be no right but *legitimo modo* by dissolution. The pursuer *answered*; *imo*, That albeit the King or his officers might quarrel his right, as not proceeding upon dissolution, or any other having their right upon dissolution, yet the defender cannot, especially seeing he hath homologated the pursuer's right, his predecessors, to whom he is heir, having taken infeftment thereupon; likeas, the pursuer has satisfied the King's interest by giving bond to the King's Advocate to hold the lands ward of the King in the same way as the defender would, therefore the Advocate hath declared he will not concern himself. *2do*, The pursuer having obtained a new right of the King since the act of Parliament 1661, the same must be valid to him as to those vassals who have or shall consent; because the exception of the act expressly bears, that such a consent is equivalent as if the vassal had resigned in the King's hands in favour and for new infeftment to the interposed superior, and had then taken a subaltern right of him, against which there can be no pretence, so that (by a right in the exception) it cannot be meant a perfect right proceeding upon dissolution, because that would be valid without the vassal's consent, but that the vassal's consent being equivalent to a resignation, makes the right valid without dissolution;

Which the LORDS found relevant, the Duke proving a sufficient consent; but it was not decided whether Major Ballantine's taking infeftment would import a sufficient consent conform to the exception of the act, so that he might not thereafter return to the King.

1669. July 28.—THE of Duke Hamilton insisted in his declarator against the Laird of Blackwood, for declaring that he had right to his superiority by the act of Parliament 1661, bearing, 'that whosoever should get right from the King to the superiority of the annexed kirk-lands, the same should be valid as to those vassals who had confirmed, or should consent'. And *alleged*, that Major Ballantine, to whom Blackwood is heir, had taken an infeftment of the estate of Blackwood, from the Marquis of Hamilton, upon Blackwood's resignation, and upon the resignation of two apprisers, in *anno* 1642, the Marquis then having a right to the superiority granted by the King in *anno* 1636, which, albeit it was not then valid because the lands were then annexed to

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the Crown, by the act 10th Parliament 1633, and were not dissolved, yet the Major having taken infeftment as to his part, his heirs could not quarrel the superiority, though the King might; and now the King and Parliament by the act 1661, c. 30. having declared such rights of superiority valid as to those vassals, who had, or should consent; and the Duke having gotten a new right of the the superiority since the act, the former consent is valid; likeas William Lowrie Blackwood's father and tutor gave a bond, that so soon as the Duke should obtain the superiority, the son should become vassal. The defender *alleged*, that his father's bond was only effectual against his father, but not against himself, and his father never being fiar of the estate, his bond could never be a consent of the vassal; neither can the consent of any tutor, or lawful administrator, be sufficient to give such a consent, which is not an act of office or administration; and as to the infeftment taken by Major Ballantine, *first*, The simple taking of infeftment from a Lord of erection by the vassals of kirk-lands cannot import their passing from the King, and the benefit of the act of annexation, so that they may not return to the King thereafter; neither can it be such a consent as is meant in this act of Parliament, otherwise the King and the leiges should both lose the benefit of the annexation; seeing most part of the vassals have continued to take infeftment of the Lords of erection, through ignorance or inadvertence, finding their infeftments flowing from the Lords of erection; and in respect that the Lords of erection have still right to the feuduties till they be redeemed; which being a common error that they may safely so do till the redemption, and yet may still take infeftment from the King when they please, it were a very evil consequence, if thereupon they should not only lose the benefit to be vassals to the King, but by disclamation lose the property. *2dly*, As to this case, it cannot be presumed but Major Ballantine is in the same case with other vassals of kirk-lands, and also in this much better case, that he is in a manifest and palpable error, in so far as the disposition that he takes from the apprisers, bears expressly that the apprisers are informed that the Marquis of Hamilton was superior, and their procuratory bears warrant, either to resign in the King's hands, or the Marquis's hands, or in the hands of any other lawful superior; and Blackwood's procuratory in the contract of marriage bears warrant to resign in the hands of the King, the Marquis of Hamilton, or the Earl of Roxburgh, who had right of erection before the Marquis, or any other lawful superior; so that by resigning in the Marquis's hand, it is evident that the resigner and the Major believed that the Marquis was superior, whereas he was not, any right he then had being absolutely null by the act of annexation 1633, and the King was the only superior; yea, by the taking of that infeftment he incurred disclamation, unless it were excused by his error; but the consent requisite here must be such, as the party knowing the King was his superior, did chuse to interject another superior, and become his perpetual vassal. It was *answered* for the pursuer, that the acceptance of the infeftment, as it is now stated, can be no error, because it is evidenced by the

apprisers rights now produced, that they hold of the King, and were infeft by him, and yet the Major took the infeftment upon their resignation in the Duke's hands; likeas the rights produced relate to the right of annexation, which being a most public law, and recent at that time, cannot be thought but to be known to any at that time, *et ignorantia juris neminem excusat*. It was answered, That the error was the greater that the apprisers infeftment was holden of the King, seeing in their disposition and procuratory they mention they were informed the Marquis was superior, and therefore the procuratory is to resign in the hands of the King, the Marquis, or any other lawful superior; and the other procuratory is in the like term; so that the acceptor of the writs did not intend nor do any new or free deed in favours of the Marquis, but did only that deed that they supposed was necessary, and so did not by this infeftment make the Marquis superior, as that his right should be valid by their consent, but did take the right from the Marquis, as being superior before they took it, which was a palpable error, so prejudicial to them, that it might infer disclamation, if it were not excusable upon error; and if it had been intended that the Major minded to make the Marquis his superior, where he was not, there is no doubt but it would have been exprest in the right itself, being so great a deference to the Marquis, and would not have been past over in common form; neither can it be thought that this was procured by the Marquis, upon account and favouring the Major, the infeftment being granted by the Lady Marquis, as her son's commissioner, he being then in England, and having no great influence then, being the time of the troubles of the country. It was answered, That the other vassals of that barony did voluntarily accept the Marquis as their superior, and gave bonds for that purpose, which are produced, and it is most like that Blackwood hath given bond, which has been lost or given up to him upon taking this infeftment, which is an implement thereof.

THE LORDS did not see that the single taking of the infeftment from a Lord of the erection, did import his consent to become vassal thereby for ever, or that he might not thereafter return to the King; neither did they find such a consent as is meant in the act of Parliament; but considering the whole circumstances of this case, and especially the father's clear bond, who procured and settled the controverted right of this estate for his son, then an infant, they found there was no error, but a choice of the Marquis to be superior in place of the King, and therefore declared.

Fol. Dic. v. 1. p. 530. Stair, v. 1. p. 639. & 647.

* * * Gosford reports this case:

1669. July 14.

IN a declarator, pursued at the Duke's instance against Blackwood for declaring his right of superiority of the lands of Blackwood, as being infeft in the superiorities of Lesmehago in *anno* 1636, by charter under the Great Seal, and upon the late act of Parliament ratifying the annexation of the superiority of

No 48. kirk lands in *anno* 1633, with an express proviso, declaring, that notwithstanding thereof, any who had gotten, or should get, new infeftments of the superiority of kirk lands, the same should stand good, as to such vassals, who had given their consent to the said right of superiority; whereupon they did subsume, that Major Bannatine, to whom Blackwood was heir, had consented, by taking a charter of his lands to be holden of the Duke in *anno* 1642, and that his father, as tutor and administrator, had given bond to the Duke, obliging him to take the lands to be holden of him, so soon as he should get right to the superiority; it was *alleged*, that all parties having interest were not called, viz. the King's officers, seeing the right granted to the Duke was not upon dissolution of the annexed property, without which the pursuer's right was not valid. The King's Advocate having seen the process, and declaring that he was satisfied as to the King's interest; and thereafter the defender insisting upon the invalidity of the right for the reasons foresaid, the Lords found, that it being libelled that he had consented to the pursuer's right, he had no interest to propose the said allegiance, which was only competent to the King.

1669. *July* 28.—THE aforementioned declarator, Duke Hamilton against Blackwood, being again called, it was of new *alleged* for the defender, That the charter granted by the Marquis of Hamilton in *anno* 1642, and accepted by Major Bannatine, as vassal of the said lands, could not infer such a consent as is required in the late act of Parliament ratifying the annexation of the superiority of kirk lands, with an exception only of such as had consented to the right granted by the King in favour of the Lords of erection, or others his subjects, because the act of annexation in *anno* 1633, being then standing in full force, without any such exception, and vassals of church lands being in great uncertainty, as to the true superiors, having been in use to enter and take charters from the Lords of Erection, or from the abbots, the defender taking this charter from Duke Hamilton, who had no right in his person, it was done by manifest error, which was incident to many others as well as him, and could not be interpreted to be a full and clear consent to be only his vassal, which should have been drawn in express terms for that purpose; otherwise the taking of a charter from the Duke, who had no right, and which only by consequence infers a consent, ought not to conclude him within the exception of the act of Parliament; likeas to evince that Major Bannatine did it only by error, and as an act of common course, thereafter, in *anno* 1650, his heir was infeft under the Great Seal, holden of the King. THE LORDS, notwithstanding, did sustain the declarator, and decerned; because in this case they found several specialities which put a difference between Major Bannatine and his heirs, and the common case of vassals to church lands, viz. that all the rest of the vassals of Lesmahago, whereof Blackwood was a part, about that same time had agreed to enter vassals to the Duke, and the defender's father as tutor and administrator, and taking burden had, in *anno* 1650, given bond to this Duke Hamilton,

to enter his vassal in the said lands ; *2do*, The said lands were held ward, and Major Bannatine did acquire the same by contract of marriage, bearing a resignation in favours of the heirs tailzie and provision, so that it was of great importance to obtain infeftment by charter from the right superior ; as likewise the Major had right to several comprisings of the estate, and upon all these rights did take a charter from Duke Hamilton, which, in common sense could not have been supposed to have been done by error or mistake. This interlocator was given, albeit the charter by the Duke to Major Bannatine was upon a resignation, bearing either to be holden of the King or the Major, or any other lawful superior ; which made the decision very hard, the error being founded upon an uncertainty contained in the ground of the charter.

Gosford MS. No 173. p. 69. & No 197. p. 79.

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1673. *January 14.* EARL OF NITHSDALE *against* FEUARS OF HOLYWOOD.

THE Earl of Nithsdale pursues improbation and reduction against the feuars of Holywood, and craved certification *contra non producta*. The defenders *alleged* no process, because the pursuer hath no sufficient title to reduce or improve the defenders' rights, he being only a Lord of Erection ; and by the act 10th Parliament 1633, the superiority of all the erected benefices is annexed to the Crown, and there is only reserved to the Lords of Erection the feu-duties, till they be redeemed, which cannot give them interest to reduce or improve. The pursuer *answered*, That by his infeftment he hath right to all the lands of the benefice which are not feued but in property, and consequently hath interest to call for production of the evidents, that it may appear what hath been property, and likewise what are the feu-duties of the lands feued ; *2do*, the pursuit is also at the instance of his Majesty's Advocate, who hath unquestionable interest to improve and reduce. It was *replied*, That the general course of the Advocate can give no interest for production, but only a special process at his Majesty's instance, by express warrant from his Majesty or his officers ; and if upon this ground improbations be sustained, all the vassals of kirk-lands of Scotland may be so called in question. And it is known, that King Charles the first writ several letters, declaring, that he would not insist against the feuars, or ancient possessors of kirk lands.

THE LORDS found no process in the reduction and improbation, but declared they would suffer the pursuer to turn the same into an exhibition, that the pursuer might have inspection what the feu duties were.

Fol. Dic. v. 1. p. 530. Stair, v 2. p. 150.

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