

SECT. 9. IMPLIED DISCHARGE AND RENUNCIATION. 6461

at the horn long before, and so the King had right to the same by the liferent long before the comprising. In a cause of Sir Patrick Murray's it was found otherwise in my opinion.

Fol. Dic. v. 1. p. 435. Spottiswood, (ESCHEAT & LIFERENT.) p. 99.

No 54.

1629. July 1. LA. CATHCART *against* VASSALS.

No 55.

FOUND that the King's confirmation of a ward or blench holding to be holden of the Lo. Cathcart, who held ward of the Prince free from recognition but not from ward.

Fol. Dic. v. 1. p. 435. Kerse, MS. fol. 81.

* * * See Durie's report of this case, No 6. p. 4176.

1669. June 19. SCOT *against* LANGTON.

No 56.

FOUND that the King's consenting to a wadset granted by his vassal, implied a renunciation of the vassal's liferent escheat *quoad* the wadset.

Fol. Dic. v. 1. p. 435. Stair.

* * * See this case, No 32. p. 5100.

1672. June 28. EARL OF EGLINTON *against* LORD GREENOCK.

No 57.

Feus granted to a sub-vassal with consent of the superior are, by virtue of the act 1606, cap. 12. secure against ward.

Fol. Dic. v. 1. p. 435. Gosford. Stair.

* * * See this case, No 7. p. 4177.

1673. February 6. LORD HALTON *against* The EARL of WEMYSS.

THE Lord Halton having a gift of the recognition of the estate of Craig, pursues declarator of recognition, on this ground, that the whole ward lands were disposed by Craig to Pittarro, after the King's return, *anno* 1660. Comparance is made for the Earl of Wemyss, who produced an infeftment of annualrent granted by Craig out of his whole estate united in one barony; which

No 58.
The King's confirmation of a right to part of the ward lands granted by the vassal,

No 58.
 secures a-
 gainst poste-
 rior recogni-
 tions, but not
 against those
 already incur-
 red; which
 cannot be
 done without
 a *novodamus*.

annualrent was confirmed by the King long before the gift of recognition granted to the pursuer. It was *answered* for the pursuer, That the defence is not relevant, for it is the unquestionable principle of feudal law, and our custom, 'That in proper fees or ward-holdings, if the vassal alienate the major part of the fee without consent of the superior, the fee falls in recognition and re- turns to the superior.' And albeit the superior's consent may be either ante- cedent, concomitant, or consequent to the right made by the ward-vassal, and so may exclude recognition, in so far as it is incurred by that right consented to; yet the consent to that right can never import that the superior hath con- sented to prior alienations made by the vassal without his consent, as if the su- perior had received resignation from the new vassal in favours of another, that confirmation might import a subsequent consent of the superior to that new vassal's right, but could never import a consent to pass from any prior recogni- tion or feudal delinquency, by which the property was returned to the superior by a several and anterior deed before the right confirmed or consented to; for these consents of the superior being gratuitous, are not to be extended beyond what is expressly granted, especially in confirmations granted by the King, which pass in Exchequer of course, and are denied to none, which ought not to be extended to take away recognitions fallen before by other alienations than those confirmed, which the King or his officers did not know; and, if that should once be sustained, the Exchequer would either insert a clause, 'except- ing former recognitions,' or would not confirm till they searched the registers for former recognitions; and therefore that defence is not relevant, that this an- nualrent was confirmed before the donatar's gift, unless it had been confirmed before Craig's total alienation, whereupon the recognition is craved to be decla- red. It was *replied* for the defender, That his defence, as propounded, is most relevant, because whatever might be alleged in the case of an indirect consent of the superior by accepting of resignation or homologation; yet, where the su- perior directly repeats and confirms the annualrent now quarrelled, that confirma- tion doth necessarily import that the superior acknowledges and allows that the annualrenter hath right to his annualrent, which the superior makes firm by his confirmation, and so communicates all strength to it that it can, or at least his consent, if it communicate not, his right must infer *non repugnantiam*, that he will not quarrel the right confirmed upon account of any feudal delinquency by which he might claim the right of property; and, though the confirmation would not communicate or exclude rights of property competent to the supe- rior, yet it cannot but exclude feudal delinquencies competent to the superior as superior; otherwise the superior's confirmation should neither secure from former recognitions, disclamations, surprisions, and the like, contrary to the common and received opinion of the lawyers and people of this kingdom, as appears by Craig, l. 3. d. 3. And there is an express decision observed both by my Lord Haddington, then the King's advocate, and Sir Thomas Hope, *anno* 1612. in the case of Adam Rae, No 53. p. 6459. who being donatar to the recognition of

the barony of Auchterlony or Kelly, insisted for declarator upon three sasines granted by Auchterlony, with consent of his son to his oye; the last of which was *anno* 1605, and upon a sasine granted in favour of the Earl of Crawford 1610; wherein compearance was made for eight or nine annualrenters; who proponed their defences in the same terms this defender propones, viz. that these annualrenters were confirmed before the donatar's gift, without necessity to allege confirmed before the deeds of recognition; and in the recognition of the estate of Gray at the instance of Sir George Kinnaird, decided since the King's return, confirmations being produced long after the deeds of recognition were allowed, and not insisted against. And if this were not sustained, the securities of all the lieges may be in hazard by gifts of recognition, seeing during the usurpation such infeftments were thought to be valid, and recognitions were discharged. The pursuer *duplied*, That there is no such received opinion or practice, that a confirmation excludes all anterior recognitions and feudal delinquencies; but, on the contrary, the common resolution of all lawyers hath ever been, that to secure against that, a *novodamus* was necessary; and it never was the opinion of any, that a simple confirmation is equivalent to a *novodamus*; and if this were once sustained, it were easy to evacuate all the King's casualties by resignations or confirmations, which pass of course, and are never refused to any, but when a *novodamus* is included, the composition to the King is increased, and it is done of knowledge to exclude all these hazards; and it is without question, that confirmation and resignation are equivalent terms in law, so that the confirmation imports only a receiving of the vassal in such right as his author had. And as to the practiques alleged upon, Sir George Kinnaird's decret was produced, in which there is nothing of this point either proponed or sustained; and, albeit Sir George did not quarrel several infeftments confirmed, yet it is clear that these infeftments were confirmed even after his gift, which the defender will not pretend to be relevant. And as to Rae's practise, *imo*, One decision either contrary to the nature of the right, or to the conveniency of the people, doth never determine the Lords, unless a consuetude were introduced by several decisions; and it is clear, that this decision is against the current of law, which the Lords would not allow, viz. that an alienation by a grandfather to his oye should infer recognition, because he is not immediate *successurus*; but taking the materials of that decision as they could be justly sustained, they make nothing against this case, for excluding the recognition, as falling upon the dispositions to the oye, there remained no more but the disposition made to Crawford, which was *anno* 1610, and all the annualrents confirmed that mention a date, were not only before the donatar's gift, which was *anno* 1611, but were before the deed of recognition by the disposition to Crawford, which was *anno* 1610; so that the Lords and parties were not anxious as to the terms of the defence, the confirmations being both before the deed and gift of recognition.

No 58.

THE LORDS found that a confirmation, albeit it excluded recognition by the right confirmed, or by any several posterior deed, yet that it did not exclude a total recognition incurred before the infeftments and confirmation.

Fol. Dic. v. 1. p. 435 Stair, v. 2. p. 164.

1676. January 14.

AYTON against DUNCAN.

No 59.

Confirmation excludes not the superior or his donatar from the casualties of superiority fallen before the confirmation, which are consistent with the right of property; excluding only recognition, and such like, totally subversive of the right of property.

AYTON of Kinaldie, as donatar by the Arch-bishop of St Andrews, to the liferent escheat of Hamilton of Kinkell, pursues declarator thereof: Appearance is made for James Duncan, who produced an infeftment of an annualrent of L. 40 out of these lands, in security of 1000 merks, who *alleged*, that the declarator behaved to be with exception of his annualrent, because he was publicly infest by the Bishop of St Andrews, by his charter of confirmation produced, long before the gift granted to this pursuer was intimated, or any citation or declarator thereupon; so that the donatar being but assignee by his gift, if the defender had gotten a discharge, or a second gift, which needed no declarator, as to the defender's own right, he would exclude the donatar; and, in this case, he hath the equivalent, viz. a charter of confirmation from the superior, before any intimation or diligence, and therefore is in the same case as if the superior himself were pursuing for this casualty, who would be excluded as being *in dolo*, as receiving a singular successor for an onerous cause, without mention or reservation of any right of his own. *2do*, The right of property comprehends, and is extended, to all other lesser rights; so that, whoever disposes the fee, is understood to dispoise all right, unless it be reserved; and therefore, the superior dispoising the right of property to a new vassal, either by his charter upon resignation, or by confirmation, dispoises all other inferior rights, so that a donatar of liferent or ward, dispoising the property, though without mention thereof, doth dispoise the same, and *omne jus*, and so must the superior's charter of property dispoise all right the superior hath. *3tio*, The consent of any party to a disposition of property, transmits all right the consenter had, and is not understood to be *non repugnantia*, or to consent that the dispoiser should dispoise all his right, for that he might do without consent, unless he were interdicted; but it imports, that the consenter communicates his own right, and the superior's confirmation is a very full consent. It was *answered* for the pursuer; That albeit it be true that an original disposition of property is presumed to comprehend all lesser rights, unless reserved, or that consent doth often times operate the same effect, yet that makes nothing to the point in question, where there is nothing intended or done, but the accepting of a new vassal in place of an old, and transmission of the right of the one to the other, which can only be done by the superior by resignation or confirmation, which, as to this, are alike; and no man thought himself secure by a charter upon resignation as to prior casualties, though not reserved; and there is less reason for