

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.

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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 consentor 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 consentor 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

a confirmation, whereunto the vassal having only disposed his own right, the superior confirms what he hath done, and accepts him, but disposes nothing of his own superiority, or any casualty thereof. And in charters upon resignation, the vassal having resigned the fee in the superior's hands *in favorem*, the superior disposes the fee, but disposes nothing of his superiority, or any casualty thereof; and charters, either upon resignation, or by confirmation, are not equivalent to the superior's joint and simple consent, nor can be understood to give any more than what was the right of the former vassal disposer, at least can only give the right of fee, but nothing of the superiority, unless the charter contain a *novodamus*, for that is an original right joined with the communication of the old right; and, therefore, though it should express no special casualty, it comprehends all; because the right of property comprehends all inferior right, when it is simply disposed, and not for a particular effect, albeit clauses of *novodamus* use to pass by special gift, these not being known or composed for, seeing the King is not prejudged by the neglect of his officers, but it is not so in other superiors; this only is common to both, that such charters granted exclude recognition or any other right destructive of, and inconsistent with the fee and property, but not such rights as do but burden the same; and seeing singular successors, for their securities against casualties, use to adject clauses *de novodamus*, where these are not, it is neither the intention of the superior, nor expectation of the vassal to be free thereof.

THE LORDS repelled the defence, and found that a confirmation did not exclude the superior or his donatar from the casualties of the superiority fallen before the confirmation, which were consistent with the right of property; for albeit this right of annualrent did not stand formally in the person of the former vassal, who had the right of property, which comprehends the annualrent, yet it was no new original right granted by the superior, but a transmission of a part of the old right to this annualrenter.

There was also an allegiance upon a reservation in the charter of confirmation, whereupon both parties pretended a specialty in their favours. But the LORDS determined the general point, that both superiors and vassals might know their condition.

*Fol. Dic. v. 1. p. 435. Stair, v. 2. p. 398.*

\* \* \* Gosford reports the same case :

1676. *January 12.*—IN a multiple-poiding, raised at the instance of the tenants of Kinkell against Kinaldie, and James Duncan, it was *alleged* for Kinaldie, That he ought to be preferred, because he was donatar to Kinkell's liferent escheat, by a gift from the Bishop of St Andrews, who was superior before any confirmation of the infestment of annualrent granted to Duncan; and the said confirmation not bearing a *de novodamus*, could not take away from the superior's donatar the right of escheat. *Ido*, As this confirmation was

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only of course, and had no *de novodamus*, so it was affected with a special provision, bearing *reservatus nobis feudefirmis aliisque debitis et consentis*, which did import the liferent escheat, or any other thing due to the bishop before the confirmation. It was *answered* for Duncan, That notwithstanding he ought to be preferred, and that the first reason could not militate against him, because albeit Kinkell, who was common debtor, was at the horn before his confirmation, and his liferent escheat gifted, yet, there being no declarator obtained thereupon, he obtaining a public right from the Bishop by a confirmation, which was of a charter to be holden *a me*, the Bishop granting the same, no private deed could prejudice the new vassal, unless the same had been publicly declared by a decret, and unless the Bishop had particularly reserved that gift. It was *answered* to the 2d, That the reservations being only of the feu-duties, *aliisque debitis et consentis*, would not include a liferent escheat, which was fallen before upon a particular rebellion, which can never be interpreted to be *debitum et consentum*, but can only be extended to the *reddendo* of the charter, such as casualties.—THE LORDS having considered this case as a general case, to be a practique betwixt superiors and new vassals, did ordain the same to be heard *in præsentia*; and, after a full hearing, they did long debate amongst themselves how it should be decided: As to the 1st point, it being *argued* by some, That there was a great difference betwixt vassals who enter by the King in Exchequer, by way of resignation or confirmation, and others, who enter by other superiors, who hold these superiorities of the King, there being a special act of Parliament, declaring, that the King cannot be prejudged of his casualties by his officers entering of new vassals, unless the same be particularly gifted and disposed upon composition, which is done, upon that reason, that the King, or his officers, do only grant signatures in course, and cannot, nor are not obliged to know, that his former vassal was at the horn, or that the ward, or non-entry, did belong to the King; whereas other superiors are no ways provided for by this act of Parliament, but on the contrary, they receiving a new vassal, upon resignation, or confirmation, it is against law to burden that same vassal by any deed of theirs, contrary to their own public right, especially where that same casualty was known to them, as was in this case; and a new vassal being in *bona fide*, and not obliged to search all registers, he needed not seek a *de novodamus*, which is only a late invention *ad majorem securitatem*, and was never practised of old; so that the superior having it in his power to grant a new charter or not, the presumption of law lies against him if he did not grant a voluntary right, which he could never have been compelled to do if he did know of any right or casualty, or which he might know by the searching of the register, before he did receive a new vassal, without any intimation that he had granted a prior gift, or might grant the same, as being in his power. It was *argued* by others, That a superior granting a new right, by confirmation or resignation, did it only in course, and did only convey his former vassal's right, which he had disposed; and he being at the horn, and his liferent escheat fal-

len, did not prejudge himself thereof, unless he had particularly disposed the same by a *de novodamus*, and needed not receive the same in his new right; and that all superiors, albeit vassals to the King, are founded in law as to the casualties, albeit they are not mentioned in the act of Parliament with the King. It was *argued*, by those of the contrary opinion, that a present vassal disposing by resignation, or a charter *a me*, any right he had, which was only *utile dominium*, the superior who before stood infeft and had *directum dominium* of the lands, becomes absolute *dominus*, and hath *plenum dominium*; and by granting of a new charter to the vassal, without any provision or restriction, which is a perfect public right, the vassal can never be burdened with any private deed of his ordination, which is only an assignation to prior mails and duties, or in time coming, unless the same had been made public by intimation, or a decret of declarator: Notwithstanding whereof, the Lords did prefer the donatar, which was hard; I myself being of a different opinion, and craving, that, before that was made a leading case, the preference should rather be determined upon the second point, founded upon the restriction as it was conceived, but this was refused as not being necessary, in respect of the foresaid decision upon the first point.

Gosford, MS. No 832. p. 525.

1683. February 23.

HIS MAJESTY'S ADVOCATE *against* The CREDITORS of the LAIRD of CROMARTY.

IN a declarator of recognition, pursued by his Majesty's Advocate against the Creditors of the Laird of Cromarty, it was *alleged*, That base infeftments, confirmed after a concurrence of others, extending to the major part of the lands, before the gift, could not fall under recognition, neither could they fall *in computo*, to make up the major part, so as to make the rest recognosce.—THE LORDS found, that though the confirmation did secure the infeftment confirmed, yet, before confirmation, the major part being alienated, and so *jus* being *regi acquisitum*, the same behoved to fall *in computo*, to make the rest of the lands recognosce. It was further *alleged*, That Cromarty, the common author, having obtained a new infeftment with a *novodamus*, any base infeftments anterior to the *novodamus*, could not enter *in computo* with the subsequent base infeftments, to make up a ground of recognition, seeing the *novodamus* was an original right. And it being *replied* by the King's Advocate, That a *novodamus* did sufficiently secure the vassal, and did denude the King of any recognition fallen; but there being no recognition fallen the time of the *novodamus*, the base infeftments that were anterior, being less than the half, the *novodamus* could not stop the concurrence of the antecedent base rights with the subsequent;—THE LORDS found, that albeit there was no punishment inflicted by the law of the

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A confirmation, after the major part of land is alienated, and before the gift of recognition, secures the right confirmed.

An alienation made by a ward-vassal, confirmed by the superior before recognition is incurred, is not only safe from recognition, but cannot be brought *in computo* with after alienations to infer recognition; but, where the major