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position, in  
favour of the  
new vassal,  
*ex capite in-*  
*hibitionis.*

judge him as a lawful creditor, of any real diligence, by inhibitions against his vassal's author, as was found in the case of Lord Torphichen against Mason's Creditors, 11th July 1673, *voce* Reduction. THE LORDS did sustain the reduction, notwithstanding of the answer; and found, that a charter, upon resignation or confirmation, granted to a new vassal, did not prejudge him as a creditor to his last vassal, to reduce upon inhibition, or to make use of any real right or diligence he had used against him; but that the same might affect the right confirmed; but, if the charter of confirmation or resignation had been a *de novo damus*, it might have altered the decision.

*Fol. Dic. v. 1. p. 438. Gosford, MS. No 638. p. 370.*

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Charter of  
resignation  
from the  
Crown im-  
plies a confir-  
mation of no  
base right or  
servitude,  
though men-  
tioned in the  
charter.

1681. January 26.

EDIE against THOIRS and DUNN.

GEORGE SEATON having disposed the lands of Newark to Mr Alexander Seaton, his brother, he took infestment base, whereupon William Gordon, Sheriff-clerk of Aberdeen, took a gift of recognition from the King, and obtained declarator thereupon. William Forsyth, and Patrick Dunn his author bound in warrandice, being now heritor of the lands of Tipperty, raise reduction and improbation of the decret of declarator, and grounds thereof, in so far as might concern a servitude of a water-gang through the lands of Newark, to a mill in the lands of Tipperty, and likewise for a servitude of casting peats in a moss; the one of which servitudes was constituted by the heritor of Newark, and was enjoyed by the heritor long past prescription; the other, though constituted within prescription, yet was constituted by the King's consent, in so far as it is expressly designed in an infestment granted by the King upon a resignation, which imports the King's consent and acceptance, not only of the purchaser's fee, but of the reservation of this servitude from that purchaser's fee; whereupon Forsyth, as having good right to maintain the servitudes acquired to his lands of Tipperty, alledged that the declarator was collusive and null, for want of probation, in so far as it bears the recognition instructed only by sasines, which, being but assertions of notaries, could not prove, without production of the warrants, otherwise any notary could ruin any ward-vassal. *2do*, if need were, he offered to prove, that, if the principal sasine and warrant were produced, it would appear that the warrant was razed and vitiated; and, whereas there was only disposed an annualrent out of the land, it was made a disposition of the land, which inferred recognition, whereas, the annualrent would not. *3tio*, The recognition could not extend to any further than the returning of the fee to the King, or to the donatar, free of *majora gravamina*, such as sub-feus, or annualrents, liferents, or multures; but was never extended to *minora gravamina*, such as ways, water-gangs, fuel, &c. enjoyed by prescription; for, though donatars of ward or non-entry might exclude such small servitudes, as well as donatars of recognition, yet, though gifts of non-entry be frequent and ordinary, it was never

pretended, nor found, that the lesser servitudes, constituted by prescription, ceased thereby. 4to, As to the servitude that was assented to by the King, in accepting the resignation, wherein this servitude was repeated, it was answered for the donatar, and Edie having right from him, who had also raised reduction of these servitudes, as falling in consequence, That the right of the vassal, who constituted the same, falling by the recognition, thereby the fee behoved to return to the King, free of all burden, to which he had not assented: And, as to the prescription, it could not run against the King, who had no interest to interrupt, while his vassal had right, *et contra non valentem agere non currit præscriptio*; and the law makes no distinction, whether the burdens be great or small: And, as to the pretence of the King's consent, by accepting a resignation, burdened with the servitude, though that would be sufficient against any other superior, yet not against the King, seeing, by act of Parliament, the neglect of his Officers prejudices him not; and it is known that they never consider reservations in resignations which pass in course, but they only consider confirmations: And, as to the nullity alleged, whatever might have been said against the donatar, before sentence for producing the principal sasines and warrants, yet, seeing the constant consuetude hath ever sustained recognition upon extracts of sasines, the same cannot be null, as wanting probation; but, if the pursuer shall improve the warrants, either for not production, or upon falsehood, or upon erasure, being produced, the recognition will fall therewith, but cannot oblige the donatar to produce the warrants, unless he had the same, or that he, or any to his behoof, had the right to the fee of the lands, recognosced by a voluntary disposition, whereby it might be presumed that he had them, and suppressed them to sustain the recognition.

THE LORDS repelled the alledgeance of the nullity, in respect of the consuetude, and no objection made before sentence, and sustained Thoir's reduction and improbation, for improving the warrants and erasure of the disposition; and found, that these smaller servitudes are sufficiently constituted by prescription, and cannot be quarrelled by the superior, unless upon interruption; but found, that the late servitude, within prescription, was not validated by the King's accepting a resignation, in which it was reserved, seeing these pass in course, unless it had been in a confirmation.

*Fol. Dic. v. 1. p. 438. Stair, v. 2. p. 842.*

\* \* \* Fountainhall reports the same case:

TURAINÉ of Troverane, being heritor of Meikle Tippetty in 1511, constitutes a servitude of an aqueduct to a mill on it, in favours of the lands of Little Tippetty. Thereafter, in 1636, they granted another servitude of moss-leave furth of them. Meikle Tippetty holding ward of the King, by a base infestment in 1651, they recognosce, and David Adie is made donatar thereto, and now raises a reduction of these two servitudes, on this reason, that Meikle Tippetty (which is the *prædium serviens*) having returned to the King, by

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recognition, it must return free of all deeds done by the vassal, which were not confirmed by the King; but, *ita est*, these two servitudes were never confirmed; and, however they subsisted against the vassal, yet his right being dissolved, *resoluta jure dantis resolvitur jus accipientis*. *Alleged, 1st*, The defender's author was not cited to the declarator of recognition, nor was the warrant of the base sasine produced, but only the sasine itself, which did not sufficiently instruct that the recognition was incurred. THE LORDS admitted the author to compare for his interest, as to such servitudes whereof he was in possession; and found the donatar not obliged to produce the warrant of the sasine, unless it appear the donatar was heritor of the lands the time of the recognition, and so is presumed to have the warrants of his own, or his author's sasines, if he succeeded by a voluntary right to them, or any other who had the right of the lands, to the donatar's behoof, the time of the declarator.

Then it was *answered* to the reason, That the heritor of the dominant tenement, *viz.* of Little Tipperty, had prescribed these servitudes, (though they had no constitution in writing, as they have,) by 40 years possession, before incurring the recognition in the first servitude, and by 40 years possession, before the declarator for the second. *2dly*, These servitudes are mentioned in a charter of resignation from the King, which is equivalent to a confirmation. *Replied*, These servitudes could not prescribe; because, the King, before the casualty of recognition existed, was *non valens agere*, and had no interest to quarrel these servitudes; and the King was not bound to raise a declarator to annul these servitudes, in case a recognition should fall afterwards, as was found in a declarator, the Duke of Lauderdale against the Earl of Tweeddale, 25th January 1678, *voce* PRESCRIPTION, and betwixt him and the Viscount of Oxenford, 28th February 1666, *IBIDEM*, that rights granted by liferenters, the possession, during the liferenter's time, could not be counted to make up the years of prescription, against the fiar; because, the fiar was then *non valens agere*, and not bound to pursue such declarators. And, as for the last servitude, it is far within prescription; because, the years of Cromwell's usurpation must be deducted, in which the King was *non valens agere*. THE LORDS found these two servitudes being but *minora gravamina*, they prescribed by 40 years possession, which makes a sufficient constitution, whether the possession be before or after the recognition; and that the possession, being peaceable and uninterrupted, it excluded both the superior and the vassal; and found, a reservation, contained in the charter of resignation, does not import a confirmation against the King and his donatar, whatever it might import against a private superior; because, these resignations pass in Exchequer of course, without adverting to them. Then, on the 11th February 1681, on a bill, the LORDS deducted the years of the King's minority, and of the usurpation, by which the last servitude was not prescribed, though it was urged by some of the LORDS, when the distinction was made, *inter majora et minora gravamina*; (some think this distinction not grounded in law) it was

intended that no deduction from the years of prescription should be made, *in minoribus illis servitutibus*; especially seeing the King was superior to both, and so had no prejudice that his

served both his vassals.

*Fountainhall, MS.*

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S E C T. XIII.

Effect of Consent.

1623. February 4.

GUILD against GUILD.

IN an action pursued by Guild, to hear the right of the sum of 200 merks decerned to pertain to the pursuer, which pursuit was founded upon a testament of the pursuer's father, wherein he assigned to the pursuer the right of that sum which was addebted to him, conform to an obligation made to him thereupon by his debtor, and to the which assignation made by the said testament his wife consented, and the testament was subscribed by her, and she was pursued thereupon; the LORDS found the wife's consent subscribed in the testament could not prejudge her, but that notwithstanding thereof she had right to her own third of the defunct's free gear, and of this sum controverted, amongst the rest of the whole free goods, whereof she was not prejudged by the said assignation, contained in the testament, and consented to by her, seeing that assignation was but of the nature of a legacy, which could go no further than the defunct's own third; likeas they found, That the father's giving in tocher with the pursuer since that testament, a certain sum of money, ought to be ascribed by her, to be given in satisfaction of so much of the defunct's part, or of her own part, as the pursuer acclaimed from the defender, as intromitted with by her *pro tanto*, and that the same ought to liberate the defender *pro tanto* anent her intromission with the defunct's goods and gear.

*Alt. Lawtie.*

Clerk, *Hay.*

*Fol. Dic. v. I. p. 438. Durie, p. 43.*

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An assignation to a sum in a testament, to which the testator's wife subscribed a consent, found not to prejudice her right of third.

1630. December 15.

STIRLING against HER TENANTS.

JEAN STIRLING being provided, by her contract of marriage, to an annual rent out of the lands of Templeland, by her umquhile husband, whereto her umquhile husband's father was a consenter in the contract, after her husband's decease, she pursuing the tenants for pointing of the ground for that annual rent, by virtue of her sasine following upon that contract, and the tenants defending with tacks, set by the umquhile father of her husband; so that they alleged

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A wife was provided in an annual.