

1686. February 15. LORD CHANCELLOR *against* BROWN.

No 62.

A WADSET being granted, to be held *a me et de me*, containing a back-tack to the reverser for a duty equivalent to the interest of the money; the King's confirmation of the wadset was found not to secure the back-tack, in prejudice of the ward which arose upon the wadsetter's death.

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

. See this case by Harcarse, No 8. p. 3012.

. Sir P. Home reports the same case :

1688. February.

GEORGE WAUCHOP of Cleghorn having granted a wadset to Robert Brown stationer of the lands of Cleghorn, which held ward of the King, for 9000 merks affected with a back-tack for payment of the annualrent of the same; and Robert Brown being deceased, and the Earl of Perth, Lord High Chancellor, having obtained a gift of all wards falling for several years, having pursued a declarator of ward against Charles Brown the wadsetter's apparent heir; *alleged* for the defender, That albeit his father was infest, to be holden *a me et de me*, and thereafter the wadset was confirmed by the King, yet it being but the confirmation of a base infestment, the effect of it was only to secure against forefaulture, but did not make the King superior to the wadsetter; and albeit the King was superior, yet the ward can extend no farther but to the back-tack duties, and not to the whole rents of the lands, seeing the King and his donatar could have no farther right than the wadsetter, as also the wadset was satisfied and paid by the wadsetter's intromission; and albeit the back-tack duty did contain a clause irritant, in case of not payment of the back-tack duty, and that the wadsetter had likewise apprised for these back-tack duties, yet there was no infestment past upon the apprising, and the back-tack duties, for which the apprising was led, were also paid by the wadsetter's intromission, for which Cleghorn the heritor had intended count and reckoning against the the apparent heir of the wadsetter. *Answered*, That the wadset being to be holden either *a me* or *de me*, the confirmation granted by the King made the base infestment to become public, and consequently the wadsetter to be the King's vassal; and the wadset being confirmed, he had thereby right to the whole rents, and might have excluded the King from the same; and so, by the same reason the ward having now fallen, the King and his donatar have now right to the whole rents, and the back-tack duty is only a personal right betwixt the wadsetter and the granter of the wadset; and personal provisions and obligations, or disposition or other right not particularly mentioned in the infestment, will neither prejudice a singular successor, nor the superior; and infestment having followed upon the wadset, albeit the wadsetter had intromitted with as much as would have paid back the sums of wadset and the tack.

duties for which apprising was led, however there might be a ground of declarator for declaring the wadset to be extinguished, yet, seeing there was no declarator obtained, nor renunciation granted by the wadsetter before the casualty of ward fell to the King, but the wadset right being still standing, the King and his donatar have right to the ward of the whole lands, by the wadsetter's decease. THE LORDS repelled the first allegiance, and found, that the confirmation made the defender's right public; and repelled the second allegiance, founded upon the back-tack; and found that the casualty belongs to the King as to the whole subject; and repelled the last allegiance, bearing that the wadsetter had intromitted with as much of the rents as would extinguish the wadset, unless there had been a decret of declarator of extinction obtained before the casualties fell.

No 62.

Sir P. Home, MS. v. 3.

1687. July.

THE EARL OF LAUDERDALE *against* THE VASSALS OF DUNDEE.

IN the reduction of a decret of recognition, recovered by the Earl of Lauderdale against the Vassals of Dundee, the LORDS having refused to turn the decret into a libel, but resolved to hear the parties what they could say in material justice *quasi in libello*,

It was *alleged* for the vassals, That one of the base rights being forty years before the other, and so prescribed *quoad* the delict, it could not concur to make the recognition.

Answered; Recognition cannot prescribe till once incurred, after which time only, prescription of the act of recognition runs, for *actio non nata non præscribitur*; and the first base right did not comprehend the major part of the ward tenement.

THE LORDS repelled the defence in respect of the answer.

Then it was *alleged* against another right to one Edgar, That it was renounced, in so far as for the space of forty years before incurring recognition, no document was taken upon it, and so it was prescribed. And as that right could have no effect against the ward vassal, to carry away the lands, so it could not be looked on as a ground of alienation, seeing the lands remained effectually with the ward vassal, disponer; and the prescription ought to operate a renunciation before recognition was incurred, unless the donatar will allege interruption.

Answered; Sasine being taken upon that base right, the donatar may found upon it as a concurring ground, unless it were taken away by a formal renunciation of the real right; and prescription being put in exception is not a re-

No 63.

Found in conformity with No 60. p. 6467.

Base rights confirmed subduce from the rental of the barony, and, in a question of recognition, are no more to be considered than if they had never been parts of the barony.