No 67.

THE LORDS found, that the infeftment for relief, though attaining present possession, was not equivalent to a wadset or annualrent immediately granted to the creditor, and that the voluntary deed of the cautioner without distress, was not to be regarded, and therefore found it might be conjoined as a conditional distress by hazard; so that for instance, if the half of the fee were alienated, this infeftment for relief would make the alienation of more than the half, and infer recognition; for the Lords thought that a wadset with a backtack, though of the whole barony, would not infer recognition, unless the sum exceeded the value of the half of the barony, or an infeftment of the whole for payment of sums, but only to be considered as to the value of these sums. *See* RECOGNITION.

Stair, v. 2. p. 885.

*** See Harcarse, Sir P. Home, and P. Falconer's report of this case, No 61. p. 6470.

1707. *March* 21.

The LAIRD of GRANT *against* The CREDITORS of HALGREEN.

No 68.
A public infeftment cannot be brought *in computo* with prior base infeftments, to make up the major half, to infer recognition of the base alienations.

IN a declarator of recognition of the lands of Halgreen at the instance of the Laird of Grant the donatar, the value of the ward lands being proved to extend to about L. 42,800, and there being a public infeftment in them for L. 12,000 granted to Provost Couts in *anno* 1686, and some base infeftments granted in the year 1687 and 1688 for a matter of L. 10,000, and then a public infeftment for L. 20,000 to Arbuthnot of Knox in *anno* 1689; The pursuer *contended* That recognition was incurred and the declarator ought to be sustained; in respect the base infeftments, though at the date thereof they were within the half of the value of the ward-fee, came to exceed the half by the supervenient public infeftment 1689. Not as if the public infeftments did infer recognition, or came *in computo* to make it up, but the antecedent base infeftments inferred it how soon the major part of the vassal's effectual property, deducting the public infeftments, was basely alienated; because he was then, without the superior's consent, rendered incapable to serve him, which is the main reason of recognition; as Craig, my Lord Stair, and all the feudists observe. And as recognition would have been certainly incurred, had the base infeftments been posterior to the last public infeftment, they must have the same effect when anterior thereto; seeing *de facto* the vassal is equally disabled in this case, as in the other. Thus, February 6. 1673, Lord Hatton *contra* Earl of Weems, No 58. p. 6461.; February 23 1681, Hay *contra* Creditors of Murie, No 71. p. 6513.; though confirmation secure against recognition falling by the infeftment confirmed, it doth not secure against recognition upon other prior subaltern infeftments not confirmed. And infeftment upon resignation or confirmation in favours of a total purchaser, after his author had made some

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base infeftments within the half, will not hinder these base infeftments to be conjoined with subsequent base infeftments made by the purchaser himself. Yea, base deeds that were legal at the beginning, do frequently come afterwards to infer recognition, through the vassal's neglect to get them confirmed. So the base infeftments granted during the troubles and usurpation, when ward-holdings were suppressed, not sought to be confirmed after the Restoration, did *ex post facto*, infer recognition; January 7. 1676, Cockburn *contra* Cockburn, *voce* RECOGNITION; July 29. 1672, Hatton *contra* Earl of Northesk, IBIDEM; December 15. 1669, Maitland of Pittrichie against Leight, IBIDEM. For *sæpe evenit ut quod ab initio valuit, postea evanescat, cum ad casum pervenerit a quo incipere non potuit.* Yea, with us no subaltern infeftment within or without the half could be granted of a ward-fee, till the act 71, Parliament 14, James II. allowing feus set to a competent avail, which was restricted by the act 16, Parliament 1633, and the ward-vassal discharged under the pain of recognition to alienate without consent of his superior the most part of their land.

Answered for the defenders, Albeit the Lords have found, that prior base infeftments valid *ab initio* fell under recognition by the supervening of other base infeftments, it was never dreamed that the granting of public infeftments upon resignation should have the same effect as to anterior base infeftments; because, 1*mo*, Recognitions being odious are not to be extended to undecided cases; and there was no fault in the vassal to alienate what was below the half of the value, and the creditors were in *bona fide* to take and retain their base infeftments without confirmation till the granter had alienated the major part without the superior's consent. 2*do*, If a subsequent infeftment upon resignation could infer recognition of anterior base infeftments, it were easy for the superior and his vassals, by collusion, to evacuate the fee, and to elude anterior just creditors. 3*tio*, Tis a principle in law, that to infer recognition, base infeftments equivalent to the major part of the ward-land, must concur at the same time; so that if one base infeftment be confirmed by the superior before the taking of another, these two would not concur to make up the major part. Now since the base infeftments in this case at the taking of the last did not extend to a third of the value of the estate, it is absurd to make use of the subsequent public infeftment (which was the superior's own deed) to make the recognition incur. For at that rate a ward-vassal of 10,000 merks granting a base infeftment for 1000 merks, and thereafter disponing the other 9000 redeemably or irredeemably with the superior's consent, recognition would be incurred by the base infeftment for the 1000 merks, which is ridiculous. It is but a stretch to allege, that though the public infeftment comes not *in computo*, it must be subduced from the whole value; which is to do the thing *per ambages*, that cannot be done directly, and is a metaphysical subtlety not to be allowed in penal delinquencies. Nor can the half of the ward-fee be understood as basely alienated; because, the public redeemable infeftments for L. 32,000 *in annis* 1686, and 1689, left Halgreen vassal in the whole property; and if his

ward had fallen, the same would have been valued with respect to the whole, without any regard to the burden of annualrents, which being a mere servitude, could be extinguished by a simple renunciation without a re-investiture. The cited decisions are nothing to the purpose; for the conjoining infeftments granted by the author, with infeftments granted by the purchaser, to infer recognition, was thought very hard, as my Lord Stair observes; and such as had base infeftments in the late times, might have procured confirmations or resignations upon the progress contained in their rights, whom law punished for their neglect to do it; whereas the expeding infeftment upon Knox's resignation, did *ipso facto* subject the intermediate base infeftments to the mercy of the superior. As to the ancient feudal customs when feus were made purely for service, and were not the subject of commerce, and the superior could not be forced to accept of a vassal, it is not worth the while to examine them now, when they are sold and purchased for onerous causes, and the superior has not the choice of his vassal, but upon apprising or adjudication may be compelled to admit of any creditor. No 68.

Replied for the pursuer; No base infeftment in a ward-fee, though within the half of the value, is safe, or can be taken, being an inchoate delict depending upon the subsequent deeds of the granter, whereby he retains not the major part for enabling him to serve the superior; and the receiver trusting him runs the risk of coming to have a ward-fee, whereof the majo. part stands alienated. Nor is it to be objected. that the superior here claims the casualty from his own deed of granting a public infeftment, without which it could not be incurred; because, the intervening base infeftments, continuing without confirmation till after the public infeftment, are to be esteemed of a date posterior thereto *quoad* the superior who was not obliged to know them; and omission to seek confirmation thereof immediately after expeding the public infeftment was equivalent to a reiteration. *Eoaem redit* upon the matter, whether the public infeftments be redeemable or irredeemable, seeing both equally reduce the vassal to a state of incapacity to serve his superior. Yea he seems to prejudge the superior more by a redeemable infeftment, because, then the superior retains his burdened vassal with the view of serving him as before, though less capable; whereas in the case of an irredeemable right, the superior gets a new vassal who may serve him effectually on what is required. 2*do*, Whatever restriction might be put upon a common odious recognition, the pursuer's gift is favourable, being granted in security of a just debt, and therefore ought to be sustained; as adjudications or apprisings, found null as to expiring of the legal, will be sustained as a real security for the debt; and a gift of escheat in favours of a creditor will be sustained to him as a security, though he be a friend of the rebel's, and suffer him to retain possessson, December 23. 1623, Ballanden *contra* Murray, *voce* PROOF; December 4. 1669, Jaffrey *contra* Jaffrey. IBIDEM.

THE LORDS found, That recognition was not incurred in this case.

Fol. Dic. v. 1. *p.* 437. *Forbes, p.* 159.