

No. 10. 1684. *January.* SHEARER *against* LORD SALTON.

In the action of recognition at the instance of Patrick Shearer *contra* the Lord Salton, the Lords found a confirmation granted by the Earl of Marischal, superior, could not defend against the recognition, being granted after he was denuded by expired apprisings.

*Sir P. Home MS. v. 1. p. 546.*

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No. 11. 1688. *February 15.* LORD CHANCELLOR *against* BROWN.

The ward was found to fall by the death of an improper wadsetter infest.  
*Harcarse.*

\* \* \* This case is No. 8. p. 3012. *voce* CONFIRMATION.

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1707. *July 15.*  
The CREDITORS of EDINGLASSIE *against* GORDON of CARNOUSSIE.

No. 12.  
Recognition  
inferred by  
the deeds of  
the reverser  
during the  
legal of an  
apprising.

In the sale of Edinglassie, there arises a competition of creditors, wherein compareance is made for Gordon of Carnoussie; and for him it was alleged, That the lands of Carnoussie libelled in the sale ought not to be exposed to roup for Edinglassie's debt, because the same belonged to him, not only as being originally purchased by Sir George Gordon, his father, in life-rent, and to him, a second son, in fee, but more especially because he had obtained a gift of recognition thereof, incurred by deeds of alienation done by Ogilvie of Carnoussie, a former heritor, and thereupon had also obtained a declarator of recognition *in foro*.

The creditors repeated a reduction of that decret of recognition, in which they were not called, and alleged, *1mo*, Though Edinglassie, their author, was only life-renter, yet the disposition of Carnoussie was purchased by his money, and contained a faculty to redeem, burden, or impignorate, at his pleasure, whereby the creditors adjudgers from him have the same right as if he had explicitly exercised the faculty. *2do*, There was no recognition incurred by the deeds of Ogilvie of Carnoussie, because he was denuded by an apprising led by Forbes of Watertoun, in the year 1649, whereupon he was publicly infest before the said alienations; and it is certain, that recognition is only inferred by the deeds of the vassal, which holds as well in the case of apprisers within the legal, as after the expiration, because apprisers infest are vassals, and denude the former heritor; and so it has been several times found, as particularly, 20th July, 1671, Lindsay of Mount *sontra* Maxwell of Kirkconnel, No. 7. p. 16445.; and the like, 28th July, 1680, The King's Advocate *contra* Yeoman of Dryburgh, No. 9. p. 16446.; in both

which cases, it was found, That the ward and marriage of the appriser deceasing within the legal, did fall to the superior, upon this solid foundation of law, that the appriser infest was the only vassal. *3tio*, In this case, the deeds of alienation were after expiration of the legal, whereby Ogilvie of Carnoussie was totally denuded, in as far as the apprising being led in the year 1649, and the legal being but 7 years, it did expire in the year 1656, prior to the deed of alienation; and albeit the act of debtor and creditor 1661, contains a clause, that all apprisings not expired in the year 1652 should be current for three years thereafter, that clause was designed for a special benefit and gratification to the debtor, and ought not to be excluded to afford an advantage to the superior, by deeds of alienation done by a debtor, after he was wholly divested of the fee by the law standing for the time.

It was answered for the defender: That supposing his father's contracting of debt could be constructed an exercise of the faculty, yet he had made a fair and honest purchase by himself, and bruiked by his own right, in as far as the original disposition did provide that the lands might be bruiked by that or any other right, and did narrate and except from the warrandice the wadset-rights by which recognition was incurred; and he being satisfied, he could not bruik securely by virtue that disposition; and being creditor to, and cautioner for, his father, and obliged to pay these cautionries, he also purchased the right of these wadsets, and a gift of recognition to secure all. And as to the objections against the deeds of recognition, it is answered, *1mo*, The reverser, during the currency of the legal, is, in the construction of law, reputed the heritor, and the apprising only a security for a sum; for the reverser pursues removings, receiveth vassals, and, by the act of Parliament 1681, has the only interest of electing barons to represent the shire, exclusive of apprisers during the legal; all which are characters of property; and were it otherwise, great inconveniences might follow; many adjudgers might be infest; and though there were but one infestment, yet that is extended to all prior and subsequent adjudgers within year and day, and the superior would have equal claim to the casualties upon the death of all these. Besides, it were a great incongruity, that the death of an appriser within the legal should bring the burden of ward, marriage, and other casualties, upon the apprised lands, which might prove a far greater burden than the apprising itself. And as to the practicks, they are not sufficient to make a rule contrary to the analogy of law; they were determined when casualties of superiority were extended to the utmost, and were very little approved at the time; and they were not in the case of a recognition, but the first in the case of ward-duties, and the last in the case of a marriage; and in the first case, the adjudication being extinct by intromission, the gift of the reverser's ward was found to take place thereafter; and in the last, the marriage was not valued with regard to the whole estate, but only the apprised lands. *2do*, The act 1661 takes off the legal of apprising, to all intents and purposes.

No. 12. “ The Lords found, That the deeds of the reverser, during the currency of the legal, did infer recognition ; and that the act of Parliament 1661 did prorogate the legal to all intents ; but did not determine how far the apprising might be a burden upon the recognition, or how far the creditors, by their diligence against Edinglassie, might have the benefit of the apprising as a separate right and burden upon the same.

*Dalrymple, No. 81. p. 102.*

\* \* \* This case is reported by Forbes :

Sir George Gordon of Edinglassie having right by progress to an apprising of the lands of Carnoussie, led *in anno* 1649, by Forbes of Watertoun against Sir George Ogilvie, then heritor, the creditors of Sir George Gordon adjudged these lands from his apparent heir, and insisted in a process of sale ; where compearance was made for George Gordon, his second son, who contended, that the lands of Carnoussie could not be exposed to sale for his father’s debt, since he had right thereto by charter and sasine proceeding upon a gift of recognition, incurred by deeds of Sir George Ogilvie, the former heritor, declared in his favours.

Answered for the pursuers : Recognition could not be incurred by any deeds of Sir George Ogilvie after he was denuded by the apprising 1649, upon which Watertoun was infest under the Great Seal ; whereby he became the King’s vassal, and the casualties of ward, marriage, and relief, could only fall due by his death, and recognition could only be incurred by his deeds ; and the right of the former vassal resolved in a simple reversion ; *cum non possint esse duo ejusdem rei domini* ; which may be cleared from the constant course of decisions, particularly, July 28, 1680, The King’s Advocate *contra* Yeoman, No. 9. p. 16446. where the marriage was found to fall by the death of an appriser within the legal ; February 3, 1681, *Ker contra* Henderson, No. 31. p. 6915. where an appriser’s charge against the superior, with an offer of a year’s rent, would have excluded non-entry by the reverser’s death ; and March 10, 1621, Lord Balmerinloch *contra* Seton, it was found, that an appriser infest might reduce posterior voluntary infestments by which the debtor’s lands had recognosed. Now, that recognition cannot be inferred in prejudice of an appriser by any deed of the reverser, is further made out from the instance of inhibition, which, by the act 15, Parl. 2. Ja. VII. cannot be prejudiced or disappointed by recognition incurred by the debtor’s posterior deeds. And, by the act of Parliament 1621, no bankrupt or interposed person can wrong lawful creditors, who have done diligence by inhibition or comprising, duly to affect the dyver’s estate ; which excellent provision in our law would be easily evacuated, if it were permitted to a dyver to defraud his creditors by doing of deeds inferring recognition.

Replied for George Gordon : The reverser, by an apprising, is not so divested of his estate as to cease to be proprietor. On the contrary, all the characters of

property remain during the legal, with the burden of the appriser's security; and the donatar of recognition pleads the effect thereof no higher than to carry the property with that burden. So the reverser may possess, remove tenants, receive vassals, take compositions, and confirm charters; yea, when the apprising is extinguished, the reverser needs no resignation from the appriser, or new right from the superior; consequently, he the reverser is proprietor, and the appriser but a creditor. So that the property can only be evacuated by the feudal delinquency of the former; otherwise, a creditor infest for relief or warrandice in ward-lands, or an appriser of these, might be subject to the casualties of ward, which were hard. Again, by an express act of Parliament, 1681, apprisers or adjudgers are declared incapable, during the legal, to vote in the election of commissioners to the Parliament or convention. And were it not absurd, that a great estate should be sunk by the fact of an appriser for a small sum, in prejudice of the reverser and his other creditors? As to the act 1686, which provides, that inhibition shall exclude recognition, it might be contended, that it makes for the defender, since it was otherwise before the said statute; and there is no such statute in favours of apprisers. But that is not to the purpose; for the defender does not controvert, but an apprising will be sustained as a security for the debt, notwithstanding of recognition incurred by posterior deeds during the legal, though the legal, in that case, could never expire in prejudice of the recognition, arising to the superior from the very nature of a proper fee, and understood as a part of the *reddendo* thereof. The decisions urged for the pursuer do not concern the present state of the case; for the argument from the decision in the case of marriage or the ward-duties doth not hold in recognition, because marriage or ward-duties do not extinguish the fee, but are only casualties arising from the condition of the person of the vassal; whereas, recognition makes the very fee itself to return; which can never happen by the deed of a party having only right for security, as an apprising during the legal is, but by the deed of the reverser, who has the right of property. So, at farthest, the deed of an appriser during the legal could only make his own apprising and security recognise. And in the decision against Yeoman, the marriage was not modified according to the appriser's whole estate, but to two years rent of the appraised estate.

The Lords found, That the deeds of the reverser, and not of the appriser, do infer recognition during the currency of the legal.

*Forbes, p. 180.*

\* \* This case is also reported by Fountainhall:

The Laird of Carnoussie having purchased in the preferable rights on these lands, for the better securing himself, he also purchased the gift of recognition, incurred by Sir George Ogilvie of Carnoussie, the last heritor, his granting base infeftments unconformed forth thereof; and reduction being raised thereof by some unsatisfied

No. 12. creditors, they insisted, *1mo*, on this reason, that Sir George Ogilvie was denuded of the right of property before his granting of these base rights, in so far as Forbes of Waterton had, *in anno* 1649, apprised these lands from him, and stood publicly infest; and so he being the King's vassal, it behoved to be deeds of his to make the ward-lands recognosce, and no delinquencies of Sir George, the reverser, could make this casually fall, and that it was so decided, 20th July 1671, Lindsay against Maxwell of Kirkconnel, No. 7. p. 16445. and 28th July 1680, the King's Advocate against Yeoman, No. 9. p. 16446. It were against the analogy of the feudal law to make it open by the death of both adjudgers, or the debtor reverser; and it might be as destructive to the interest of creditors; for where one became insolvent and *obarratus*, he might, to the prejudice of his creditors to whom he was owing more than his estate was worth, grant base infestments in ward-lands, and so cut off all their debts at one stroke. And whereas it may be said, they should have confirmed to preserve their rights, it may be answered, that a malicious debtor may easily prevent this, by granting their base rights while they are but *in cursu diligentia*, and leading their adjudications. Answered, That creditors apprising or adjudging within the legal, can never be considered as heritors and proprietors, their rights being only *pignora pratoria* for security of their sums, and all that time under redemption; so that the reverser, during the time of the running of the legal, has all the marks and characters of the true *dominus*; for he enters vassals, he has the vote for chusing commissioners to the Parliament, and by the 21st act 1681, apprisers and adjudgers are expressly debarred therefrom during the currency of the legal, which is a clear demonstration, that our law esteems the reverser to be the only heritor, and he has the *dominium utile*; and, on his paying the debt, or its being extinguished by intromission, he needs not be reinvested, nor reseised, which behoved to be if he were fully divested; whereas apprisers and adjudgers after the legal must take a new infestment, as irredeemable proprietors; and for the inconveniency urged, if the casualty fall by the reverser's deeds, it cuts as sharp the other way; for suppose it to open by the adjudgers, then it may fall by the death of every one of them. And what if an estate of nine or ten thousand merks a year be adjudged for a small sum far within the worth, shall the base rights granted by such an adjudger, carry away the estate from the reverser, where the right of redeeming is ten times of more value than the debt adjudged for? This were most iniquitous, and beyond all measure hard. And for the decisions, they were *in materia odiosa*, in times when these casualties of superiority were too much screwed, and have not been followed since, especially where *non exemplis vivendum sed legibus*; neither were they in the precise case of recognition, but of ward and marriage; and *argumentum a disparatis non concludit*. And what if one were infest in ward-lands for relief of cautioners, or in warrandice in case of eviction, would any think that by these delinquencies recognition could be incurred? *2do*. It was contended for the creditors against this recognition, that Sir George Ogilvie the reverser's grant-

ing base infeftments, could never infer this recognition; because they were given after the legal of Waterton's apprising was expired, which was led in 1649, so the seven years ran out in 1656; and so Sir George being entirely denuded, his deeds after that could not prejudice the appriser, who by the elapsing of the legal was stated in the full right and property of the lands. Answered, After the legal, a creditor has it in his option either to take the land adjudged *in solutum*, or to retain it still as a security, and to intromit with no more than his annual-rents. But, *2do*, by the 62d act 1661, the legal of all apprisings not expired in 1652 are prorogated for three years longer, within which space Sir George granted these base infeftments that incurred the recognition; and so he was still heritor. Replied, It is true, the legal of such apprisings is prorogated to 1664, but that prorogation was only *ad particularem effectum*, that they might redeem in that time, but did not convey any right to the reverser to grant base infeftments, but the apprising *quoad* that effect was to be reputed expired.—The Lords having considered this nice abstract point, found the recognition incurred by the reverser's deeds within the legal, and that it would not fall by the apprisers, who had only a real pledge, for security of their money, in the apprised or adjudged lands during the currency of the legal, and did not fully denude the debtor till after the legal was run; and found the three years prorogation by act of parliament 1661, had all the effects of the ordinary legal, and that the reverser continued *dominus* and heritor till the full outrunning of the same.

No. 12.

*Fountainhall, v. 2. p. 382.*

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1713. February 12. ERSKINE against HAMILTON

No. 13.

No casualty of superiority doth fall through the death of an appriser infeft, who, during the legal, has conveyed his right by disposition in favour of the reverser, recorded in the register of reversions.

*Forbes.*

\* \* This case is No. 73. p. 6515. *voce* IMPLIED DISCHARGE.

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1739. July 24. DONATAR of WARD against CREDITORS of BONHARD.

No. 14.

The Lords were unanimous, that ward does not fall by the death of an adjudger though infeft within the legal, nor even after the legal, unless he was in possession; for till then, even after the legal, the adjudger is not deemed proprietor, which one must be before ward can fall by his death; he is but a creditor

By whose death the casualty of ward falls, and by what it is excluded.