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the pursuer insisted for improving the writs called for, so that the repetition of the conclusion of the libel hath been only through inadvertance not fully set down. And as to the discharge of the feu-duty, *1mo*, It is vitiated in the date. *2do*, It wants writer and witnesses; and albeit it were holograph, it cannot instruct the true date, and it can never import a passing from the improbation further than for the term discharged, especially seeing it was granted by Doctor Hay, who was singular successor to the Chancellor, and perhaps knew not of the improbation. The pursuer *answered*, That the certification being granted in absence, the obtainer thereof might frame it as he pleased; but it cannot be supposed to be truly better than as it stands; and though improbations being in absence, are very much adhered to, yet they are odious rights, and very reducible upon any defect or informality, seeing it is formality that gives them all their strength: And as to the discharge, the date of it hath been altered at the subscription by the subscriber's hand, as appears by comparing the date and subscription; *2do*, In the very body of the discharge, no ways altered, it bears to discharge the year 1624, after the certification, and the discharge as it stands, is in the ordinary way as discharges use to be given to tenants and vassals for small feu-duties, and therefore must be sufficient in a case so favourable for the pursuer, who has a clear right; and should not be elided by this dubious certification, which must be restricted to a certification in a reduction, which is only reducing the rights till they be produced, and so falls, they being now produced.

THE LORDS repelled the defence upon the certification, in respect of the reply and discharge produced, and decerned the defender to re-possess the pursuer; but assoilzied him from the bygone profits, seeing he possessed by a title, and had just reason to defend in a matter so dubious.

Stair, v. 1. p. 729.

1687. December 15.

WILSON against SMITH.

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THE LORDS found, in a case betwixt Wilson and Smith, that a subject superior's accepting feu-duties, after he knew a recognition was incurred, was a passing from that casuality. Albeit it was argued from Craig, that *argumentum a forisfactura ad recognitionem* was good; and yet the taking feu-duties from a rebel would not be a remitting of a forfeiture.

Fol. Dic. v. 1. p. 430. Fountainhall, v. 1. p. 490.

* * * Harcarse reports the same case:

1687. December 16.—THE Laird of Dundas having feued out some acres of land, with an irritant clause *de non alienando*, which the feuer, notwithstanding

the irritancy, did wadset; and Dundass having thereafter disposed the superiority of the feu to Mr George Wilson, Mr George pursued a reduction and declarator of extinction of the feu upon the foresaid irritant clause.

Alleged for the defender: That any fault committed by him was in Dundass's time, who disposed only the superiority to the pursuer. *2do*, It was offered to be proven that Dundass did pass from the said irritancy, and approve the wadset, by accepting feu-duties from the wadsetter, who was in the natural possession, and (as in recognitions) any approbation of the superior, whether antecedent or subsequent, should purge the irritancy. *3tio*, The wadset was renounced before the pursuer acquired the superiority.

Answered for the pursuer; The right of superiority comprehends *omne jus* in the lands, and the irritancy being incurred in Dundass's time, and not reserved, nor the benefit thereof given to any, *transit* to the pursuer by Dundass's disposition to him. *2do*, The granting of discharges to the wadsetter of the feu was not *modus habilis*, to extinguish the effect of irritancy; for that could only import at most a security to the wadsetter of his right, and not a security of the reversion to the granter of the wadset; so that, after redemption of the wadset, the feu returned free to Dundass, and consequently to the pursuer's singular successor. And recognition being incurred by the granting of a wadset, a subsequent confirmation of the wadset ought not to secure the reversion. *3tio*, The redemption of lands, before quarrelling, purges no irritancy incurred through the alienation.

“ THE LORDS found the second allegiance relevant to purge the irritancy.”

Harcarse, (SUPERIORITY.) No 941. p. 264.

1696. *January 14.* LOCKHART *against* The CREDITORS of NICOLSON.

MERSINGTON reported George Lockhart of Carnwath against the Creditors of Nicolson, in a declarator of recognition of a part of the lands of Laswade, holding ward of the late Archbishop of St Andrews, and gifted by him to William Montgomery, for the behoof of the deceased President Lockhart. The defences were, *1mo*, Against the severity of this feudal delinquency, (but that can only be rectified in a Parliament,) and that Sir William's charter from the Bishop was to his heirs and assignees, which Sir Thomas Craig interprets to be a tacit concession to the ward vassal to alienate, as having his implied consent. *2do*, That the holding was unclear, being likewise a sum of money. *3tio*, That the superior after the recognition was incurred, and he knew of it, accepted of the feu-duties and other casualties, which was a renouncing and passing from the recognition, and acknowledgment that he still continued his vassal. *Answered*, A charter of ward-lands *haredibus et assignatis*, is only a consent to their assigning before infeftment be taken thereon, but not thereafter; as was found 5th February 1663, Lady Carnegie, *voce* SUPERIOR AND VASSAL. To the *second*,

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The Court decerned in a recognition, though the superior, after he knew that it was incurred, received the feu-duties.