

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.

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though there be a special duty, yet it is not payable *nomine feudifirmæ*, but only superadded to the *servitia debita et consueta*; and though wards are to be co-arcuate on all occasions, yet where the *reddendo* is unclear, *feudum militare præsumitur*, as the true ancient holding. And to the *third*, *nullo modo relevat*, seeing the accepting the feu-duties after the gift cannot prejudice the donatar's *jus quasitum*; and as little before it, because *non constat* what may be the event of the declarator, as was found in a declarator of escheat, 6th June 1666, Earl of Cassilis *contra* Agnew, No 3. p. 6408.; and in the case of a minister accepting a tack-duty, this was found no homologation of the tack; Chalmers against Wood, No 78. p. 5698. THE LORDS repelled the Creditors' defences; and declared in the recognition.

*Fol. Dic. v. 1. p. 430. Fountainball, v. 1. p. 699.*

1697. February 11. COCKBURN against LAW, and Others.

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In a declarator of recognition of a feu, this defence was sustained, that, since the recognition, the superior or factor had accepted of feu-duty from a singular successor, not entered by himself.

JAMES COCKBURN, as donatar to the recognition of the lands of Monkton, pursues a declarator against John Law and the other creditors; because, by the original charter of the same, dated in 1558, granted by George, Archdean of St Andrews, and Commendator of the abbacy of Dunfermling, it is feued out to Gilbert Hay, with the express irritancy, that if they dispone any part of the lands without the superior's licence had thereto, they should forfeit, tyne and amit the feu; and *ita est*, in 1686, Alexander Hay, the last vassal publicly infeft, dispomed the lands to Mr Alexander Hay, advocate, whereon he was infeft base, and so the lands recognised. *Alleged*, The heritors never bruiked by by that charter, but only by subsequent rights not containing any such clause; and so the creditors cannot be prejudged. *Answered*, The posterior rights expressly relate to the ancient original feu, and its tenor. *2do*, *Alleged*, The Earl of Lauderdale who gifted this recognition was not superior, but had only right to the feu-duties, as other Lords of erection have. *Answered*, Thirlestane's right to the Lordship of Musselburgh, (whereof the superiority of these lands is a part,) is excepted from the general act of annexation cap. 29. Parl. 1587, and is again excepted by the 53d act 1661, and from the act *salvo jure*, in 1663. *3tio*, *Alleged*, The superior has accepted the feu-duty since the recognition was incurred, and so *præsumitur a caducitate recessisse*. *Answered*, *Non relevat*, unless he knew it was fallen. THE LORDS repelled the first two defences; but sustained the third in these terms; that he, by himself, or his factors by his order, had accepted the feu-duty since the recognition fell, from a vassal and singular successor, whom he knew not to be entered by himself, which infers his consequential knowledge of the recognition being incurred; though I suppose he knew not then of the irritancy contained in the original charter. THE LORDS were the easier in declaring this recognition, that it was not extended, but only for security of a sum of money due to James Cockburn, &c.

*Fol. Dic. v. 1. p. 431. Fountainball, v. 1. p. 766.*