

1710. February 10.

MR GEORGE LESLIE of Kincaigie, Advocate, *against* The REAL CREDITORS of Riccarton-Craig.

## No 65.

The King's confirmation of base infeftments granted by his vassal to his creditors after he has been year and day at the horn without a *novodamus*, does not secure the rights confirmed against the common debtor's life-rent escheat, though gifted and declared after the confirmation.

In a competition of the Creditors of Riccarton, Mr George Leslie, who had procured from the Queen a gift of single and life-rent escheat of the common debtor, denounced rebel March 1. 1698, *pleaded* preference to the Real Creditors by heritable bonds and base infeftments posterior to the annual rebellion; albeit prior to, and confirmed under the Great Seal before the gift and declarator thereon; because, *id non agsbatur* by the simple confirmation without a *novodamus* to debar the superior or his donatar from a casualty already fallen, but only to state the creditor confirmed vassal for thereafter *salvo jure suo et cujuslibet*, Stair, Inst. L. 2. T. 11. and L. 3. T. 3. No 59. p. 6464, Aiton *contra* Duncan; especially considering, that confirmations pass of course in Exchequer, and the Sovereign cannot be prejudiced by the negligence of her officers.

*Alleged* for the Creditors; The donatar can be in no better case than the superior, who could not be heard to pursue such a casualty against a singular successor for onerous causes, received simply in place of the former vassal, without mention of any reserved right, February 26. 1623, Sibbald *contra* L. of Leithindy, No 6. p. 3616.; for, even a simple consenter to a right cannot be allowed to quarrel it. And confirmation by the Queen, who is always favourable to her vassals, must be as effectual, if not more, than an ordinary superior's confirmation; besides, in all charters, whether of resignation or confirmation, the fee is disposed *tanquam optimum maximum*, which includes all lesser rights, and consequently the casualty of escheat, at least so far as to save the right confirmed; as confirmation excludes recognition incurred before or after. *2do*, If confirmation did not purge all prior fallen casualties, the superior might claim two life-rent escheats out of the same subjects, in case the vassal confirmed should happen to be year and day at the horn, which is absurd. *3tio*, The receiving one vassal in place of another, is indeed an effect of confirmation, but not the sole effect; for it also establisheth the fee in the vassal's person as freely as the superior would give it, and a *novodamus* hath this farther effect, that it remits the bygone casualties of feu and blench-duties, which are specially reserved in a charter of confirmation. *4to*, My Lord Stair, in the place cited, speaks only of base infeftments granted after rebellion and not confirmed; and the decision betwixt Aiton and Duncan is single and singular, contrary to the former practick in the year 1623.

*Answered* for the donatar; Albeit confirmation doth hinder recognition by the deed confirmed, in respect that feudal delinquency is only incurred for want of the superior's consent to the vassal's deed, and purged by his consenting at any time; yet confirmation doth not secure even the right confirmed, against recognition incurred by anterior deeds; consequently, confirmation of the vassal's deed after his year and day rebellion, doth not exclude the escheat fallen

to the superior before. The practick betwixt Sibbald and Lethindie is quite misapplied ; for there the Lords only found, that Lethindie's liferent escheat did accrue to Clunie, the immediate superior, his liferent escheat, fallen into the hands of the Bishop, Clunie's superior, and not to Sibbald, the donatar of Clunie's single escheat. *2do, Esto*, any of Riccarton's confirmed creditors were year and day at the horn, the superior would not have right to two liferent escheats, but only he would have two strings in his bow, so as he might chuse to take the benefit of either the principal debtor's or his creditor's escheat.

THE LORDS preferred the donatar.

*Fol. Dic. v. 1. p. 435. Forbes, p. 398.*

\* \* \* Fountainhall reports the same case.

1710. February 17.—IN the ranking of the Creditors of Mr Robert Craig of Riccarton, a competition arose betwixt Mr George Lesly, donatar to his liferent escheat, and sundry of the creditors, standing infest and confirmed before the date of the gift. *Alleged*, These confirmations can give no preference, because they are posterior, not only to the denunciation, but year and day after the rebellion, by which there was a *jus quæsitum* to the Queen, who has gifted it to Mr Lesly likewise a lawful creditor ; for *id non agebatur* by the confirmation to preclude the superior from the casuality of the escheat already fallen in the Queen's hands, but only to receive the creditors in the place of the former vassal, as Stair tells, B. 2. T. 11. & B. 3. T. 3. and was expressly found by the Lords on the 14th January 1676, Ayton against Duncan, No 59. p. 6464. ; so that nothing could effectually denude the Queen but a *novodamus*, which none of the creditors have. *Answered*, A donatar is but the Queen's assignee, who cannot be allowed to quarrel any deed of hers preceding the gift, as their charters of confirmation are ; and if the superior were pursuing, the confirmation would exclude, as was found in the case of a bishop's vassal, marked by Durie, 26th February 1623, Sibbalds *contra* Lethindie and Cluny, No 6. p. 3616. ; and the Sovereign uses to be more benign and less rigorous than other superiors ; and the confirmation reserves the feu and blench duties for all other burden and exaction, and so not having reserved the escheat *exceptio firmat regulam in casibus non exceptis* ; and it is *triti juris*, that a confirmation excludes the casuality of recognition, and there can be no *dispar ratio* given, why it should not operate as effectually against a liferent escheat ; and law presumes that a confirmation conveys some right ; and it is *gratis dictum*, that a *novodamus* only remits and discharges this casuality, for it may be done otherwise, as well as by it. *Replied*, The common maxim is opposed, that *confirmatio nihil novi juris tribuit*, and the Queen's officers' negligence cannot prejudge her of her casualities ; and the confirmation does nothing but states the creditor in the former vassal's place ; and it is a mistake, that a confirmation excludes a recognition, for it only saves the

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right confirmed, and no more. THE LORDS found the Sovereign's simple confirmation, without a *novodamus*, cannot defend against the donatar to the life-rent escheat, where the annual rebellion was run out before the confirmation, though the gift be posterior to the said confirmation.

*Fountainhall, v. 2. p. 569.*

1739. February 2.

GIBSON against SCOT.

No 66.

FOUND, That a charter of confirmation of a disposition granted by the last vassal to his apparent heir, implied a discharge of all former feu duties.

*Fol. Dic. v. 3. p. 304. Kilkerran, No 1. p. 297.*

S E C T. X.

Effect of Public Infeftment with respect to Recognition.

No 67.

Public infeftment of the whole lands does not save from recognition, if the base infeftments, granted by the purchaser and his author, extend above the half.

But a public infeftment of part of the lands, is safe against recognition, if not already incurred.

1681. July 7, and March 1683. HAY against CREDITORS of MURIE.

CONFIRMATION of a base right must save from recognition, *quia hoc agitur* by the confirmation; or, if a particular part of the barony be disposed to be holden of the superior, a charter of resignation or confirmation, will also save that part from recognition; but where the whole ward-lands are disposed to be holden of the superior, a charter of resignation or confirmation will have no effect to save from recognition, because no more is intended thereby, than to receive one vassal in place of another, subjected to the same burdens and to the same grounds of challenge that lay against the former vassal; and therefore, in this case, the deeds of the author will be conjoined with those of the singular successor to infer recognition, as if all were granted by the same person.

A purchaser of a part of a barony holding ward, being infeft upon a charter of resignation, which imports the superior's consent, no base right thereafter granted by the author can be brought *in computo*, to subject the public infeftment to recognition. But a charter of resignation will not save the lands contained in the charter from recognition, where the major part was alienated before the date of the resignation. And as to base rights granted by the resigner after resignation, before the same is completed by infeftment, the LORDS found, that such right, granted before subscribing of the charter in the case of