

## S E C T. IX.

## Effect of a Charter of Confirmation.

1612. February 28.

RAE against LAIRD of KELLY.

No 53.

IN an action of recognition betwixt Adam Rae and the Laird of Kelly, the LORDS found the infeftments granted after the fault, with the King's confirmation, before the infeftment of recognition given to Adam Rae, good and sufficient to stay the recognition, notwithstanding they had not the gift of *novodamus*.

In the same cause, the LORDS found an infeftment granted by the good-sire to the oye, with consent of the son, to be a cause of recognition, because the oye was not immediately to succeed.

*Fol. Dic. v. I. p. 435. Kerse, MS. fol. 118.*

\* \* \* Haddington reports the same case :

ADAM RAE being infeft in the barony of Kellie by his Majesty, as fallen in his Highness's hands by recognition, pursued declarator thereof against many parties for alienation of the said hail barony made by William Auchterlony of Kellie to James Auchterlony his oye 1595 ; and, by another alienation of the said barony, made by the said Laird of Kellie to his foresaid oye, in *anno* 1604 ; as likewise, by alienation of the said hail barony, made by old Kellie to his said oye in *anno* 1605 ; and for an alienation of the said hail barony, made of his land of Kellie to Earl of Crawford in *anno* 1610 or 1611. It was *excepted* by the defenders, That the infeftment whereupon the recognition was sought being base, and old Kellie having retained possession to the time of his decease, as the King's immediate vassal, and sinesyne this Kellie being retoured heir to him, his retour standing, no recognition could be granted of the said lands ; which allegiance the LORDS repelled. Thereafter, some particular defenders proponed these allegiances for their lands wherein they stood infeft before the alienation, whereupon recognition was founded, which was found relevant *pro tanto*. Thereafter some other defenders alleged that they were infeft in feu-farm before the said alienation, and so needed no confirmation, and could not fall under recognition ; which the LORDS thought also relevant. Thereafter it was *alleged*, That diverse of the defenders were infeft in their particular portions of the land, and confirmed by the King in *anno* 1608 and 1609, before the date of the pursuer's infeftment of recognition, the same was lawful, *quia cum is con-*

No 53.

*firmat qui dare potuit, dedisse videtur.* It was answered, That the alienation made by the King's vassal without his consent in *anno 1595*, made the vassal to amit the lands, and the right and property thereof to return to the King, and the declarator tended to hear and see it declared, that the property, at that time and thereafter, was tint and did return to the King; and therefore, the King becoming proprietor in *anno 1595*, his right of property could not be taken from him by any such confirmation of dispositions made by Kellie, who had amitted his property; for the King could not be denuded of his property, unless the seeker of infeftment had expressed the King's right, and the King being informed of his own right, had wittingly dispoined the same. Notwithstanding whereof, the Lords, considering the danger which the lieges might sustain if a private sasine, never apprehending possession, and granted to a minor, being a conjunct person, should infer recognition of these lands, and prejudge them of their public rights acquired *bona fide*, and confirmed by the King, for eschewing of that universal danger, they found the allegiance relevant. Thereafter it was *excepted*, That the alienation made by the guidisr to the oye, being his eldest son's eldest son, and so his apparent heir, could infer no recognition, and for this purpose, albeit the extracts of the *feudes* are in every Doctor's. The pursuer *replied*, That the eldest son being in life, his son could not be heir to the guidisr; in respect whereof, the LORDS repelled that allegiance. It was thereafter *excepted*, That the alienations set in feu to the particular defenders and to others in wadsets confirmed by the King, before the recognition, extending to more than the half of the lands, the alienation of the rest being less than the half, could not infer recognition, because it was lawful to analzie the least half. It was *replied*, That the hail being analzied by the guidisr to the oye, albeit a part of the pursuit was elided by the lawful infeftments of some parcels of the lands, yet, whatever was not elided, was unlawfully analzied, and so inferred recognition; which answers the LORDS found relevant. Finally, the defenders alleged that the infeftment of the barony granted by the guidisr to the oye could not infer recognition, because the sasine proceeded upon a lawful feu-charter; which allegiance the LORDS found relevant against the summons and against the hail posterior infeftments, albeit granted to the said oye *penultimo* February 1612. It was also found, that the defenders who had taken their infeftments holden feu or otherwise of Kellie, and had obtained the same confirmed by the King, behoved to be vassals to the pursuer, who was now the King's vassal in place of Kellie.

*Haddington, MS. No 2418.*

No 54.

1624. November 25. The LAIRD of COULTER *against* BALBEGNO.

THE LORDS found an exception upon a comprising confirmed by the King, being before the gift of a liferent, relevant; albeit the rebel was year and day