len, did not prejudge himself thereof, unless he had particularly disponed the same by a *de novodamus*, and needed not receive the same in his new right; and that all superiors, albeit vassals to the King, are founded in law as to the casualties, albeit they are not mentioned in the act of Parliament with the King. It was *argued*, by those of the contrary opinion, that a present vassal disponing by resignation, or a charter *a me*, any right he had, which was only *utile dominium*, the superior who before stood infeft and had *directum dominium* of the lands, becomes absolute *dominus*, and hath *plenum dominium*; and by granting of a new charter to the vassal, without any provision or restriction, which is a perfect public right, the vassal can never be burdened with any private deed of his ordination, which is only an assignation to prior mails and duties, or in time coming, unless the same had been made public by intimation, or a decreet of declarator: Notwithstanding whereof, the LORDS did prefer the donatar, which was hard; I myself being of a different opinion, and craving, that, before that was made a leading case, the preference should rather be determined upon the second point, founded upon the restriction as it was conceived, but this was refused as not being necessary, in respect of the foresaid decision upon the first point.

No 59.

Gosford, MS. No 832. *p.* 525.

1683. *February* 23.

HIS MAJESTY'S ADVOCATE *against* The CREDITORS of the LAIRD of CROMARTY.

No 60.
A confirmation, after the major part of land is alienated, and before the gift of recognition, secures the right confirmed.

An alienation made by a ward-vassal, confirmed by the superior before recognition is incurred, is not only safe from recognition, but cannot be brought *in computo* with after alienations to infer recognition; but, where the major

IN a declarator of recognition, pursued by his Majesty's Advocate against the Creditors of the Laird of Cromarty, it was *alleged*, That base infeftments, confirmed after a concourse of others, extending to the major part of the lands, before the gift, could not fall under recognition, neither could they fall *in computo*, to make up the major part, so as to make the rest recognosce.——THE LORDS found, that though the confirmation did secure the infeftment confirmed, yet, before confirmation, the major part being alienated, and so *jus* being *regi acquisitum*, the same behoved to fall *in computo*, to make the rest of the lands recognosce. It was further *alleged*, That Cromarty, the common author, having obtained a new infeftment with a *novodamus*, any base infeftments anterior to the *novodamus*, could not enter *in computo* with the subsequent base infeftments, to make up a ground of recognition, seeing the *novodamus* was an original right. And it being *replied* by the King's Advocate, That a *novodamus* did sufficiently secure the vassal, and did denude the King of any recognition fallen; but there being no recognition fallen the time of the *novodamus*, the base infeftments that were anterior, being less than the half, the *novodamus* could not stop the concourse of the antecedent base rights with the subsequent;—THE LORDS found, that albeit there was no punishment inflicted by the law of the

No 60.
part is alienated, the confirmation of any one of the alienations will not relieve the others from recognition already incurred, tho' laying aside the subject confirmed, the others do not extend to the half.

kingdom until the major part was alienated, yet the alienation of any part of the feu, without the superior's consent, was an inchoate delict, and that the *novodamus* was virtually a confirmation of all the anterior base rights, and therefore found, that the *novodamus* did secure the vassal, so that antecedent base infeftments could not enter *in computo*, nor be a ground of recognition, with subsequent base infeftments, to make up the major part. It was *alleged*, 3*tio*, That such base infeftments as were out of both feu, ward, and burgage-lands, or out of lands belonging to several heritors, to wit Cromarty and my Lord Tarbat, they being *correi debendi*, cannot be grounds of recognition for the hail value of the sums therein contained, but allenarly for a proportion of the sums effeiring to the ward lands, being compared with the other lands; in regard that albeit the creditor might take himself to the ward lands for the hail, yet there was a proportional real right of relief competent out of the rest of the lands.—THE LORDS, in respect it was optional to the creditors to uplift the whole annualrent out of the ward lands, therefore they sustained these rights, for the hail value of them, to be grounds of recognition. It was, 4*to*, *alleged*, That such base infeftments as were granted under trust, notwithstanding whereof the granter remained in possession of the lands, and the writs were undelivered, (being in the granter's charter chest) ought not to come *in computo*. It was *answered* by the Advocate, That the superior was not concerned what trust was betwixt the granter and receiver, and these qualifications were not relevant, seeing base infeftments, without being clad with possession, are a sufficient ground of recognition, and the grounds being lying in the disponer's charter chest, were not sufficient, seeing they might have been delivered and re-delivered back again; and, if that were sustained, it would evacuate all recognitions.——THE LORDS repelled the objection thus qualified, and sustained the grounds of recognition.

Fol. Dic. v. 1. *p.* 435. *P. Falconer, No* 53. *p.* 30.

*** Harcarse reports the same case:

IN a declarator of recognition against the Creditors of Cromarty, it was *alleged* for the defenders, That all rights confirmed, whether *a me* or *de me*, before the major part is disponed, are secure themselves, and cannot be brought *in computo* with other alienations made thereafter, to make these posterior alienations to recognosce, although confirmations, after disponing of the major part, would only secure the rights confirmed, but would come *in computo* with others not confirmed; which allegeance the LORDS found relevant.

2*do*, It was *alleged*, That confirmations *a me*, and resignations, being original rights, even made after the incurring of recognition, should secure the lands resigned as a *distinctum tenementum*, without a *novodamus*; and if it did not operate, that the new vassal got nothing, seeing the recognition carried away the property.——THE LORDS repelled this allegeance against the King and his

donatar. But this is more debateable against private superiors. And here recognition being made by a father to his eldest son, the case was less favourable than if it had been granted in favours of a stranger. No 60.

3*tio*, It was *alleged*, That when the lesser part is disponed base, without consent of the superior, and the disponer gets a charter of resignation with a *novodamus*, and thereafter dispones a part without consent, these alienations before and after the resignation cannot (in respect of the *novodamus*) be conjoined to make the major part fall and recognosce.

Answered; There being no casualty fallen the time of granting the *novodamus*, it could not take off the contempt *quoad* those sold before; so that how soon the major part came to be disponed after the *novodamus*, the recognition belonged to the King; although it is clear, that if the major part had been disponed before the *novodamus*, and consequently the casualty had existed, the supervenient *novodamus* would have secured all.

Replied; *Novodamus* secured as effectually as if the King had got a resignation *ad remanentiam*, and then disponed. 2*do*, Though recognition was not completed the time of resignation, it was inchoated. 3*tio*, The *novodamus* is virtually a confirmation; and as it would have transmitted the right of recognition, had it been complete, so it must purge the quality of contempt when it was incomplete.——THE LORDS sustained the allegeance, and found the *novodamus* secured the alienation before the resignation, though the major part was not then disponed, as effectually as if these particular rights had been confirmed the time of the resignation. But it appears, that if the superior was denuded by a gift the time of granting the *novodamus*, the *novodamus* would not then have that effect. But a gift will infer warrandice.

4*to*, It was *alleged*, That, in the case of wadsets out of ward, blench, and feu-lands, holding of one or more superiors, granted by one or more persons jointly, the sum of the wadset cannot be considered wholly in relation to the ward-lands, but proportionally.

Answered; Seeing a wadsetter may take himself to any part of the lands wadset, the ward-lands should recognosce, although he might have relief *pro rata* off the other persons bound in the wadset, seeing in that case the contempt is nothing lessened; and if it were otherwise, such methods would always be taken to prevent recognition. And the interlocutor between the Laird of Dun and Keith of Jackstoun, *voce* RECOGNITION, which imported the contrary, was thereafter stopped.——THE LORDS repelled the allegeance in respect of the answer.

5*to*, It was *alleged*, That Cromarty having granted an alienation to his own servant, and kept the charter and sasine always in his own possession, without delivering the same, that must either be reputed a trust for his own behoof, or a fraudulent deed, to incur recognition in prejudice of the former rights granted to the creditors.——THE LORDS found, that the infeftment, though in trust, made a change of the vassal for a time, and consequently inferred recognition.

No 60.

And found dole and fraud in the disponer relevant to preclude him from all benefit he could have by the gift; but that it could not prejudge the superior, unless he were *particeps fraudis*. And they found, that the disponer's keeping the charter and sasine in his own person, was no qualification of fraud; for the superior might have disponed it avowedly without any onerous cause; and so the concealing could not be out of any evil design, as being of no advantage to him.

6*to*, THE LORDS found, that redeemable rights paid (if not actually renounced) before the concourse of other rights, came *in computo* to make up a major part. And found, as in Muirie's case, No 61 *infra*, that inhibition did not hinder recognition; but found that sasines wanting essential solemnities, as the words *vidi scivi*, &c. or *traditio terræ et lapidis*, &c. were simply null, and did not infer recognition. It was debated, though not determined, if sasines only null *quoad* third parties, for want of registration, should make recognition. See RECOGNITION.

Harcarse, (RECOGNITION.) *No* 825. *p.* 231.

No 61.

Found that base rights cannot be brought *in computo* in questions of recognition, but the duty contained in a base charter, and the real worth of the superiority, were subject which remained with the disponer, and might be brought *in computo* to make up the major half not disponed.

1683. *March*. JOHN HAY *against* The CREDITORS of MUIRIE.

IN the cause betwixt John Hay and the Creditors of Muirie, July 7. 1681, No 67. p. 6500. the Lords having found, that a right and infeftment of relief of cautionry, though for a sum exceeding the half of the worth of the lands, did not infer recognition, as not being a present right till after distress, and that notwithstanding voluntary payment made by the cautioner, or his transacting the debt without distress; but did not determine the manner of distress, whether horning was sufficient, or if actual payment was necessary, or if distress for a part of the debt would infer a total relief so as to make the whole infeftment of relief be computed in the recognition; or if it would infer only relief *pro rata* of the distress; yet they found, that, though the contract, whereon the infeftment of annualrent followed, and to which it related, did narrate, that Ballegerno the cautioner was distressed by inhibition, and otherwise, for the whole debt, and had power to enter to possess the lands, and uplift the rents to be paid to the creditor, they would not consider the infeftment as a purified relief for the value of the whole sum of 14,000 merks of cautionry, but reserved *in quanto* to their consideration at the conclusion of the cause. And some thought the relief was purified only for so much of the rents as the cautioner had uplifted out of the relief-lands, the cautioner being obliged himself to employ the rents for that effect.

It was *alleged*; The foresaid interlocutor ought to be rectified, and that the cautioner being distressed, the infeftment of relief must be understood as purified *in tanto*, or *in toto*, conform to the distress, without respect that he might have other relief off the principal, out of his other real or personal e-