duties for which apprising was led, however there might be a ground of declarator for declaring the wadset to be extinguished, yet, seeing there was no declarator obtained, nor renunciation granted by the wadsetter before the casualty of ward fell to the King, but the wadset right being still standing, the King and his donatar have right to the ward of the whole lands, by the wadsetter's decease. THE LORDS repelled the first allegeance, and found, that the confirmation made the defender's right public; and repelled the second allegeance, founded upon the back-tack; and found that the casualty belongs to the King as to the whole subject; and repelled the last allegeance, bearing that the wadsetter had intromitted with as much of the rents as would extinguish the wadset, unless there had been a decreet of declarator of extinction obtained before the casualties fell.

No 62.

Sir P. Home, MS. v. 3.

1687. *July.*

The EARL of LAUDERDALE *against* The VASSALS of DUNDEE.

No 63.
Found in conformity with No 60. p. 6467.

Base rights confirmed subduce from the rental of the barony, and, in a question of recognition, are no more to be considered than if they had never been parts of the barony.

IN the reduction of a decreet of recognition, recovered by the Earl of Lauderdale against the Vassals of Dundee, the LORDS having refused to turn the decreet into a libel, but resolved to hear the parties what they could say in material justice *quasi in libello*,

It was *alleged* for the vassals, That one of the base rights being forty years before the other, and so prescribed *quoad* the delict, it could not concur to make the recognition.

Answered; Recognition cannot prescribe till once incurred, after which time only, prescription of the act of recognition runs, for *actio non nata non præscribitur*; and the first base right did not comprehend the major part of the ward tenement.

THE LORDS repelled the defence in respect of the answer.

Then it was *alleged* against another right to one Edgar, That it was renounced, in so far as for the space of forty years before incurring recognition, no document was taken upon it, and so it was prescribed. And as that right could have no effect against the ward vassal, to carry away the lands, so it could not be looked on as a ground of alienation, seeing the lands remained effectually with the ward vassal, disponer; and the prescription ought to operate a renunciation before recognition was incurred, unless the donatar will allege interruption.

Answered; Sasine being taken upon that base right, the donatar may found upon it as a concurring ground, unless it were taken away by a formal renunciation of the real right; and prescription being put in exception is not a re-

No 63. nunciation; and it were very difficult for the King, or his donatar, to prove interruption, which could only be known from those whose interest it is to conceal the same.

Replied, That in private rights prescription runs against the King; and the reason of recognition being because the vassal has disponed ward lands, it cannot be properly said after prescription, that they disponed, the right and infeftment being brought *ad non causam* by the prescription, which is a discharge in law, and so must include all things necessary and usual in discharges by paction *inter* parties; and an improbation of a base right is no formal renunciation, though it would extinguish the base infeftment before recognition was incurred. 2*do*, By the same analogy, prescription of bonds might be repelled against a donatar of escheat, and *multo magis* against a donatar of *ultimus hæres*, or bastardy, which is not *causa penalis*.

THE LORDS repelled the allegeance and answer, in respect of the reply; but this point was not fully considered.

Upon pronouncing this interlocutor, it was *alleged*, That the base right was lawful, being granted before the year 1633, and could not be a ground of recognition, which took off the point of prescription; 2*do*, Base rights *de me* confirmed ought to be reckoned a part of the barony, seeing the barony was not disjoined.

Answered; Though the superior consent to gratify the old vassal, and secure the sub-vassal, it is not to be supposed that he intends the lands should continue to be reckoned a part of the *subjectum dividendum*; for then it would follow, that if the superior confirmed one half, the vassal might dispone the other without his consent.

THE LORDS repelled the allegeance in respect of the answer, and found, That the base rights confirmed do subduce from the rental of the barony, though they do not concur to make up the recognition.

In this process the LORDS found, That the minute of a sasine upon the back of a charter, did not instruct there was a sasine taken, seeing the instrument or extract was not produced, by which it might perhaps appear, that there were nullities and want of essential clauses, as *vidi*, *scivi*, &c. or *traditio terræ et lapidis*; and found, That a sasine bearing only *traditio terræ et lapidis*, was no sasine of annualrent.

THE LORDS also found, That a public infeftment being given after recognition, in satisfaction of a base infeftment of annualrent, unconfirmed before recognition, if the said base annualrent was used as a concurring ground to make up the major part, the lands in the public infeftment ought not to be subduced from the rental in the computation of the major part, though now they are disjoined by the public infeftment, and so to be considered as to the other grounds of recognition.

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THE LORDS also repelled the defence against a sasine produced as a ground of recognition, viz. that it appeared by the sasine, that it was a feu before the year 1633, and so lawful, unless the creditors would say, that the feu was for a competent avail, conform to the act of Parliament, and prove the same by production of the charter; and would not burden the donatar to allege, that it was feued for an incompetent avail; though the contrary had been found in the Laird of Dun's cause *contra* Lord Arbuthnot, No 4. p. 4175. where the donatar was burdened to propone and prove the allegeance of the incompetent avail.

It was *alleged* against a sasine of an annualrent of victual, That the symbol ought to have been a rip of corn or stubble of the land, whereas the sasine bore a penny as the symbol.

Answered; The sasine had never been quarrelled against the heritor upon that ground hitherto; 2*do*, The sasine having the essentials, though defective in many things, may found recognition, seeing the disponer cannot quarrel it upon these defects.

THE LORDS sustained the sasine.

THE LORDS sustained all base infeftments after the 12th April 1654, (which was the date of the usurper's ordinance about ward lands), as lawful, according to the law then standing, and not to be grounds of recognition, unless the vassal continued after the King's restitution without obtaining confirmation.

THE LORDS also found, That though a confirmation *de me* or *a me* after the incurring recognition, saved the right confirmed itself, yet such right might be computed by the superior as concurring grounds of recognition for the rest.—*See* PRESCRIPTION. RECOGNITION.

Fol. Dic. v. 1. *p.* 435. & 436. *Harcarse*, (RECOGNITION), *No* 830. *p.* 237.

*** Fountainhall reports the same case:

1686. *January* 21. THE reduction at the instance of Scrimzeor of Kirkton and the other creditors of the late Earl of Dundee against Lord Lauderdale, of his decreet of recognition of Dundee's estate, after Pitmedden had offered to report it, being called in and heard in presence; and they having first *alleged*, That they were wronged in the rental, because the fifth part was deducted as the teind, which ought not, seeing it held ward as well as the stock. *Answered*, That in the ward charter the teinds were only mentioned as a consequent of the patronage; that as he presented to the kirk, so he also presented to the teinds; 2*do*, That they having belonged to the Abbacy of Lindores, there were tacks and prorogations thereof given to the Earls of Dundee; *ergo*, they were not his by an heritable right. THE LORDS having advised the reasons of reduction, they found the teinds were no part of the ward-holding.

2*do*, They *alleged*, the rent of Inverkeithing by the decreet was only proved to be 22 chalders of victual; and they offered to prove, that (besides what held

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feu of my Lord Haddington), the ward-lands were 30 chalders. *Answered*, This was competent and omitted. *Replied*, 1*mo*, Many of them were minors; 2*do*, Though they were all marked compearing by a promiscuous compearance of some advocates for them all, yet in this they were wronged, many of them never having truly compeared. THE LORDS found this was competent and omitted, and so repelled it; but it ran so near, that some of Lord Lauderdale's unfriends muttered, that the votes were wrong counted. And this cause being resumed on the 27th of January, the LORDS would not loose Lauderdale's decreet, but desired the creditors procurators to propone what, in material justice and equity, they had to say against it, if they were *in campo et libello*; for they clamoured if they were once reponed, they would demonstrate the base alienations were but patched up, and that the half of the ward-lands was not alienated, though Lauderdale's decreet bore base alienations above the value of the whole.

Thereafter, on the 3d and 4th of February, the Creditors being heard fully *in præsentia*, they *alleged*, 1*mo*, That Lauderdale had taken the gift of the Earl of Dundee's *ultimus hæres*, whereby he made himself liable for all Dundee's debts *quoad valorem* of the estate, after which he was *in mala fide* to acquire a gift of recognition in his person to cut them off; and that the LORDS, in December last, in Galbreath against Deans, *voce* ULTIMUS HÆRES, had found that a donatar of an *ultimus hæres*, and a bastardy, could not afterwards purchase a gift of escheat to cut off the bastard's creditors. *Answered*, 1*mo*, Lauderdale never possessed by the title of *ultimus hæres*; though they alleged, that he thereby intromitted with Dundee's charter-chest, without inventory, and so had found there all the retired grounds of recognition now made use of. 2*do*, That it is not a passive title, and that only the *hæreditas jacens*, which has fallen caduciary to the King, is liable to creditors' diligence; and that Craig, *L.* 2. *D.* 17. § 12. does not mean that he is personally liable, when he says, *qui succedit ut ultimus hæres tenetur non minus quam alius hæres*; but only that the estate is affectable *inventario tenus* by the creditors. 3*tio*, *Nihil impedit* but one may purchase diverse rights in his person, and bruik by any of them; and the practice did not quadrate, for there she had procured the gift of escheat after the creditor had obtained a decreet against her; which the LORDS justly found fraudulent, and taken only to evacuate the decreet. This being advised, the LORDS repelled the creditors' allegeance, and found he was not in the case of another heir or executor served or confirmed, who might not elude it by acquiring another singular title.

2*do*, *Alleged*, They were prejudged, because in the rental some ward-lands of Inverkeithing (a part of the barony), were not rentalled as property, but only as superiority. *Answered*, They being feued *tempore licito*, before the prohibitory act 16th, Parl. 1633, there was no more in the Earl of Dundee's person but the feu-duty, the 71st act 1457 sufficiently confirming them. THE

LORDS found no more could be considered here but the feu-duty. See 9th March 1639, Lord Almond *contra* Hope, *voce* SUPERIOR and VASSAL. No 63.

3*tio*, The creditors *alleged*, that several of the grounds of recognition were to be presumed to be satisfied and extinct, and only found in Dundee's charter-chest; 1*mo*, Because of their antiquity, viz. Edgar and Lyell's infeftments, the one in 1600, the other in 1610; 2*do*, That none claimed these debts, which was a clear evidence they were paid; 3*tio*, Being before the act 1617, for registration of sasines (yet the secretary's register was prior, though only in use a while), Lauderdale could not have got them, but retired in the charter-chest. THE LORDS found, if this was proponed to infer a presumptive probation, they would repel it; seeing in Cromarty's case, No 60. p. 6467., they had rejected the like presumptions; but if they alleged and offered to prove positively, that Lauderdale found them in the charter-chest retired, they would find it relevant, and admit it to their probation: But found that the King, nor his donatar of recognition, were not obliged either to produce the charters, or to prove the base rights were clad with possession, seeing it was to be presumed that heritors would abstract the writs by which these two might be proved.

4*to*, They *alleged*, that these old infeftments, viz. Edgar's in 1600, and Lyell's in 1610, were prescribed, being 80 years ago; and seeing the debt was extinct, they could never be resuscitated to be made a ground of recognition. *Answered*, That the debt might be extinct as to the effect of exaction, and yet not as to the casualty of recognition; for by the principles of law, *contra non valentem agere non currit præscriptio*; but so it is, the feudal delinquency of recognition was not incurred till the major part of the barony was alienated by base infeftments; now the last base infeftment is within these 40 years, and every one of the grounds and steps which connect and make up the recognition, are within 40 years one of another, (for if any of them were without the 40 years of another, that would be prescribed; and could not be made use of as a ground of recognition); now the action could not exist till the half, and a little more, were annalzied, and so it could not begin to prescribe till then; for *actioni nondum natæ non præscribitur*; but *ita est* the last base infeftment that completes the recognition is within 40 years of the pursuit. *Replied*, If this connection holds, base rights of debts 200 years ago may be raked up from death to infer recognition; and a debt totally sopite cannot revive. THE LORDS repelled the prescription, in respect of the answer, that the last ground was within 40 years,

5*to*, *Alleged*, Edgar's sasine cannot be a ground, because it bears to be *secundum chartam feudifirmæ*; but in 1600, ward-lands might be feued without hazard of recognition; Stewart against Feuers of Ernock, No 1. p. 4169. *Answered*, *Non relevat*, unless they produce the charter, to see if it be feued at a competent avail; for the 71st act 1457, allowing these sub-infeudations if set at a competent avail, they cannot found thereon unless they subsume in the terms of it. *Replied*, *In re tam antiqua* it must be presumed to have been *solemniter actum*, according to

No 63. law, unless they prove the contrary. THE LORDS inclined at least to think the donatar was not obliged to produce the charter, or to prove the disconformity with the retoured mail.

6*to*, *Alleged*, That Ethie's, Blackness', and Fotheringhame's base infeftments were granted in 1654, when ward-holdings were suppressed, and so could be no grounds of recognition, and that they were renounced in 1660, before they could confirm them at Exchequer, and so there was no contempt; as was found in Sir George Kinnaird's case with the creditors of the Lord Gray*.

7*mo*, Objected against one of the sasines, that it bore not the particular sum for which it was granted, and so was not a liquid ground; 2*do*, That being an annualrent, it bore only the delivery of earth and stone, and not the symbol of a penny, and so was null, and could be no valid ground to infer recognition, nor come *in computo*; 3*tio*, That one of the sasines was only a minute on the back of the charter, bearing sasine was given such a day, yet the decreet bore production of the sasine, which was *probatio probata*, though now not extant; 4*to*, That sundry of the sasines were for the same sums, and the one included the other, or was granted in satisfaction of the other.

THE LORDS declared they would not lose their time in hearing their objections, unless they were able to cast as many base rights, by which the recognition in the decreet was calculated and made up, as would reduce the base alienations to be within the half of the worth of the barony; for the cutting off two or three grounds would not bring it to that point, seeing it was proved in the decreet, that the base infeftments far exceeded the worth of the lands.

1686. *February* 19. THE case of the creditors of Dundee against Lauderdale, mentioned 21st January 1686, being further advised; the LORDS found, that, in Edgar's infeftment, the creditors must prove the feu was set with diminution; though in Arbuthnot and Dun's case, No 4. p. 4175. the donatar was burdened, because he impugned the feu, and not for the reason in the decreet, because it was a negative.

Then, on the 23d February, the LORDS loosed the probation of the rental, and allowed a new mutual probation to both parties thereanent. And it being voted, whether the price formerly modified by the LORDS for the chalder, should be re-considered, it came to the Chancellor's vote, who superseded to give it.

1687. *June* 21. THE LORDS having advised the reduction pursued by the creditors of the late Earl of Dundee against the Earl of Lauderdale, for reducing his decreet of recognition of that barony, as mentioned *supra* 18th February 1686, they assoilzied, and found the major part of the victual was alienated, and the whole money-rent, and L. 700 more, and therefore of new declared the recognition to be incurred.

Fountainhall, v. 1. *p.* 394. 406. & 458.

* Examine General List of Names.

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*** This case is also reported by Sir P. Home.

IN the action of declarator of recognition, at the instance of the Earl of Lauderdale against the Creditors of the Earl of Dundee, the Creditors having been reponed against the decreet that the Earl of Lauderdale had obtained, it was *alleged* for them, that Edgar's sasine in anno 1600, could be no ground of recognition, because it proceeded upon a feu charter when it was lawful to set ward lands in feu, conform to the 71st act, 14th Parl. James II.; as also, the said feu infeftment was prescribed, no diligence being done thereupon, for the space of 40 years, and so could not be sustained as a ground of recognition, and it must be presumed that right was satisfied, and retired, and has been lying in the Earl of Dundee's charter chest when the Earl of Lauderdale intromitted therewith, seeing there is no person representing Edgar, or deriving right from him, pretends any right to that infeftment. *Answered*, That albeit the sasine does bear to have proceeded upon a feu charter, yet it does not appear to have been set at a competent avail, which is required by the act of Parliament to make feus of ward lands to subsist, and therefore, the creditors ought to produce the charter, and instruct that the lands were feued at a competent avail; and prescription for taking off the recognition cannot run against the King, because it is presumed, that the party infeft has been in possession; as also, there is not 40 years from the date of Edgar's infeftment, and the next deed which concurs, to make up the recognition, there being infeftment granted to Lyell in the year 1610. It was *objected* against Lyell's sasine, that it could be no ground of recognition, because the charter which is the warrant thereof, is null, seeing there is but only one subscribing witness, and there is no sasine produced but only a minute upon the back of the charter, bearing sasine to have been taken, which can be no ground of recognition; as also, the sasine being but of 13 acres of land in the east field of Dundee, the same lands are also contained in the Earl of Eathie's infeftment, which is likewise made use of as a ground of recognition, and in so far as these lands are connected in two rights, they cannot be both made use of as distinct grounds of recognition, and Lyell's infeftment being taken out of the way, there is more than 40 years betwixt the date of Edgar's infeftment which is in the year 1600, and the next deed made use of as a ground of recognition, which is in the year 1648; and, therefore, if Edgar's sasine could be any ground of recognition, yet if either there be 40 years betwixt the date of the first deed of recognition, and the other deeds concurring to make up the recognition, or if there be 40 years from the last concurring deed of recognition, and the date of the gift and declarator thereupon, it prescribes. *Answered*, That Lyell's charter has two witnesses inserted, and the law did not, at that time, require subscribing witnesses, and the former decreet bears the production of the sasine; and albeit the creditors be so far reponed against the

No 63. decreet as that they are allowed to propone their defences as if they were in libels, yet seeing it was marked produced in the decreet, it is sufficient to instruct, that it was then produced, and the minute upon the back of the charter has all the substantials of the sasine, viz. the date and tenor of the sasine, and the bailies' and attornies' names, and the names and designations of the witnesses, and the minutes are subscribed by the notary; and it will appear, by comparing the Earl of Eathie's sasine with the lands, that they are not of the same lands, seeing the lands contained in Lyell's infeftment are designed to lie in the east field of Dundee, and the lands contained in the Earl of Eathie's infeftment are designed to lie in the east side of the hill of Dundee. *Replied*, That the minute of a sasine cannot have the effect of a sasine, seeing it doth not bear all the solemnities, such as the passing to the ground of the lands, delivering the symbols, and others requisite in extended sasines; and the former decreet being now in effect turned into a libel, the sasine ought to be again produced, and it is evident, that the sasine has not been formerly produced, but the clerk's servant, in extracting, did mistake the minute for the sasine, and the 13 acres contained in the sasine are a part of the same lands contained in the Earl of Eathie's infeftment, the lands in the east field of Dundee and the east side of the hill of Dundee, being one and the same lands. It was *objected* against Fothringham of Powrie's sasine of 300 merks, and Kinaldie's sasine of 90 bolls of bear, That these could not be sustained as grounds of recognition, because they were disponed to the Earl of Eathie, and were the same sums that made up the L. 1000, for which there was an infeftment of the annualrent granted to him out of the mains of Didup; and Kinaldie's sasine of an annuity of victual was null, as not bearing the proper symbols, the infeftment being by earth and stone and a penny of money, whereas this being an infeftment of annuity of victual, the proper symbol was a rip of corn, as in the case of an infeftment of teinds; and these lands, out of which Kinaldie's infeftment was granted, were thereafter disponed to Sir Alexander Wedderburn of Blackness, so that both these rights cannot be be made use of as distinct grounds of recognition. *Answered*, That Kinaldie's infeftment was not disponed to the Earl of Eathie, nor are the lands in which Kinaldie and Blackness are infeft one and the same lands; and the delivery of earth and stone where the corn grows is the proper symbol for an infeftment of annualrent of victual. It was *objected* against the Earl of Caithnes's sasine, That they could not be sustained as grounds of recognition, because they were granted the time of the English usurpation, when it was lawful to set ward lands in feu; and albeit they had been valid grounds of recognition, yet they were renounced in the year 1660, which was before there were concurring deeds of recognition; and the infeftment of property of the lands on the east side of the hill of Dundee was granted when the foresaid infeftment of annualrent was renounced, and is confirmed under the Great Seal before the recognition was incurred, and so cannot come in competition with other

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deeds to make up the recognition; and repeats the same objection against Fletcher's sasine being granted in the English time and renounced; as also that in satisfaction thereof, the Earl of Dundee did grant an infeftment of property of certain lands; so that both the infeftment of annualrent, and infeftment of property, cannot be sustained as grounds of recognition; and the same objection was repeated against Fothringham of Powrie's sasine, that it was renounced in the year 1659, and that for the said sum the Earl of Dundee did grant a disposition of certain acres, as appears by the disposition, which mentions a renunciation; so that the said infeftment of annualrent being extinguished by the renunciation, and no infeftment having followed upon the disposition, it cannot be sustained as a ground of recognition. *Answered*, That the Earl of Eathie's sasine was before the act of the usurper, allowing ward lands to be set in feu, which was dated 12th April 1654, and does only take effect from that time; as to any infeftments after the usurper's act, they were not confirmed since the year 1660, that the King was restored, and all the usurper's acts being rescinded, do still remain grounds of recognition; and the Earl of Eathie's infeftment of property was not confirmed before the recognition was incurred. It was *objected* to John Watson's sasine, That it could be no ground of recognition, because it bears to be of the lands by east the burn of Inverkeithing, which was no part of the ward lands, but a part of those lands which the Earl of Dundee did hold of other superiors. It was *objected* against Reid's sasine, That it could not be sustained as a ground of recognition, because it was torn and eaten, and does not bear the annualrent nor sums for which the same is redeemable; and it is *ipso jure null*, because the infeftment is of the lands by earth and stone, whereas this being an infeftment of annualrent, should have been a symbol of a penny money, and not by earth and stone, which is only of the property of the lands; and an infeftment of property cannot be sustained as an infeftment of annualrent, as also the infeftment was loosed by requisition, upon which apprising followed. *Answered*, That the bond, bearing the precept of sasine, which was the warrant thereof, is produced; and the symbol of earth and stone is likewise sufficient for an annualrent, albeit it does not bear likewise a penny money; because, the right of property does eminently contain a right of annualrent, and which bears the sum and annualrent; and, albeit there was requisition and apprising following upon the said bond, yet it did not loose the real right; because, there was a posterior bond granted by the Earl of Dundee to Reid, for that and other sums, which bears an express provision, that it should be lawful for Reid to use all execution, personal and real, for the same, without prejudice of his real right, which is declared to stand in full force, until he should be completely satisfied; and the apprising was led upon the last bond; and, albeit the bond had not contained that provision, yet creditors have always been allowed to pass from their comprisings, and recur to their infeftments. It was *objected* against Wedderburn

No 63. of Blackness's sasine, That it was renounced when the Earl of Dundee granted an infeftment of property, and the infeftment of property could not be sustained as a ground of recognition, because it was confirmed under the Great Seal; as also, Kinnaldy's infeftment of annualrent of 90 bolls of bear, was granted out of the same lands, and so could not be sustained as distinct grounds of recognition. *Answered*, That the renunciation is not produced; and, if it were, the recognition was incurred before the renunciation, and the infeftment of property was not granted in satisfaction of the annualrent; as also, the infeftment of property must come *in computo*; because, the recognition was incurred before the confirmation. It was *objected* against Pitcur's sasine of the lands of Newlibber, That it could not be sustained as a ground of recognition; because, the lands were feued out to several vassals, by the Earl of Dundee, by old feus, before the year 1633; so that the right made in favours of Pitcur doth only carry the superiority of their feu-duties, which were a very inconsiderable part of the ward tenement. It was *objected* against Auchinleck's sasine, and the sasine in favours of his children, That the first infeftment, in favours of the father, was renounced, and having advanced a greater sum to the Earl of Dundee, Auchinleck, the father, did take the bonds in the childrens name, upon which they were infeft; so that both the father's and the childrens sasines cannot be sustained as distinct grounds of recognition, and the children did never pretend right to the father's infeftment of annualrent, in respect it was renounced. It was *objected* against Watson of Kingudie's sasine, That it was confirmed before recognition was incurred, and Straiton's sasine was confirmed before the gift of recognition; so that these infeftments could not be sustained as grounds of recognition. THE LORDS repelled the alledgeance of prescription, made for the pursuer against Edgar's sasine; as also repelled the other alledgeance made against the same, why it cannot be a ground of recognition, as the alledgeance is proponed; but, if the pursuer, before the conclusion of the cause, shall produce the feu-charter, which is the warrant of the sasine, the LORDS ordain the same to be received; and also repelled the alledgeance, bearing that it is presumed, that the said sasine hath been retired, and in the Earl of Dundee's charter chest, unless the creditors will offer to prove positively, that the foresaid sasine was found in the Earl of Dundee's charter chest; and, in so far as the decreet of recognition does not bear a special production of the sasine, found, that the same must yet be produced; and ordain the Earl of Lauderdale, defender, to condescend how Edgar's sasine came in his hands; and, as to the second alledgeance, made against Thomas and Catharine Lyons' infeftment, the LORDS sustained the same, in regard there is no sasine produced; but, if the defenders shall either produce the sasine, or prove the tenor thereof, before the conclusion of the cause, ordain the same to be received; and, as to the third objection, made against Powrie's sasine of 5000 merks, and Kinnaldy's infeftment for 10,000 merks, the LORDS sustain the alledgeance, *viz.* that the sums contained in these in-

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feftments were assigned to the Earl of Eathie, and were the sums that made up the infeftment of annualrent, granted to him for L. 10,000, and find the same relevant to be proved *scripto vel juramento;* and, as to the fourth alledgeance, bearing that Kinnaldy's infeftment of annuity, and Blackness his infeftment of property, are of the same lands; so that they cannot be distinct grounds of recognition, the LORDS allow a conjunct probation, *viz.* to the pursuers to prove, that both infeftments are of one and the same lands, and the defenders to prove, that they are distinct lands, and that *pro ut de jure*; and repelled the alledgeance of nullity, proponed against Kinnaldy's son; and likewise repelled the first member of the foresaid fourth alledgeance, proponed against the Earl of Eathie's infeftment of annualrent, founded on the act of the Usurper, in regard the infeftments were before the date of the act; but sustained the other member of the alledgeance, founded on the renunciation of these infeftments, and found the same relevant to be proved *scripto*, unless it appear, by computation, that the recognition was incurred before the renunciation was granted: and also repelled the first member of the fifth alledgeance, made against George Fletcher's infeftment of annualrent, founded on the act of the Usurper, in regard the infeftment is prior to the act; and find the second member thereof, *viz.* that the infeftment of property was granted to the said George Fletcher, in satisfaction of his prior infeftment and annualrent, relevant to be proved *scripto vel juramento;* and, as to the sixth alledgeance, proponed against John Fotheringhame of Dunoon his infeftment, find the said alledgeance relevant in these terms, that the same was renounced before the recognition was incurred, to be proved *scripto vel juramento;* and found, that the infeftment granted to the father and son cannot be but a ground of recognition; and, as to the seventh alledgeance, proponed against John Watson's sasine of L. 60, the LORDS allow a conjunct probation, *viz.* the pursuer to prove that these lands, of which the sasine is given, are not part of the ward lands, but holden of the Earl of Haddington, or some other superior, or are part and pertinent of these lands, which the LORDS found relevant to be proved, as follows, *viz.* that these lands are no part of the ward lands, but hold of the Earl of Haddington, or some other, *scripto vel juramento*, or that they are part and pertinent of these lands *prout de jure;* and allow the defenders, if they think fit, also to prove *prout de jure*, that they are part and pertinent of the ward lands; and repelled the eighth alledgeance made and proponed for the said pursuers, against William Reid's sasine, in respect of the answer; and found the first member of the ninth alledgeance, proponed for the said pursuer, against Sir Alexander Wedderburn's sasine of annualrent, bearing that the same was renounced in the year 1660, and that the annualrent of property of the 21 acres of land was granted in satisfaction of the annualrent, relevant to be proved *scripto vel juramento*, in case, by computation, it shall be found, that the renunciation was granted before the recognition was incurred; and also sustained the

No 63. other member of the said ninth alledgeance, *viz.* that the said Sir Alexander Wedderburn his infeftment of property was confirmed before recognition was incurred, and the same relevant to be proved *scripto*, and likewise sustains Blackness's infeftment of the said acres as a burden only *quoad* the value of the lands, whereof the infeftment is granted. And as to the tenth allegeance, find that Pitcurr's sasine could be no ground of recognition, nor the feu-duties counted a part of the rental of the ward lands, in case the infeftment was confirmed before the recognition was incurred; and sustained the allegeance against Mr Andrew Auchinleck's infeftment, viz. that the same was renounced, or the infeftments in favours of the children granted in satisfaction of the same, and found the same relevant to be proved *scripto vel juramento.* And as to the last allegeance proponed by the pursuer against Robert Straiton and —— Fithie their infeftment, found the same relevant in these terms, that these infeftments were confirmed before the recognition was incurred, to be proved *scripto;* and likewise found as to the infeftments which were confirmed after the recognition was incurred but before the gift of recognition, that the confirmation doth defend these infeftments, but so as they must come *in computo.* It was farther *alleged* for the Creditors, That the Earl of Lauderdale having obtained the gift of *ultimus hæres*, he was liable to the creditors for their debts upon that title, and the creditors being reponed against that decreet, they ought now to have a conjunct probation for constituting the rental; as also, there were several lands omitted when the former probation was adduced. *Answered*, That the Earl of Lauderdale did bruik the estate by virtue of the gift of recognition and expired apprisings, to which he had acquired rights, and not by the gift of *ultimus hæres*, and there being a probation formerly adduced upon the rental, there cannot now be a conjunct probation allowed to the creditors. *Replied*, That the Earl of Lauderdale having first obtained the gift of *ultimus hæres*, and by virtue thereof, intromitted with the rents of the lands and the charter-chest by his acceptation of the gift, and making use of the same, he therefore became liable to the creditors for payment of the debts as any others are, as is clear from Craig, Lib. 2. Digest. 17. § 12. 'Si ultimus hæres succedat tenetur non minus quam alius hæres;' and by an express decision, Alexander against Lord Salton, *voce* MUTUAL CONTRACT, the donatar of a bastardy, pursuing for payment of a debt due to the husband, was found liable to fulfil the bastard's back-bond, and an *ultimus hæres* by his acceptation of the gift, is in the same manner liable to the creditors as when an apparent heir is served heir, who, albeit he acquire supervenient rights to the lands which might have defended him against the creditors, yet he will be liable for the defunct's debts, seeing *qui semel hæres semper hæres*, and there being *jus quæsitum* to the creditors by the Earl of Lauderdale's acceptation of the gift, and making use thereof, he could not free himself from the debts by his acquiring supervenient rights, as was decided, Galbraith against Deans, *voce* ULTIMUS HÆRES, where a donatar to a bastardy having thereafter acquired a gift to the bastard's escheat,

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to which he would have ascribed his intromission; the LORDS found that he could not by any subsequent title *ex post facto* acquired, prejudge the creditors, but was liable to them for their debts; and albeit, in that case, the creditors had obtained a decreet against the donatar of bastardy, before he had obtained the gift of escheat, yet that did not alter the case, seeing the decreet was only in absence, and there was no diligence done thereupon before the donatar to the bastardy obtained the gift of escheat; and there was no necessity for a sentence in this case, seeing the debt was sufficiently constituted by bond under the Earl of Dundee's hand, upon whose decease, the Earl of Lauderdale did obtain the gift of *ultimus hæres* some years before he obtained the gift of recognition and other rights; as also, there were several lands that did fall under the gift of *ultimus hæres* that did not fall under the recognition; the LORDS, as to the first allegeance, adhered to their former interlocutor, whereby they repelled the allegeance founded upon the Earl of Lauderdale's gift of *ultimus hæres*; and, as to these points, how far the Earl of Lauderdale's donatar should be liable to the creditors for any intromissions he had before he acquired other titles than that of *ultimus hæres*, and for his intromissions with the rents of these lands of the estate of Dundee which did not hold ward, the LORDS reserved the same to be considered in any other process that shall be raised by the creditors upon these grounds; and as to the second allegeance, the LORDS allowed a conjunct probation to both parties anent the rental, not only of any lands omitted formerly, but of the whole lands of the estate of Dundee and Didup. See RECOGNITION.—ULTIMUS HÆRES.

Sir Pat. Home, MS. v. 2. No 753.

1687. *January.* DUKE of QUEENSBERRY *against* GORDON of Spadoch.

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IN a pursuit for ward-duties at the instance of the superior;

Alleged for one who had an infeftment out of the lands, That the superior had consented to the heritable bond, upon which the infeftment proceeded, which imports a confirmation.

Answered; The consent saves only from recognition, and is at most but a confirmation *de me*, not *a me*, to denude the disponer, and to make the annual-renter the superior's vassal, seeing the bond contains not an obligement for double infeftments.

THE LORDS sustained the answer.

Fol. Dic. v. 1. p. 435 Harcarse, (WARDS & MARRIAGES.) *No* 1010. *p.* 285.