

a tacit reservation of all prior rights belonging to the superior, and whereof he cannot be denuded *habili modo*, but by a gift or *de novo damus*, as said is: it being clear, that all superiors, notwithstanding thereof, may pursue for non-entries, bygone feu-duties, escheats, or wards, and all other benefits arising from feudal delicts. And, as to the opinion of lawyers, and Craig and the practicks adduced, it was *gratis dictum* that it was the constant opinion of all lawyers having advised to take another course for securing against recognitions; and that title alleged, is so far from being of that judgment, that it expressly declares that the superior's consent or confirmation should be so circumstantial, that it must import that he did know of the right of recognition falling to him, and that he did pass therefrom: and, even in that case, it is declared, that if the party, acquirer of the right, should happen to die before infestment upon the confirmation, it doth not save from recognition. And, as to the practick alleged, no respect can be had thereto, it being but an imperfect minute of a decision, by a person of no authority, which does not bear the ground of law, nor that same case as it is now pleaded.

To the second it was REPLIED, That the argument being only *ab incommodo*, it is retorted; seeing, if it should be otherwise decided, the king and all other superiors should be infinitely prejudged of their undoubted right, founded upon law and reason; for not only all casualties remain with him, notwithstanding of a confirmation, but the right of property, which falls by recognition, purpru-sion, or any other feudal delict, cannot be taken away by confirmation, unless the same were expressly disposed; seeing his majesty, or any other superior, doth as effectually acquire the right of property, *delinquendo quam alienando*; whereof he cannot be divested but *habili modo*, and not by a deed of course. And as to that declaring of Pittarro's seasine null, no respect can be had thereto, seeing, by that decret, Pittarro was only declared to have no right by the disposition: But, as to the king's interest of recognition, there was no debate thereupon, it neither being libelled, nor any thing contained in the decret following thereupon.

The Lords did sustain the recognition; upon this ground chiefly,—That the deed whereupon it fell was not confirmed. Which seems very hard, the case of recognition never having been extended so far by any former practick, against which a naked consent as to all rights of property doth infer *non repugnantiam*; far more a confirmation under the Great Seal, which hath been thought a perfect security by all lawyers: But especially in this case, where the recognition is founded upon a deed of fraud, *elicita viis et modis*; so that the vassal could not be said to be *sui juris*, and to do a deed deliberately, in prejudice of the superior, which law interprets to be the only cause of so great a crime. But I was declined in this action, my brother being concerned, as having purchased a part of the Maynes of Dudhope, which was challenged upon that same ground.

Page 303.

---

1673. January 31. The LORD LINDSAY against The LORD BALMERINO and The LAIRD of POURIE FOTHERINGHAME.

In an improbation, pursued at the instance of the Lord Lindsay, as succeed-

ing by progress, in the place of the Earl of Crawford, in the right of the lands of Moorhouse, wherein certification being craved *contra non producta* :

It was ALLEGED for the Lord Balmerino, That there could be no certification ; because he had produced an infestment of the property, granted to him by one Lovell, his author, to be holden of himself, by virtue whereof he had been in possession past forty years ; and so his right was prescribed. And as to the superiority, they had produced a charter, flowing from the Earl of Crawford, to the Laird of Pourie Ogilvie, of whom Lovell held the said lands.

It was REPLIED, That the pursuer being infest in the said lands, the writs produced could not hinder certification, seeing there was no seisine following upon Pourie Ogilvie's right ; and forty years' possession of the property could not defend against the improbation.

The Lords did sustain the allegiance as to the right of property ; but, as to the superiority, did grant certification against all rights flowing from Lovell's superior, or from the king ; seeing it was acknowledged that the Earl of Crawford was superior, and it was not instructed that he was fully denuded.

Page 306.

1673. February 5. BROWN of COALSTOUN *against* EDWARD NICOLLAS.

IN a pursuit, for maills and duties, of the Lands of Dunglass, at the instance of Edward Nicollas, as being infest upon a comprising in August 1668 ; compearance was made for several other comprisers who had comprised the said lands, whereof Alexander Young was the first compriiser ; who ALLEGED,—That, by the late Act of Parliament anent debtor and creditor, they ought to come all in *pari passu*, and the rents divided equally amongst them. Compearance was made for Brown of Coalstoun, who was infest in an annualrent effeiring to ten thousand merks, out of the said lands, and in possession of a term's annualrent, before all the comprisers, except Alexander Young and Nicollas ; and ALLEGED, That he ought to be preferred as to his annualrents, because he was infest and in possession, before all the comprisers except these two ; and as to these two prior comprisers, albeit by the late Act of Parliament they could be in no better condition than those comprised within year and day, yet, as to the annualrent, he ought to be preferred *in solidum*, seeing the Act of Parliament is only made as to comprisers within year and day : but, as to annualrenters, they are not at all prejudged thereby, but must be in that same condition they were before the Act of Parliament. And the law, giving them preference after the date of their infestments and possession, to all other creditors who had done no diligence by inhibitions nor comprising, which were not *in rerum natura*, when they lent their money, they were *in bona fide* to contract upon an infestment of annual rent with the common debtor : otherwise no creditor could be secured, or take a wadset disposition, or any other real right of the debtor's lands, until year and day should pass after the first comprising ; which were to obstruct all commerce amongst the subjects, and render the fundamental law, as to securities, void and elusory ; which was never the meaning of the Act of Parliament, the only reason thereof being, to obviate the prejudice that many creditors might suffer, being at a great distance, by the diligence of others, who, by a prior comprising,