

No 6.

*** Fountainhall reports the same case :

OBJECTED against a sasine, that it wanted four witnesses, having only three, and so was null.—THE LORDS sustained the sasine. *Alleged*, The Bishop's was in non-entry. *Answered*, He had a charter of confirmation.—THE LORDS found, if the charter of confirmation be a charter *a me*, to be holden of the granter's superior, then the confirmation is drawn back to the date, and stops the non-entry so as to exclude Kenmure ; but if the charter was *de me*, then the confirmation does not stop the non-entry, for the confirmation of a charter *de me* excludes only the King from the casualty of recognition, but not from non-entry.

Fountainhall, MS.

*** The following additional particulars are afterwards reported by Lord Fountainhall.

1680. *January 27.*

A COMPRISER of Kenmure's estate ratifies an annualrent furth of it ; thereafter the comprising is conveyed in Kenmure's person, and expires ; and he quarrels the annualrent after the expiration of the legal.—*Alleged*, He can never be heard, in respect of his author's ratification of it.—*Replied*, That militated against him indeed during the running of the legal, but cannot be obtruded now, never having redeemed nor used an order.—THE LORDS inclined to find Kenmure could not question this base infeftment, he being the apparent heir ; but it was not then decided.

Fountainhall, v. I. p. 127.

No 7.

1687. *June.* BOTHWEL of Glencorse *against* DEANS of Woodhouselee.

A SUPERIOR confirming an infeftment indefinitely, which had been taken both *de me et a me*, conform to clauses in a disposition for that effect, was presumed to confirm the infeftment *a me*, to make the right public, and he was preferred to the casualties ; and the base superior was not found liable to enter the vassal conform to his obligation in the disposition.

Fol. Dic. v. 1. p. 193. *Harcarse*, (INFESTMENT.) No 609. p. 170.

No 8.

Found in conformity with No 7.

1688. *February 15.* LORD CHANCELLOR *against* CHARLES BROWN.

UPON the death of Robert Brown, who had an improper wadset of Gleg-horn's lands, affected with a back-tack, there was a process raised at the instance of the King's donatar of ward, for mails and duties of the land since the ward, and a liquidation of the heir's marriage.

Alleged for the defender, *imo*, Robert Brown was not the King's vassal, in so far as the wadset was to be holden *a me* or *de me*, and the confirmation being

indefinite of the infeftment taken on the precept, and the defender restricts it to the infeftment *de me*; and so the confirmation shall give him no benefit as the King's vassal; and if Gleghorny die, the casualties of the superiority will fall by his death; and the confirmation of the base right will only secure against forfeiture; 2do, *Esto* the defender's ward were fallen, yet there being a back-tack never declared, and the defunct not in possession, the mails and duties cannot exceed the back-tack duties; and the confirmation is equivalent to the King's consent to the back-tack, which imports *non repugnantiam*; 3tio, The wadset was a redeemable right, and the defunct had intromitted with the rents of the lands upon a comprising for the back-tack duties, which rents exceed these back-tack duties and sums in the wadset. Now this ought to be sustained against the superior, as well as it would be sustained against a singular successor in the wadset.

Answered for the pursuer; The indefinite saine following upon a precept to take infeftment both *de me* and *a me*, answers to both holdings, and is presumed to respect the best holding, unless it had expressly borne the *tenendas* to be only of the base superior; and now the defender hath no election, *multo minus* after the casualty hath emerged; and therefore the confirmation must be applied to the infeftment *a me*; 2do, The ward of the wadset lands falls to the superior, and the back-tack doth not restrict the right, but possession, in which sense it is not real *quoad* the superior, and must sleep during the ward, just like a tack set by the heritor: Nor doth the superior's confirmation import any consent but such as is congruous to his own right of superiority; for it is not to be supposed, that he intended thereby to prejudge himself of his casualties, which are usually reserved in confirmations; and a consent to a tack not in a way of confirmation, being no act of a superior, is stronger than a confirmation of the back-tack duties. And as a confirmation of a base infeftment would not hinder the superior to exclude the party so infeft from mails and duties, *multo minus* can the confirmation in so far as relates to the back-tack; but both must sleep during the ward; 3tio, Intromissions with the duties of lands, after declaring of the back-tack, or other extrinsic intromissions, do not extinguish the wadset, as intromissions within the legal in apprisings do by act of Parliament, unless before the wadsetter's death application had been made by way of compensation. And though extrinsic payment to a wadsetter, even upon an unregistered discharge, or payment by poinding of goods, hath been sustained to extinguish the wadset, in prejudice of a singular successor thereto, yet that cannot be obtruded against superiors *quoad* the *reddendo* of their superiority.

THE LORDS repelled all the defender's three allegiances, in respect of the answers made thereto. And in the reasoning it was doubted by some, if the reverser might redeem the wadset during the minority.

Fol. Dic. v. 1. p. 193. Harcarse, (WARDS & MARRIAGES.) No 1012. p. 287.