SECT. XI.

Effect of *Novodamus*.

No 69.

1611. *July.* LAIRD of COLDINGKNOWS *against* CORSBIE.

Lands being in non-entry, a gift of ward, marriage, and non-entry will not serve for the non-entry any longer than three terms after the expiring of the ward; and a particular gift of non-entry subjoined in the said gift of ward, marriage, and non-entry, for the donatar's bruiking the said gift of non-entry after the expiring of the ward, will not be sustained. An infeftment of lands, with a clause *de novodamus ratione forisfacturæ, non introitus*, &c. will not purge the bygone entries; because *hoc non agebatur* to prejudge the King of his casualty of the non-entry, but only to grant an heritable right *ad futurum*.

Fol. Dic. v. 1. *p.* 437. *Haddington, MS. No* 2287.

1672. *July* 9. LORD HALTOUN *against* EARL NORTHESK.

No 70.
Clauses of *novodamus* in a charter from the Crown, secure the vassal against all claims which the King has to the property by forfeiture, recognition, &c. but not to any casualty of superiority not burdening the property, and therefore it was found that such a clause did not import a discharge of the casualty of marriage.

MY Lord Haltoun as donatar to the marriage of the late Earl of Dundee, pursues for the avail of the marriage. The Earl of Northesk and others having now right to the lands *allege* that the lands cannot be burdened with the avail of this marriage, they being singular successors to the Earl of Dundee, and infeft many years ago; 1*mo*, Because they offer them to prove that the Earl of Dundee was married before his father's death. To this it was *replied*, That if he was married before his father's death, it was by precipitation, to exclude the King his superior, and was after his father was wounded in the battle of York, in *anno* 1644, after which shortly he died, having never come abroad; as was found lately in the case of the Lord Colvill. The defender *duplied*, 1*mo*, That this was no precipitation because he offers to prove that there was an antecedent treaty of marriage, and proclamations before the Earl's father received his wounds, which differences the case from that of Colvill. 2*do*, It is offered to be proved, that his father convalesced of his wounds, and came abroad, and played at bowls thereafter; but by an accidental fever shortly after, died.

THE LORDS finding these allegeances contrary, would prefer neither party in the probation; but before answer ordained either party to produce witnesses upon the whole matter of fact alleged.

The defender farther *alleged* absolvitor, because by the act of Parliament 1640, ratified *anno* 1641, by the King then present in Parliament, the marriage of all that should happen to be due in the expedition was discharged. It was

answered, That the act of Parliament could not extend to this case which fell out *anno* 1644, there being an intervening pacification, and act of oblivion, which terminated the troubles that then were, after which there was no new act discharging the marriages of those that died in the war; and the clause in that act ought to be strictly interpreted; as was found lately in the case of the marriage of the Laird of Strichen. Likeas, that act is rescinded by the Parliament 1661; which, though it contain a *salvo* of private parties rights, flowing from these rescinded acts of Parliament, yet ought not to extend to this marriage. No 70.

THE LORDS repelled the defence upon the act of Parliament, in respect of the reply, that the troubles were terminated by a pacification or oblivion, before this marriage fell.

The defender further *alleged* absolvitor, because he being infeft upon Dundee's resignation, his charter contains a *novodamus*, for all right the King had, particularly by ward, relief, &c. It was *answered* That albeit clauses *de novo damus* granted to subjects, be sufficient to exclude all casualties of their superiority, whereunto the clause can be extended; yet such clauses obtained from the King, or Exchequer, can only have this effect to supply the defects of the ancient infeftments, by the want of charters, sasines, procuratories, or precepts, and so to make an original right, or to take away all pretence the King could have to the property, by recognition, disclamation, &c. but cannot be extended to the casualties which use to pass by special gifts, and which are not known to the King or Exchequer; and therefore as the stile of other gifts hath no effect further than the meaning of Exchequer, as gifts of non-entry, and gifts of ward, which bear expressly, 'ay and while the entry of the nearest heir;' and as the non-entry doth not extend to the ward, nor the ward to the non-entry, or to subsequent wards before the entry of the heir; and gifts of escheat, bearing all goods to be acquired, are but extended to goods acquired a year after the gift; so that the King being secured by a particular act of Parliament against the negligence of his officers, such clauses passing of course, without special knowledge of what is fallen, or any composition therefor, the same ought to be no further extended than to the property, and so it was not found to extend to a liferent escheat, but only to forefaulture and recognition, in the case observed by the Earl of Haddington, 5th July 1611, Skene *contra* ——. *voce* JUS SUPERVENIENS. 2*do*, This marriage hath never fallen in consideration, when this clause was granted, because marriage is not therein expressed; which would have been without doubt, if it had been then known, and under consideration; for the word may comprehend marriage, and ordinarily doth in the same gift; yet marriage may be gifted alone; and it was found in the case of Barclay of Pearstoun, that such a clause of *novodamus* as this, did not exclude his marriage, as appears by the decreet of Exchequer *in foro* produced. It was *answered*, That the decreet of Exchequer was upon agreement, and that it appears by the decreet, that by Pearstoun's charter, the King's casualties were reserved, but are

No 70.

not reserved in this charter, and that these clauses do not pass of course, but upon special trial and consideration, and trial of what casualties are fallen out, and upon a far higher composition than when this clause is not included, and that it hath been always understood that a *novodamus* purged these casualties; otherways there were no possibility to secure purchasers, who could not know whether any such casualty had for 40 years before occured; and albeit the King be secured against the negligence of his officers, yet that it is only as to their omissions in making defences or interruptions, but not in gifts given by them.

THE LORDS found that this clause *de novo damus* not expressing the marriage, was not to be extended thereto. This point concerning the *novodamus* was stopped, till it was further heard *in præsentia*.

1672. *July* 11.—THE Lord Halton insisted against Northesk and others, for the avail of Dundee's marriage, who *alleged* absolvitor, because the pursuer having the right of *ultimus hæres* of the Earl of Dundee, and having made use of the gift, and possessed thereby, he doth now represent Dundee as being his last heir; and Dundee being obliged in absolute warrandice to warrant the defender's right, that obligation doth burden the pursuer as his last heir, as well as his other heirs, and he cannot pursue for that which he is obliged to purge and warrant.—The pursuer *answered*, That he, as donatar to the King, who is *ultimus hæres*, is not in the condition of other heirs, who are liable personally for the defunct's whole debt; but the most that can be pretended against the pursuer is, that he is liable *quoad* his intromission, in so far as the same is lucrative and free, and that the estate may be affected with the defunct's debts and obligements; and therefore the pursuer being now only insisting in a declaratory action, to declare that he hath right to Dundee's marriage, and what the avail of it is, any defence upon the warrandice is not competent against the same.

THE LORDS found the defence not competent against the declarator, but reserved the same against any action that should be intented for payment or poinding of the ground; especially seeing that it was not now liquid what the value and burden of the estate was, and how far this warrandice, or the eviction arising therefrom, would be preferable to others of Dundee's creditors.

1672. *July* 17.—THE interlocutor upon the debate at Halton's instance against Northesk, being stopped by bill, and this day called again, Northesk resumed his defence upon the *novodamus*, bearing expressly 'ward and relief, disclamation, purpresture, recognition, forfaulture, bastardy, and last heir, for all other 'rights his Majesty had, or could claim to the said lands, fruits, or profits there-'of, any manner of way;' and thereupon *alleged*, That this being a clause necessary for the security of lieges, especially those who buy and acquire estates, and who cannot know with what casualties to the superior the same may be af-

fected, especially as due to the King, against whom prescription hath no effect, by the statute securing the King's interest against the negligence of his officers, which is most properly extended to their omission of interruptions, so that in the minority of any heritor for the time, or his being married after his predecessor's death, a casualty should be gifted or acclaimed, though two hundred years ago, it should infer a distress; neither could the purchaser take special gifts of the several casualties, because these would be null if the particular cause of vacation were not expressed, which a stranger could not know; so that such clauses, as they are necessary, they are most ancient, and of common reputation to be a sufficient security against all casualties of superiority; and where they are granted to subjects, *qui sibi invigilant*, they take away all pretence of right that the superior can any way claim. Neither doth it import that this was a brief way to evacuate the King's casualties, which ought not to be given in grant; for these clauses hinder not but the King may gift all the casualties, only they will not have effect against such fees as are given with these clauses, but may affect all representing the heritors for the time, or their other interests.—It was *answered* for the donatar, That this clause did import no more but to secure against forfaulture and recognition, and the defects of the fee upon which the superior might reduce or improve, and that all the rest was *exuberantia styli*, passing of course, without the noticing of the King's officers, *periculo petentis*, as the exuberant style of gifts of escheat, ward, and non-entry; and whatever effect such clauses may have as to private superiors, it is beyond question, that the general clause *cum omni alio jure*, is not to be taken strictly and literally, but is exuberant, and is to be limited. For, *1mo*, The general clause could never extend to liferent escheats, which were never in a clause *de novo damus*, and which, by a clear decision 5th July 1611, Skene against ——, *voce* JUS SUPERVENIENS, was found not to extend to liferent escheat. *2do*, Such clauses can never extend to the King's bygone feu-duties, or to any particular right by infeftment that the King might have out of such lands, either of annualrent, or warrandice, or the multures of the King's mills; neither can the pretence of the ample extention of clauses of warrandice to particulars not expressed, or clauses of remissions be drawn to this case, or the amplitude of Royal concessions; because clauses of warrandice being ordinarily upon an equivalent price, are involved in the nature of the right, though nothing were expressed; and remissions, and other Royal beneficences, are acts of Princes *proprio motu*, and not upon any composition, or to give away the casualties belonging to the King; so that seeing the general clause can neither extend to all rights, nor yet to all casualties, there is no pretence to extend it to this marriage, which is neither expressed, and seems to have been left out of purpose; seeing in the same charter the marriage is taxed, and the ward also, and in the clause *de novo damus*, the ward is expressed and not the marriage.—It was *replied*, That though the general clause cannot extend to all rights, yet where there are specialities expressed, and with them a general clause, that generality must have effect; and though it cannot

No 70.

No 70. be extended to matters of greater importance than those expressed, or matters of another nature, yet it ought to be extended to marriage, forfaulture, and recognition, which are far greater, being expressed, than ward, which is of the same nature; yea ward doth naturally comprehend marriage, as a casuality flowing therefrom; and there are few clauses *de novo damus* that do express marriage upon the same account; all which will be rendered ineffectual, if this clause be not found valid as to the marriage; and as to the instances of other rights, to which this clause will not extend, albeit these were yielded, they are wholly of another nature, and they are not casualties that ever are given by gift; for the King's feu-duties and tax-duties, which are equivalent, or infeftments of annualrent or warrandice, are not disposable by gift, but only are dischargeable upon payment.—It was *duplied* for the donatar, That the instances adduced do not at all convel the allegeance upon the general clause, that it cannot extend to all rights according to the letter of it; so that of necessity it must be a redundant and exuberant clause, to be restricted according to the meaning and interest of parties; yea it cannot be extended to liferent escheat, albeit it be a less casualty, and of the like nature with non-entry; so that still it remains that the clause must be limited; and there can be no juster limitation than that it should not extend to the maariage, as not being the meaning of the parties; because both ward and marriage are taxed in the charter, and that ward is expressly put in the *novodamus*, and not marriage; and albeit ward comprehends marriage, when the question is a ward-holding, for so also it comprehends relief, yet when the question is of the casualty of ward, it comprehends not the marriage; yea a formal gift of ward, with all right the King could have thereby, would neither extend to marriage nor relief, unless they were expressed; and in this *novodamus* albeit ward be expressed, relief is also expressed.

THE LORDS, considering that this debate as to clauses *de novo damus*, was of great importance to the lieges, and not cleared by decisions, they gave distinct interlocutors to both the members of the donatar's allegeance against the *novodamus*; and found, that clauses of *novodamus* granted by the King did not only extend to forfaulture, and recognition, and supplement of the defects of the right, but to ward, relief, bastardy, and last heir, as being expressed in the clause; but found, 2*do*, That this clause did not extend to the marriage, which was not expressed, and which they found not to be comprehended under ward, especially seeing the marriage was taxed in this charter, and so under special consideration of parties, and omitted.

Fol. Dic. v. 1. *p.* 437. *Stair, v.* 2. *p.* 95. 98. & 103.

*** Gosford reports the same case.

1672. *July* 9.—THE Lord Hattoun, treasurer depute, as donatar to the ward of the marriage of the deceased Earl of Dundee, did pursue a declarator of the avail of the marriage against the Earl of Northesk and others, who

No 70.

were infeft upon rights flowing from the deceased Earl of Dundee. It was *alleged* for Northesk *absolvitor*, because he was infeft upon Dundee's resignation by way of charter, bearing a *de novo damus* long prior to the pursuer's gift, which did purge all prior casualties, and did expressly secure him from ward relief and non-entries, and all real incumbrances that might affect the said lands, by a general clause subjoined to those particulars expressed, whereby the King did renounce all right and interest whereby he might affect the same. It was *replied*, That there is a great difference betwixt the King and other superiors, in granting charters with a *de novo damus*, for private superiors cannot but know the casualties that have fallen to them, and so justly prejudge themselves by a *de novodamus*, of all prior casualties which have fallen to them, whereas the King, not knowing of these casualties, cannot be prejudged, seeing all rights granted by him are either by obreption or surreption, or upon a false narrative, and so cannot prejudge any right competent to his Majesty; likeas by act of Parliament, it is declared, that the negligence of the King's officers ought not to prejudge his Majesty, and therefore, the avail of the marriage not being expressly disponed, the same did still belong to the King and his donatar, as was lately decided in the Exchequer, in the case, The King's Advocate against Barclay of Pearstoun. It was *duplied* for the defenders, That the charter bearing a *de novo damus*, being upon a signature passed the King's own hand, docqueted by the secretary, revised by the King's advocate, and componed in Exchequer, can never be said to have been surreptitiously procured, and being drawn as amply as any signature is ordinarily drawn with a *de novodamus*, and conform to the general practice of all writers to the signet, is such an unquestionable right, as heretofore never any did pretend, as donatar, to pursue for any casualty preceding the same, and all lawyers and advocates did look upon a *de novo damus* as such a perfect security to the lieges, as being an original right flowing from the superior, which, in the construction of law, carries the property of the feu *tanquam optimum et maximum*, and free of all pretences and distress from the granter, so that to loose and unhinge this principle, were to take away the foundation of the securities of the most part of the ancient families in Scotland, who, by such grants, have, by the advice of their lawyers, thought themselves secured from all troubles and dangers whatsoever; and, therefore, unless there had been a particular reservation of the marriage, it cannot be imagined but this *de novo damus*, bearing an express renunciation of all wards, whereof the marriage is but a consequence, and a general of all dangers and hazards whatsoever, without any special reservation at all, can be the foundation of this pursuit for the avail of the marriage at the donatar's instance. And for the decreet of the Exchequer, it ought not to be a rule to the Lords of Session; neither was that decreet given upon the point now in question, but upon this point, that Barclay of Pearstoun being second brother, and married before the death of the elder brother, to whom he succeeded, it was contended, that his marriage could not fall, in re-

No 70. spect he was a widower, and the parties did agree by composition before the decreet was pronounced.

THE LORDS did repel the defence and duply notwithstanding, and sustained the declarator, which was hard.

Thereafter, the said cause being heard *in præsentia* upon the foresaid grounds, and many arguments adduced *pro* and *con.*, the LORDS, of new, on the 17th of this instant, did give their interlocutor upon these two points: 1*mo*, That a charter bearing a *de novo damus*, containing likewise special burdens, such as wards, reliefs, non-entries, or escheats, not only secures the vassal from recognition, nullities, and all other defects, whereby the property of the lands may be quarrelled, but likewise from all the special casualties enumerated; and the signature being revised and componed in Exchequer, whereupon the charter is expede, and infeftment followed, can never, upon pretence that it was surreptitiously procured, and passed by negligence of the King's officers, be again brought in question by the King or donatar, and falls not within the compass of the act of Parliament anent the negligence of the King's officers. The *second* point controverted, whereupon interlocutor was pronounced, was, whether or not that charter, upon resignation of the vassal in favours of a third person who was a creditor, getting a signature passed under the King's own hand, docqueted by his secretary, being presented in Exchequer, revised by the King's advocate, componed and passed, bearing a *de novo damus*, and a renouncing of ward, relief, and non-entries, with a general clause subjoined of all right, interest, or claim which the King can have to the said lands, is a sufficient security against the casualty of marriage, which is not particularly enumerated with ward, relief, and non-entries. As to which, the LORDS did find, that marriage did still belong to the King or his donatar, notwithstanding that the signature was so conceived; to which they declared they were moved upon these considerations, that marriage was a casualty distinct from ward of its own nature, and if it was not specially renounced, it was reserved to the King; that the signature containing a taxation both of the ward and marriage which were then under consideration, the marriage being then due as well as the ward, ought to have been particularly renounced, as well as the other; and it not being so, it must be presumed, that the King did not intend to give the same: Likeas, by a decreet of the Lords, it was found, that a *novodamus* did not take away a liferent escheat; and by the foresaid decreet of Barclay of Pearstoun, did not take away the marriage. Which last interlocutor was most hard, seeing in law a *de novo damus* being a charter given to a stranger who could not be presumed to have concealed the pretended casuality, which did fall in his author's time, above 26 years before, as is pretended; and if he had conceived any danger thereby, he might have as easily obtained the same by a particular renunciation, as all the rest; and it being the general and common stile of all *de novo damus's* to express particulars, but never mention marriage, all lawyers, and writers to the signet,

No 70.

conceiving, that without expressing thereof by the general clause and *de novo damus*, with the special renunciation of ward, was a perfect security to the vassal, not only as to the property, which was of a far greater value and importance, but as to all proper casualities due to the superior, unless any of them were particularly reserved; for in law there being an enumeration of some particulars contained in a discharge, with a full and general clause subjoined, it comprehends all specialties which are *ejusdem naturæ* with those expressed, and is so constantly decided; whereas, by this interlocutor, a door was opened to question all charters of *de novo damus* not bearing expressly the renunciation of the marriage, which is scarce ever expressed but of late, and that in very few charters; so that the lieges were in *bona fide* to acquiesce in the common stile and opinion of all lawyers before this decision. As likewise that uncontroverted ground of law, that the marriage being *tractatum et agitatum* the time of the passing of the signature, in so far as the ward and marriage were both taxed (which was the chief ground of the interlocutor) and so by the general subsequent renunciation, the marriage was clearly taken away, unless it had been reserved; upon which ground, in the case of Blair against Blair, 3d July 1672, *voce* PROOF, the LORDS did lately sustain, that a general discharge did take away a special bond from an assignee; it being proved by witnesses, that it was *tractatum*, and communed upon, the time of the discharge.

Gosford, MS. No 508. *p.* 267.

1681. *February* 23. HAY *against* CREDITORS of Muirie.

No 71.
A *novodamus* was found to be virtually a confirmation of all anterior base rights, so as to preclude them from being conjoined with alienations made after the *novodamus* to infer recognition.

JOHN HAY of Muirie having obtained a gift of recognition from the King, of the lands of Muirie, pursues declarator thereon against the creditors and vassals of Muirie, who *alleged* no process, because there is nothing to instruct a recognition incurred, but extracts of sasines out of the register; and though the principal sasines were produced, they are but assertions of notaries, unless the warrants were produced. It was *answered*, That these sasines are sufficient *ad fundandam litem*, and have ever been so sustained; nor is the pursuer obliged to produce the warrants, but the defenders may have incident by horning against the havers of the warrants, if he found upon any quality therein in his favours. "THE LORDS found the sasines sufficient *ad fundandam litem*, but allowed the defenders diligence by horning against the havers of the warrants, without prejudice to insist in improbation of the sasines and warrants against the sub-vassals, to whom they are granted by the King's ward vassal." The defenders further *alleged*, That the recognition could not be incurred, unless the major part of the ward-fee were alienated by deeds consisting together at the