

No 6.

though there be a special duty, yet it is not payable *nomine feudifirmæ*, but only superadded to the *servitia debita et consueta*; and though wards are to be co-arcuate on all occasions, yet where the *reddendo* is unclear, *feudum militare præsumitur*, as the true ancient holding. And to the *third*, *nullo modo relevat*, seeing the accepting the feu-duties after the gift cannot prejudice the donatar's *jus quasitum*; and as little before it, because *non constat* what may be the event of the declarator, as was found in a declarator of escheat, 6th June 1666, Earl of Cassilis *contra* Agnew, No 3. p. 6408.; and in the case of a minister accepting a tack-duty, this was found no homologation of the tack; Chalmers against Wood, No 78. p. 5698. THE LORDS repelled the Creditors' defences; and declared in the recognition.

*Fol. Dic. v. 1. p. 430. Fountainball, v. 1. p. 699.*

1697. February 11. COCKBURN *against* LAW, and Others.

No 7.

In a declarator of recognition of a feu, this defence was sustained, that, since the recognition, the superior or factor had accepted of feu-duty from a singular successor, not entered by himself.

JAMES COCKBURN, as donatar to the recognition of the lands of Monkton, pursues a declarator against John Law and the other creditors; because, by the original charter of the same, dated in 1558, granted by George, Archdean of St Andrews, and Commendator of the abbacy of Dunfermling, it is feued out to Gilbert Hay, with the express irritancy, that if they dispone any part of the lands without the superior's licence had thereto, they should forfeit, tyne and amit the feu; and *ita est*, in 1686, Alexander Hay, the last vassal publicly infeft, dispomed the lands to Mr Alexander Hay, advocate, whereon he was infeft base, and so the lands recognised. *Alleged*, The heritors never bruiked by by that charter, but only by subsequent rights not containing any such clause; and so the creditors cannot be prejudged. *Answered*, The posterior rights expressly relate to the ancient original feu, and its tenor. *2do*, *Alleged*, The Earl of Lauderdale who gifted this recognition was not superior, but had only right to the feu-duties, as other Lords of erection have. *Answered*, Thirlestane's right to the Lordship of Musselburgh, (whereof the superiority of these lands is a part,) is excepted from the general act of annexation cap. 29. Parl. 1587, and is again excepted by the 53d act 1661, and from the act *salvo jure*, in 1663. *3tio*, *Alleged*, The superior has accepted the feu-duty since the recognition was incurred, and so *præsumitur a caducitate recessisse*. *Answered*, *Non relevat*, unless he knew it was fallen. THE LORDS repelled the first two defences; but sustained the third in these terms; that he, by himself, or his factors by his order, had accepted the feu-duty since the recognition fell, from a vassal and singular successor, whom he knew not to be entered by himself, which infers his consequential knowledge of the recognition being incurred; though I suppose he knew not then of the irritancy contained in the original charter. THE LORDS were the easier in declaring this recognition, that it was not extended, but only for security of a sum of money due to James Cockburn, &c.

*Fol. Dic. v. 1. p. 431. Fountainball, v. 1. p. 766.*