1669. *July* 15. JACK *against* JACK.

No 8.
Recognition not incurred by an infeftment taken on a tutor's precept.

PATRICK JACK having only three daughters, Margaret, his eldest daughter, married John Douglas, and there is a contract betwixt John Douglas and the tutors of the other two daughters, dividing their father's inheritance in three parts, and mutually disponing the same with procuratory and precept; and there being a salmon fishing holding ward of the King, which fell to Margaret's share, John Douglas takes infeftment upon the tutors' precept, disponing for the other two that fishing after his death. The said Margaret takes a gift of recognition of the said salmon fishing, as falling by the infeftment taken by John Douglas without consent of the superior, and thereupon pursues declarator. Katharine Jack, and Robertson her spouse, and the other sister, pursue a reduction of the contract of division, as done by their tutors in their minority, to their lesion; and, in answer to the recognition, *alleged*, 1*mo*, That this recognition occurred in the time of the English, when recognitions were excluded, and such infeftments by the law then in use were allowed; 2*do*, The infeftment here granted proceeded only upon the disposition of their tutors, whose acts, except in what is proper to the administration of their office, are void. It was *answered*, as to the first, That they opponed the decision in the case of Sir George Kinnaird against the Vassals of the Master of Gray, by which it was found that infeftments taken of ward-lands without the superior's consent, even during the usurpation, inferred recognition; and, to the second, that the division among the daughters was an act of administration that the daughters might have been compelled to do. It was *answered*, That there is no such decision produced, and that in the case of the vassals of Gray, they did continue in possession several years after the King's restitution, and did not take confirmations; but here the said Margaret, one of the sisters, who should have taken confirmation before she had continued possession, cannot have benefit by her own fault, and make use of a gift of recognition in her own person, proceeding upon her own and her husband's fault; neither can the division be a lawful act of administration of the tutors, in so far as they granted them precepts of sasine to be holden of their pupil, which no law could have compelled them to do, but only procuratories of resignation; likeas it was John Douglas's fault not to make use of the procuratory, but of the precept.

THE LORDS found no recognition incurred; but, because the parties might have been troubled if any other had taken the gift, they ordained the other two sisters to pay their part of the expenses of the gift.

Stair, *v.* 1. *p.* 640.

*** Gosford's report of this case is No 78. p. 5698. *voce* HOMOLOGATION.