

1674. February 13. VISCOUNT of KILSYTH *contra* HAMILTON.

THE Viscount of Kilsyth pursues declarator of recognition of certain ward-lands holden of him by the Laird of Bardowie, as being alienated by Bardowie, by granting of feus to sub-vassals. The defender *alleged*, That these feus were granted *anno* 1656, during the Usurpation, when ward-holdings were for the most suppress, and no recognition sustained, nor confirmations required; and that after the King's restitution, the defender made application to his superior for confirmation, which is sufficient to take away contempt; and in the recognition at the instance of Pittrichie against Gight, the reason wherefor the Lords sustained the same, though during the Usurpation, was, because after the King's return the sub-vassals continued to possess, and craved no confirmation, which holds not in this case. It was *answered*, That the King refuses confirmation to none, and none of his subjects can be said to be a stranger to him, which holds not in other superiors, who are not obliged to confirm but if the please.

THE LORDS found the defence relevant, confirmation being demanded after the King's restitution in due time, providing that if the superior refused to confirm the sub-vassals rights, that the vassals purge the same by resignation *ad remanentiam*, that the superior be prejudged thereby of no casualty.

*Fol. Dic. v. 2. p. 315. Stair, v. 2. p. 266.*

No 12.

Where lands had been alienated during the usurpation, subsequent confirmation saved from recognition.

1674. July 15. SIR CHARLES ARESKINE, Lord Lyon, *contra* FORBES.

FORBES of Auchintoul being infeft by the Lord Forbes in certain lands in wadset, with a clause irritant in the reversion, Auchintoul obtained declarator of the expiring of the reversion, and so having the full right of the lands holden of the King, he did dispoise the whole lands to his eldest son, his heirs and assignees, and the eldest son gave subaltern rights to strangers of the major part: The Lord Forbes obtained a gift of recognition from the King, in the name of Sir Charles Areskine, Lyon, who now pursues a declarator of recognition, upon the alienation made by Auchintoul the vassal to his eldest son, and by him to strangers. The defender *alleged*, That this declarator was not relevant, because, though alienations of ward-lands, without the superior's consent, do regularly infer recognition; yet it hath this exception, that the alienation being made to the person who is *alioqui successurus*, and who would fall to be vassal by the course of law, it is but *preceptio hereditatis*, and infers not recognition, so that the disposition to the son is valid; and for the disposition by the son, there is neither law nor custom to infer recognition from them, because the son is not vassal, and it is a certain rule, that *pœnæ non sunt extendendæ*; and re-

No 13.

Recognition inferred by a disposition of an apparent heir, conveyed by him before infeftment to strangers. The difficulty was, that the disposition to the son could not infer recognition, being to one *alioqui successurus*; nor that to the stranger, the son being a vassal.