resignation. As to the second, upon the desire of the archbishop, it was ordained to be heard *in præsentia;* though many of the Lords declared their judgment, that as Commissary Falconer, and his son, now Lord Newtoun, were both provided to one place in the commissariat of Edinburgh, and the longest liver of them, so the clerkship of the commissariat being but a naked office, and they having no church benefice, the gift could not be reduced upon that reason of dilapidation.

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1677. *July* 6. THOMAS OGILVIE of LOGIE *against* SIR JOHN and DAVID MOUNTCREIFFS of TIPPERMALLOCH.

IN a declarator of recognition, at the instance of Ogilvie of Logie, upon this reason, That the lands of Logie and Banfarge being held ward of the Marquis of Douglas, by Mr David Mountcreiff, who was heritor thereof, and disponed three parts of five to be holden base of himself, whereupon infeftment followed; and Sir John and David Mountcreiffs, and the Lady Reries, who acquired the said base right, having disponed the same to James Ogilvie of Logie, by double infeftments; one to be holden of themselves and the other of the Marquis of Douglas, by resignation or confirmation, to be passed upon Ogilvie's own expenses; he finding that the Marquis refused to enter him his vassal, was forced to take a gift of recognition; and thereby having good right to the lands, craved, that the same might be declared, and that he should be free of the price of the lands; at least, that they should be liable upon the warrandice.

It was ALLEGED for the defender, That the lands could not be recognosced upon the grounds libelled: 1*st.* Because the seasines whereupon the recognition is craved were lawful; because the same were granted, and the lands disponed to be holden feu, before the Act of Parliament discharging vassals of ward lands, to set the same free without consent of the superior; which was allowed by Act of Parliament King James III. 2*d.* As it was leisome by the law, so the charter granted by the Marquis of Douglas, to Mr David Mountcreiff, did contain a special privilege that it should be lawful to him to infeft tenants in the said lands as freely as Alexander Wishart of Logie might have done by his charter granted by the Earl of Angus *in anno* 1511; in which it was declared that he might do the same without any peril or hazard. 3*d.* The pursuer was expressly obliged to procure his own confirmation upon his own charges and expenses.

It was REPLIED to the *first*, That, by the Act of Parliament James III, when the feudal law, whereby this case must be determined, all subinfeudations must be *ad decorandum*, and making the lands better as to the superior: and, by subsequent Acts of Parliament, the same were declared void being granted without the superior's consent; but so it is that, by this base infeftment granted to the sub-vassal, the feu-duty payable yearly is only one merk Scots; whereas, by our law and practick, the least feu-duty in the case of change was a year's duty, to which the lands were retoured, and so cannot hinder recognition.

It was ANSWERED to the *second*, That, albeit the charter 1511 gives power to dispone to sub-vassals without any peril; yet that could only be interpreted as to the change of the holding: but here, the *reddendo* and feu-duty being so in-

considerable, that the whole benefit of the superiority is of no value, it must, in law, infer a ground of recognition.

It was REPLIED to the *third*, That, albeit the pursuer was obliged to infeft upon his own charges, yet, seeing the Marquis was not obliged to receive him vassal, for the reasons foresaid, as having right by recognition; whatsoever sums of money the pursuer did pay, in relation to that hazard, as well as his entry; he ought to be refunded, and the recognition declared.

The Lords, having considered the charters whereupon the declarator was founded; with the obligements in the disposition to infeft; did find, That the pursuer might justly retain out of the price for the gift of recognition, which fell due to the superior, by disponing the lands feu for a merk Scots yearly, as a feu-duty; which was not lawful, and could not be under a year's duty, according to the retour of the lands: but, as to what was paid for entering vassal to the Marquis, which could only be interpreted a year's duty, if he had been charged upon an adjudication or comprising, they found, by his obligement to infeft himself, he could have no retention.

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1677. *July* 6. WALTER and ROBERT LOCHARTS *against* WILLIAM LOCHART of WICKETSHAW.

IN an action at the instance of Walter and Robert Lochart, as being provided by their father, Steven Lochart, to the sum of 6000 merks, conform to a bond granted by William Lochart to his father; Steven being then his eldest son and apparent heir; against the defender, William Lochart, as representing him;—it was ALLEGED for the defender, That the bond granted by the goodsire was *ipso jure* null, in so far as he was minor, *et in familia* with Steven, his father, to whom he granted the bond. *Secundo*, It was null upon that ground, That it was *contra pacta connubialia;* in so far as, by the contract of marriage, wherein the fee of the estate was provided to the said William, it was only with the burden of 4600 merks; and therefore, any addition of 1400 merks, by a bond, was *ipso jure* null.

It was REPLIED, That the power to burden the fee of the estate, both by the contract and the posterior bond in favour of the rest of the children, who had no other provision, being in contemplation of the whole fee of the land and estate in favour of his apparent heir, was most valid in law, and could never be revoked by the son as minor; there being no lesion, but granted for a most onerous and just cause. *Secundo*, Not only the defender's goodsire, but likewise his father, long after their majority, had homologated the said bond, by making payment of the annualrent, and receiving discharges therefor from the pursuers.

It was DUPLIED, That the payment was only made by the defender's father, who did not know of these nullities, not being acquainted therewith, nor living the time of the granting of the bond; which, as to the father, was null, as being granted *contra pacta dotalia.*

The Lords did repel these defences; being chiefly moved upon that ground, That the defender's father, after majority, had homologated the last additional bond of 1400 merks, by making payment of the whole annualrents several