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And found dole and fraud in the disponent relevant to preclude him from all benefit he could have by the gift; but that it could not prejudice the superior, unless he were *particeps fraudis*. And they found, that the disponent's keeping the charter and sasine in his own person, was no qualification of fraud; for the superior might have disponent it avowedly without any onerous cause; and so the concealing could not be out of any evil design, as being of no advantage to him.

60, THE LORDS found, that redeemable rights paid (if not actually renounced) before the concurrence of other rights, came *in computo* to make up a major part. And found, as in Muirie's case, No 61 *infra*, that inhibition did not hinder recognition; but found that sasines wanting essential solemnities, as the words *vidi scivi*, &c. or *traditio terræ et lapidis*, &c. were simply null, and did not infer recognition. It was debated, though not determined, if sasines only null *quoad* third parties, for want of registration, should make recognition. See RECOGNITION.

Harcarse, (RECOGNITION.) No 825. p. 231.

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Found that base rights cannot be brought *in computo* in questions of recognition, but the duty contained in a base charter, and the real worth of the superiority, were subject which remained with the disponent, and might be brought *in computo* to make up the major half not disponent.

1683: *March*. JOHN HAY *against* THE CREDITORS OF MUIRIE.

In the cause betwixt John Hay and the Creditors of Muirie, July 7. 1681, No 67. p. 6500. the Lords having found, that a right and infeftment of relief of cautionry, though for a sum exceeding the half of the worth of the lands, did not infer recognition, as not being a present right till after distress, and that notwithstanding voluntary payment made by the cautioner, or his transacting the debt without distress; but did not determine the manner of distress, whether horning was sufficient, or if actual payment was necessary, or if distress for a part of the debt would infer a total relief so as to make the whole infeftment of relief be computed in the recognition; or if it would infer only relief *pro rata* of the distress; yet they found, that, though the contract, whereon the infeftment of annualrent followed, and to which it related, did narrate, that Ballegerno the cautioner was distressed by inhibition, and otherwise, for the whole debt, and had power to enter to possess the lands, and uplift the rents to be paid to the creditor, they would not consider the infeftment as a purified relief for the value of the whole sum of 14,000 merks of cautionry, but reserved *in quanto* to their consideration at the conclusion of the cause. And some thought the relief was purified only for so much of the rents as the cautioner had uplifted out of the relief-lands, the cautioner being obliged himself to employ the rents for that effect.

It was *alleged*; The foresaid interlocutor ought to be rectified, and that the cautioner being distressed, the infeftment of relief must be understood as purified *in tanto*, or *in toto*, conform to the distress, without respect that he might have other relief off the principal, out of his other real or personale.

state; for after distress it is the same case *quoad* the superior, as if the infestment of relief had been granted *ab initio* after the distress had occurred, and so it became a present title of possession, and in effect a right of security rather than relief; nor could the cautioner's accepting payment for his relief and never actually possessing, or intromitting with the rents, prejudice the superior's *jus quesitum* by the distress which purified the cautioner's infestment; as, after the eviction of principal lands, the warrandice lands came in their place, and the receiver of the infestment in warrandice could not then, by taking payment of the debt and ground thereof, prejudice the superior's right.

Answered; That the vassal's condition by the relief of cautionry, is not worse, nor is he thereby disabled to serve the superior.

THE LORDS found, that his right of relief proceeding upon a narrative, that the cautioner had been distressed, and containing a power to enter to present possession, was purified *ab initio quoad valorem*. And adhered to their former interlocutor, finding, that inhibition did not stop recognition, notwithstanding the alleged inconveniencies, and parities with other rights granted by minors without consent of their curators, interdicted persons, and the like.

Thereafter it was *alleged*; That after resignation accepted by the superior, and before infestment, any deeds done by the vassal in relation to the lands resigned, could not prejudice the person in whose favours resignation was made, because resignation and confirmation have the same effect, and the superior does equally consent to the right, by accepting resignation as by granting confirmation, and he would be obliged in law to grant a charter; and his receiving of a second resignation is declared by act of Parliament to be *crimen stellationatus*.

Answered; As resignation would not hinder the casualties of the feu to accresce to the superior, if the vassal died before infestment; and as a base infestment granted by the vassal, and confirmed, or otherwise made public after resignation, and before infestment thereon, would be preferred to the infestment expedite thereafter upon resignation; so neither ought the resignation to secure against recognition, more than it is effectual against rights of property. Besides, there is a great difference between a confirmation where *hoc agebatur*, and a resignation which is an act that passes of course, especially in Exchequer. 2. The resignation is but an inchoate consent at best, and the subscribing of a charter by a private superior, and the affixing of the Great Seal to one signed by the King, with a previous resignation, imports only a consent *ab eo tempore*, and is scarcely equivalent to the effect of a confirmation till sasine follow. And whatever might be said, if the superior had been *in mora* to expedite an offered charter, (and no such *mora* can be imputed to the Exchequer) yet where the superior is not *in mora*, deeds intervening between resignation and infestment may concur with other rights to infer recognition, even against the right following upon the resignation, in respect the superior's consent (which is only considered from the time of infestment) brings it to the common case of rights

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THE LORDS found, that all rights granted by the vassal, resigner, after resignation, and before subscribing of the charter, in the case of private superiors, and before appending of the Great Seal to the charter, where the King is superior, came to be considered as grounds of recognition, either as to the right resigned, or as to other rights, notwithstanding the resignation. And the reason of the difference betwixt the King and a subject-superior is, because the King's consent is never complete till the Great Seal is affixed, though the signature be passed his Majesty's hand, and compounded in Exchequer.

Thereafter it was *alleged*; That a vassal's deeds completed by infeftment, even between affixing of the seal where the King is superior, or subscribing the charter, where the superior is a subject, and the taking sasine thereon, are grounds of recognition. And as a base sasine taken after sealing of the charter of resignation, and before infeftment thereon, if made public before sasine taken upon the said charter of resignation, would carry the preferable right of the lands, so it would infer recognition, seeing *tantum facere potest vassallus delinquendo quantum contrahendo*. But there being no base sasine between the appending of the seal and taking infeftment upon the charter of resignation, this debate was dropt and let fall.

Thereafter it was *alleged*; That though after recognition is incurred, the superior's confirmation of any particular base right, or of such rights even exceeding the major part, will not secure the rights not confirmed; yet it will secure those confirmed, if the superior hath not antecedently gifted away the recognition; so *a pari* a charter upon a resignation, without a *novodamus* importing the superior's consent, should secure the lands resigned.

Answered; A superior's accepting resignations, and granting charters thereon without a *novodamus*, being ordinary acts wherein the change of the vassal is only considered, without considering if the major or minor part be disposed, the superior is not presumed thereby to pass from any casualty of recognition; whereas in a confirmation of a base right *hoc agitur*, and the securing against recognition is thereby intended.

THE LORDS repelled the allegiance in respect of the answer; and found, that infeftment upon the resignation without a *novodamus*, did not secure the lands resigned against a recognition incurred before, though a confirmation of the right would have secured against recognition, if then standing in the superior's person ungifted; as was found in the case of Cromarty, No 60. p. 6467.

Thereafter it was *alleged*; That seeing confirmations *de me* did not disunite the lands confirmed from the ancient barony, if there were so many rights confirmed *de me* as made the major part, the vassal might dispose of the lesser half without consent, or hazard of recognition, which is inferred by a disposition of the major part without consent. And anciently when feus were gratuitous concessions, no more recognised but what was disposed; and the disposing of the

major part without the consent of the superior, did only make that major part, and not the whole, fall under recognition; far less should a disposition of more than the half of ward-lands infer a total recognition with us, where such are purchased for prices near to the value of the same.

Answered; If the superior having confirmed the half of the feu *de me*, the vassal might dispose of the other half; he might render himself incapable to serve his superior, which were absurd. And superiors intending to gratify their vassals, by confirming their rights, do not advert if the lands confirmed be the major part. And the position, that the vassal may dispoise the half without the superior's consent, doth only take place where the other half remains with the vassal unannalzed *ad sustinenda onera vassali*. For though it might with some truth be pleaded, that if a vassal dispose of ten of a twenty-one pound land, without the superior's consent, and then dispose of the remaining eleven pound, the superior's confirmation of the eleven pound land would hinder the ten pound land first disposed to recognosce; especially if at the time of the confirmation the superior knew the vassal to be denuded of the other half, as if the superior seemed thereby to allow of the vassal's being denuded of the whole; yet this consequence would choke the analogy of recognition, seeing the superior's intention to secure the lands confirmed is not to be in other consequences prejudicial to him. But if the major part were not disposed and confirmed, but resigned *ad remanentiam* for the superior's advantage, it might be more doubtful if the ten pound land first disposed without his consent should recognosce.

The Lords did not directly determine the point; but they inclined to sustain the answer notwithstanding the allegiance, and to find that base rights *de me* confirmed were not to be considered *quoad* the property *in computo* to make the major part to be considered as remaining with the barony, but only *quoad* the value of the superiority, so as base infeftments *de me* as well as *a me* have the effect of a disunion; which seems consequential to the former point.

Thereafter it was *alleged*; That the lordship of Errol being an eighty pound land, erected in a barony in the person of the Lord Errol, and a twenty pound land thereof being resigned in favours of _____, with a dispensation for taking sasine at one place, and a clause for payment of one tack-duty for the whole twenty pound land; though the said twenty pound land resigned could not be called a barony, there being no union or erection, yet it should be looked upon as one tenement, because of the one sasine and one *reddendo*; so that the major part must be disposed without consent, to infer recognition of any part thereof.

Answered; Lands are united either naturally, when contiguous, or civilly when discontinuous lands are united by a formal clause of union in one barony or tenement, in a charter granted by the King. And the charter in question, containing no formal clause of union, but only a dispensation to take off the necessity of several sasines in the discontinuous parts, can be considered as an union.

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ad hunc effectum allenary, and not *quoad omnes effectus*; so that the parts of the twenty pound land are to be considered in relation to their natural union, which makes so many *distincta tenementa* as there are discontiguous parcels; and therefore recognition is to be inferred from a disposition of the major part of each of these contiguous parcels; nor have the vassals hereby any prejudice; for, on the other hand, the alienation of the major part, or total of one distinct tenement, cannot prejudge the other tenements.

THE LORDS found, that the dispensation for taking sasine at one place, and the *reddendo* of one taxed duty in the charter of resignation, did not import a civil union of the discontiguous tenements, which therefore were to be considered as *distincta tenementa*, so as the alienation of the major part of each did recognosce the respective tenements disposed.

Thereafter it was *alleged*; That the lands of Errol and the lands of _____ are not to be reputed discontiguous, the interjected lands being only disposed base, and the superiority standing in the person of the vassal disposer; but are to be looked upon as parts and pertinents of the barony, with respect to sovereign superior, to defend against a discontiguity.

Answered; As the value of the superiority, and not the property, by the base alienation thereof, is to be considered in the person of the vassal disposer, in a competition of lands remaining with him, so that property ought not to hinder recognition to arise from any fictitious contiguity it has with the mains of Errol and _____ not disposed.

This point received no interlocutor, and the parties settled before pronouncing of decret.

Fol. Dic. v. 1. p. 436. Harcarse, (RECOGNITION.) No 826. p. 232.

* * * Sir P. Home reports the same case.

SIR JOHN HAY, Advocate, having obtained a gift of recognition of the lands and barony of Muiry, and having pursued a declarator upon the gift, and for instructing of the grounds of recognition, having produced an infeftment granted by William Ogilvy of Muiry, the ward vassal to the Laird of Balagarno, for relief of the sum of 14,500 merks, wherein he stood engaged as cautioner for Muiry, *alleged* for the Lady Balagarno, and the other Creditors of Muiry, That the infeftment being only for relief, could not be a ground of recognition, seeing the debts might have been paid by the principal debtor, or out of his estate and means, and so the infeftment of relief made effectual before the major part of the lands were alienated, and the concurring deeds which might infer recognition did exist. *Answered*, That the infeftment of relief differed nothing from a pure and simple infeftment granted by the debtor to a confident person for payment of the debts; and as such an infeftment would have been a ground of recognition, so likewise an infeftment for relief, there being the same parity of reason for both, especially in this case, it being

provided by the right, that Balgarno, the cautioner, should presently enter to the possession of the lands, and to uplift the rents at the next term for his relief; and an infestment of relief ought to infer recognition as well as an infestment of annualrent, or a wadset, seeing an infestment of annualrent, or wadset, may be purged by payment as well as an infestment of relief; and as these are certainly grounds of recognition, so likewise an infestment of relief. *Replied*, That an infestment of relief being but a conditional right, and not to take effect but after distress, and in so far as the cautioner is distressed, such rights cannot be sustained to infer a recognition, unless they actually take effect, so that the cautioner be distressed, and he make use of the infestment for his relief; it being clear, by many decisions, and particularly by a late decision, the Laird of Kilfanies against the Earl of Northesk, * where, albeit Kilfanies had an infestment of relief for all debts wherein he stood engaged as principal, with, or as cautioner for the Earl of Northesk, his father, and was presently appointed to enter to the possession of the lands for his relief, yet the LORDS found, that he could enter to the possession, and affect the rents for his relief before he was distressed, and that by virtue of the infestment he had only right to the rents, in so far as he was distressed, so that such infestments of relief being only but conditional, and depending upon a future event, cannot be a ground of recognition, unless distress actually followed, and the condition be purified. And in case distress should follow, it is only effectual in so far as the cautioner is distressed, and in that case, can only be sustained as a ground of recognition *pro tanto*, but not *pro toto*, unless the cautioner be distressed, and has made payment of the hail sums for which the infestment of relief is granted, as in the case of an infestment of warrandice, which will not infer recognition unless distress and eviction did actually follow, and in so far only as the eviction does extend to the infestment of warrandice, will be sustained as a ground of recognition; and an infestment of relief is of the same nature of an infestment of warrandice, seeing both are but conditional, and depend upon a future event. And it is the opinion of the lawyers that have written on that subject, that such infestments do not make the feu recognosce, *Rosenthal de feud. cap. 9. Conclus. 14. No 3. and Conclus. 34. Nos 16. and 17. and Covartius Resolut. lib. 3. cap. 8. Nos 1. and 2.* As in the case where the lands are sold *sub pacto legis commissoriæ*, upon that condition, that, if the price shall not be paid within a certain time, the bargain shall be null, *vel sub pacto addictio- nis in diem*, as when lands are sold with that condition, that if any person shall offer a better price within a certain time, the bargain shall be null; in which cases, by the feudal law, the vassal does not lose his feu, unless the condition exist, and be purified, *quia venditio non est pura sed conditionalis ipso jure resolutiva*; and that is the difference between an infestment of relief and an infestment of annualrent, or of a wadset, the one being but conditional, and depending upon a future event, whereas the other is pure and simple, and does

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lief as a ground of recognition, albeit the Laird of Balgarno had not entered to the possession of the lands by virtue thereof.

It was further *alleged* for the Creditors, that there being inhibitions served upon several bonds granted to them by Ogilvy of Muirie, the ward vassal, before the contracting of the debts upon which the recognition is inferred, and that they had raised a reduction of these rights *ex capite inhibitionis* which they had repeated, and the deeds whereupon recognition is inferred being reduced, the gift of recognition must fall in consequence. *Answered*, That seeing by the law of the kingdom, a ward vassal disposing the hail lands, or the major part thereof, without the superior's consent or confirmation, being a ground of recognition, and thereby there being *jus acquisitum* to the King and other superiors; albeit the rights which were the grounds of recognition should thereafter be reduced *ex capite inhibitionis*, so far as concerns the party to whom the same was granted, so that he cannot affect the lands to the prejudice of the party at whose instance the inhibition was served, yet that cannot prejudice the King and other superiors of the casualty of recognition which doth arise to them by the vassal's delinquency, no more than it can prejudice them of the casualties of forfeiture, ward, or non-entry; it being inherent in the nature of the right granted to the vassal of his lands, that upon the alienation of the same, or of the major part thereof, and upon the committing of such crimes and delinquencies, the lands do recognise to the superior without the burden of any deeds done by the vassal in favour of creditors or diligence done by them thereupon, which cannot prejudice the superior of the casualties arising to him by such deeds done by the vassal, unless the same had been done with the superior's consent, or confirmed by him; and if it were otherways sustained, it would be a compendious way for vassals of ward lands to prejudice the superiors, and evacuate all rights of recognition, by granting bonds upon inhibition being served at the instance of the creditors, who might reduce such rights *ex capite inhibitionis*, and so recognition should never be incurred. *Replied*, That inhibition being the great security of the lieges, introduced in favour of creditors by the public law of the kingdom, by which they have *jus ad rem*, and right to reduce all subsequent debts and deeds which may affect the lands in their prejudice, it cannot be taken from them without their own consent, and an alienation made, and debts contracted after the inhibition, cannot be a ground of recognition, because the dominion and property of the lands after inhibition is not transferred from the person of the vassal to the person of the buyer, it being a certain principle in law that alienations *contra prohibitionem legis dominium non transferunt in accipientem. leg. ult. Cod. De rebus alienis non alienand.* And it is farther cleared by the gloss, and lawyers upon that law, and the reason is, *quia alienatione prohibita videtur omnis actus per quam fit translatio domini directi utilis vel alicujus juris in re prohibita, et ratio est*, because a party cannot transfer

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a right to another that was not first in his own person ; but so it is, that when an alienation of a thing is prohibited by the law and by the judge, the party has not right to alienate, and consequently, the dominion and property cannot be transferred in prejudice of the creditor, in whose favours the law is introduced discharging such alienations ; and if the dominion and property of the lands be not transferred, that it must necessarily follow, that there can be no recognition, and as the dominion and property are not transferred by such alienations after inhibition, so the alienation itself, as being prohibited by the law, is *ipso jure* null, *et quod nullum est nullum in jure producit effectum*, leg. 5. *Cód. De legibus* ; by which it is expressly provided, that *nullum pactum, nullam conventionem, nullum contractum inter eos videri volumus subsecutum, qui contrahunt lege contrahere prohibente. Hoc est, ut ea quæ lege fieri prohibentur, si fuerint facta, non solum inutilia, sed pro infectis etiam habeantur ; licet legislator fieri prohibuerit tantum, nec specialiter dixerit inutile esse debere quod factum est ; sed et si quid fuerit subsecutum ex eo, vel ob id quod interdicante lege factum est, illud quoque cassum atque inutile esse præcipimus.* By which it appears, that not only such alienations are null and void, but all that has followed thereupon, and any casualty or benefit arising to a third party thereby does fall in consequence, *nam cum principalis causa non consistat, nec ea quidem quæ sequuntur, locum habent*, leg. 178. *D. De regulis juris* ; *et non-entis nulla sunt accidentia*. As also, it is a principle in law, that when an act is null and void, it does not deserve a punishment, *nam actus nullus et inutilis pœnam non mœretur, et leg. 1. Digest. Quisque juris, Quid enim officit conatus cum injuria nullum habuerit effectum?* And it is clear from the feudal law, that *ob alienationem aliunde nullam vassalli feudum non cadit*, *Carolus Mulineus, in consuetud. Paris. feud. par. 21. No 32. and 33.* where he gives many particular instances, as in the case of alienations made after inhibition and interdiction, or disposition made by minors, without consent of their curators, and many other cases of that nature, because the dominion and property in these cases are not transferred ; as also this is clear in the case of dispositions extorted *per vim et metum*, or by fraud and circumvention, and deeds done upon death-bed, and infestments that are null and void by an intrinsic nullity, such as the want of witnesses and other legal solemnities ; so that, seeing such alienations have no effect in law, there can no casualty arise thereby to the superior ; and as this is clear from the principles of reason, and from the principles of the civil and feudal law, and the laws and customs of other nations, so likewise from our laws and practice, whenever the case occurred, and was so decided, 10th March 1627, the Lord Balmerino against Seaton of Pitmedden, *voce* RECOGNITION, where the Lords found, that a party who had comprised the debtor's lands, and was infest therein, and who had served inhibition before the comprising, and having pursued reduction of infestments posterior to his rights, made by his debtor since the comprising and sasine, and which posterior rights were the cause why his debtor's lands did recognise, and consequently, that he might reduce the said right, which was

the ground of the recognition, with the charter and infeftment of recognition, *ad hunc effectum* that the cautioner might be paid of his true debt; by which it appears, that after the ward-vassal is denuded by apprising, or if there be inhibition served against him, he can do no deed thereafter in prejudice of the creditor's diligence, that might infer recognition. As also it was decided in the case of the Laird of Powrie, * who had right to a disposition granted upon death-bed, whereupon infeftment followed, and being reduced upon that ground, did not infer recognition; and albeit inhibitions will not prejudice the King, and other superiors, of forfeiture, non-entry, ward, and marriage, and other casualties of that nature, yet there is a vast difference between these casualties and the casualty of recognition; because the casualty of forfeiture being for treason, it is the greatest of crimes that can be committed against the King, and there are many things introduced by the law against treason for the heinousness of the crime, which do not take place in other small feudal delicts; and the casualty of forfeiture arises to the King by the very fact and deed of treason committed by the vassal, which cannot be reduced, recalled, or taken away by the inhibition, or other legal diligence done by the creditor against the vassal; and therefore, in such cases that maxim holds *quod factum est infectum fieri nequit*. But it is otherwise in the case of recognition, which proceeds upon some fact and deed of the vassal, which may be annulled, and is reducible in law; so that the ground and foundation of the recognition being taken away, that it has no effect in law, the casualty of recognition must fall in consequence. As also the law makes a distinction betwixt *crimina feudalia*, and *non feudalia*; and lawyers call these properly feudal delicts, *quæ primario immediate, et principaliter committuntur in personam domini*; such as treason, upon committing thereof the vassal doth immediately lose his lands and estate; and *crimina non feudalia* are said to be those that are not directly committed against the superior, but only that *per accidens et in consequentia*, by the intervention of some other fact or deed of the vassal's, upon which there arise the casualties to the superior; as to which, if that fact and deed be taken away, and the party stated in the same case as if it had not been done, then the casualty will fall in consequence, Rosenthall, *de feud. cap. 10. Conclus. 12. No 5.* And the only reason in law, why by the alienation of the greatest part of the ward-lands, the hail lands do recognosce, is the contempt that is pretended to be done to the superior, and that the vassal has not so much remaining as will be sufficient to maintain him, and to perform the duties and services that are incumbent to be performed by the vassal to the superior; but so it is, that the alienation being reduced upon the inhibition, as the deed is null, and so no contempt done to the superior, (seeing there can be no contempt upon a null deed,) so likewise there is no prejudice done to the superior; because these deeds being taken away, both the superior and vassal are in their own place, and the rights of the lands cannot be exhausted by any alienation that is null in law, and does not affect the lands; so that the reason of the law ceasing, there can be no recog-

* Examine General List of Names.

No 61. nition inferred upon those deeds that are granted by the ward-vassal after inhibition; and the casualty of recognition does likewise vastly differ from the casualty of non-entry, ward, and marriage; because the casualties arise to the superior immediately *ea ipsa natura feudi*, by the decease of the former vassal, against which inhibition can have no effect. But it is otherwise in the case of recognition arising to the superior by the alienation made by the vassal, without the superior's consent, which being reduced and taken away by the inhibition *res jam redintegratur*, and the vassal, both as to the creditor and the superior, is in the same case as if the alienation had never been made. *Duplied*, That it being provided by the public law of the kingdom, that if a vassal of ward lands should alienate the hail lands, or the major part thereof, without the superior's consent, then the same should recognosce to the superior, there is as good reason to preserve that law inviolable, in favours of the King and other superiors, as the public law of inhibitions in favours of the creditors, which can only be understood to take effect for reducing of rights made by the ward-vassal, after inhibition, as to the party who accepted of a right of these lands after the inhibition. And the laws above cited are only to be understood as to the annulling of all rights, as to the party who accepted of the same contrary to the inhibition, but not as to casualties arising to third parties, by which deeds there is *jus acquisitum* to them, and which cannot be taken away from them without their own consent; as also, it is a certain rule in law, that if a party's right depend upon a preceding cause prior to the inhibition, that the right, in that case, cannot be reduced *ex capite inhibitionis*; but so it is, that the casualty of recognition, arising to the superior by the alienation made by the vassal, depends upon a preceding cause, viz. the nature of the feu, by which it recognosces to the superior by the vassal's alienating of the lands, or the major part thereof, without the superior's consent; and for that same reason, in the case where a party is infeft in lands without a resolute and irritant clause, if there should be an inhibition served against him, and he should thereafter grant a disposition of the lands to a third party, the lands would recognosce, and belong to the superior or any other person in whose favours the clause irritant is conceived, albeit the creditor, at whose instance the inhibition was served, should reduce the disposition; and the case betwixt the Lord Balmerinloch and Pitmedden does not meet this case, because, in that case, the ward-vassal was denuded by apprising, and infeftment following thereupon before the deed done by the vassal, upon which recognition was inferred, was the principal reason of that decision, and not the inhibition which was served upon the grounds, for which the apprising was led. And albeit a disposition granted upon death-bed doth not infer recognition, that is because law presumes that a party being upon death-bed, he was *infirmi judicii*, and to have been done *ex fervore et impatientia morbi*, and as done by a person that was not *sanae mentis*, and are reputed in law as deeds done without consent, which cannot infer any contempt done to the superior, but being *ipso jure* null, cannot be a ground of recognition; which holds not in the case where dispositions are made by persons in their *liege poustie*,

which is direct contempt of the superior; as also the consequence does not hold that is drawn from infeftments that are null in law for want of legal solemnities, because such rights are intrinsically null, and so can have no effect in law as to any party; whereas a disposition made by a ward-vassal, being a valid deed, it makes the land to recognosce to the superior, albeit it may be reduced upon the intrinsic ground of inhibition, as is clear in the case of dispositions made by the ward-vassal in defraud of his lawful creditors, which may be reduced upon the act 18th Parliament 1621. And yet certainly, such dispositions will be sustained as grounds of recognition. THE LORDS repelled the defence founded upon the inhibition; and found that recognition was not excluded nor burdened by the inhibition against the ward vassal, albeit the deeds whereupon recognition was inferred might be reduced *ex capite inhibitionis*, in respect the pursuer did not pursue reduction before the declarator of recognition.

It was likewise *alleged* for James Carnegie of Phinhaven, who had a right from Kininmouth of Hill to a wadset of a part of the lands, for L. 16,800 granted by the Laird of Muirie the ward vassal, upon which Kininmouth was publicly infeft under the Great Seal, That such rights as were granted by the ward vassal after the resignation made in the Exchequer's hands in favours of Kininmouth, and such rights as were made after the charter under the Great Seal, and before the sasine, these could not be sustained as grounds of recognition in prejudice of Kininmouth, nor so much as come in *computo* to make up the recognition, because the ward vassal being denuded by the disposition and resignation made in the superior's hands, and accepted, was consenting to the right. And it is clear, from Craig, Lib. 3. Dieg. 3. Tit. 11. That 'consensus impedit recognitionem si scriptis adhibeatur, sive ante, sive post dispositionem, vel in actu disponendi, vel etiam post mortem disponentis;' and Tit. 35. 'Dominus (inquit) excipiendo resignationem videtur jus resignantis approbare, itaque post eam non competit domino actio recognitionis, quod in actione inter Dominum de Calderhead et Maxwell de Aikenhead, decidisset Senatus;' especially seeing all diligence was used for completing of the right by infeftment, the charter being expedé about five weeks after the resignation, and sasine was taken some few weeks after the charter; and as intermediate deeds done betwixt the resignation and expeding the charter should not be sustained as grounds of recognition, far less can such deeds as were done after the charter, and before the sasine was taken, be sustained to infer recognition; seeing infeftment was taken, and the right completed long before the gift of recognition, as was decided in the case of Adam Rae against the Laird of Kellie, No 53. p. 6459. where the LORDS found the infeftment granted after the fault, with the King's confirmation before the infeftment of recognition given to Adam Rae, sufficient to stop the recognition, notwithstanding they had not the gift of a *novodamus*. And albeit it should come in *computo* to make the gift of the lands recognosce, yet the public infeftment being expedé upon the resignation, ought at least to be sustained to defend itself, the public in-

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feftment being before the gift of recognition, as was lately decided in the case of the King's Advocate against the Creditors of Cromarty, No 60. p. 6467. where the LORDS found that a charter of confirmation, being before the gift of recognition, did secure itself, albeit it came in *computo* to make the rest of the lands recognosce, and a charter upon resignation is equivalent, as to all effects, (if not stronger) to a charter of confirmation. *Answered*, That not only the deeds done by the ward-vassal after the resignation and before the charter, but the deeds done after the charter, and before the sasine, ought to be sustained as grounds of recognition, because the right was not completed before sasine was taken, as is clear by the decision in the action at the instance of his Majesty's Advocate against Strachan of Kinaldie, * where the LORDS found that the Exchequer's accepting of a resignation, and the granting of a charter thereupon, albeit under the King's own hand, yet the same not being completed by infestment, did not prejudice the King of the casualty of ward and marriage, so neither ought it to prejudice his Majesty of the casualty of recognition; and as the resignation, nor the charter, did not so denude the vassal, but notwithstanding, if he had disposed the lands to other persons, and they had been first infest, would have been preferred, so, by that same reason, any intermediate deeds done by the vassal betwixt the resignation and the completing of the right by the sasine, must be sustained as grounds of recognition, and are *media impedimenta*, that the sasine cannot be drawn back to the date of the resignation, to make the right complete, that it should not come in *computo*; neither can this public infestment, proceeding only upon resignation, secure itself against such deeds as were done before the completing of the infestment, albeit it was competent before the gift of recognition, as was sustained in the case of a confirmation, because infestments upon resignation pass of course, and the superior did not consider the casualty of recognition; but in the case of confirmation, he behoved to have under his consideration that casualty, seeing he confirms the right, which *ab initio* was granted without his consent. THE LORDS repelled the allegiance, and sustained the rights granted by the ward-vassal after the resignation, and before Kininmouth's right was complete by taking sasine, as grounds of recognition; and found, that the infestment being upon resignation, albeit before the gift of recognition, did not secure itself.

Sir P. Home, MS. v. 1. No 468.

* * * P. Falconer reports the same case :

1683. *March 15.*—IN the declarator of recognition, pursued by Sir John Hay against the Lairds of Powrie and Phinhaven, the LORDS found, That the infestment of relief by Muirie to Ballegarno, bearing, that Ballegarno, as cautioner, was distressed for the particular sums mentioned in the bond, and therefore he disposed the right of annualrent out of the lands for his relief, and declared the cautioner's entry to be at a certain term therein mentioned, and that the cautioner should apply what he should uplift for payment of

* Examine General List of Names.

the creditor, was a sufficient ground of recognition *quoad valorem* of the annual-rent; notwithstanding it was *alleged*, That the cautioner, or at least the creditor, (from whom the cautioner derived right) as being executor-creditor to the common debtor, might get payment and relief otherways. It was likewise *alleged* for Phinhaven, That the lands of the Mains of Errol could not fall under recognition, because Kininmouth of Hill, since the infeftment was granted to Phinhaven, had resigned the said lands, which imported the superior's consent; likeas, within four or five weeks, he had, upon that resignation, expedite his charter, which was equivalent to a confirmation, after which, the superior could not gift the recognition to his prejudice, and that posterior deeds could not concur with anterior ones, to make up the alienation of the major part. It was *replied*, That the vassal was not denuded, either by the resignation, or by the charter, but that base infeftments, taken before sasine upon the superior's charter, might be grounds of recognition, and that there was a difference betwixt a confirmation and a resignation, seeing that the superior, by the confirmation, did confirm a real right, which had been done without his consent, but in resignation he did not so. THE LORDS found, that resignations passed in course, and therefore could not stop the recognition, and were not equivalent to confirmations; but they found, that after sasine upon the charter, which did import the King's consent, no base rights granted by the vassal, could concur to make up a recognition, to the prejudice of Phinhaven's right.

1683. *March 20.*—IN the declarator of recognition, pursued by Sir John Hay of Murie against Phinhaven and others, it being *alleged* for Phinhaven, That that parcel of the lands of Murie, whereto he had right, could not fall under recognition, because they were resigned in the superior's hands, upon a procuratory from the common author, before the alienation of the major part, and that he was in a course of diligence, having past his charter within five or six weeks, and taken sasine thereupon, so that no partial deeds, after this sasine, could be a ground of recognition to prejudge him. *2do*, That his being infeft upon the charter of resignation sufficiently secured him against the recognition, seeing the infeftment of resignation was equivalent to a confirmation, as was found in the case, King's Advocate against Creditors of Cromarty, No 60. p. 6467.; and that a confirmation, after the alienation of the major part, did secure itself, albeit it did come *in computo*, to make the rest recognosce. It was *replied* for the pursuer, That infeftments of resignation pass in course, and the superior did not consider the casualty of recognition, whereas, in the case of confirmation, he behoved to have that casualty in view, seeing he confirmed the right, which, *ab initio*, was granted without his consent. THE LORDS repelled the defence, and found, That an infeftment of resignation, albeit before the gift, did not secure itself.

P. Falconer, No 59. p. 39. & No 60. p. 40.