

* * Fountainhall reports the same case.

No 111.

IN John Hay's declarator of recognition against the Creditors, (27th Nov. 1680) No 28. p. 6960. "THE LORDS found the inhibition used by Ballegerno against the last Laird of Muiresk, being used alone, did not hinder but, by his contracting of debts posterior to the inhibition, and granting base infeftments thereon, the casualty of recognition existed, and fell in his Majesty's hands, and that the King is not concerned though his ward vassal be standing inhibited." But at this rate, none will lend to ward vassals; because in despite of their diligence, (except only a confirmation) they can make their lands recognosce when they please. Then the creditors *alleged*, The deed on which the recognition was incurred was reduced at their instance before the gift of the recognition. "THE LORDS also repelled this," because in the case of my Lord Halton with Northesk, they found the recognition of the lands of Craig incurred, tho' the disposition whereon it depended was reduced in the Parl. 1661, *ex capite abrietatis*, 29th July, 1672, *voce* RECOGNITION. Yet the Lords had found, if the disposition, the ground of the recognition, was subscribed or delivered on death-bed, it could not infer recognition, 20th July 1669, Barclay, No 57. 3241. See also a contrary decision in Durie, 10th March 1627, L. Balmerino, *voce* RECOGNITION. And in this case of John Hay, the Lords found *non refert* whether the deeds inferring the recognition were done by the person inhibited or by his heirs or assignees, being vassals for the time.

Fountainhall, v. 1. p. 122.

1683. *March.*

HIS MAJESTY'S ADVOCATE *against* The CREDITORS OF CROMARTY.

IN the declarator of recognition at the instance of his Majesty's Advocate against the Creditors of the estate of Cromarty, the LORDS decided these points, *First*, That alienations, though without consent of the superiors, yet if they be confirmed before the major part be annalized, cannot recognosce themselves, nor come in competition to make the recognition as to other lands. *Secundo*, That a confirmation after a major part is alienated, and before the gift, doth secure the rights confirmed, but must come in competition to make up the major part for the recognoscing of what is confirmed. *3tio*, That a *novodamus* doth so secure anent a recognition, that all the alienations before the *novodamus* cannot come in competition to make up the ground of recognition. *4to*, That notwithstanding the infeftments upon which recognition is craved, by likeness of lands of different holdings, and belonging to different heritors, must be considered as a ground of recognition *quoad valorem* of the whole sums whereupon infeftment

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Found in conformity with the above.

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was taken, without respect to the relief that might be expected out of the other lands. 5to, THE LORDS repelled the allegiance that the infeftments were in trust, as it was qualified, viz. That they were in the vassal's charter-chest, and that he detained the possession, except that the vassal's fraud or dole were instructed, or that the gift were to the vassal's behoof. 6to, THE LORDS repelled the defence founded upon the resignation made by old Cromarty in favour of his son, albeit bearing a confirmation of what relates to rights made to the vassal, and not to rights made by the vassal. 7mo, Repelled the defences founded upon the inhibition, which was prior to the deeds made use of for making up the recognitions. 8vo, Found that the infeftments that were *habile modo* extinguished before the concurrence of the major part, cannot come in competition. 9mo, That sasines which are intrinsically null, are not to be respected as grounds of recognition.

Fol. Dic. v. 1. p. 475. Sir P. Home, MS. v. 1. No 473.

* * * This case by P. Falconer and Harcarse, is No 60. p. 6467.
voce IMPLIED DISCHARGE and RENUNCIATION.

No 113.

Where an inhibited person had disposed with consent of the superior, a deed inferring recognition by the disponent, was found not to prejudice the inhibitor, because *quoad* him the disposition was understood to be null.

1687. July. SIR JOHN FALCONER *against* JOHN BALLANTYNE.

IN a declarator at the instance of Sir John Falconer, as donatar of recognition of Provost Græme's lands, compearance was made for one John Ballantyne, who *alleged*, That he had raised reduction *ex capite lecti*, of Provost Græme's right, as flowing by progress from George Rome, after he stood inhibited by the defender's father.

Answered, Inhibition giving no *jus in re*, the right of the lands was validly transmitted to the Provost, who being vassal, was capable to commit the deed of recognition, whereby there is *jus quæsitum* to the superior. And it was found in Powrie's case, * that inhibition whereupon the creditor had no real diligence, did not hinder recognition.

Replied, Though inhibition did not hinder the transmission of a real right, as to all effects, but only in so far as prejudicial to the ground of the inhibition, yet the right is transmitted *cum suo onere, quia nemo plus juris tribuit quam ipse habet*, and the cited practice does not meet; for in Powrie's case recognition was incurred by a person inhibited, who was full and unlimited vassal to the superior. But here the feu being transmitted after inhibition *cum onere*, Græme can only be considered a vassal as limited by the inhibition against this author, who could not by his deed prejudice the same; for if Græme's ward had fallen, and thereafter his right had been reduced *ex capite inhibitionis*, the inhibitor doing real diligence against the land, would certainly have access thereto, unless the donatar of the ward did purge the ground of the inhibition. And if inhibition would exclude the superior from the ward profits, which arise from

* The case alluded to is Hay against Creditors of Murie, No 61. p. 6470.