

*pursuers answered*, That any law or custom that then was, is now annulled and rescinded, as from the beginning. The defender *answered*, That no laws of whatsoever tenor can be drawn back by invalidate deeds, done by the law and custom for the time, especially as to matters penal, such as recognitions; so that parties having acted *bona fide*, according to any thing they could know for a rule, cannot fall in the penalty and certification of recognition, which imports a contempt of the superior, and cannot be inferred by any deed legal for the time. The pursuer *answered*, That the contempt is the same, when the vassal alienates his fee without the superior's consent; and when such alienations being by law become void, and the superior's right of recognition revived, the vassal did not after that time crave the superior's confirmation as heir; so the Laird of Gight having never sought confirmation from the King since his Restoration, it is no less contempt, than if, since the King's Restoration, he had alienated, especially seeing the King refuses confirmation to none who demand it. It was *answered* for the purchasers, That the vassal being denuded in their favour, according to the law standing for the time, his fault cannot lose their right; for though he should collude against them, yet that ought not to pre-judge them; and there being no obligation upon the vassal to seek a confirmation, to the behoof of the purchasers, they cannot be prejudged for not obtaining the same. The purchaser *answered*, That the pursuer might have craved the King's confirmation of their right, both for themselves, and in name of Gight the immediate vassal, which Gight neither would nor could oppose.

No 9.

THE LORDS repelled the defences in respect of the reply, that no confirmation was craved, neither by the vassal nor purchasers, his sub-vassals, which they might have done if they had pleased, and therefore declared the lands to be recognosced.

*Stair, v. 1. p. 656.*

1671. February 17.

WILLIAM GORDON against SIR ALEXANDER M'CUCCLOCH of Ardwall.

WILLIAM GORDON, as donatar to the recognition of the barony of Cardines, by alienation of the major part thereof, pursues a declarator of the recognition against Sir Alexander M'Culloch, who stands now infest therein; who *alleged* no process, because the pursuer produces no charter to show the lands to hold ward, neither doth he produce the infestments libelled, by which the recognition is alleged to be procured; and if he shall get a term to prove, and so liti-contestation be made, the defender will either be excluded from his defences, which he cannot propone or know before he see the infestments, or otherwise two liti-contestations may be in the same cause, by admitting of exceptions after the term; and, albeit these infestments be not the pursuer's own writs, yet he ought to have used an incident upon his summons, to have compelled the

No 10.

A donatar pursuing declarator of recognition is obliged to produce no more *in initio litis* except his gift.

No 10. havers to produce the same, and so before litiscontestation, the defender might have proponed his defence. It was *answered*, That the pursuer is obliged to produce no more *in initio litis* than his gift of recognition from the King; for the law presumeth that the King is superior, and that the lands are ward, unless the defender offer to prove the contrary. As for the infeftments, whereby recognition is incurred, they are not the pursuer's title, but *media concludendi*, which he may produce *ad modum probationis*.

THE LORDS sustained the process, and assigned a term to prove the infeftments libelled for inferring the recognition, and reserved all the defender's defences after the production thereof, in the same manner as if they were now produced.

*Stair, v. I. p. 723.*

1672. July 29.

Lord HALTOUN Treasurer-depute *against* Earl of NORTHESK.

No 11.

Recognition found incurred by alienation of the fee, though the disposition was reduced as having been obtained by circumvention.

THE Lord Haltoun being donatar to the recognition of the lands of Craig, pursues declarator thereon, upon this ground, That Craig had disposed the lands in favour of Pittaro younger, his brother's son, in March 1660, upon which disposition, sasine was taken in May 1660. This disposition having been reduced in Parliament *anno* 1662, as having been obtained from Craig by circumvention, Craig did dispoise the lands to the Earl of Dundee, who being debtor to the Earl of Northesk, he is now infeft in the lands upon an apprising against Dundee, and thereupon *allegeth* absolutor; *imo*, Because the disposition granted by Craig to Pittaro, which is the cause of the recognition, being reduced in Parliament upon a circumvention, it cannot infer recognition, which necessarily requires a deed done in contempt of the superior, alienating the fee, and obtruding a stranger vassal without his consent, which can only be a deliberate act, and not to be such an act wherein the vassal was circumvened; but in this case the vassal was not only circumvened by the motives inducing him to subscribe the disposition, but it appears by the decret of Parliament reducing the disposition, that the grounds of the reduction were, that Craig when he subscribed it was drunk, and that it having been communed that he should only ratify a bond of *tailzie*, which he had formerly granted to Pittaro, instead of that ratification, Pittaro presented this disposition wholly different, which Craig subscribed without reading the same; so that either of these grounds were sufficient alone to hinder recognition, in respect that there was no real consent given by the subscription, the subscriber having been drunk, and subscribing one writ in place of another; or at least it can be no deliberate consent to infer contempt of the superior and recognition of the fee. The pursuer *answered*, That the vassal having subscribed, which did alienate the fee, the superior was not obliged to enquire by what motives he was induced to do it,