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

No 12.
Where lands had been alienated during the usurpation, subsequent confirmation saved from recognition.

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 casuality.

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

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

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.

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 dispone 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 Auchitoul 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 hæriditatis*, 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. cognition doth proceed upon feudal diligence, whereby the vassal, contrary to the feudal contract, obtrudes a stranger to his superior, or disables himself in his feudal services, by putting away the greater part of his fee, which therefore takes only place in the cases acknowledged by law and custom, and cannot be extended to like cases, neither to cases dubious, seeing there must be still knowledge and contempt of the vassal, and here the son was minor and ignorant; and this case having never been decided, is dubious, so that it were very hard to annual the stranger's rights purchased for the money *bona fide*, much more to annul both their rights, and their author's rights, whereby the warrandice would become ineffectual; for, if the superior had consented to the vassal's right granted to the son, there could be no question of the right granted by the son, and the allowance of law is equivalent to a consent. The pursuer *answered*, That his declarator was most relevant, and founded in the common feudal customs, which is evident to be received by us very anciently by the act of Parliament, R. 2. Anent feuers of ward-lands, evidencing, that before that time feus of ward-lands might not be granted: It is true, that late custom hath introduced an exception of alienation by vassals to those who, by the course of law, would necessarily succeed them, and that because the superior thereby could have no damage, the fee remaining in the vassal's family in the same way as it would have been by succession, and which takes not place in alienations made by one brother to another, or to a second son, or to a person in the tailzie, not being in the first member, because, albeit there were no son born when the vassal dispones to his brother, yet because a son may be born, the brother is but a stranger; and this exception doth imply and import, that the alienation to the son shall be without hurt to the superior, so that the son can do no other deed than if he were vassal, and his apparancy states him *fictione juris* as if he were vassal; for if the eldest son should have given disposition and infeftment, either before himself was infeft after his father's death, or before he got any right from his father, yet if he survived his father, and so became to have right, his former disposition to a stranger would make his supervening right to accress to that stranger, and so would alienate the fee and infer recognition; or if he granted a feu, when the act of Parliament anent feus stood valid, that feu would be good, if thereafter he became to be infeft as heir; or by his annual rebellion before his father's death, his liferent would fall to his superior when he became to be vassal; and the allowance of this exception is no ways equivalent to the superior's consent, or if it were, it could but reach a qualified consent, that the superior should not be prejudged by the son's alienations. Neither is the minority of the son or vassal regarded in recognition more than in horning, or other legal consequences; and it is the fault of the vassal which is respected, who, if he had disponed to his son, might have included a clause irritant, that the son might not dispone in prejudice of the superior, but having disponed to him, his heirs and assignees, without limitation, so he hath given him an express power to dispone to what stranger he pleased, so that qui facit per alium facit per se, the vassal

giving that power to his son, doth by his son dispone to a stranger; and as this is quadrant to law, so if the contrary were sustained, here were an approved way laid down to evacuate all recognitions by disponing to the eldest son, and he to strangers. No 13.

The Lords found the libel relevant, and sustained the recognition upon the son's alienation of the major part.

In this case, the son did not purge the dispositions made by him, during his father's life, and did survive his father, and so became directly vassal; but it did not appear, whether he was actually served and infeft in the lands as vassal.

Fol. Dic. v. 2. p. 315. Stair, v. 2. p. 275.

1676. *January* 7. Cockburn *against* Cockburn.

No 14.
Recognition sustained upon a wife's infeftment of ward, in the year 1643, though, by the laws then standing such were allowable, seeing after the rescinding of these laws, there was no application made to the King for confirmation.

Sir James Cockburn of Ryslaw pursues declarator of recognition of the lands of Easter Prantunan, holden ward of the King, as fallen in recognition, by an infeftment granted by James Cockburn of Ryslaw, to Ninian Cockburn his natural son, *anno* 1643; and calls Cockburn of Chouslie, as apparent heir to Ryslaw; who *alleged* absolvitor, because, by the act of Parliament 1641, it was lawful to set feus of ward-lands holden of the King, and albeit these acts be rescinded, yet there is a *salvo* of rights acquired by them; and though they were not, the granting of such rights at that time could be no contempt or ingratitude against the superior. It was *answered*, That though there was no contempt at that time, yet it became a contempt, in so far as no application was made to the King, or Exchequer, for a confirmation after his return, and after the rescinding of these acts, as hath been frequently sustained by the Lords.

The Lords repelled the defence, in respect of the reply.

Fol. Dic. v. 2. p. 315. Stair, v. 2. p. 393.

1678. *February* 14. Arbuthnot of Know *against* Margaret Straiton.

No 15.

The Lords found the lands recognosced, but the Lady *alleging* she had a right of liferent, by virtue of the first infeftment of these lands granted to her husband, whereby he acquires the lands to himself and her, the longest liver of them two, whereby they are publicly infeft, the Lords sustained this infeftment to continue her liferent.

Fol. Dic. v. 2. p. 316. Fountainhall, MS.

*** The same case is afterwards mentioned also by Fountainhall.

November 6. 1678.—In the improbation pursued by Alexander Arbuthnot against Margaret Straton, for improving a bond granted to her husband betwixt her contract and marriage, the Lords declared they would summarily call it in the Inner-house, only upon fourteen days advertisement, as being