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biters, and therefore could not quarrel the bond filled up by them, and so had no reason to consider or determine the rest of the points.

Stair, v. 2. p. 709.

*** Fountainhall reports this case:

ALLEGED, The bond charged on was in obedience to a decreet-arbitral, which was illegal. *Answered,* The accepting the discharge was a homologation of it. THE LORDS ordained the arbiters to be examined, if they made known to Auchterblair what sum they had filled up in his bond, in regard he had implicitly accepted the discharge.

Fountainhall, MS.

1683. *February* 2. JAMES BUCHAN *against* JAMES FORBES, and Others.

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A gift of recognition, being granted by one who had a base infeftment, the donatar's base infeftment was found to be no ground of recognition to make up the major part, because it was his fault he did not confirm.

IN the action of declarator of recognition, pursued at the instance of James Buchan of Ockhorn against James Forbes of Savock, it being *alleged,* That Forbes of Watterton and Petrie their base infeftments could be no ground of recognition of the barony of Auchnacoy, because these sasines being taken in the English time, when the casualties of recognition were suppressed, shortly after the King's restoration, they required their money contained in their rights, and thereby loosed the wadsets, and that they never possest by virtue of these rights after the King's restoration;—and it being *replied,* That in taking of the sasine without the superior's consent, there was contempt of the superior that occasions recognition; and the recognition does not absolutely loose the wadset, seeing always it is in the power of the creditor to return to his real right;—the LORDS found the defence relevant. And it was further *alleged,* That the pursuer's sasine of the lands of Ockhorn could be no ground of recognition of the barony of Auchnacoy, whereof it is alleged that it is a part, because it was the pursuer's fault that he did not make application to his Majesty for confirmation of his right; and so having omitted to confirm his base right, it cannot prejudge the defenders by helping to make up the alienation of the major part, and so make their interest to recognosce. "THE LORDS found, that although the pursuer's sasine might be a ground of recognition in favours of a third person, yet the gift being granted to the pursuer, his own base infeftment could be no ground of recognition to make up the major part."

Fol. Dic. v. 2. p. 82. P. Falconer, No 46. p. 25.

*** Sir P. Home reports this case:

1683. *March.*—JAMES Buchan of Ockhorn having obtained a gift of recognition from the King, of the lands of Auchnacoy, Ockhorn, and patronage of

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the church of Logie; and the pursuer having produced several infeftments of annualrent, and upon wadsets; *alleged* for the defender, That the greatest part of these infeftments being granted the time of the late usurpation, when it was lawful to grant feu infeftments of ward-lands, these can be no ground of recognition, especially seeing the creditor did not continue to possess by virtue of these rights after the King's restoration, as was decided in the cause of Sir George Kinnaird and Forbes of Auchintoul; and others of these infeftments were made moveable by requisition before the King's restoration; and as to the infeftments of the lands of Ockhorn, that can be no ground of recognition, because it being granted to the pursuer himself, if was his own fault he did not confirm it, and *nemo debet lucrari ex suo dolo vel culpa*; several of the infeftments are loosed by requisition, and so becoming extinct, could not be a ground of recognition; and the patronage of the church of Logie, being a part of the ward-holding, ought to be computed as a part of the lands, as it was worth the time of the granting of the base infeftment, which was the hail value of the teinds of the parochine, which then did belong to Auchnacoy in place of the patronage, by the act of Parliament in the year 1649; and, albeit the act in the English's time concerning ward-holdings, and the act in the year 1649 were rescinded, yet the recognition must be considered according to the law standing for the time when the base infeftments were granted. *Answered*, That the parties to whom the base infeftments were granted, not having obtained a confirmation for several years after his Majesty's restoration, and that the former laws were rescinded, did infer recognition in the same manner as if the infeftments had been granted after the act of Parliament in the year 1661, rescinding these former laws, as is clear by many decisions; and, as such infeftments would have inferred recognition, albeit the parties by virtue thereof had not entered to the possession; so by that same reason, their neglecting to obtain confirmance after the act rescissory must infer recognition, albeit they did not possess by virtue of their right; and the recognition did not fall by the disposition to the pursuer of the lands of Ockhorn, and albeit that disposition had been in the last right that up the alienation of the major part of the barony, *quia nihil impediebat* but he might take gift of recognition to fortify and secure his own right; and the using of requisition, albeit it may loose the real right and make the same moveable, yet that being *jus acquisitum* to the King by the infeftment, it did infer recognition, unless not only requisition had had been made, which might have been passed from, but that the right had been actually renounced before the major part of the barony was alienated; and the patronage of the church, which is a thing of itself which does not yield any rent, could not come in the computation; and albeit the patron, by the act of Parliament 1649, had right to the teinds, yet that being *surrogatum*, and allowed in place of the patronage, *sapit naturam surrogati*, and so cannot come in competition, especially seeing that act is rescinded. The Lords found the defence relevant, that the defenders required the sasines contained in their

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rights, by which requisition the wadset was loosed, unless they had possessed by virtue of these rights, and since the King's restoration; and found, that albeit the disposition of the lands of Ockhorn, if it had been granted to a third person might be a ground of recognition; yet, the gift being granted to the pursuer, they found his own base infeftment upon the foresaid disposition, could not come in the calcul, to make up the major part of the lands, and so could be no ground of recognition.

Sir P. Home, MS. No 440.

*** Harcarse also reports this case:

1683. *January*.—BUCHAN of Auchnacoy having in the English time, disponed the major part of his land, by granting several base-infeftments, whereof one was granted to his brother, who, after the King's return, procured a gift of recognition, and pursued declarator;

Compearance was made for Forbes of Saak, &c. who had right to the lands disponed, and *alleged*, That the alienation was at a time when it was lawful to alienate ward-lands without the superior's consent; and the defenders in the year 1662, after the act rescissory, having made a requisition of the wadset sums, and thereon apprised before any gift of recognition, this must be equivalent to the seeking of a confirmation from the King after his return; for the defenders intending to pass from the wadset, could not crave a confirmation; nor can they be said to have been in contempt, suppose requisition had been longer a using after the act rescissory than it was, seeing they were never in possession of the wadset.

Answered for the pursuer; Though the alienation was lawful *ab initio*, yet the defenders not having applied for confirmation, or made requisition immediately after the act rescissory, the defenders began from that time to be guilty of contempt, as if the alienation had been made immediately after the act rescissory. And in the case of recognition, *perinde est* whether the receiver of the right possess thereby or not, it being incurred by the taking sasine.

"THE LORDS having considered the allegeance and circumstances mentioned, found recognition *quoad* these lands not to be incurred."

Thereafter it was *alleged* for the defender; That one of the wadsetters *a me* having confirmed, and expede the infeftment *a me* during the English time, recognition could not be incurred; which allegeance the LORDS found relevant.

Then it was *alleged* for the defenders; That the pursuer after the King's return ought to have craved a confirmation of his right, and not to have taken the gift of recognition in defraud of his brother the common debtor, or to make use of the same against the defenders farther than for a proportion of the expenses of obtaining the gift, and for security of his own lands.

Answered; A confirmation could not have saved the pursuer's lands without a *novodamus*. And at the passing of his gift, he gave a back-bond to the Ex-

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chequer, that being secured of his own lands, and of some personal debts due to him by his brother the disponer, he should make no further use of the gift. Again, it was free for the King to grant the gift in favours of the pursuer, or any body else; and the pursuer's taking of the gift was not a fraudulent, but a rational and necessary course; nor can the pursuer be suspected of collusion with his brother, to make the recognition be incurred in prejudice of the other creditors, his brother being one of those that strenuously quarrelled his right; and there being several alienations made to others after that in favours of the pursuer.

"THE LORDS found, that the pursuer's own lands, whereof he neglected to take confirmation, ought not to be brought *in computo*, for making up the major part, in order to infer recognition; and that the pursuer could not use the gift to the prejudice of the defender; nor could thereby secure the personal debts due to him." There was no difference of opinion among the Lords about this interlocutor, which seems irregular. After it was carried by vote, a settlement was recommended from the Bench, but that took no effect.

1688. *July*.—JAMES BUCHAN having raised reduction of the decreet mentioned above, the debate was resumed; but the LORDS considering, that it was *res judicata super iisdem deductis*, they were unwilling to meddle with it; but recommended a settlement to the parties.

Harcarse, (REMOVING.) *No* 824. *p*. 230. & *No* 831. *p*. 239.

*** Fountainhall also mentions this case:

1683. *February* 7—JAMES BUCHAN of Ockhorn's recognition of Auchnacoy discussed, and Forbes of Savock assoilzied from it, as not incurred.

1684. *February* 29.—FORBES of Savock or Auchnacoy *contra* Buchan of Ockhorn being reported by Redford; the LORDS ordained them before answer for clearing the matter of fact, to condescend to whom he paid the sum of the wadset, (whether to M'Ghie, or to) and to produce the second contract of wadset, by which it is alleged, the first is innovate and past from.

Fountainhall, v. 1. *p*. 216. 276.

1685. *November* 24. ARCHBISHOP of ST ANDREWS *against* TOWN of GLASGOW.

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A BISHOP having set a 19 years tack of his tithes for a small duty, but a large grassum, after his *conge d' eslire* was come down for another bishoprick; and, after his translation, being charged for the grassum; it was *objected*, That the tack was null, as being granted after the setter ceased to be Bishop of that dio-