1679. *November* 27. GRANT *against* GRANT.

No 16.
A person who had received from arbiters the discharge of a process, found not entitled to challenge a bond which had been put blank in their hands, and filled up by them.

MR JAMES GRANT having charged Grant of Auchterblair upon his bond for 2000 merks, he suspends on this reason, that this bond was put blank in the hands of arbiters, by the charger and suspender, that they should hear both parties anent a process of four swine and 26 sheep alleged spuilzied from the charger's tenants; and that without hearing of parties, or taking of probation, the arbiters had filled up 2000 merks, which was most exorbitant, in which the arbiters did chiefly proceed upon an act of litiscontestation, patched up by the charger, by collusion of a clerk without authority, bearing, That the suspender's defence that he bought the swine *bona fide*, and therefore was free at least of the violent profits, was repelled, unless he did allege that he bought them in a public market; and as to the sheep, that they were intromitted with by warrant from the Laird of Grant, whose officer having riped aud found sheep skins in the houses of two widows, on the charger's land, for which they could give no good account, he did fine them in L. 50, and thereupon their sheep were taken from them by the suspender. It was *answered* for the charger, That it is known how far the violent profits of brood swine may go; and by the declaration of the arbiters produced, it is instructed that they did hear both parties, and did take probation, by which it appeareth, That a tenant of Grant's having the swine in a poind-fold, upon account of skaith, the owner did offer satisfaction, and yet the suspender intromitted with the swine, and only promised to warrant the tenant who poinded them, albeit both parties did apply to him as Grant's Bailie, whereby he was *in mala fide* to buy them, much less to take them as he did; and as to the sheep, it is not alleged that there was any poinding upon a sentence, but a summary seizing of the sheep, as belonging to thieves; but the main reason insisted on was, that albeit bonds granted upon *compromit*, are in effect decreets-arbitral, and may be reduced *ad arbitrium boni viri*; yet where the parties consigned a bond, and a discharge in the arbiters' hands, without any other submission, but leaving the bond blank to be filled up by the arbiters, if the consigner of the bond accept of the discharge, and receive it from the arbiters, he can never come against the bond granted for the discharge, no more than if he had subscribed the decreet-arbitral after it had been pronounced; but if he did not acquiesce and approve the arbitriment, he should have refused the discharge and protested; and if this point be not holden firm, that mean of terminating pleas, most useful to the kingdom, is cut off by consigning of mutual writs, without any other submission, in which case, if they accept and receive the writ in their favours, they can never quarrel the writ in favours of the other party.

THE LORDS found the foresaid answer relevant against the reasons of suspension, That the suspender had received the discharge of the process from the ar-

No 16. 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.

No 17.
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