

No 109. a declarator, and the decret being only effectual after eviction and liquidation; which accordingly was declared by the Lords.

Betwixt the same parties, it was *alleged*, That the defender's right was ratified by a creditor, who had a comprising expired; so that the pursuer had no interest to question the defender's right; it was *answered*, That the pursuer desired only such right as was after the inhibition to be reduced, without prejudice of any other, which he could not nor was obliged to debate *hoc loco*.

THE LORDS, notwithstanding found the allegiance relevant. See LEGAL DILIGENCE.—REDUCTION.

Dirleton, No 116. & 117. p. 49.

No 110.

1680. *January 7.* M'LELLAN *against* MUSCHET.

Inhibition was found not to reach a renunciation of an infeftment of annual-rent or discharges granted by the person inhibited upon true payment. See act of sederunt, 19th February 1680, 'anent the taking renunciations from persons inhibited.'

Fol. Dic. v. 1. p. 475. Stair.

* * * This case is No. 10. p. 571, *voce* ANNUALRENT, INFESTMENT OF.

1680. *December 16.*

HAY *against* The LADY BALLEGERNO and the LAIRD of BATHAIKE.

No 111.

Inhibition was found not to exclude or burden a recognition.

JOHN HAY of Muirie as donatar to the recognition of the lands of Powrie, pursues declarator thereon. Comparance is made for the Lady Ballegerno, as heir to her father, who had a wadset upon a part of the lands, and who had used inhibition; and likewise Bathaïke compeared, having also inhibited and raised reduction of the ward-vassal's author's right, and of his own right and the deeds of recognition, as falling in consequence. It was *alleged* for the defender, *imo*, That recognition is rigorous and odious, and though it was far extended when ward-holdings were gratuitous, and granted for fidelity and service to the superior, yet now being commonly onerous, and importing no such personal service, recognition ought to be favourably and moderately sustained; and though it doth import, that the ward-vassal's atrocious delinquence against the nature of the feu, should make his right recognosce and return to the superior, without any burden not consented to by the superior, or introduced by law, yet the effect of recognition is excluded in many cases; as, *imo*, An alienation upon death-bed was found by the Lords not to infer recognition in the case of Cap-

tain Barclay and the Lady Towie, upon the 20th of July 1669, No 57. p. 3241. No 111.

2do, The law restores minors when they are lesed, which would take effect against infestment granted by them, whereby the fee recognosced, much more if that infestment were given by a minor, having curators not consenting, and which is alike in deeds done by prodigals after interdiction published without consent of the interdictors, who are the prodigal's curators; or if a creditor were *in cursu diligentia*, as having denounced lands to be apprised, and failing in no diligence, the debtor should *medio tempore* dispone, and thereby prefer another creditor who had done no diligence. And here in the case of Bathaike, he hath a reduction upon his inhibition against his author, whose deed hath incurred the recognition, which would reduce his author's right, and in consequence the right inferring the recognition; and there is more reason that inhibitions should exclude recognition than any of these cases, it being a remeid introduced by statute, that creditors obtaining letters of inhibition, published and registrated, 'prohibiting his debtor and all the lieges to grant any public or private infestments prejudicial to his debt,' that therefore the dispositions incurring this recognition, being *spreto mandato* of the King's public proclamation, they are null, and thereby reduced; and the defenders crave them so to be reduced, and therefore they may be declared free of the recognition as to them; for the defenders do not oppose the recognition simply, but only in so far as it may exclude their debt; and seeing the ground of the recognition is no atrocious deed or crime against the superior, but an alienation of a part of the fee for a just and adequate cause, it cannot be accounted as a proper crime, as killing, or invading or betraying the superior; and the law having taken off the true ground of recognition by alienation of the major part of the fee, and obtruding of a stranger or an enemy to be a vassal to the superior, in place of his vassal whose family he had chosen and entrusted; for by the acts anent apprisings and adjudications, the superior can refuse no creditor apprising; and if this be sustained, it will be easy for ward-vassals, who have much debt, to do a deed of recognition, and thereby shun all their debts, knowing they may easily compone with a superior. The pursuer answered; That the defence upon the inhibition is not relevant to exclude the recognition; for though inhibitions be an excellent remeid introduced by law, yet it is only against posterior voluntary deeds of the vassal; who though he stand in fee of lands, yet cannot disappoint the creditor inhibiting; but inhibitions do not declare such rights null, but that they are only annullable by way of reduction and restitution, to the effect that the ground of the inhibition may affect the debtor's lands; but there is neither law nor custom to extend inhibitions further, or any way against superiors; nor was there ever such a ground insisted on, much less sustained by the Lords, though it could not but very frequently occur, and wherein the kingdom hath generally acquiesced; so now to open a door to the contrary would breed innumerable debates; for whereas, there is a practique observed by Durie, 10th March 1627, between my Lord Bal-

NO III. merinoch and Pitmedden, *voce* RECOGNITION ; it is clear that there were not only inhibitions, but apprising and infeftment before the deeds of recognition. And as to the exception on deathbed, the law presumes persons upon deathbed to be weak and incapable to do deeds of importance ; and that is a presumption *juris et de jure*, admitting of no contrary probation ; so that, though the person upon deathbed could be proved to be of a clear judgment, it would not be sustained. And albeit infeftments granted by minors having curators, or lavish persons having interdictors, without their consent, might exclude recognition ; yet law hath declared these deeds *ipso jure* null ; but that cannot be extended to infeftments by minors acting by themselves, having no curators, or with consent of their curators ; for such deeds are valid, but law hath allowed restitution in *integrum* against the contractors, but never against the superior ; otherwise it might be pleaded against the escheat or liferent of minors falling by their deeds in minority, which was never pretended ; and, though they were prejudicial to creditors, that could not take away the superior's right, but there is none. For if the King be superior, he grants confirmations of course to all that require them ; and if a subject, the creditor may forbear to lend his money, unless he get infeftment with consent of the superior ; or if he hath followed the faith of his debtor, and begin to suspect the same, he hath easy remeid by apprising or adjudication, whereupon the superior must receive him upon payment of a year's rent. And as to the fraud of ward-vassals, in no case can fraud be extended to those who are not *participes*, as the superior, who in this case is the King. But if a superior could be instructed colluding, his own fraud would be relevant against him, but never his vassal's. And as to the favour of creditors, it cannot go beyond law ; and there is a much more favourable case, when persons *bona fide* acquire feus of ward lands far within the half ; yet if another vassal add an alienation, which will exceed the half, the recognition will unquestionably take away the first feu, though valid and legal at the time when it was granted ; for therein the purchaser follows the faith of his author, without consent of the superior. And as to Bathaike's defence, that the vassal whom he inhibited was not *in culpa*, for he did never alienate, but his singular successor ; so that this reduction is against his author's right, annulling in consequence his successor's right ; it was *answered*, that there was no difficulty in this case, seeing reduction and diligence was not insisted in before the deed of recognition, and all diligence used for attaining infeftment ; for the apprising being neglected, and no infeftment attained thereupon, it could not exclude recognition.

THE LORDS found, that the inhibition simply used could not exclude or burden a recognition ; and found, that Bathaike's reduction being but lately raised after the deeds of recognition, and this process of declarator, it doth not alter the case ; and that it was alike whether the deeds recognosced were done by the person inhibited, or by his heirs and assignees being vassals for the time.

Fel. Dic. v. 1. p. 475. Stair, v. 2. p. 816.

* * 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

No 112.
Found in conformity with the above.