No 2. charter, and for one duty, yet, in respect the said lands lay discontiguous, and there was no union, it could never save the defender from the fall of recognition, if he analzied; nam ut sasinæ fuerunt tenementa diversa, et non unita And also, if a lord or baron hold of the King three or four baronies in ward, if he analzie most part of any one of them, the same may be recognosced, and fall in the King's hands, nam quæ est ratio totius quoad totum, eadem est ratio partis quoad partem, et si vasalus totum feudum alienaverit, totum omittit, ut in F. Lib. 2. T. 38. De vasallo qui contra constitutionem Lotharii.

The Lords, after long reasoning at the bar, and amongst themselves, found the exception relevant, in respect of the charter and disposition, which was, that all that was contained in one infeftment, and under one duty, albeit there was no union alleged.

Fol. Dic. v. 2. *p.* 313. *Colvil, MS. p.* 459.

1591. *December* —. King's Advocate *against* The Earl of Cassilis.

No 3. Alienation in favour of the nearest heir does not infer recognition.

A brother was not accounted nearest, where the party being young, and married, was *in spe* to have children.

The King's Advocate, and Mr David Mackgill, his son, as donatar to the gift of recognition of the lands of Culzean, pursued the Earl of Cassilis and Sir Thomas Kennedy, tutor of Cassilis, to hear and see the L. 20 land of Culzean decerned to come under recognition, by reason of alienation made thereof by Gilbert Earl of Cassilis, to the said Sir Thomas, his brother-german, they holding ward of the King. *Excepted*, That they fell not under recognition by the reason foresaid, because, at the time of the making of the said alienation, the said Sir Thomas was heir-apparent to the Earl, he having no lawful children procreate of his own body; and therefore it could not be counted an alienation *tanquam extraneæ personæ*, seeing he was in the mean time *hæres successurus*. *Replied*, That the Earl was all the time married, and so *habebat sub spe hæredes de suo corpore*: Likeas, he thereafter procreated children that succeeded him, so that his brother could not be accounted his nearest and apparent heir, as long as he was in hopes of children, being young and married. The Lords repelled the exception, and thought Sir Thomas could not be counted my Lord's nearest heir, in respect of the marriage, and children procreated thereafter.

Fol. Dic. v. 2. *p.* 315. *Spottiswood*, (Recognition.) *p.* 251.

*** Colvil reports this case:

The King's Advocate, and Mr David M'Gill, his son, as donatar to the gift of recognition of the lands of Culzean, to be decerned to come under recognition, because there was alienation made of the said lands, which were holden

ward of the King's Majesty, by Gilbert Earl of Cassilis to Sir Thomas Kennedy his brother-german. It was *excepted*, That the lands fell not under recognition, because of the disposition made to the said Sir Thomas; because, at the making thereof, the said Sir Thomas was his nearest and apparent heir, he having no lawful bairns procreated of his own body, and so the alienation made to him, who was heir before, to succeed to him, could not be accounted *tanquam extraneæ personæ*. To this was *answered*, That the said Earl, at the making of the said alienation, was married, and so being married *habebat hæredes de corpore suo sub spe*; and so his brother-german could not be accounted to be his nearest and apparent heir, so long as he is joined in marriage, and had any hope to get bairns procreated of his own body, as he thereafter procreated bairns, and the Earl of Cassilis that is present Earl. THE LORDS found that the said Sir Thomas, at the time of making the alienation, could not be accounted his nearest apparent heir, in respect of the marriage, and the bairns procreated thereafter. No 3.

Colvil, MS. p. 465.

1612. *February* 28. RAE *against* Lord KELLIE. No 4.

THE LORDS found an infeftment granted by the goodsire to the grandchild, with consent of the son, to be a cause of recognition, because the grandchild was not immediately to succeed.

Fol. Dic. v. 2. *p.* 315. *Haddington. Hope.*

*** This case is No 53. p. 6459. *voce* IMPLIED DISCHARGE.

1623. *March* 25. L. HUNTHILL *against* RUTHERFORD. No 5. Declarator of recognition.

IN an action betwixt L. Hunthill and Rutherford, an infeftment being given of lands fallen by recognition, and thereupon decreet of removing obtained against the tenants; thereafter, upon resignation by him who acquired the right of recognition, another being infeft in these lands, and pursuing action of succeeding in the *vice*, against one who had entered to the possession of him, against whom the said decreet of removing was obtained before, as said is, at the author's instance; who compearing, and *alleging* the pursuer's right and sasine of the lands, to be no sufficient right and title, which could give him the right to the lands, or to produce this action, because it depended upon the right of recognition, acquired by his author, which was never declared, and no declarator of recognition being obtained upon the said first infeftment, the same, and all other subaltern rights depending thereupon, was not sufficient; this