

1669. December 14.

MAITLAND of Pitrichie *against* LESLIE of ——— and the Laird of GIGHT.

No 9.  
Alienation  
during the  
usurpation.

IN a declarator of recognition pursued against the Laird of Gight, for disposing the most part of the barony of Gight without the King's consent, compearance was made for Leslie, who *alleged*, That the gift could not be declared as to the lands disposed to him, because his right was granted after the year 1641, at which time it was lawful to the King's vassals to dispoise their lands which hold ward of the King, without his consent, notwithstanding of the act of Parliament 1633, which, as to the disposing ward lands to be holden feu, did put the King in the same condition with all other superiors who were the King's vassals, who had power to do the same by act of Parliament 1606. It was *answered*, That the Parliament 1641, and subsequent Parliaments during the troubles, and whole acts thereof, were rescinded, so that no allegiance could be founded thereupon. It was *replied*, That the act rescissory could only be respected as to the future, but not militate *ad praterita*, seeing vassals having a standing law for the time, could not be said to have contemned nor neglected the superior of whom they held ward, which is the only ground of law whereupon recognition is enforced; and the subjects were *in bona fide* to acquire such rights, and give out their moneys, being so warranted as said is. It was *duplied*, That the act rescissory did take away and rescind all these Parliaments, as if they had never been, and their acts were made; and, as to any private rights, or securities founded thereupon, they were only declared to stand valid during that or the next Session of that Parliament 1661, until they should be further considered, which never having been done in any of these sessions of Parliament, the condition was never purified, and these rights were *funditus* taken away; yet, by a late practick, Sir George Kinnaird against Reid of Knappe, the LORDS did decide it *in terminis*, that there was no ground for a recognition. Notwithstanding of the said practick, and reasons adduced, the LORDS were much divided in their opinions, and, by one vote only, they did sustain the declarator of recognition, which was a very hard decision.

*Fol. Dic. v. 2. p. 315. Gosford, MS. p. 87.*

\* \* \* Stair reports this case :

1669. December 15.—MAITLAND of Pitrichie having obtained the gift of recognition from the King, of certain ward-lands, held by the Laird of Gight of his Majesty, pursues declarator of recognition upon Gight's alienation of the lands; wherein compearance was made for the purchasers thereof, who *alleged*, Absolvitor, because the time of their alienation, by the law and custom in force for the time, such alienations without consent of the superior were valid. The

*pursuers answered*, That any law or custom that then was, is now annulled and rescinded, as from the beginning. The defender *answered*, That no laws of whatsoever tenor can be drawn back by invalidate deeds, done by the law and custom for the time, especially as to matters penal, such as recognitions; so that parties having acted *bona fide*, according to any thing they could know for a rule, cannot fall in the penalty and certification of recognition, which imports a contempt of the superior, and cannot be inferred by any deed legal for the time. The pursuer *answered*, That the contempt is the same, when the vassal alienates his fee without the superior's consent; and when such alienations being by law become void, and the superior's right of recognition revived, the vassal did not after that time crave the superior's confirmation as heir; so the Laird of Gight having never sought confirmation from the King since his Restoration, it is no less contempt, than if, since the King's Restoration, he had alienated, especially seeing the King refuses confirmation to none who demand it. It was *answered* for the purchasers, That the vassal being denuded in their favour, according to the law standing for the time, his fault cannot lose their right; for though he should collude against them, yet that ought not to pre-judge them; and there being no obligation upon the vassal to seek a confirmation, to the behoof of the purchasers, they cannot be prejudged for not obtaining the same. The purchaser *answered*, That the pursuer might have craved the King's confirmation of their right, both for themselves, and in name of Gight the immediate vassal, which Gight neither would nor could oppose.

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THE LORDS repelled the defences in respect of the reply, that no confirmation was craved, neither by the vassal nor purchasers, his sub-vassals, which they might have done if they had pleased, and therefore declared the lands to be recognosced.

*Stair, v. 1. p. 656.*

1671. February 17.

WILLIAM GORDON against SIR ALEXANDER M'CUCCLOCH of Ardwall.

WILLIAM GORDON, as donatar to the recognition of the barony of Cardines, by alienation of the major part thereof, pursues a declarator of the recognition against Sir Alexander M'Culloch, who stands now infest therein; who *alleged* no process, because the pursuer produces no charter to show the lands to hold ward, neither doth he produce the infestments libelled, by which the recognition is alleged to be procured; and if he shall get a term to prove, and so liti-contestation be made, the defender will either be excluded from his defences, which he cannot propone or know before he see the infestments, or otherwise two liti-contestations may be in the same cause, by admitting of exceptions after the term; and, albeit these infestments be not the pursuer's own writs, yet he ought to have used an incident upon his summons, to have compelled the

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A donatar pursuing declarator of recognition is obliged to produce no more *in initio litis* except his gift.