to the landlord, *omnium mobilium quæ induxit inquilinus in domum conductam*, and to the master *in prædiis rusticis in omnia invecta et illata a colono; item omnia bona in navi hypothecantur pro naulo.* And it were a very unreasonable faschery and vexation, yea, both impertinent and distasteful, to put landlords to inquire or try if the goods that are in their tenants' houses be theirs, yea or no, seeing the finding of them in their possession presumes and induces the property.

REPLIED,—It is extremely absurd to think that if I should lend or depositate and set by any of my household stuff beside a friend, that his landlord should have a right of detention of my goods, albeit I prove to him that they are mine, which takes off that weak presumption of being found in his possession.

And this privilege of tacit hypothecation ought not to be stretched beyond the true limits of law and material justice, or to give him an interest in the goods within the house, any farther than the same belongs to his tenant; and I think it would be so found by the Lords: yet the present case seems to be clothed with some more favourable circumstances; as, that she was the wife, and only continued her former possession, and had used them as her own *jure familiaritatis* two whole years; which in moveables may be enough to prescription, if not of the property against the true owner, yet at least *ad hunc effectum* to give the landlord a hypothec in them for the mail addebted by her who had so peaceably possessed them, though without a title. But whatever be in this, there is no doubt but the landlord's hypothec will stand good in them *quoad* a third: because, as relict, the law appoints her a third; and though she had not legally claimed it in her lifetime, nor established the right thereof formally in her person, yet the landlord, as creditor to her, may now seize upon it. *L.* 41 *D. de acquirenda possessione. Vide omnino* Matthæum *de Afflictis, decisione Concilii Neapolitani* 184.

Advocates' MS. No. 371, *folio* 150.

1672. *June, July, and November.* LORD HALTON, Treasurer-depute *against* The EARL OF NORTHESK and other creditors of the EARL OF DUNDIE.

1672. *June* 22.—THIS following point went to interlocutor: whether or no a *de novo damus* from his majesty does not import to the vassal receiver, discharge, liberation, and, exoneration of ward, marriage, feu-duties, and all other casualties due furth of those lands preceding the date of the said charter. Though this was looked upon as a principle wherein there could be no controversy, yet it was alleged by some, that unless it were superscribed by his majesty's own hand, he could not be prejudged by such gifts, and that the sloth or negligence of his officers of state could infer no wrong to him. *Vide* the 14th act of the Parliament 1600.

This is a miserable and pitiful way of venting our wit, by shaking the very foundations of law, and leaving nothing certain. But the true source of all is from the woful divisions in the house, especially between the president and the advocate; each of them raking, though from hell, all that may any way conduce to

carry the causes that they head. *Flectere si nequeo superos*, &c. *Vide supra*, 339, [15*th June*, 1672.] *Advocates' MS. No.* 344, *folio* 135.

July.—THE treasurer-depute, as he who has obtained the gift of the marriage of the late Earl of Dundie, which marriage existed through the decease of the Lord Dudhope, father to the said earl, pursues declarator for the avail of the said marriage, against my Lord Dundie's whole creditors. In which action it was ALLEGED for the EARL OF NORTHESK, that no marriage could be declared against him, nor could the avail thereof (whatever the Lords shall modify the same at,) ever affect the lands of Craig, which were transmitted to him by progress from the said Earl of Dundie, whose marriage was now sought to be declared; because, upon the said earl's resignation, and a signature superscribed by his Majesty's own hand, he stood infeft in these lands with a *de novo damus*, which must import to him an exoneration and discharge of all casualties due furth of these lands preceding the day and date of the charter.*

The Lords found the *de novo damus* did not discharge this casualty of the marriage, because there being many casualties named in the said clause, viz. wards, reliefs, non-entries, escheats, forfaultures, bastardies, recognitions, last heir, &c. the marriage was not expressed; and as to the general clause, whereby his majesty gives, grants, and dispones the said land, and all right, title, interest, or claim of right he has thereto, by whatsoever manner of way, preceding the date of these presents, they found not that sufficient to bear a discharge of a marriage, because the king transmits nothing by these general clauses, and he can give nothing away but what is specially named: that a *de novo damus* secures allenarly the property of the land, but does not secure against prior casualties, because his majesty cannot be prejudged by the negligence of his officers.

I never observed an interlocutor so generally displease as this did. I found no lawyer, neither great nor small, would own or seek to justify it, but all cried out that the foundations were shaken; the security of the lieges was overthrown; all their rights were branled; that the screwing up the casualties of superiority at this rate, would make the whole kingdom think the king the worst and unsurest superior they can hold of. It made all in mockery speer who was pursuer, and if he had a brother. My Lord Halton's own advocates confessed it was horribly arbitrary and unjust. Sir George Lockhart, who was one of them, asserted that his goodfather would have quit his land sooner than passed such an interlocutor. I never heard it doubted but a *de novo damus* did cut off all bygones, that they could never be sought; that it had been ever so advised by all lawyers; that because it excluded his majesty from all precedings, therefore the composition was raised considerably higher than what it used to be in ordinary cases, where that clause was put in; that it passed for an uncontroverted principle, (if so be we have any in our law,) that if a subject superior give a charter to his vassal with such a clause, it undoubtedly cuts him off from all he can claim out of that land preceding its date; that a *de novo damus* is an original gift, and has all the words of a new donation, *videlicet, exonerando, transferendo, et extradonando*;

* The farther arguments that were urged, especially from the practique in 1611, and Peirston's practique in 166–, are to be seen in the informations beside me.

that the king gives the land by this clause *prout optimus maximus est*, and so free from all antecedent incumbrances; that their finding the marriage not to be discharged, because not expressed, was nought save a silly evasion, seeing, though not one of them had been enumerated, they were all cut off thereby; that the just bounds of all things were confounded; that strange things were hurried through in Parliament, and things as strange were advised with close doors in the session, and reported again at side bars; that no man talk of decisions after this; that all other decisions, though blameable, could shroud themselves under some cloak of law, but this stood naked; none was found who would either own or palliate it: that the least they can modify the avail to will be 20,000 merks, seeing he got that in tocher with Dalhousie's daughter: that he will betake him to any one creditor he pleases, and affect his land therewith, the same being *debitum fundi*, and will leave him to his relief of the rest: that the pursuer being likewise donatar, and having the gift of *ultimus hæres* of the said earl and his heir, he must warrant the rights and infeftments granted to them by his predecessor, and so this gift of the marriage can no more prejudge them than if the deceased Earl of Dundee, their debtor, and author in the lands they possess, or any to his behoof, had procured the same; that he may not renounce the same now to their prejudice, since he has made use of it already. *Vide infra, No.* 368.

Advocates' MS. No. 361, *folio* 147.

1672. *July.*—ABOUT this time, in the recognition pursued by the Lord Treasurer Depute against the Earl of Northesk, and the other creditors of the Earl of Dundee, the lords found the lands of Craig had recognosced in his majesty's hand, through a disposition thereof, made *in anno* 1659, by the laird of Craig to Pittarrow, and a base infeftment taken thereupon; notwithstanding it was ALLEGED, 1*mo*, That, *ante omnia*, my Lord Halton ought to make patent to them the charter kist which he had got delivered to him, to the effect it might be tried from the old evidents and charters, whether these lands held ward yea or no, and which might furnish them with many other defences. 2*do*, That the disposition made to Pittarrow could never be the ground of a recognition, because it was reduced and *funditus* taken away in Parliament; which annulled it *quoad omnes effectus*, as if it had never been, especially seeing it was reduced *ob defectum consensus*, it having been elicited from him when he was drunk so extremely, that he had not the use of his reason. For though the reduction of a disposition of ward lands, and of a base seasine taken thereon, because of informality, not registration, or the like, does not hinder the incurring of recognition, because the vassal *fecit omne quod in se erat;* yet if such a right be reduced for want of consent, there no delict is committed, (seeing *animus et propositum faciunt maleficium;)* the vassal is not guilty of ingratitude, and, therefore, ought not to be punished with the tinsel of his lands; and it is the same as if an idiot or furious person should alienate ward lands without his superior's consent; in all which cases *animus delinquendi præcipue spectandus est. Vide omnino Craig, lib.* 3, *page* 344.

The Lords, before answer to this allegeance, ordained the grounds and warrants, and other minutes of that decreet of Parliament in 1661, to be produced before them; (though I cannot see what power or right they had to call for the warrants of a decreet of Parliament, or to try and canvass upon what grounds the same proceeded, and if they were warrantable and rational:) and on perusal of the de-

positions of the witnesses, whereupon the decreet proceeded, they repelled the defence; in regard it appeared from the testimonies, that Craig's drunkenness, the time of the making of that disposition, was not so deep as that he was wholly bereaved of sense and reason; but that he acted by a will and consent, though not altogether so clear.

3tio, It was ALLEGED, that it was granted the time of the usurpers, when all ward holdings were discharged, or it was agreeable to the 58th Act of Parliament in 1641, then standing unrescinded, which appointed all such lands to be holden feu; and betwixt the time it was granted, and the time of its being questioned in Parliament and reduced, there were no judicatories sitting, wherein he might have obtained it confirmed; likewise, if it had not been annulled by a decreet of Parliament, he would have obtained a confirmation thereof, long before the date of the pursuer's gift of recognition, and so would have excluded the same. Notwithstanding of all thir defences, the Lords found the recognition of the lands of Craig incurred. As also, notwithstanding it was alleged, that Pittarrow was Craig's apparent heir mediate at least, to whom alienations do not infer recognition. *Vide Craig, page* 345. This was repelled, because old Pittarrow was the immediate nearest heir. *See Hadington, penult February*, 1612, *Rae* against *Kellie*.

As for the barony of Dundie, it was ALLEGED, that the deeds founded on could never infer recognition thereof, seeing they were far within the half of the said barony as to its ancient extent. Whereunto it was REPLIED, that in the computation of the total of the barony, no lands, whereof there were public infeftments granted, either by resignation or confirmation, could be reputed a part of the barony, because they were thereby dismembered; and the remanent could only be esteemed the barony, the major part whereof was alienated. DUPLIED,—The Earl of Dundie retained the *dominium directum* of these lands, and they behoved still to be reputed parts of the barony, &c.

The Lords found the alienation of the major part of the lands remaining unresigned and unconfirmed, made those parts of the barony to recognosce, and therefore repelled the allegeance.

But the truth is, the Lords were so stated at this time, that hardly any thing could have been proposed against this recognition, over the belly whereof they were not inclined to go. *Advocates' MS. No.* 368, *folio* 148.

1672. *November*. IN the declarator of recognition, mentioned *supra, No.* 368, pursued by My Lord Treasurer Depute, against the Earls of Northesk and Weimes, and sundry other persons, it was ALLEGED for Weimes, that no declarator could pass in his prejudice, because he stood infeft in an annualrent, furth of these lands, confirmed before the gift of recognition. This defence at first proponing was found relevant; but thereafter, it having been answered by the pursuer, that they behoved to say, confirmed before the incurring of the recognition whereupon the gift is grounded, viz. Pitarrow's base seasine in 1659; the Lords repelled the same, in respect of the answer, or reply. Whereupon Weymes, having applied for a new hearing, it was most contentiously debated, Whether or no ward lands could recognosce, in prejudice of an infeftment confirmed before the gift, but after the delict and forfaulture of recognition was committed, by the undue alienation of the said lands without the superior's consent.

Wherein it was ALLEGED for the Earl of Weymes that the common law, our laws, and acts of Parliament; Craig and all that write *de feudis;* the Lords' constant tract of pratiques and decisions; the universal opinion of all lawyers; and the security of the lieges, (which here ought to be *suprema lex,)* seem to have settled this so far above all the rational limits of a just contradiction, that to hear it now drawn in question, strikes us all with amazement, doubting where such scepticism may end, and if this arbitrary latitude of ransacking principles will leave us any thing fixed or certain at all; that upon the faith of these laws all the subjects of Scotland have hitherto rested, ever understanding and supposing that an infeftment *confirmed* before the gift was most sufficient in law to secure that infeftment against any recognition gifted after the confirmation, though the grounds of the gift should be prior to the confirmation; else all the ward lands of Scotland should be now found open to recognitions, the interests of the people should be branled and prejudged, and a door opened for drawing all their rights under hazard and question; that his Majesty, by granting a confirmation, doth consent to the vassal's right, and so can never quarrel the same upon any preceding recognition whereby the property of the lands was returned to his hands; that *confirmatio illius qui dare potuit est donatio;* that confirmations are the ordinary way for securing rights against the hazard of recognitions; that Craig, *Tit. Quibus modis feudum ob delicta amittitur,* (page 347,) is positive that any ratification, express or tacit, as the superior's accepting a resignation, and giving charter thereupon, doth purge prior recognitions; that the Lords have so decided *in foro maxime contradictorio,* as Hadington marks it at the *penult* of *February,* 1612, in the cause of *Rae* against *Kelly,* where this defence was sustained against that recognition, infeftment confirmed before the date of the donator's gift, which is clearly the present defence; and yet the pursuer's grounds, he now insists upon, were then urged and repelled; as also it was found relevant against a process of recognition pursued by *Sir G. Kinnaird* in 1665: that the defender is *in damno vitando,* which excuses ignorance of subtilities; but the pursuer is in *lucro captando.* The defender is founded in the common opinion of the whole country in unanswerable decisions, and in the uncontroverted authority of the most eminent lawyers: whereas the pursuer hath no vestige of any authority, grounded only upon new notions, innovations, and distinctions, which, if they were sustained, no man could be secure for an hour of his estate; and that this being *tentus et habitus* for law hitherto, the most that in any sense or reason can be done, if the Lords will alter their former course, is to rectify it for the future, but not to ensnare any who, upon the faith of so many combining grounds, have rested upon confirmations in times past.

To which it was REPLIED for the pursuer, that they acknowledged that a confirmation of a base right furnished a good and a sufficient interest to defend against, and purge any recognition that could be inferred upon the ground of that infeftment so confirmed, so that it could never be used either as a partial or a total ground whereon a recognition could be craved to be inferred, or a gift taken; as also it would stand invincibly secure against any recognition that should be incurred after the date of the said confirmation; but that it should sustain against a recognition founded upon a distinct and separate ground prior to the said confirmation, because forsooth the superior had not gifted the same till after the confirmation, is an assertion so bold and groundless, so frivolous and irrelevant as ever any that was insisted on, and absolutely contrary to and inconsistent

with his Majesty's interest, and wherein there is not the least shadow of a prejudice or inconvenience to the security of the people: for can there be any thing more consentaneous to the principles and nature of feudal rights, than that where *feudum fuit commissum*, and the property of the lands was returned back to his Majesty by his vassal's fault before the confirmation, that the said property should not pass from his Majesty, except by one of thir three ways, either by consenting to, and confirming of the same seasine by which the recognition fell, or by a special disposition and gift of the recognition; or, *3tio*, by a *novo damus?* and that a naked confirmation of a separate infeftment can in no law or sense be constructed a *habilis modus* to denude his Majesty of that right, that neither being *actum* nor intended, unless the seeker of the confirmation had expressed his Majesty's right, and so the King, being certiorated of his own right, had willingly disponed the same: that thir defenders, by the same rule, behoved to say, that his Majesty passing infeftment upon a resignation, or on a comprising, should thereby purge and discharge anterior recognitions; seeing it is most certain law, that infeftment passing by resignation and confirmation, are *termini convertibiles et æquipollentes* in law, and produce the same feudal effects, and yet it is grossly ridiculous *et inauditum* to imagine, that his Majesty's accepting of a resignation purges any anterior recognition, neither is there any who does affirm it: that the King having *jus perfecte quæsitum* by the illegal alienation made to Pittarrow, any confirmation he gave thereafter to the Earl of Weymes could not prejudge him, because *confirmatio nihil novi juris tribuit;* it is but an act of course, and the common act of his Majesty as a superior, and bearing a salvo and reservation of all right, and so can never import such a consent as to dispone away a right never mentioned nor thought upon: that the 16th act of Parliament in 1633 mentions no ways for stopping recognition, but either the superior's consent to the alienation, or a confirmation thereof: that it is so vain and foolish an imagination to think that his Majesty is prejudged and denuded by such confirmations, that no solid lawyer ever dreamed of it, so great a paradox is it; that the defenders understand not Craig, who is in the contrary opinion at p. 347, in the case there betwixt *Grange Kirkcaldie*, and *Pharnyharst's brother*. And as to their strained practique in 1612, it meets not, because there the infeftment confirmed was made use of as one of the partial grounds of recognition, in which case the Lords did decide most justly that it should stay the recognition *pro tanto;* but that concerns not our point. As for the security of the lieges, the same is in no hazard, seeing we have known ways in law condescended upon as proper to stop the danger of recognition, viz. either gifts of recognition, or a general *novo damus*, and which are ordinarily used; and no judicious lawyers, in advising securities, ever rested upon confirmations of a separate right; and where it is clamoured that the contrary hath been hitherto reputed law, the same is denied upon the grounds we have represented; but *esto* it were so, such errors and mistakes cannot be the rule for the Lords' decisions, else they should be very ridiculous oftimes: with many other things contained in the informations, which see beside me.

The Lords found the said infeftment confirmed since Pittarrow's seasine, (which was the ground of the recognition,) though long before the gift, could not defend against the recognition, but declared, in prejudice and notwithstanding thereof.

All who understood law and the former practice of the bench, were much affected at this procedure of the Lords; seeing them so influenced and bowed from above, to go over a practique so clear as that in 1612 is, and whereof the principal decreet was produced, and over so much reason as was adduced, from the unsecuring of the lieges.

Sir George Lockhart violented himself much in the affair, he never pleading cheerfully against his own judgment. When some of the Advocates were asking him what could be said against so clear a principle as that defence of my Lord Weimes' was, he faintly replied, The other opinion wanted not its own colour.

The Lords ran much divided in it, through my Lord Chancellor's interest in Weymes, who far and wide complains of the unjust measure he has got from the Lords' partiality or timorousness. *Advocates' MS. No. 372, folio* 150.

1672. *November.* MR. ALEXANDER GIBSONE against JANET RAMSAY.

IN the actions of declarator of ward and marriage pursued by Mr. Alexander Gibsone, donatar thereto, against Janet Ramsay, as heir to John Ramsay of Brackmont, her father, or George Ramsay, her brother-german, it was thought by the defender's lawyers, (and the pursuer's procurators in the debate did not controvert it,) 1*mo*, That though the ward of a man, or heir male lasts and continues till he be of the age of 21, yet that it ceased and expired in an heir female at fourteen, and that she was then major *quoad* a ward; and which is Craig's opinion, and seems suitable and consonant to the nature of ward holdings, and the superior's interest in the same. (See *Craig*, pag. 285, and the fifth Act of the Parliament in 1547, there cited, which seems to favour Craig's opinion.—See *Dury*, 19*th June*, 1630, *Somervell* against *Gordon*.) 2*do*, It was resolved, that in the modification of the avail of a marriage, as the same will be taxed with respect to the whole estate, both personal and real, that the heir may succeed to, though even but temporary rights, such as tacks of teinds, &c.; (teinds are to be deduced in the making up the avail, considering only the benefit of the *tack*, with deduction of the tack-duty for the years the tack hath to run: so all the personal or real debts and liferents that do or may affect the heir or his estate must be considered and defalked, to lessen the avail; which must only be modified with respect to the free estate, all burdens laid aside. 3*tio*, That Craig's opinion was absurd, and never came in practice, where he thinks the marriage of an heretrix of ward lands must be estimated according to the avail of her haill estate: which would not make the marriage a casualty or an obvention arising to the superior by the decease of his vassal, but rather a loss or extinction of the feu; and so ought to be ranked in, not amongst the profits of superiority, but amongst the ways by which a fee opens and returns back to the superior, and is amitted; and therefore the Lords have never been in use to modify it much higher than if it were the marriage of an heir male. 4*to*, It was thought, seeing the apparent heir wanted but three months of fourteen at her predecessor's decease by which the lands warded, that the donatar to the ward and non-entry would fall only a term's rent; and as to that it was a question if it ought to be