

1682. *January 5.* HOMER MAXWELL of KILBAIN *against* GRIERSON of CAPINOCHE.

IN Homer Maxwell of Kilbain his competition with Grierson of Capinoch; the Lords, on Harcou's report, preferred Homer Maxwell, and found Capinoch's interest, *viz.* his author Crichton of Crawfordstone's seasine, was not a sufficient title to bring him in, *in hoc statu processus*; without prejudice to him to pursue upon his right, as accords. *Vol. I. Page 168.*

1680, 1681 *and* 1682. JOHN HAY of MUIRIE *against* BALLEGERNO, POURIE, and Other CREDITORS of the last LAIRD of MUIRIE.

See the prior parts in the Index to the Decisions.

1680. *December 16.*—IN John Hay's declarator of recognition against the Creditors, (27th Nov. 1680;) 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 infestments 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, though the disposition whereon it depended was reduced in the Parl. 1661, *ex capite ebrietatis*. *Vide* 23d Feb. 1681.

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*. See also a contrary decision in *Dury*, 16th *March* 1627, *L. Balmerino*.

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. *Vol. I. Page 122.*

1681. *February 23.*—IN John Hay of Muirie's declarator of recognition, against Fotheringham and others, (16th Dec. 1680,) for instructing that the lands were recognosced; John Hay, the donatar, produced sundry base seasines. Against which it being objected, that they were not probative without the charters as their warrants, but allenarly *assertio notarii*: 2do, that they were but extracts out of the registers, and not the principal seasines:

ANSWERED,—The King's donatar to the recognition cannot be supposed to have the principal seasines, or the base subaltern charters; for they are not to be got at the chancellary, as donatars of escheat may find the hornings in the register.

REPLIED,—At this rate, upon a false charter, seaisne may be taken in a gentleman's ward-lands; and that seaisne, once registrate, shall make his land fall and recognosce to the superior, without necessity of producing the said false charter, which they may destroy.

The Lords found the seaisnes alone sufficient *ad fundandam litem*; but, in respect of the preparative, the ward vassal, or his creditors, or others concerned, if he suspect either falsehood or disconformity between the seaisne and its warrant, may raise an improbation of the warrants of the said base seaisne, and so either get them produced or else be liberated of the recognition by a certification.

Then ALLEGED,—Some of the seaisnes produced were for the same sums, the one being on an original bond, and the other on a bond of corroboration thereof.

The Lords found these made not several grounds of recognition, but only one. And, some of them being only infeftments of warrandice, the Lords found they could not be considered nor made use of in the calculation of the alienating of the half, unless it were proven that distress or eviction had followed thereupon. Though John Hay's procurators craved that they might be liquidated, though not to the full value, yet to a sum, because of the hazard and uncertain event. Which the Lords refused.

The Lords conjoined Muirie's own and his author's deeds to make up the recognition. They also inclined to find that no base infeftments, either paid or renounced, and so purged before the granting of the other deeds, could be used in making up the alienation of the half, to infer the recognition. Several of thir points had been formerly decided in other cases. *Vide* 5th Jan. 1682.

*Vol. I. Page 131.*

1682. *January 5.*—In John Hay of Muirie's recognition against Pourie, Ballegerno, and other Creditors, (23d Feb. 1681;) it being objected against Ogilvie of Muirie, that he could not be adduced by the creditors as a witness to prove the rental of the lands, *1mo*, Because he was not in the list of the witnesses signed by the clerk, though he was both in the diligence and in the caption: *2do*, That he was the creditor's author, and tied to them in warrandice, and so might tyne or win in the cause; and it was on his deeds partly that the recognition was incurred:—the Lords, on thir reasons, rejected him.

Then objected against that he was Pourie's domestic servant; and so, Pourie being a party, he could not be received.

ANSWERED,—It was not Pourie, but his daughter-in-law, the Lady Ballegerno, who was the party. REPLIED,—The rights on Muirie's estate were all taken in Pourie's own name.

The Lords, before answer to this objection, ordained Pourie to give his oath of calumny, whether these rights were to his own, or to his son and daughter-in-law's behoof.

*Vol. I. Page 168.*

See many other reports of this case in the Index to the Decisions, under Hay against Muirie's Creditors. See the concluding part of the Report, *infra*, 14th August 1684.