

No 10. havers to produce the same, and so before litiscontestation, the defender might have proponed his defence. It was *answered*, That the pursuer is obliged to produce no more *in initio litis* than his gift of recognition from the King; for the law presumeth that the King is superior, and that the lands are ward, unless the defender offer to prove the contrary. As for the infeftments, whereby recognition is incurred, they are not the pursuer's title, but *media concludendi*, which he may produce *ad modum probationis*.

THE LORDS sustained the process, and assigned a term to prove the infeftments libelled for inferring the recognition, and reserved all the defender's defences after the production thereof, in the same manner as if they were now produced.

*Stair, v. I. p. 723.*

1672. July 29.

Lord HALTOUN Treasurer-depute *against* Earl of NORTHESK.

No 11.

Recognition found incurred by alienation of the fee, though the disposition was reduced as having been obtained by circumvention.

THE Lord Haltoun being donatar to the recognition of the lands of Craig, pursues declarator thereon, upon this ground, That Craig had disposed the lands in favour of Pittaro younger, his brother's son, in March 1660, upon which disposition, sasine was taken in May 1660. This disposition having been reduced in Parliament *anno* 1662, as having been obtained from Craig by circumvention, Craig did dispoise the lands to the Earl of Dundee, who being debtor to the Earl of Northesk, he is now infeft in the lands upon an apprising against Dundee, and thereupon *allegeth* absolutor; *imo*, Because the disposition granted by Craig to Pittaro, which is the cause of the recognition, being reduced in Parliament upon a circumvention, it cannot infer recognition, which necessarily requires a deed done in contempt of the superior, alienating the fee, and obtruding a stranger vassal without his consent, which can only be a deliberate act, and not to be such an act wherein the vassal was circumvened; but in this case the vassal was not only circumvened by the motives inducing him to subscribe the disposition, but it appears by the decret of Parliament reducing the disposition, that the grounds of the reduction were, that Craig when he subscribed it was drunk, and that it having been communed that he should only ratify a bond of *tailzie*, which he had formerly granted to Pittaro, instead of that ratification, Pittaro presented this disposition wholly different, which Craig subscribed without reading the same; so that either of these grounds were sufficient alone to hinder recognition, in respect that there was no real consent given by the subscription, the subscriber having been drunk, and subscribing one writ in place of another; or at least it can be no deliberate consent to infer contempt of the superior and recognition of the fee. The pursuer *answered*, That the vassal having subscribed, which did alienate the fee, the superior was not obliged to enquire by what motives he was induced to do it,

or whether he was circumvened or not, but only whether he had alienated the fee; for the superior's right is so strongly founded *injure*, that nullities in the disposition will not prejudice his recognition more than it could prejudice the minor's escheat or liferent, as was found in the case of the Lady Carnegy *contra* Lord Cranburn, No 7. p. 13380.; yea, though a minor having curators, had disposed without their consent, or being interdicted had disposed without his interdictors, though as to other effects the disposition would be null, yet as to the superior, for the liferent or recognition; it would be effectual; and a circumvention is not effectual against singular successors, not partaking of the fraud, much less against the superior; and if the vassal should so far trust any party, as either to subscribe a blank, or subscribe a writ containing clauses contrary to communing, without reading the same, it was his own fault, and could not excuse him from recognition; neither can the pretence of drunkenness exclude recognition, it being the vassal's own fault; and albeit drunkenness may make the party the more easy to be deceived, yet it takes not away his rational consent, unless it were to that degree, that he had not the use of his reason, and that the same could be proved by extrinsic visible evidences; and neither of these points is instructed by the decret of Parliament, wherein the decerniture bears only, that there was much unstraightness in obtaining this disposition, and therefore the Parliament reduced the same, which doth not infer, that either drunkenness to that degree was proved, or subscribing of one writ in place of another. It was *replied*, That the unstraightness expressed in the decret of Parliament must necessarily import to have been done by the deeds libelled; and albeit minority or interdiction should not impede recognition, yet if the vassal did not give consent, as being out of capacity to make use of his reason, his subscription would not infer recognition; as if the vassal had been furious, pupil, or drunk, to the being incapable of reason, or if a disposition of his land had been foysted into his testament, or in place of his testament, albeit it had been read to him, or if a disposition of his lands had been offered, and he had subscribed the same by error in the substance of the act, none of these could have inferred recognition, and all of them would have been sufficient against singular successors; albeit circumvention upon fraudulent motives, inducing a true consent, be in some cases ineffectual against singular successors, not partaking of the fraud.

THE LORDS having ordained the warrants of the decret of Parliament to be produced, they found that there was nothing proved in the decret or warrants in relation to drunkenness, and nothing proved as to any anterior ratification of a tailzie, and in place thereof offering the disposition without reading the same, as to which Craig's own deposition did only bear the same, but spoke nothing of drunkenness, therefore the LORDS found, that neither the decret of Parliament, nor grounds thereof did stop the recognition.

At the pronouncing of which interlocutor, the defender offered to prove, that Craig, when he subscribed the disposition, was so drunk that he had not the use

No II. of his reason, It was *answered*, That by the decret of Parliament, and grounds thereof alleged upon by the defender, it was evident that Craig was not drunk to that degree; *imo*, Because, albeit Craig was pursuer of the reduction, and did libel he was drunk, yet neither he, nor any of the witnesses, so much as mention drunkenness; *2do* His deposition bears, that, at desire of Pittaro, he filled up the date and witnesses with his own hand; *3tio*, He depones that he subscribed without reading, upon special trust of his nephew, to whom he would have committed his life, which being an act of trust, upon a rational consideration, doth evidence that he was not drunk to the incapacity of reason; and *lastly*, He depones that the witnesses were not present when he subscribed, which clears that he remembered what he had done several years after, and so was not stupidly drunk to impede his reason.

THE LORDS found that these evidences did sufficiently instruct that Craig, when he subscribed, was not so drunk as not to have the use of his reason, and in respect thereof repelled the allegiance upon his drunkenness.

The defender further *alleged*, That this disposition could not import contempt, in respect of an act and proclamation of the Usurper 1653, taking away ward-holdings, whereupon all the people generally dispoised ward-lands, without consent of superiors, which at least ought to excuse the recognition by so common an error. It was *answered*, That this allegiance had been frequently repelled, as in the case of the recognition at the instance of Sir George Kinnaird of the estate of Gray, and at the instance of Pittrichy *contra* Gordon of Gight, especially because the vassal, after the King's return, continued in the fault, and did not require confirmation from the King, or any gift or discharge; and there was no case so little favourable as this, the infestment having been taken after all authority of the Usurper's ceased, and after the King was acknowledged by the Parliament, and Commissioners sent to him for his return. It was *replied*, That the disposition being reduced in Parliament, the vassal could not crave confirmation thereof, and it was not usual to seek a discharge of recognitions.

THE LORDS repelled also the defence upon the Usurper's act, in respect of the reply.

The defender further *alleged* absolvitor, because Pittaro was *alioqui successurus*, and so was no stranger. It was *answered*, That Pittaro was not immediate apparent heir, his father being alive; neither was he *alioqui successurus*, seeing Craig might have had children of his own; upon which ground President Spottiswood observes, that in the recognition pursued against the Earl of Cassilis and Culzean, the same was found incurred, though the Earl had no children, and Culzean was his brother and apparent heir forthe time\*; whereupon

THE LORDS did also repel this defence in respect of the answer.

*Fol. Dic. v. 2. p. 315. Stair, v. 2. p. III.*

\* See King's Advocate against E. Cassilis, No 3. p. 13378.