1663. *February* 5. LADY CARNEGY *against* LORD CRANBURN.

No 58.
Feuda are *stricti juris*, and go not to assignees, unless expressed; and after infeftment, though the disposition bear to assignees, the assignation has no effect.

THE LORDS advised the rest of the defences (*see* RECOGNITION), proponed for the Lord Cranburn, in the recognition pursued at the instance of my Lady Carnegy, who *alleged*, 1*st*, That recognition was only competent in proper ward-holdings, and not in blench feu or burgage, these only being *feuda recta et militaria*, and all others but *feudastra*; but the lands of Innerweek are not a proper military feu holding ward, being only a taxed ward, wherein the ward duties are taxed yearly, and the marriage is taxed to so much, and so is in the nature of a feu; neither was it ever yet found in Scotland, that a taxed ward did fall in recognition. The pursuer *answered*, That the defence is not relevant to rule in our law, being that alienation of ward lands, without the consent of the superior, infers recognition, and neither law nor custom hath made exception of taxed wards, which have but lately occurred in the time of King James, who and King Charles were most sparing to grant gifts of recognition, whereby there hath been few debates or decisions thereanent; and there is no consequence, that because the casualty of the ward, when it falls, is liquidated and taxed, or the value of the marriage, that therefore the fee is not a military fee, wherein the vassal is obliged to assist his superior in counsel and in war, in the stoutest obligations of faithfulness and gratitude; and therefore, his withdrawing himself from his vassalage, and obtaining another to him, is the greatest ingratitude, that the superior had taxed the benefit of the ward and marriage at low rates, which casualties cannot be drawn to prejudge the superior of other casualties, but on the contrary *exceptio firmat regulam in non exceptis*.

THE LORDS repelled this defence. It was further *alleged*, that here was no offer of a stranger, but of the vassal's own grandchild, who is now his apparent heir in one half of these lands, as being the eldest son of his second daughter; and recognition was never found in such a case. The pursuer *answered*, That albeit the defender be now apparent heir to the vassal disponer, yet the case must be considered as it was in the time of the disposition, when he had an elder brother, the then Lord Cranburn, living, and was not *alioqui successurus*; and the LORDS had formerly found, that an alienation of ward lands, by the Earl of Cassillis to his own brother, albeit he was his nearest of kin for the time, having no children, yet seeing he could not be esteemed *alioqui successurus*, or heir apparent, in regard the Earl might have children, therefore they found recognition incurred.

THE LORDS repelled this defence. 3*dly*, It was further *alleged*, That there could be no recognition where there was no alienation of the fee without the superior's consent; here there was no alienation of the fee, because the sasine being taken to be held from Dirleton, of the King, not confirmed, was altogether null, and therefore Dirleton was not divested, nor Cranburn invested, for such an infeftment is ineffectual and incompleat till confirmation, and could

No 58. never be the ground of pursuit or defence against any party. 2*dly*, By such an infeftment, the superior's consent is a condition implied, for an infeftment to be held of the superior is null till confirming, and implies as much as if the sasine had been expressly granted, *si dominus consenserit*, and so can be no obtrusion or ingratitude. 3*dly*, Craig, in his *Dieges. de recognitionibus*, reports the decision of the LORDS betwixt M'Kenzie and Bane, (*see* APPENDIX), whereby they found, that the sasine being unregistered, was null, and inferred no recognition, *quia non spectatur affectus, sed effectus*; yet that was but an extrinsic nullity, much more here, the sasine being intrinsically null. The pursuer *answered*, 1*st*, That if this ground hold, there could be no recognition, except by subaltern base infeftments held of the vassal, in which there is far less ingratitude, there being no new vassal obtunded, nor the vassal withdrawing himself from his clientel, nor any prejudice to the superior, because subaltern infeftments would exclude none of the casualties of the superiority; yet such alienations, exceeding the half of the fee, do unquestionably infer recognition, though the ingratitude be no more than this, that the vassal renders himself unable fitly to serve his superior, by delapidating his fee, or the major part thereof; how much more, when he does all that in him is, to withdraw himself from the superior's clientel, by obtruding to him a stranger, alienating from him the whole fee, and albeit the sasine be null, as to other effects, till it be confirmed, yet as Craig observes in the foresaid place, *vassalus fecit quantum in se erat*. 2*dly*, Though by our statutes, or peculiar custom, such sasines unconfirmed are null, yet by the act of Parliament 1633, anent ward-holdings, recognition is declared to proceed according to common law, which can be no other than the common feudal customs, by which customs it is sure that the recognition is chiefly inferred by the vassal's alienation; as to the implied condition, *si Dominus consenserit*, though that were expressed, yet the vassal giving sasine, the tradition of sasine is inconsistent with such a condition, being understood as a suspensive condition, for he that delivers posseision *de facto*, cannot be said upon any condition not to deliver the same *de facto*, and therefore it is but *protestatio contratia facto*; and if it be understood as a resolutive condition, as needs it must, it impedes not the alienation, but only might resolve the same. As to the decision upon the not registration of the sasine *una herundo non facit ver*, and albeit it might be a rule in that individual case, it cannot be extended *ad alios casus*, although it were a statute, much less a practick.

THE LORDS also repelled this defence. 4*thly*, It was further *alleged* by the defender, that Dirleton's infeftment was granted by the King, *hæredibus et assignatis quibuscunque*, and thereby the King consented that he should dispone his right to any assignee or singular successor, and this clause is equivalent to the ordinary feudal clauses, *vassallo et quibus dederit*, which is ever understood to exclude recognition; neither can this be understood to be *stilus curiæ*, as when assignees are casten in in charters passing the Exchequer; but this is an

original grant under the King's own hand. The pursuer *answered*, That this defence ought to be repelled, because such concessions, contrary to the common course of law, are *stricti juris*, and not to be extended *ad effectus non expressos, præsertim prohibitos*; but the adjection of assignees is no ways to allow alienations of the fee, without consent, but to this effect; because *feuda* and *beneficia* are in themselves *stricti juris*, and belong not to assignees, unless assignees be expressed; and therefore, albeit no infeftment had been taken, the disposition, charter, or precept could not be assigned; so that this is adjected, to the end that those may be assigned before infeftment, but after infeftment assignation hath no effect, and this is the true intent of assignees; in dispositions of lands, it is clear, when the disponer is obliged to infeft the acquirer, his heirs, and assignees whatsoever, there is no ground whereon to compel him to grant a second infeftment to a new assignee, but only to grant the first infeftment to that person himself, or to any assignee whatsoever, which clears the sense in this case. It hath also this further effect, that singular successors thereby might have right to a part of the lands, which though it would not infer recognition if done, yet if there were no mention of assignees, it would be null, and as not done in the same case as a tack, not mentioning assignees. No 58.

THE LORDS repelled this also. *5thly*, It was further *alleged*, That recognition takes only place where there is contempt and ingratitude, and so no deed done through ignorance infers it, as when it is dubious whether the holding be ward or not; and therefore recognition cannot be inferred, seeing there is so much ground here to doubt this right, being a taxed ward, and to his heirs and assignees; and it is not clear, whether it would be incurred through a sasine *a se*, or to one in his family, whereupon the wisest of men might doubt, much more Dirleton, being illiterate, not able to read or write. It was *answered*, *Ignorantia juris neminem excusat. 2dly, Ubi est copia peritorum ignorantia est supina.* Here Dirleton did this deed clandestinely, without consulting his ordinary advocates, or any lawyers, and so was inexcuseable; and if pretence of ignorance could suffice, there could be no recognition, seeing it cannot miss to be ignorance that any should do that deed that will be ineffectual, and lose their right.

THE LORDS repelled this defence, and all the defences jointly, and decerned, see No 11. p. 7732. *Fol. Dic. v. 2. p. 76. Stair, v. 1. p. 172.*

*** See a similar case 14th January 1696, Lockhart against Creditors of Nicolson, No 6. p. 6411, *voce* IMPLIED DISCHARGE AND RENUNCIATION.

1665. *January* 31. ANDERSON *against* PROVAN. No 59.

IF a master assign his rent, the assignee has the same privilege of hypothec that the master had.

Fol. Dic. v. 2. p. 78.

*** This case is No 36. p. 6235, *voce* HYPOTHEC.