to the children of the marriage, he was obliged to provide them to the whole conquest of lands, or money, during the marriage.

The Lords did sustain the reduction, in so far as might be extended to the sum of two thousand merks only; and found, that taking the bond to her in fee, ought to be interpreted in satisfaction of her portion *pro tanto;* and could not be ascribed to the obligement of conquest, unless her whole portion had been first satisfied *aliunde*; and that the pursuer ought to be assigned to that bond.

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1673. *January* 22. JOHN MADER *against* ANDREW SMITH.

IN a suspension of double poinding, raised by Archibald Don, as debtor to Richard Gavenlock, against Mader and Smith, as creditors to the said Gavenlock, who had both of them arrested, and obtained decreets to make forthcoming against the suspender,—it was ALLEGED for Smith, That he ought to be preferred; because he had done the first diligence, by getting a decreet to make forthcoming.

It was ANSWERED for Mader, That no respect could be had to Smith's diligence, because it was preposterous, *et nimia diligentia*, in respect the arrestment was used long before the term of payment of his bond; whereas Mader had arrested after the term of payment, and thereupon obtained decreet, before which he was not obliged to do diligence; as was found by practick in Durie, 12th January 1628, betwixt Douglas and Acheson.

The Lords preferred Mader to Smith, albeit posterior in diligence; and found, that Smith's arrestment and decreet, being before the term of payment, was *nimia diligentia:* which was hard; seeing that arrestments or inhibitions might lawfully be served before the term of payment; and the decreet to make forthcoming was justly given, superseding the execution, until after the term of payment; and that the case in Durie was upon the arrestment of a minister's stipend before it was due, being only *in cursu*, whereas, in this case of a personal bond, *cessit dies*, the time of the subscribing thereof by the debtor, *licet nondum venit*, until the term of payment.

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1673. *January.* The LORD THESAURER-DEPUTE *against* The EARL of WEMYSS, NORTHESK, and OTHERS.

IN a declarator of recognition of the lands of Rossy, which pertained to the Laird of Craig, and held ward of his Majesty, at the instance of the Lord Hatton, theasurer-depute, as donatar to the gift of recognition under the Great Seal, against the Earl of Wemyss, as being infeft in an annualrent, effeiring to £17,000 principal out of the said lands, and Northesk and others, who were infeft upon dispositions or comprisings:

It was ALLEGED for the Earl of Wemyss, That his infeftment was public, and confirmed by a charter under the Great Seal long before the gift of

recognition made to the pursuer, which must defend him against recognition at the instance of the superior or his donatar, whose gift is posterior to the confirmation:—*1st.* Because a confirmation is a ratification of the right confirmed, and implies as much as if the superior had subscribed consenter to the charter; *quo casu* he can never quarrel the right upon pretence of any ground then standing in his person, and competent to him the time of the subscription, which may *funditus* take away the right confirmed, and make it void and null; but, on the contrary, he thereby acknowledges that he himself hath only right to the superiority, and that his vassal, who disponed the said annualrent, hath the only right of property; and so can never reduce the same contrary to his own express deed and consent; after which, albeit a superior or his donatar may pursue for prior casualties fallen to him, such as nonentries, wards, and marriages, yet, as to the right and property itself, it is so secure by confirmation, that it was never questioned heretofore, by any process or sentence, as being an undoubted right in the opinion of all lawyers; and particularly of Craig, in that title *de Recognitione, lib.* 3, *page* 347, where he expressly asserts, that a consent or confirmation, or a charter granted upon resignation, doth altogether secure from recognition: and likewise, by a practick *in anno* 1612, betwixt one Rae, the King's donatar, and the Heritors of the Lands of Auchterholme, who had obtained a confirmation before the donatar's gift, the same case was decided, *in terminis*, against the donatar. *2d.* It was ALLEGED, —That if the defence should not be sustained, all ward lands held of the king, or any other superior, should be rendered obnoxious to infinite pleas and trouble, not only upon pretence of recognition, but all other feudal delicts, which may make the property return and be recognised; such as purprusion, disclamation, and not showing of holdings, or any clause irritant, there being *par ratio* in them all: and, if in blench and feu-holdings, a confirmation secures against all nullities, albeit expressly contained in the original charters or statutes by Act of Parliament, *multo magis* where the property is craved to be taken away *per actionem penalem*, which, being so odious and grievous, is always restricted; and any deed importing a passing from that pretence and interest is ever admitted by our law and practick. And farther, the deed whereupon the recognition is founded, being a disposition and seasine taken by Pittarro, which, in plain Parliament, was declared void and null, as being elicited from the Laird of Craig, *viis et modis*, any right thereby acquired being, by a sentence of a Parliament, *funditus* taken away, there could remain no ground for a gift of recognition to be granted by the king.

It was REPLIED for the pursuer, That the declarator was well founded in law, notwithstanding of the reasons. And to the first reason, it was answered, That it being undoubted in law, that, by the first seasine given to Pittarro, the recognition was incurred, nothing could take away the right thereof from the king or his donatar, but an express consent or confirmation of that same deed by which it did fall, or by a gift of recognition or *de novo damus;* neither of which can be alleged in this case: but, on the contrary, the right whereupon the defence is founded, is a simple confirmation of a separate and distinct right of an annualrent granted to the Earl of Wemyss, which is not the ground of the gift of recognition; so that, the said confirmation, being but a thing of course, cannot prejudge the superior or his donatar, no more than a charter upon a resignation, they being *termini convertibiles*, and implying, in their own nature,

a tacit reservation of all prior rights belonging to the superior, and whereof he cannot be denuded *habili modo*, but by a gift or *de novo damus*, as said is: it being clear, that all superiors, notwithstanding thereof, may pursue for non-entries, bygone feu-duties, escheats, or wards, and all other benefits arising from feudal delicts. And, as to the opinion of lawyers, and Craig and the practicks adduced, it was *gratis dictum* that it was the constant opinion of all lawyers having advised to take another course for securing against recognitions; and that title alleged, is so far from being of that judgment, that it expressly declares that the superior's consent or confirmation should be so circumstantial, that it must import that he did know of the right of recognition falling to him, and that he did pass therefrom: and, even in that case, it is declared, that if the party, acquirer of the right, should happen to die before infeftment upon the confirmation, it doth not save from recognition. And, as to the practick alleged, no respect can be had thereto, it being but an imperfect minute of a decision, by a person of no authority, which does not bear the ground of law, nor that same case as it is now pleaded.

To the second it was REPLIED, That the argument being only *ab incommodo*, it is retorted; seeing, if it should be otherwise decided, the king and all other superiors should be infinitely prejudged of their undoubted right, founded upon law and reason; for not only all casualties remain with him, notwithstanding of a confirmation, but the right of property, which falls by recognition, purprusion, or any other feudal delict, cannot be taken away by confirmation, unless the same were expressly disponed; seeing his majesty, or any other superior, doth as effectually acquire the right of property, *delinquendo quam alienando;* whereof he cannot be divested but *habili modo*, and not by a deed of course. And as to that declaring of Pittarro's seasine null, no respect can be had thereto, seeing, by that decreet, Pittarro was only declared to have no right by the disposition: But, as to the king's interest of recognition, there was no debate thereupon, it neither being libelled, nor any thing contained in the decreet following thereupon.

The Lords did sustain the recognition; upon this ground chiefly,—That the deed whereupon it fell was not confirmed. Which seems very hard, the case of recognition never having been extended so far by any former practick, against which a naked consent as to all rights of property doth infer *non repugnantiam;* far more a confirmation under the Great Seal, which hath been thought a perfect security by all lawyers: But especially in this case, where the recognition is founded upon a deed of fraud, *elicita viis et modis;* so that the vassal could not be said to be *sui juris*, and to do a deed deliberately, in prejudice of the superior, which law interprets to be the only cause of so great a crime. But I was declined in this action, my brother being concerned, as having purchased a part of the Maynes of Dudhope, which was challenged upon that same ground. *Page* 303.

1673. *January* 31. The LORD LINDSAY *against* The LORD BALMERINO and The LAIRD of POURIE FOTHERINGHAME.

IN an improbation, pursued at the instance of the Lord Lindsay, as succeed-