not prescribed, to make the lands recognosce; the LORDS found, that, notwithstanding the prescription, they might concur, the last ground being within 40 years; for they found, that the debt might be extinct as to the effect of execution, and yet not as to the casualty of recognition, for *contra non valentem agere non currit præscriptio;* but so it is, that the feudal delinquency of recognition is not incurred till the major part of the barony be alienated by base infeftments. Now, supposing the last base infeftment to be within 40 years, and every one of the grounds and steps, which make up the recognition, being supposed to be within 40 years of each other, the action could not exist till the half, and a little more, were alienated, and so could not begin to prescribe till then, since *actioni nondum natæ non præscribitur.* No 24.

A similar decision is reported by Forbes, 25th July 1712, Moncrieff against Heirs of Ballo, No 168. p. 10932, *voce* PRESCRIPTION.

THE LORDS sustained all base infeftments after the 12th of April 1654, (the date of the Usurper's ordinance about ward-lands) as lawful, and not to be the ground of recognition, unless the vassal continued after the King's restoration without demanding confirmation.

Fol. Dic. v. 2. p. 314. 315. Harcarse.

*** This case is No 63. p. 6485., *voce* IMPLIED DISCHARGE AND RENUNCIATION.

1687. *June.* KER of Littledean *against* LAW.

No 25.

IN a declarator of recognition of ward-lands, which were wadset with a back-tack, for a sum under half the value; *alleged* for the defender, That till the back-tack be declared void, and brought to the case of a proper wadset, the back-tack duty only is to be considered as the burden. *Answered,* It is the vassal's contempt in disponing the whole lands, and not the value of the back-tack duty that infers recognition. THE LORDS repelled the defence.

Fol. Dic. v. 2. p. 314. Harcarse.

*** This case is No 40. p. 6437., *voce* IMPLIED DISCHARGE & RENUNCIATION.

1725. *January* 13.

Sir JAMES HALL of Dunglas, *against* JOHN CRAW Writer in Greenlaw.

No 26.

Where a wife, in her contract of mar-

MARGRAET TAIT succeeded her brother James, by a precept of *clare constat* from the superior, in a ward-fee, which she disponed in her contract of marriage to James Craw her husband, his heirs and assignees whatsomever, heri-

No 26.
riage, disponed ward-lands to her husband, his heirs and assignees' infeftment taken thereon found to infer recognition.

tably and irredeemably, to be holden either *a se* or *de se*; and she granted a precept of sasine for infefting him *de se* of the disponer, during all the days of her life, upon which he was infeft.

Sir James Hall, who had acquired right to the superiority, pursued a declarator of recognition, which he contended was incurred by taking the infeftment without his consent.

John Craw the defender, who was served heir of conquest to James the husband, proponed the following defences; 1*mo*, That the fee being *feudum fœmineum* might be alienated by a wife to her husband *nomine dotis*; and according to the disposition of the feudal law, such alienation did not infer recognition, no more than it would have done, had it been conveyed to one who was alioqui successurus. Voet, Digressio, lib. 38. § 87. De feudis, says, Feudum fœminem a fœmina ad quam devolutum est, in dotem recte datur, which holds in France and several other places, as appears from Antonius Faber, lib. 4. tit. 43. De jure emphyteut. defin. 36. 2*do*, The sasine being taken upon a complex warrant, bearing either to be holden *a me* or *de me*, the same ought to be interpreted favourably, as proceeding upon a charter *a me*, which is null of itself till it be confirmed, and therefore cannot infer recognition; or if it should be supposed to have been taken on the precept *de me*, yet seeing it bears to be holden of the wife during her life, the same is null after her decease, and therefore recognition is not thereby incurred; for the sasine could subsist no longer than the granter's life, and the vassall's real right was at an end.

It was *answered* for the superior, That all alienations without the superior's consent were contrary to the principles of the feudal law; and though some of the Doctors do allow an exception, when a woman does it *nomine dotis*, yet that holds not with us, as appears from Craig, lib. 3. dieg. 3. where treating of the question, An mulier possit, ratione dotis, feudum transferre in maritum inconsulto domino? He says, Mirum est quod juris interpretes in hoc casu permitti et licere volunt. And it is likeways contrary to our statutes, act 12th, Parliament 18th James VIth, and 16th act of King Charles I.'s Parliament. And as to the customs and laws of other nations, they can have no influence in the present question, because these feudal customs were *localia* and concerned only such places where they were in observance, which does not appear from any practick to have been in this country.

To the *second* it was *answered*, That suppose the infeftment had been *a me*, yet it would infer recognition, because the vassal, by granting tradition, had sufficiently shown his ingratitude to the superior, as was found 5th February 1663, Lady Carnegy against Lord Cranburn, No 7. p. 13380.; but in this case the sasine proceeds on the precept *de me*, and the adjection of the words, during all the days of the granter's lifetime, cannot mend the matter; for it is all one as if it had been to be held of her simply, in which case her heirs would be understood; as when one purchases lands to himself, it is of the same import, as if it was to him and his heirs.

No 26.

" THE LORDS found, That a wife in her contract of marriage, disponing ward-lands to her husband and his heirs, infeftment being taken thereon, infers recognition; but found the sasine in this special case being taken of the wife only during her lifetime, was now null after her decease; and that therefore the recognition was not incurred."

Reporter, *Lord Newhall.* Act. *Ja. Colvil, Dun. Forbes et Geo. Pringle.*
Alt. *Alex. Hay et Ch. Areskine.* Clerk, *Gibson.*

Fol. Dic. v. 2. *p.* 315. *Edgar, p.* 146.

*** Lord Kames reports this case:

1725. *January* 14—IN the declarator of recognition of ward-lands, at the instance of Sir James Hall of Dunglas *contra* John Craw, the dispute came to this, 'If a wife's alienating her ward-lands to her husband, his heirs and 'assignees whatsomever, *nomine dotis*, does not infer recognition?'

And it was *pleaded* for the defender, That such alienations did not infer recognition by the feudal law, and consequently not by our custom, which has received the feudal law; and the feudal law must be reckoned ours, in every case where it cannot be shown we have expressly receded from it. The reasons are, 1*mo*, The favour of marriage; 2*do*, That the heiress-vassal is presumed to marry with consent of the superior. The heirs of the marriage are *alioqui successuri*, who are heirs to the husband; and he himself, to whom the infeftment is granted, cannot in the eye of the law be accounted a stranger.

Answered for the pursuer, This defence is plainly inconsistent with the nature of ward-holdings; for it is a condition and quality in every such right, 'That the vassal shall not alienate the fee without the superior's consent.' Now the fact is, that the vassal has truly alienated the fee, and that in the most absolute manner, 'to her husband, his heirs and assignees;' whence the alienation is null, and the lands return to the superior, from whom they were derived under that condition and quality: So that truly a declarator of recognition differs little from a common declarator of irritancy. It has no influence, that the alienation is made to the husband; for this is as effectually altering the line of succession appointed by the the superior, as if made to any other whatever; and *de facto* the defender, who served heir to his father the husband in these ward-lands, is of another marriage. As for the feudal law; whatever influence it has among us, is by way of advice, not authority; and if there is solid reason on the other side, as in the present case, that will be followed.

" THE LORDS found, that a wife in her contract of marriage disponing wardlands to her husband and his heirs, infeftment being taken thereon, infers recognition."

Rem. Dec. v. 1. *No* 54. *p.* 105.