

not confirmed infers Recognition: Partly, because such a Feifin ^{quite} by our Law, is not so by the common Feudal Customs which sustain it as good if the Superior acquiesce approve or homologate it without a formal Confirmation in Writ, partly, for that Grantor of Infestment a se not confirmed thereby quantum in se erat, all that lay in him to alienate the Fee (viz) ^{discovered} in the granting Infestment to be holden of the Superior, than in granting subaltern Infestments to be held of the Vassal; Seeing by the latter no new Vassal is introduced, nor the Superior abridged of any of his (as usual) but only the immediate Vassal by dilapidating his Fee, unjustly, if he serve the Superior, whereas by the former, the Vassal doth all he can to withdraw himself from his Duty to the Superior, and substitute a Stranger in his Room. It hath been also a Question, whether Recognition is necessary in Alienation under Condition, if the Superior consent, or saving the Superior Right? As to which, Craig (viz) following Baldus will have such Clauses inserted fairly and bona fide by one not knowing but the Superior may consent, or ignorant of any Prejudice he may sustain thereby, to hinder Recognition; but allow no such Effect to Clauses of that Kind deceitfully or shammingly inserted by one to whom the Superior previously declared he would never consent; or who had no Reason to think the Superior would do it, because perhaps the Alienation is in favour of his Enemy, or one too powerful to be easily dispensed with. The Lord. Har. Feud. & Lib. 2. Tit. 11. s. 19 distinguishes thus from the Nature and Senar of the Clause, that there can be no Recognition if the Clause is suspensive i.e. if Possession only be delivered to the Acquirer, and the Transmission of the Property delayed till the Superior's Will is known, like Aditio in diem in the Civil Law; as when the Vassal disposes to another Possession without Infeifin, or possesses him by an Instrument of Possession bearing expressly that he should have no Right to the Property till the Superior's Consent were obtained. But a Clause resolutive on the same tho' transmitted in the Event of its proving defeat is satisfactory to the Superior or prejudicial to his Interest, doth not exclude Recognition, for 'tis as if avoided by the general Clauses salvo jure casu habet, or salvo jure Superioris; 15 March 1631 E. Galloway contra Burgeses of Wigton. Albeit the Vassal do at first alienate only the Half of his Lands, or some lesser Part without Consent of the Superior which he may do; yet if he thereafter alienate as much more as counting the Part formerly disposed doth exceed the Half of his Fee, ^{and both these Aliens are to be considered as if they were standing together} the whole Fee falls under Recognition, and the first Purchaser will also lose his Right, which, tho' validly made at the Time, returns to the Superior ex post facto by a retroactive Effect. Craig Feud. s. 14. Slair

Slair Feud. s. 17. McKenzie Lib. 2. Tit. 5. and subaltern Rights granted by the present Ward Vassal or by his Predecessors and Auctores de consuetudine confer Recognition, so soon as they go beyond the Half of the Fee. Whereby not only the Infestments which completed the ground of Recognition by making the Alienation exceed the Half of the Ward Fee, but also those which were lawful before while the major Part had not alienated, become void and fall under the Recognition 7 July 1601 Hay contra Creditors of Murray. At the same Time this seems very hard and is contrary both to the Civil and Canon Laws; Whereby ubi inter constituta curant licet ut loqui voluerit a quo measure non potuerint l. 25. s. 1. ff. de r. a. p. Factum legitime in 6 Decretal. de Reg. jur. Base Infestments continued after the course of others alienated to the major Part of the Lands fall in compute to make the rest of the Lands recognisable, tho' the Confirmation only secure the Infestments unimpaired. Because the major Part being alienated before Confirmation there was no question in the Superior 23 Febr. 1602 Kings. Percale contra Creditors of L. Cromarty. Infestments of Annualrent out of Lands held in part by Free Ward and in part by Free Tenure being several hereditaments were sustained as grounds of Recognition for the whole Value of such Annualrents, tho' there was a proportionable real Right of Relief competent out of the rest of the Lands. Because it was optional to the Creditors to uplift the whole Rent out of the whole Lands 23 Febr. 1603 Kings. Percale contra Creditors of L. Cromarty. Base Infestments granted in Trust tho' undelivered and tho' the Lands remained in Possession of the Grantor were brought in compute to infer Recognition eodem die inter eosdem. An Infestment of Annualrent in the Grantor's Cautioners for their Relief was found a sufficient ground of Recognition quoad valorem of the Annualrent, tho' the Debt might probably be paid out of the principal Debtor's Effects 15 March 1603 Hay contra L. Pourne & Phinhaven. Base Infestments taken after Resignation of the Lands in the Superior's Hand, and a Charter thereupon expedite before the Superior's Charter, may concur with anterior base Infestments to infer Recognition, to the Prejudice of him in whose Favour Resignation is made; Seeing the Vassal was not divested by the Resignation and Charter, tho' a Charter of Confirmation would have secured the Right confirmed. But after Feifin upon the Charter of Resignation, which imports the Superior's Consent and divides the Resigner, no base Rights can concur to make Recognition to the Prejudice of the Obtainer of the Charter eodem die inter eosdem. Tho' the Confirmation of a base Infestment after Alienation of the major Part, which secures itself, comes in compute to make the rest fall in Recognition ut supra: Yet the