

No 8.

hic inducit aliam personam, for he bruiked the lands *aliter* as wardatar *regi*, et *aliter* as Lord Glamis. THE LORDS, after long reasoning, repelled the allegiance of the defender, and remitted the summons and reply to probation, in respect of the ward disposed to the said Lord.

Fol. Dic. v. I. p. 514. Colvil, MS. p. 302.

1611. July 5.

JAMES SKENE.

No 9.

A Lady's liferent found not to accresce as *jus superveniens* to a donatar of escheat.

JAMES SKENE, donatar to the Earl of Athole's escheat and liferent, seeking declarator thereof, and of the old Countess of Athole's liferent, to the which the said Earl had right, contending in the particular declarator for the mails and duties of diverse lands, against some gentlemen who were infest, they excepted upon their heritable infestments granted to them in anno 1584; which was taken away by reply, that the Countess was infest in conjunct fee holden of the King in anno 1579. They *duplicated*, That the Earl, who as heir to his father, being obliged to warrant them, had obtained the right of my Lady's liferent, and so *jus superveniens emptori*, behoved to accresce to them, and corroborate their right. To this was *answered*, That this right could not accresce to them, because before the Earl was found heir to his father, and so long before he could have been obliged to warrant them, his liferent and escheat had fallen in the King's hand; and, by that means, the liferent of the Countess falling to his Majesty's donatar, the Earl was denuded of that right before he was heir; and so, in respect of that mid-impediment which denuded the Earl of the right of the Countess her liferent, before her was that person who, as heir, might have been obliged to warrant those who were infest before his father, he had not the benefit of the Countess' liferent to transfer in these vassals. In respect whereof, the LORDS repelled the exception. In that same cause, Lethentie and Fardill *alleging*, That their infestments were confirmed by the King, with a clause *de novodamus*, of all right the King had, by reason of forfeiture, recognition, escheat, liferent, &c.; and so having the right of the liferent of these lands disposed to them long before the donatar's gift, they needed no declarator; the LORDS found that these clauses *de novodamus* might save from forfeiture or recognition, but would not comprehend the gift of escheat or liferent, or any such casualty of the said lands.

Haddington, MS. No 2262.

1636. March 10. CRAWFORD against L. MURDISTON.

No 10.

A vassal's right having fallen by the

THE Lady Murdiston being divorced from her husband, in whose contract of marriage, her husband was obliged to provide her to the liferent of all lands to be conquest by him after the said contract; to which clause she having made

Malcolm Crawford assignee, who charging the Laird of Murdiston her husband, from whom she was divorced, for his fault of adultery, to infest her in the lands of _____, which were a part of the ten pound land of Murdiston, and were disposed by his umquhile goodsir to Charles Gray heritably, to be holden of the L. Murdiston, and his heirs, and which L. Murdiston held the same of the Earl of Bothwell; in the which infestment, granted to Gray by Murdiston's goodsir, his said goodsir obliged himself, and his heirs, to warrant the lands from all dangers and inconveniences, &c. *contra omnes mortales*, conform to the common clause of warrandice; from the which Gray, the said of Murdiston defender had bought his said right, and given a price to him therefore convened upon; and so thereby the Lady and her assignee *alleging* this to be a conquest of these said lands, she therethrough claimed her liferent thereof, conform to the said contract of marriage. In this process it being *alleged*, that the acquiring of these lands, could not be found a conquest, because the L. Murdiston defender lost all the lands himself, and consequently Gray his vassal lost that part which he held of him, by reason of the forfeiture of the Earl of Bothwell, Murdiston's superior, which forfeiture did so extinguish the right of property alleged to be in Gray's person, being base and unconfirmed, that there remained no real right in Gray's person which he had to sell, or the acquiring thereof can be reputed conquest, and which forfeiture having preceded the alleged time of the acquiring of the right by the defender from Gray, it cannot be esteemed the acquiring of any heritable right, as conquest, but only a satisfaction for the vassal's kindness; and the pursuer *replying* that it was a conquest, seeing he bought from Gray his heritable right by an express contract of emption and vendition, neither can the preceding forfeiture be obtruded, seeing the right of that forefaultry was established in the same defender's person, before he acquired the right from Gray; which defender being heir to his goodsir, disponer of the lands to Gray, and so subject in warrandice thereof, that supervenient right of forefaultry becoming in his person, who was heir to the disponer, and holden to warrant, as said is, behoved to accresce to Gray, and to make his heritable right to revive and convalesce, at least *contra eum*, who is in effect his author, being heir to his author, and who could never have distressed Gray thereby; seeing in law *jura venditoris emptori prodesse non ambigitur*; and seeing he was and is holden to warrant, he cannot obtrude the forefaultry, *quia quem de evictione tenet actio, eundem agentem repellit exceptio*; and thereby it appears, that the right subsisted in Gray's person, notwithstanding of the forefaultry, seeing the right of the forefaultry was devolved in his person, and consequently the purchasing of the lands by him from Gray, must be found conquest; in this process, it being *alleged* for the defender, That the superveniency of the forefaultry, in the person of the heir of the disponer of the lands to Gray, could not make Gray's right, which was once extinguished, to be renewed; for there could be no superveniency, but where there was a real extant, standing right, which was not here the same, being suppressed by the forefaultry; and seeing

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forfeiture of his mediate superior, the gift of forfeiture purchased in by the immediate superior, was found to accresce to the vassal.

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it was the heir, who acquired the forefaultry, who, albeit he might be holden to warrant, as is alleged, (which he also denied) yet thereby there could be no superveniency to make a real right revive, which once was extinguished; albeit that superveniency had been in the person of him who first disposed the lands, it might have been probably alleged, that the superveniency was real, but not so in his heir, against whom there can be no ground, but a pretence of warrandice; and it being also *alleged*, that the heir could not be holden to warrant, because in such cases there could be no warrandice for the forefaultry of the superior, and it is against law, to extend warrandice thereto; and the pursuer *answering*, that he is expressly obliged to warrant *contra omnes mortales*; and it being also questioned, if this ought to be imputed as a fault of the buyer, that he sought not confirmation of his own right, to have thereby saved it from the superior's forefaultry, or if it was the fault of his author, who was obliged to warrant, and who, in respect that he was subject to warrant, ought to have foreseen the hazard of forefaultry, and so that it was his fault, the not confirmation;—THE LORDS found, notwithstanding of all that was alleged in the contrary, by the defender, that the purchasing of the lands foresaid was a conquest, and that the wife ought to have the liferent thereof; and that the forefaultry did not derogate, but that it was a conquest, seeing the right thereof was devolved in his person, who was holden to warrant, who so having the right, could not obtrude the same against that right, which he was holden to warrant; so that albeit it might be questioned, whether there should be warrandice against a forefaultry of the superiors, yet seeing that right of forefaultry was become in the person of the heir of him who sold the lands, that heir could no more object that forefaultry, inherent in his own person, against his own vassal, than the first seller might have done; so that albeit a third party might have evicted the lands, by reason of the forefaultry from Gray, *quo casu* the warrandice against Murdistoun had been more disputable, yet being in Murdistoun's own person, it was found, he could not thereby distress his said vassal; seeing in effect it was *factum suum*, from which he could make no pretext to eschew warrandice; and therefore the purchasing thereafter of Gray's right from him, by an express emption, was found conquest, as said is.

Act. Nicolson.

Alt. Advocatus & Stuart.

Clerk, Gibson.

Fol. Dic. v. I. p. 514. Durie, p. 803.

1665. February 15. BOYD of PINKHILL against TENANTS of Cairsluith.

No 11,

PINKHILL, as donatar to the ward of Cairsluith, pursues removing against the tenants, whose master compares, and *alleges*, That the gift was to the behoof of the minor, his superior; who, as representing his father and godsir, was obliged, in absolute warrandice against wards *per expressum*.