

No 14. the superior held lands ward, was liable to all casualties arising *ex natura rei*, to what donatar soever the same be given.

It was controverted amongst the LORDS, What should be the ground of the decision in point of law ; and some were of the opinion, that it was upon that ground, that *jus superveniens accrescit*, the lands being disposed to the sub-vassal *ut optima maxima* ; but it was the opinion of others, that *jus superveniens accrescit*, when it is either of the property, or of any servitude, or of casualties that had fallen before the right granted to the vassal, but not of casualties arising thereafter *ex natura rei* ; and therefore they thought, that the right should be found to accresce to the vassal, and the mutual obligation *et fides* betwixt them is such, and so exuberant, that the superior should not take advantage of a casualty fallen upon account of his own person, and by his minority ; and that a right of ward, granted to the vassal himself, or to any other to his behoof, is upon the matter a discharge of the casualty, both as to himself, and as to the sub-vassal, that is concerned in consequence.

Reporter, *Newton.*

Clerk, *Hayston.*

Dirleton, No 392. p. 192.

1681. *January 27.*

STUART *against* HUTCHISON.

No 15.
Found in conformity with
Forbes *against* Innes,
No 12.
P. 7759.

UMQUHILE David Dunbar being debtor to Hary Stuart in a sum of money, he granted a bond of corroboration, wherein he, with consent of Anna Hutchison, his wife, obliged himself to infest her in an annualrent, out of a tenement in the Canongate, whereupon he pursues a pointing of the ground. It was *alleged* for the said Anna Hutchison, that she stands infest in this tenement in liferent before this pursuer was infest, or at least had possession. It was *answered*, That her consent excludes her. It was *replied* for the defender, That this consent being adhibit *ex reverentia maritali*, and not ratified judicially with an oath, not to come in the contrary, it is null ; *2do*, This consent could only exclude or communicate any right the liferenter had in her person when she consented, but cannot reach to supervenient rights, which only accresce upon dispositions with absolute warrandice, but never unto a simple assent.

THE LORDS found that the *reverentia maritalis* was not relevant alone to annul the consent, unless threatening at least had been joined, and that the judicial ratification is not necessary, but adhibited *ad majorem cautelam* ; but found if the consent was not provided to her liferent of this tenement before her consent, that it would not prejudice her of her liferent.

1681. *July 7.*—HENRY STUART pursues a pointing of the ground of a tenement in the Canongate, upon an infestment of annualrent granted by umquhile David Dunbar to him. It was *alleged* for Anna Hutchison, relict of the said

Dávid, that she stands infest in liferent in the tenement before the pursuer's father's infestment; and therefore though he may apprise the property, he can have no right to the duties during her life. It was *replied*, That she had subscribed her husband's right of this annualrent as consentor. It was *duplicated*, Her consent could only exclude her from any right then in her person, but her infestment now founded on is posterior, and not founded upon any anterior obligation to infest her in this tenement. The pursuer *triplicated*, *Jus superveniens auctori accrescit successori*. The defender *quadruplicated*, That holds only where the author's right is with absolute warrandice, as hath been frequently decided.

THE LORDS found the consent could not exclude the defender to defend upon an infestment posterior to the consent, and prior to the infestment of annualrent, seeing there was no prior obligation to grant that infestment to the wife, and that the consent imported not absolute warrandice, therefore could not accresce to the annualrenter. This cause was determined in the same terms before, upon the 27th day of January 1681; but the minutes being wanting, it was reported again, and the same way determined this day.

Fol. Dic. v. 1. p. 514. Stair, v. 2. p. 846. & 888.

1686. *January.*

Major BUNTIN and DRUMELZIER *against* MURRAY of Stanhope:

IN a pointing of the ground of some lands belonging to Stanhope, and holding of Drumelzier, at the instance of the donatar of Drumelzier's marriage;

Alleged for the defender; *1m*, The defender's lands were feued out before the year 1633, and so are only liable for the feu-duty, conform to several statutes concerning the feuing of ward-lands; *2do*, Drumelzier was obliged not to lie out, and being entered, to enter the defender's heirs, consequently is liable in warrandice; for, if Drumelzier had entered, he would have satisfied the superior before his entry, which would have prevented the gifting of the marriage; *3tio*, The gift is to Drumelzier's behoof, and so he must communicate a proportion to the defender, upon his paying a share of the composition.

Answered for the pursuer; Albeit the contract of alienation in feu be before the year 1633, infestment was not taken thereon till the year 1634; and the sasine only by which the vassal is *in feudo* is to be considered. And as the superior could not have craved the casualties of superiority in the contract before sasine, neither can the vassal have any benefit by the contract, as being before the 1633, when the sasine was after it; *2do*, The provision, that the superior should not lie out, imports only, that he shall enter when in law he may enter. And a ward vassal cannot force his superior to enter him till his majority: Besides, though here entered, the land would be liable to the casualty falling by

No 16.

Found in conformity with No 14. p. 7761.