

No. 15. 1666. *December 8.* EARL CASSILLIS *against* TENANTS of DALMORTON.

A servitude of thirlage constituted by a vassal, was not found to prejudice the superior in possession of the lands by his casualty of ward.

*Stair.*

\* \* \* This case is No. 3. p. 5006. *voce* GENERAL ASSIGNATION.

No. 16.

1681. *December 2.* YEAMAN of Dryburgh *against* INNERINGTY.

Patrick Yeaman of Dryburgh having adjudged his debtor's ward-lands, and being infeft and dying within the legal, and his son's marriage being gifted and paid, the son pursued a declarator to have it found, that the avail of his marriage being *debitum fundi*, should be refunded before the adjudication could be redeemed.

Many of the Lords were of opinion, that the pursuer's claim was not relevant, seeing he was put to pay the avail of his marriage through no deed of the debtor, but *ex accidenti*, by his father's leaving a son unmarried at his death. And, by the like consequence, a disponent of ward-lands base would be liable in warrandice upon their warding to the superior; which were absurd, seeing these casualties happen by the nature and *reddendo* of the ward-holding, and not by any deed or fault of the debtor; though it might be otherwise in recognition incurred through the disponent's or debtor's fault.

The Lords decerned in absence, the defender not compearing.

*Harcarse, No. 1004. p. 283.*

No. 17.

1684. *February:*

MARQUIS of QUEENSBERRY *against* EARL of ANNANDALE.

The Earl of Annandale being vassal in some lands, as a part of the lordship of Torthorrel, disponent the same to another holding base of himself; and the ward of these lands falling by the minority of this Earl of Annandale, the Marquis of Queensberry, as superior of these lands, pursued the Earl for mails and duties.

Alleged for the defender: No process, the heritable possessor not being called; *2do*, The Earl cannot be liable for the mails and duties, he not being intromitter therewith; nor can the heritor be liable, unless he hath intromitted, these duties not being *debitum fundi*.

Answered: The pursuer is content to call the sub-vassal *cum processu*; and, *2do*, He is not obliged to know any but his own vassal; for he hath not acknowledged the sub-vassal's right flowing from the Earl; and the sub-vassal's possession by virtue thereof must be considered as the Earl's possession, as a tacksman's possession is reputed the setter's.

The Lords, before answer, ordained the sub-vassal to be called *cum processu*.

*Harcarse, No. 1006. p. 284.*