1676. *December* 1. LORD LINDSAY *against* GRIERSON.

No 14.
A superior obtaining gift of his own ward, for his own behoof, was found to have no right to extend this against his vassals.

THE LORD LINDSAY, as donatar to the ward of the Laird of Lague, pursues the tenants of Bargaltoun for mails and duties, Bargaltoun holding of Lague, who holds the same of the king. It was *alleged* for Bargaltoun, That he offered to prove that the gift was taken to the behoof of Lague himself, the superior of whom he holds his land, with absolute warrandice; which being disponed to him with absolute warrandice, imports it to be *uti optimum maximum*, whereby all supervenient rights to the disponer accresce to his vassal, whether they be rights of property, annualrent, servitude, or casuality. 2*do*, The defender's right bearing absolute warrandice, without any specialty, must be extended to the superior's ward, which is the first specialty expressed, when the clause is extended, and which must even extend to wards, falling after the disposition. 3*tio*, The gift of the ward returning in the superior's person, is a renunciation or discharge thereof, and so it is extinct, and cannot be extended against the vassal.—It was *answered*, That absolute warrandice, though it comprehend ward, yet it is never extended to the casuality of ward falling thereafter, unless it be so expressed; neither can the casuality fall as *jus superveniens*, because it is no right of the land, but a right of casuality of superiority, with the hazard whereof the fee is accepted and granted. And albeit the gift could import a discharge to the superior, as to his own property, yet not as to his vassals; and therefore the casuality being the King's, he might gift it to a stranger, and so to the superior with the same effect.

THE LORDS found the defence relevant, That the gift coming in the superior's person, or to his behoof, he could make no further use thereof against his vassals, they having absolute warrandice, but for a proportional part of the composition and expences, that it stood himself.

Fol. Dic. v. 1. *p.* 514. *Stair, v.* 2. *p.* 470.

*** Dirleton reports this case:

A SUPERIOR, having obtained the gift of his own ward, did pursue his sub-vassal at the instance of a donatar, in trust, and to his behoof, for mails and duties during the ward; and the defender having *alleged*, That the pursuit was to the behoof of the superior himself, and that he or his predecessor had disponed to the defender his lands with absolute warrandice;

THE LORDS found, That the gift of ward being given to the vassal, did accresce to the sub-vassal, paying his proportion of the composition; albeit it was urged, that as the King might have given the said gift to another, he might have given it to the vassal himself; and he could not be in a worse case than another donatar; and that the sub-vassal knowing the nature of the right, that

No 14. the superior held lands ward, was liable to all casualities 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 disponed 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 casualities that had fallen before the right granted to the vassal, but not of casualities 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 casuality 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 casuality, 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 infeft her in an annualrent, out of a tenement in the Canongate, whereupon he pursues a poinding of the ground. It was *alleged* for the said Anna Hutchison, that she stands infeft in this tenement in liferent before this pursuer was infeft, 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; 2*do*, 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 consenter was not provided to her liferent of this tenement before her consent, that it would not prejudge her of her liferent.

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