

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 *duplied*, 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 *triplied*, *Jus superveniens auctori accrescit successori*. The defender *quadruplied*, 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

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Found in  
conformity  
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the predecessor's death, and the unmarried apparent heir's minority. *3tio*, The defender can have no benefit by the gift, though to the superior's behoof, seeing it is notour, that ward-lands are naturally subject to the hazards due by the *reddendo*, for which a superior is not liable in warrandice, unless he be specially obliged to relieve wards and marriages, future as well as past, or that the right is but a wadset; and here the superior was only bound to warrant from fact and deed.

THE LORDS found the defender's lands liable to the casualty of the marriage, seeing the sasine was not before the 1633, and found the superior not liable in warrandice; but found, That the gift being of the behoof of the superior, by whom the ward was incurred, he ought to communicate the same to the defender, upon his paying a proportion of the composition, and of the expences wared out in procuring the same. But the LORDS did not, in the commutation of expences, allow to Drumelzier the expense of a journey to London, to wait upon the Duke of Lauderdale, to whom the half of the benefit of the ward belonged, in respect the journey was not necessary, and that the excesse, subducting expences he would have been at, at home, was but small. But the LORDS allowed 2000 merks the pursuer gave to Sir William Purves solicitor, and found the *quota* of the composition paid, and debursed expences, probable by Drumelzier's oath, without any other instruction; but found the defender not obliged to pay any share for the Duke of Rothes's half of the ward, there being no money paid to him; albeit it was *alleged*, That the Duke of Rothes did not exact his share, out of a kind of retribution for several services performed to him by the pursuer, whereby the defender, to whom the Duke stood under no such obligation, should have no benefit. And the LORDS found the defender liable for no annualrent or damage, seeing the composition and expences might have been sooner pursued for.

The defender *alleged*, That seeing the avail of the marriage was considerably augmented by his feu-lands and other estate, a proportion of the composition should lie upon that.

*Answered*; The whole composition doth not exceed the sum that would have been the avail of the marriage, though the defender had no other estate but the ward-lands. *2do*, Marriage being the *reddendo* of ward, and by law the avail accrescing by reason of the ward-vassal's other estate, the vassal is liable thereto *ex natura tenendriæ*.

THE LORDS repelled the defence.—See PROOF—WARRANTICE.

*Fol. Dic. v. 1. p. 514. Harcarse, (WARD & MARRIAGE), No 1007. p. 284.*

\*.\* Fountainhall reports this case :

WILLIAM HAY of Drumelzier's action, *contra* Murray of Stanhope, was reported by Saline. The barony of Drumelzier is holden ward, and Rothes getting the gift of Drumelzier's ward and marriage, he exacted L. 500 Sterling

of composition from him : A part of this barony had been sold by the Earl of Tweeddale, Drumelzier's father, to Stanhope ; and Drumelzier now pursues him to bear a proportional part of the said ward and marriage. He *alleged*, from the tenor of his disposition, that he behoved to be free, for he had not only absolute warrandice, but also real warrandice ; and so Drumelzier, as heir of provision to the disponder in these lands, without abiding any order of discussion of heirs, behoved to relieve him. THE LORDS found Stanhope obliged to bear a proportion effeiring to his interest and part of the barony compared with the whole, but that it was only a share of what Drumelzier truly paid for the casualty, and no more ; having repelled these two defences made for him, *1mo*, That this was a feu of ward-lands set *tempore licito* in 1632, before the prohibitory act 1633 ; *2do*, That they were obliged to receive him *gratis* in the lands, and not to lie out. *Answered* to the *1st*, The feu was not real till infefiment, and Stanhope neglected to take that till after the act of Parliament 1633, and so that act intervened as a *medium impedimentum*. To the *2d*, The obligation to receive him with absolute warrandice does not secure against future wards. See Stair, B. 2. t. 3. and Durie, 9th March 1639, Lord Almond, *voce* SUPERIOR & VASSAL ; *item*, Kincaid, No 1. p. 314. ; that he can exact no more than he paid. But the LORDS sustained the *3d* defence, founded upon the pursuit's being to Drumelzier's behoof (for he used Major Bunteine's name in it), who represents the defender's author, at least is heir of provision to him, *ad hunc effectum* to restrict the pursuit to a proportional part of the sums expended for acquiring of the gift, effeiring to the lands possessed by the defender, and the lands belonging to the pursuer ; and ordained Drumelzier to give in a condescendence of the sums he expended for acquiring the gift. See the like decided in Stair, 15th Feb. 1665, Boyd of Pinkill, No 11. p. 7758.

This cause being again debated and reported, the LORDS repelled Stanhope's defence, founded on the *bona fides* of his possession, and so craving to be free of the bygone ward-duties, as *bona fide* possessed ; as also repelled his *2d* defence, that Drumelzier's personal estate must be considered in the estimation of his marriage, as well as his real (which would have made Stanhope's part very small), in regard his process is founded on a transaction, and not on a sentence of litigation, and the transaction is far less than the marriage would have been worth, if the vassal had no other estate but the ward-lands ; and refused to allow any sums upon account of the Duke of Rothes's part of the ward, in respect he passed his part *gratis*, and there were no sums paid him ; and refused to allow Drumelzier's expences for his London journey, or to allow him annualrent for the sums expended, being neither due *pacto aut lege* ; and find the defender only liable for a proportion of the sums truly paid out ; and ordained the pursuer to depone on the condescendence of the said sums paid out by him, without obliging him to lead any further probation.

*Fountainball, v. 1. p. 393.*