

No 80.

of wadset, not bearing irredeemable, or *absque reversione*, cannot take away the express reversion of Barclay's right; for albeit an heritable right be presumed irredeemable, *presumptio eedit veritati*, and it cannot take away a reversion where it is.

THE LORDS found that the reversion granted in Barclay's right was not taken away by this posterior right and charter, but that the Earl's consent imported only his favour and good will to transmit the right to the defender; in respect of the allegiances aforesaid.

Fol. Dic. v. 1. p. 438. Stair, v. 1. p. 449.

1668. January 8.

FORBES against INNES.

No 81.

IN the case, Forbes *contra* Innes and Dalgarno, the LORDS found, That a wife having no right for the time, to lands disposed by her husband, and having, at the desire of the buyer, consented and sold her right, if she thereafter acquire from another person a right to the said lands, is not by her consent concluded, but may pursue and evict the lands upon her right; her consent operating only, that upon any right from her husband, or then in her person, she cannot question the right whereto she hath consented; and the brocard that *jus superveniens accrescit* being to be understood of *jus superveniens auctori*, whereas a consenter is not author.—See JUS SUPERVENIENS, &c.

Alt. Lockhart, Wedderburn, & Thoirs.

Fol. Dic. v. 1. p. 438. Dirleton, No 128. p. 52.

* * * Stair reports the same case :

MR JOHN FORBES, as assignee to Margaret Allardice, having obtained decret of removing against Margaret Innes, for removing from the lands of Savet, wherein the said Margaret Allardice is infest in liferent; which being suspended, it was *alleged, imo*, That this pursuit is to the behoof of Margaret Allardice, who could not obtain a removing against the defender, because the defender's husband being infest by the said Margaret Allardice's husband, and author of the lands of Savet principally, and of the lands of Govan and others in warrandice, the said Margaret Allardice did consent to the disposition of the warrandice lands, by which she obliged herself to do no deed in the contrary of that right, and is also bound in warrandice with her husband; *ita est* her pursuing this action is a deed in prejudice of the right of warrandice-lands, in so far as thereby the person having right to the principal lands, upon eviction recurs upon the warrandice lands, and so the consenter's own deed prejudices the same. It was *answered*, That by deeds contrary to warrandice were only understood some right granted by the disponent or consenter, in prejudice of the right consented to, but nowise a pursuit upon any other right of the consenter; for it

were against reason and justice, that a purchaser, to make himself secure, requiring a wife's consent to lands to which she had no right either in principal or in warrandice of other lands, that her consent should prejudice her as to her life-ferent lands, of which there was no mention; and as to her personal obligation to warrant the lands wherein she was never infeft, it is null, and can never oblige her, being a wife.

No 81.

THE LORDS found that this warrandice did not oblige the wife, and that her consent did not hinder her to pursue upon her own life-ferent, albeit *ex consequente* her pursuit excluded one having a posterior right to her life-ferent lands, who thereupon had recourse to the warrandice lands, to which she consented, seeing she had granted no right prejudicial to the right consented to.

It was further *alleged*, that the said Margaret Allardice agreed with the person having right to her life-ferent lands, principally that she should accept the warrandice lands instead of her life-ferent lands, which *excambion* putting the right of the warrandice lands now in her person, she who consented to the right thereof, can never come in the contrary of her own consent to prejudice the same. It was *answered*, That a consent cannot exclude any supervenient right of the consenter, but only such rights as the consenter had the time of the consent; it is true that a disponent with absolute warrandice, if he acquire a right, it accretes to his successor, but it is not so in a consenter, whose warrandice is not found to be obligatory, further than as to the rights in the consenter's person at that time.

Which the LORDS sustained.

It was further *alleged*, That the pursuit as to the behoof of the heir of the disponent, of the lands in question, whose predecessor being bound in absolute warrandice, he can make use of no right prejudicial to his warrandice; *2dly*, Albeit he be not heir, yet he hath behaved himself as heir, and thereby is liable to fulfil the defunct's warrandice, and so cannot come against it. It was *answered*, That behaving as heir being a vitious passive title, is not sustainable by way of exception in this case.

THE LORDS sustained the same, and found both members of the allegiance relevant.

Stair, v. I. p. 499.

* * * See the sequel of this Case, No 53. p. 1322.

1674. January 24. MURRAY against JAFFRAY and MURRAY.

UMQUHILE Murray, by his testament nominates Isobel Murray, his wife, his executrix and universal legatrix, she renouncing a tack of certain tenements in Aberdeen, granted to her by her husband in satisfaction *pro tanto* of an annual rent of 5000 merks, provided to her in her contract, and paying L. 1000, which he had left to their only child Marjory Murray. Isobel Murray

No 82.

A wife consented to her husband's testament, by which he granted to a daughter a