perior, and confirmed by him to the vassal, there could not be any ward, that vassal living, and being infeft, holden of the superior, and confirmed, as said is; so that the vassal so infeft might pursue the sub-vassal of that land, upon the ground of his said right confirmed, but had no right to pursue upon any ward which was not fallen; whereas, if the Lady's right had been made to be holden of the granter, and not of the superior, the superior's confirmation would not *eo casu* have staid the ward. *Item*, In this process it was found, that a feu being given by the Prince's vassals since the year 1606, not being confirmed by the Prince, excluded not the ward, seeing the Prince was found *hoc casu*, ought to be repute as a subject *intuitu regis*, and therefore that the act of Parliament did militate here. *See* JUS TERTII.—PERSONAL OBJECTION.—WARD. No 6.

Act. *Advocatus*. Alt. ——. Clerk, *Gibson*.

Durie, p. 456.

1672. *June* 28. EARL of EGLINTOUN *against* The LAIRD of GREENOCK.

No 7.
A feu granted by a vassal to a sub-vassal, with consent of the superior, found valid to exclude ward in so far as concerned the sub-vassal.

EGLINTOUN being superior of the lands of Broadstone, he and his donatar did pursue the Laird of Greenock, and the Earl of Mount-Alexander, for payment of the avail of the marriage, and to hear and see the lands declared to be affected therewith, in respect Mount-Alexander died infeft holding the lands ward of the pursuer. It was *alleged*, That Mount-Alexander did hold other lands in Ireland ward of the King, and therefore the ward of the marriage could never be craved by the pursuer as superior of other lands in Scotland. It was *replied*, That, by the law of this kindom, any subject who is superior of ward-lands cannot be prejudged of the benefit of his vassal's ward and marriage, by his holding lands in another kingdom ward of the King, the effect whereof can only be, that, in the modification of the avail of the marriage, no consideration ought to be had but of the lands within this kingdom.——THE LORDS did repel the defence, and found the avail of the marriage due to the pursuer, but to be modified as said is.

Thereafter, upon the 16th July 1672, it was farther *alleged* for Greenock, That the Earl of Eglintoun had consented to his right of wadset of the saids lands to be holden feu of the disponer, with a discharge of the feu-duties during the wadset; and, therefore, by the act of Parliament 1606, his lands being set in feu with the consent of the superior, cannot be liable either to the ward or to the avail of marriage. It was *replied*, That the act of Parliament 1606 does relate to the act of Parliament in King James II.'s time, giving power to vassals who held lands in ward to grant feus thereof to sub-vassals, but only where they are to acquire irredeemable rights, whereas the right in question is a right of wadset. And albeit the superior's consent, during the wadset, take from him

No 7. the benefit of the ward-holding, yet it ought not to take from him the feu-duty during the ward, nor the avail of the marriage in case of redemption.

The Lords did find, that there was no distinction betwixt wadsets and irredeemable rights in the act of Parliament King James II. and act of Parliament 1606, nor in law, but the superior's consent to a feu-holding should, in the case of a wadset, prejudge him as well as in an irredeemable right; and therefore found, that the lands could not be burdened, during the wadset, with the avail of the marriage; but they found, that he should have right to the feu-duty in place of the ward, as likeways to the right of reversion competent to Mount-Alexander, whereby he might extinguish the wadset; in which case the lands being redeemed, they might be burdened with the avail of the marriage as if they had not been wadset. *See* Marriage (Avail of).

Fol. Dic. v. 1. *p.* 295. *Gosford, MS. No* 502. *p.* 265.

*** Stair reports the same case:

The Earl of Eglintoun being superior of the lands of Broadstone, holden ward of him by the Viscount of Airds, now Earl of Mount-Alexander, there is a sub-feu thereof granted to Shaw of Greenock, for security of a sum under reversion, and for a duty of L. 40 yearly. Eglintoun doth now pursue for the avail of the marriage of Mount-Alexander, his immediate vassal, and for the ward-duties; and calls Greenock, that the ground may be poinded for the avail of the marriage, and as intromitter with the bygone fruits, whereunto he hath right for the ward duties. Greenock *alleged*, Absolvitor, *1mo*, Because the Earl of Mount-Alexander is vassal to the King in his estate in Ireland, and cannot be liable for the avail of two marriages; but his principal interest being in Ireland, the marriage due there must free him here, so that his estate in Scotland will only come in as a consideration of the extent of his fortune, and increase of the value of his marriage there. *2do*, This pursuit, either for the marriage or ward-duties, can have no effect against Greenock, the sub-vassal, or the lands, in so far as he hath right thereto, because all feus of ward-lands were valid, and did exclude the ward of the granter of the feu by express act of Parliament, until the act of Parliament 1606, whereby vassals holding ward of other superiors than the King were prohibited to grant feus without consent of the superior, or his confirmation, otherways the said feus are declared null, which necessarily imports, that, where the superior consented to the feu, the samen should stand valid, and exclude the ward of the superior as it did before the said act; *ita est*, the Earl of Eglintoun is consenter with his vassal in the contract of wadset in favours of Greenock. It was *answered*, That the superior's consent could only import, that, by the sub-feu, recognition should not be incurred, but not that the superior should be excluded from the benefit of the ward, unless that had been exprest; for it being a voluntary gratuitous deed of the superior, it should not be extended, for the naked consent cannot be so much as a confirmation;

and yet confirmations, which are ordinarily granted by the King of sub-feus, do never exclude the ward and marriage of the vassal granter thereof; albeit, by the act of Parliament 1633, feus are prohibited to be granted by the King's vassals in the same manner as by the vassals of other superiors. It was *replied*, That albeit confirmations, passing in Exchequer of course, do not exclude the ward of the vassal, because the King, by special act of Parliament, is secured from the negligence or inadvertency of his officers; yet it was never so found in a confirmation granted by a subject, in respect of the said act of Parliament 1606. No 7.

The Lords repelled the *first* defence, and found that Mount-Alexander's marriage ought only to be estimated in consideration of his estate in Scotland; but found the *second* defence founded upon the superior's consent, and act of Parliament 1606, relevant in so far as concerned the sub-vassal; but that the superior had right by the ward-duties to the subvassal's feu-duty, and to the back-tack duties, if any were, or to the superplus duties, if the superior should restrict the wadset, conform to the late act of Parliament; and the Lords had no consideration that this was a feu under reversion, nor that the old act intended feus perpetual to be for melioration. *See* Implied Discharge and Renunciation.

Stair, v. 2. p. 94.

SECT. III.

Act 58th, Parliament 1641.—Whether the Superior can renounce his Casualties.—Paction contrary to the nature of Feu-rights.

1696. *February* 27. Philliphaugh *against* Elliot.

No 8.
A feu granted by a vassal of the Crown, upon the authority of act 58th, Parliament 1641, was not found sufficient to defend against the ward and marriage of the superior, falling due after the rescissory act 1661, cap. 15. notwithstanding

The Lords advised the debate betwixt Lord Philliphaugh, as donatar to the ward and marriage of Douglas of Cavers, and Sir William Elliot of Stobs, the Laird of Gladstons, and other sub-vassals of Cavers, for bearing their proportion of 40,000 merks, to which the gift was by a backbond restricted, to be distributed as portions for the younger children of Cavers. There being a feu of these ward-lands given to Stobs in 1655, which was then lawful by the 58th act 1641, allowing ward-lands holden of subjects to be feued, Stobs *contended* it behoved to be subducted from the count, and could bear no part of the 40,000 merks. *Answered*, That the act 1641 being rescinded by the act 1661, though the feu secured *quoad* any casualties arising before the rescissory law in 1661, yet it could never defend against such casualties as fell after; because you