

intended that no deduction from the years of prescription should be made, *in minoribus illis servitutibus*; especially seeing the King was superior to both, and so had no prejudice that his

served both his vassals.

Fountainhall, MS.

No 76.

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S E C T. XIII.

Effect of Consent.

1623. February 4.

GUILD against GUILD.

IN an action pursued by Guild, to hear the right of the sum of 200 merks decerned to pertain to the pursuer, which pursuit was founded upon a testament of the pursuer's father, wherein he assigned to the pursuer the right of that sum which was addebted to him, conform to an obligation made to him thereupon by his debtor, and to the which assignation made by the said testament his wife consented, and the testament was subscribed by her, and she was pursued thereupon; the LORDS found the wife's consent subscribed in the testament could not prejudge her, but that notwithstanding thereof she had right to her own third of the defunct's free gear, and of this sum controverted, amongst the rest of the whole free goods, whereof she was not prejudged by the said assignation, contained in the testament, and consented to by her, seeing that assignation was but of the nature of a legacy, which could go no further than the defunct's own third; likeas they found, That the father's giving in tocher with the pursuer since that testament, a certain sum of money, ought to be ascribed by her, to be given in satisfaction of so much of the defunct's part, or of her own part, as the pursuer acclaimed from the defender, as intromitted with by her *pro tanto*, and that the same ought to liberate the defender *pro tanto* anent her intromission with the defunct's goods and gear.

Alt. Lawtie.

Clerk, Hay.

Fol. Dic. v. I. p. 438. Durie, p. 43.

No 77.

An assignation to a sum in a testament, to which the testator's wife subscribed a consent, found not to prejudice her right of third.

1630. December 15.

STIRLING against Her TENANTS.

JEAN STIRLING being provided, by her contract of marriage, to an annual rent out of the lands of Templeland, by her umquhile husband, whereto her umquhile husband's father was a consenter in the contract, after her husband's decease, she pursuing the tenants for pointing of the ground for that annual rent, by virtue of her sasine following upon that contract, and the tenants defending with tacks, set by the umquhile father of her husband; so that they alleged

No 78.

A wife was provided in an annual.

No 78.  
rent by her husband, with consent of her father, who was infeft in the lands. Found that though the husband was never infeft, the wife's annuity could not be affected by tacks afterwards let by her father-in-law.

they could only point the ground for the duty of the tack, specially seeing the husband, who was the author of her right to the said annualrent, was never infeft, but the father, who set the tacks;—THE LORDS found, that seeing the father consented to the said contract of marriage, and that the tacks were set after the date of the relict's contract and security, that the same could not stay the pointing of the ground for the whole annualrent, whereof she was not prejudged by the said tack set since syne, as said is, albeit her husband was not infeft, in respect of the consent foresaid of the father, before these tacks were set.

Clerk, Scot.

*Fol. Dic. v. I. p. 438. Durie, p. 548.*

1665. July 4.

JOHN BOYD, late Bailie in Edinburgh, *against* MR WILLIAM KINTORE.

No 79.  
Consent of a wadsetter in a disposition with the reverser, found not to carry his right, he having assigned no part of the sums in that wadset.

THERE being mutual reductions betwixt Mr William Kintore and John Boyd, as to the rights of the lands of Mountlothian, John Boyd deriving right from Mr Robert Logan, to whom Logan of Coatfield, with consent of Mr James Raith, and who, for all right he had to the land of Mountlothian, disposed the same; and Mr William Kintore having apprised upon a decret against Coatfield, as cautioner for a tutor, and upon the act of caution inhibited, it was *alleged* for John Boyd, that whereas, by a former interlocutor, the day of , he having objected against Kintore's decret, that thereby the tutor and his cautioner were found liable to uplift the annualrent of sums that were in the hands of secure creditors, which the tutors had not uplifted, and to be liable for annualrent *post finitam tutelam*, now he produces a decision out of Durie, July 18. 1629, Nasmith *contra* Nasmith,\* whereby it was found, That a tutor having uplifted his pupil's annualrent, though very considerable, was not liable for any annualrent therefor; *2dly*, The reason of the Lords' decision then being, that albeit the tutor was not liable to uplift and employ the annualrent every year as it was due, yet he was liable once in the tutory; but it is offered to be proved, that he died two years before the tutory expired, in which time he might both have uplifted this annualrent and re-employed it; and therefore being prevented by death, he ought to be free, both of the annualrent itself, and of the annualrent thereof.

THE LORDS having considered the decision, found it so short,\* and not to hold forth fully the case, notwithstanding thereof, they adhered to the former interlocutor, and found, That tutors are obliged to uplift, and, once in their tutory to re-employ the annualrents of the pupil, albeit the debtor were secure; but if the case had been of rents of lands, the LORDS thought these ought to have

\* The case alluded to is in these words: 'In tutor's counts, the tutor or curator is not subject to the minor to pay annualrent for the annualrent received for the minor's principal sums, albeit the said annualrent received extend to great sums of money yearly, whatever the same be.'—*Durie, p. 465.*