

case rarely contingent and oft times not known to the King's officers; and though it were, their negligence prejudices not the King by an express act of Parliament; neither is that a custom which people use to do, but customs here are only such as are judicial by the King's ministers of justice, whereanent Skene expressly saith, that this is *praxis forensis*; and, albeit the decisions adduced by him be not at large, yet the circumstances of fraud here are so pregnant, that they cannot be thought to have been more pregnant in any other case where there was no proclamation, and where the defunct was not only in *lecto*, but was *moribundus*, physicians having so declared, the common reputation being that he would not live, and dying *de facto* within a few days after, and there being no singularity in the match nor any pressing necessity of the marriage for any other effect;

THE LORDS found the libel and reply relevant, viz. that the marriage was done when the predecessor's father was *moribundus* and done without proclamation; and that he died within eight days after, there being nothing alleged to take off the presumption of fraud upon these circumstances. See APPENDIX.

Fol. Dic. v. 1. p. 570. Stair, v. 1. p. 446.

1672. June 26. EARL OF QUEENSBERRY against DUKE OF BUCCLEUCH.

EARL OF QUEENSBERRY pursues Scot of Chamberlain Newtown, for the avail of his marriage, in respect he holds the lands of Lairhope, ward of the Earl. Compearance is made for the Duke and Duchess of Buccleuch, who craved preference, because the defender had right to the lands of Chamberlain Newtown ward, and that by a progress from Turnbull of Chamberlain Newtown, his author, whose infestment ward, granted by the Earl of Bothwell, in *anno* 1528, was produced; and the original right of Lairhope, granted by Queensberry's predecessors, was only in *anno* 1571. It was *answered* for Queensberry, That the said infestment granted to Turnbull was not standing, and continued to this defender, whereby Buccleuch coming in the place of Bothwell, could have right to the marriage as the more ancient superior, because Bothwell being forfeited, and Turnbull's right unconfirmed by the King, it became void and extinct, as effectually as if Turnbull had resigned *ad perpetuam remanentiam*; and the first standing right by which this defender possesses Chamberlain Newtown, is an original right granted by the Earl of Buccleuch, which is much later than the original infestment granted by Queensberry's predecessors, which stands now in the person of the defender. It was *replied* for Buccleuch, That the forfeiture of the Earl of Bothwell did not extinguish Turnbull's infestment in the same manner as a resignation *ad remanentiam*, because the forfeiture gave only a power to the King to annul the sub-vassal's right, not being confirmed by the delinquence and forfeiture of his superior; yet it did not necessarily require a new infestment by the King to the sub-vassal, but his passing from the forfei-

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The more ancient superior is preferred in the avail of the vassal's marriage.

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ture in any way was sufficient; yea if the sub-vassal had possessed till prescription, his old infeftment would be a sufficient title for prescription, and would be validated by possession. *Ita est*, The King never excluded the sub-vassal by the forfeiture, but, on the contrary, gave him a charter, now produced, of the same lands, bearing, that they did belong to him before the forfeiture, and were in the King's hands, by reason of the forfeiture of Bothwell, which charter is in effect a restitution or confirmation. It was *answered*, That the defender hath not rested upon his old right and prescription, for there is no progress shown to the old right; but there is not only produced the charter by the King upon the forfeiture, but a posterior original right granted by Buccleuch. *2do*, The charter granted by the King is neither a restitution nor confirmation, but is a new original charter, bearing expressly to be granted by reason of the forfeiture, and bearing *reddendo servitia debita et consueta nobis ante forisfacturam*; so that by this charter, the King, as proprietor, did assume the sub-vassal in place of Bothwell, not for the services due by the sub-vassal to Bothwell, but for the services due to the King, which was only by Bothwell, and not by the sub-vassal, who was not the King's tenant, neither was there any sasine or progress of right from the King's charter, but only upon Buccleuch's charter.

THE LORDS preferred Queensberry to the avail of the marriage, as being the more ancient superior.

Fol. Dic. v. 1. p. 569. Stair, v. 2. p. 90.

* * * Gosford reports this case :

SCOTT of Chamberlainnewton, being vassal both to the Duke of Buccleuch and the Earl of Queensberry, in ward lands; after the decease of his father, the Earl of Queensberry, did pursue for the avail of the marriage, as being the elder superior, wherein comparance was made for the Duke and Duchess of Buccleuch, who *alleged*, That they ought to be preferred, because they came in the place of the Earl of Bothwell, who was forfeited by a charter from the King, who was superior of the said lands of Chamberlainnewton, before ever the heritors thereof were vassals to the Earl of Queensberry's predecessors; likeas the said Scott of Chamberlainnewton had become vassal to the King, by a charter under the great seal, disposing the said lands to him, to be held ward immediately of the King, which did seclude the Earl of Queensberry from any pretence to the marriage. It was *replied* for the Earl, That he ought to be preferred notwithstanding, because by the forfeiture of the Earl of Bothwell, who was immediate vassal to the King, the sub-vassal's right became altogether extinct; for, by all who write upon the feudal law, *delictum est modus aperiendi feudum* as effectual as a resignation of the property *ad remanentiam* in the superior's hand, these being *pares termini in jure* to make feus null *alienando vel delinquendo*. But so it is, that the Earl of Bothwell being forfeited, the sub-vassal, who was never confirmed by the King, his right became extinguished, and was consolidated with the superiority, and any new

right granted by the Duke of Buccleuch, to whom Chamberlainnewton became vassal, must be looked upon as a new right, and consequently being long posterior to the right of his lands held of the Earl of Queensberry, he ought to be preferred as *antiquior dominus*. THE LORDS having considered this case, as being *in apicibus juris*, did find, that if, after the forfeiture of Bothwell, the King had granted a confirmation of the sub-vassal's right, that law presumes it had been *confirmatio juris antiqui*; and so he being in that same case, as if he had held of the Earl of Bothwell before his forfeiture, the Duke of Buccleuch, who got the superiority, had been preferred; or, if Chamberlainnewton had remained immediate vassal to the King, by his new charter, the King or his donatar could only have had right to the marriage; but the Duke of Buccleuch, a stranger, to whom the superiority was disposed, having got a resignation from Chamberlainnewton, after he was immediate vassal to the King, and he having accepted of a new charter from the Duke of Buccleuch, to be his vassal, the LORDS did prefer the Earl of Queensberry, as *antiquior dominus*, the competition being betwixt two subjects, of whom a vassal holds several lands-ward, in which case the more ancient is always preferred.

Gosford, MS. No 497. p. 262.

No 31.

1672. June 28. EARL OF EGLINTON *against* LAIRD OF GREENOCK.

A SUBJECT SUPERIOR of ward-lands in Scotland, was found not prejudged of the benefit of the marriage, though the same vassal held ward-lands of the King in England or Ireland; and in the modification of the avail of the marriage, no consideration was had, unless of the lands within this kingdom.

Fol. Dic. v. 1. p. 569. Gosford. Stair.

*** This case is No 7. p. 4177. *voce* FEU.

No 32.

1672. July 19. EARL OF ARGYLE *against* The LAIRD OF M'LEOD.

ARCHIBALD CAMPBELL, as donatar by the Earl of Argyle, pursues the Laird of M'Leod, for the avail of his marriage, as it is taxed by his infeftments, granted him by the Earls of Argyle. The defender *alleged* absolvitor, because he holds lands ward of the King, who, by his prerogative, hath the benefit of his vassal's marriage, although he be not the most ancient superior. The pursuer *replied*, That albeit the King's prerogative doth always prefer him in simple wards, that cannot be extended to taxt-wards, for the ward being taxed, becomes in the nature of a feu; and therefore both superiors' wards being taxed, and the marriage likewise, for a small duty, both should have the taxed duty; or if the pursuer's right were simple ward, the preference of the King could only import

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Marriage of a vassal who held lands both of a subject and of the Crown, was found to belong to the King, by his prerogative.