

præsumitur semper ementis, nisi sit filius in familia; and so found the Lords in Posso's case, in February, 1668. See this in some cursory Observes out of Faber's Codex, *alibi*. But *dubatur*, if the money wherewith the land is bought be the price of lands lying in another kingdom and sold, and brought from that place, *ex. gr.* from England, where, if it had continued, they could not have reached it.

Advocates' MS. No. 471, § 6, folio 244.

ANENT THE MARRIAGE OF APPARENT HEIRS, IN WARDHOLDINGS.

THE Lords found, in the case of my Lord Colvill, in February, 1667, that an apparent heir's precipitation of his marriage when his predecessor is upon death-bed, to frustrate the Exchequer, or other superior of ward-lands, of the benefit of their marriage, is unwarrantable; and therefore found them liable in the casualty, as if they had been married after; as may be seen at the forecited place, where they went upon Balfour's authority. (Skeen, in his learned notes on *Quoniam Attachiamenta*, cap. 91. in Latin, tells sundry decisions of the same.) Yet it may be argued, that an apparent heir should be permitted to marry *in articulo mortis* of his predecessor, as well as the law allows a man to marry his concubine *in articulo mortis, ad effectum legitimandi bastardos ex ea genitos*, whereof Craig gives an instance in the Lord Semple, p. 230; for both equally prejudices the fisk. Yet there seems to be some disparity; for the marriage of the apparent heir, (if it had not been precipitated,) were a certain and uncontroverted casualty befalling to the superior. That of bastardry is not so: because the bastard may dispoise, in *liege poustie*, his means to whom he will; and if he have lawful children, they succeed to him without any right *ab intestato*; and so nothing would fall due to the King, or lord of regality, if it be within one; and they have right to bastardies and last heirs, which is doubted. *2do*, Marriage is most favourable, and therefore allowed at any time; and yet its principal end, which is *procreatio prolis*, cannot then be obtained; *et cessante causa, cessare debet effectum*; and this reason is common to both cases, only in the last there is the favour of legitimation superadded. *Vide supra*, July, 1671, No. 235.

If an heir of ward lands be infeft in his father's lifetime, his marriage is not due to the superior; and if he has got one marriage, he will not get the second when he falls a widower. *Alias* in an heiress of ward-lands.—See Skeen and Stairs on the Casualty of Marriage.

Advocates' MS. No. 471, § 7, folio 244.

1676. *February.* SIR WALTER SETON of Abercorne *against* the EARL of WINTON.

SIR WALTER SETON of Abercorne having been the Earl of Winton's tacksmen for three years, as to his casual rent of coal and salt in East Lothian, for which he was to pay him 24,000 merks of tack-duty; and when they came to count and reckon, he gave up exorbitant debursements waired out upon the putting down of

sinks, levels, and other works, which, though they were not contained in the tack, nor provided for, yet as *utilis negotiorum gestor* he craved repetition, or retention of so much, in so far as he had bettered my lord's condition by these works.

It was **CONTENDED**, That *qui aliquid facere obligatur*, (without specifying on whose charge and expence it shall be done,) *id suis sumptibus facere debet*; so *Zoesius in prælectionibus feudalibus, pagina 113*, and cites *Julius Clarus* for it. *Quod quis sponndit id suo impendio dare debet*, says, *L. 20, D. de Operis Libertorum, et Lex 53, D. de Fidei-commissariis Libertatibus*. A seller makes a right on his own charge, to the buyer, unless the contrary be specially provided by a paction. *2do*, All ambiguous and dubious clauses in writs and contracts are always, in construction of law, interpreted *contra eum* who is thereby obliged, *L. 39, D. de Pactis; L. 21 et 33, D. de Contrahenda Emptione; ibique Autumnus, in Censura Gallica*: who is censured again by *Scotanus, in Examine Juridica, pagina 3*: of which the law gives this reason, *quia potuit ille apertius contractui legem dicere, et sibi imputet* that he did it not. But, *3tio*, We are not straitened to recur here to these general principles of law, since the meaning and design of parties which governs all writs may be elicited from other particulars in this tack; as, by that clause, whereby if any new sinks or levels be made, Sir Walter is obliged to pay two bolls for every acre of ground he so breaks; if he was to pay for the ground and not my lord, much less was the expence of these levels to fall upon my lord. As to his partial payments or furnishings to my lord's house, he must say, they were chamberlains, cash-keepers, &c. in the words of the tack, obliging him to pay to my lord, his chamberlains, &c. the tack-duty, and shew their receipts, *alias* he was *in mala fide* to pay to any others. Next, my lord must have compensation, in so far as he has waired upon the pans beiting, since Sir Walter is, by a clause of the tack, bound to leave them in as good condition as they were in when he found them; which would have required a visitation by tradesmen, both at the entry and ish, ere one can institute a parallel of the deterioration. Yet this is a great *vidimus* that they were insufficient at his overgiving of the tack, because a good beit, in the opinion of persons of skill, will last for a year; and it is offered to be proven, my Lord Winton's commissioners were put to beit some of them within six months after they were cast in their hands; and that they were sufficient at his entry, must be presumed, for he would have seen to that. And if his extravagant defalcations were allowed then, it were an easy way for every tacksman to pay his duty by exhausting, absorbing, and compensing it with charges waired on the work. Sure my Lord Winton meant otherwise; and so did all other parties, since he has got the same tack-duty paid him by tacksman who succeeded to Sir Walter, and yet they carried up all these levels on their own expences, whereof Sir Walter now craves allowance. And what sober, indifferent man will imagine that Sir Walter was to have all that done to his hand, or that my Lord Winton designed to compliment him with so great an ease? *Nemo præsumitur suum temere jactare.*

Advocates' MS. No. 472, folio 244.