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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 disponed, 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.

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

No 32.

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.

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

No 33.
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.

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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an abatement of the avail of the marriage, as to the sum due to the King by the taxed marriage; for the ground of the avail of a vassal's marriage being, that the vassal should not contract affinity without consent of the superior, the marriage due to the King being taxed, the King hath thereby allowed the vassal to marry as he pleases; so that his other most ancient superior, of whom he holds ward, ought not thereby to lose his privilege of offering him a wife, and of the single avail of his marriage, if he marry without his superior's offer, and of the double avail, if he marry contrary to his superior's offer; otherwise it will be easy to evacuate the interest of all superiors as to their vassal's marriage, by infeftments of taxt-ward holding of the King; and as the King, if he had given several charters taxt-ward, might claim the taxt-marriage by all the charters, so the marriage due to the King and this superior being both taxed, both claim the taxed avail.

THE LORDS sustained the defence, and repelled the reply; and found, That one marriage was only due by a vassal, and that albeit the King might claim the greatest taxed duty in any infeftment, yet he, nor no other superior, could claim but one taxed value for the marriage of the same vassal, and so found the King only had right to this marriage.

Fol. Dic. v. 1. p. 569. Stair, v. 2. p. 106.

1673. *June* 14. GIBSON *against* RAMSAY.

No 34.
Marriage of an heretrix found not to reach the whole value of the fee, but modified as in the case of an heir-male.

UMQUHILE John Ramsay having only two daughters, one of the first, and another of the second marriage, Mr George Gibson married the daughter of the first marriage, and John Ramsay provided his whole estate to the daughter of the second marriage, but drew up a bond in favour of Mr George, of 6000 merks, which he did not deliver, but cancelled it a little before his death; whereupon Mr George obtained a gift of the ward and marriage of Janet Ramsay, daughter of the second marriage, and pursued declarator for the avail thereof, and instructed the estate to be twelve chalders of victual, and L. 150 of silver rent, and 12,000 merks of money, burdened with a liferent of nine chalders of victual, and 300 merks of annualrent, and thereupon craved that the whole free estate might be declared to be the avail of the marriage, in respect the defender is a woman, and so her marriage is the worth of her estate; that he was most favourable, his wife being heir-portioner, and excluded, and the defunct being induced by his wife to cancel a bond of 6000 merks in his favour, upon death-bed, in favour of her daughter. It was *answered*, That law and practique had stated the avail of a marriage alike, whether the party was man or woman, and otherwise the marriage of an heretrix would not be a casualty but an extinction of the fee, which were so hard, that nothing but a positive statute, or uncontroverted consuetude could infer it.