of his marriage, it was ALLEGED, That the lands being comprised from him as apparent heir to his father, he was thereby denuded; so that the right of the marriage could not fall to the king but by the death of the compriser.

It was REPLIED, That he being of age, whereby the marriage did fall; and might be gifted before the comprising; that did not take away the right of the marriage, which might affect the lands, both as to the compriser and the apparent heir, whensoever he should be served, and use redemption.

The Lords did repel the defence; and found, That an apparent heir, being marriageable, whether male or female, before a comprising led against them, it did not prejudge the king or his donatar of the avail of the marriage.

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1677. *July 5.* The ARCHBISHOP of GLASGOW *against* THOMAS CRANSTOUN and ROBERT DAVIDSON.

IN a reduction of the gift of the clerkship of Peebles, granted by the late Archbishop Lightoun, to the said Cranstoun and Paterson, conjunctly and severally, and longest liver of them two, of the whole benefit, profits, and casualties of the said office, upon these two reasons:—

1*st*. That it was *a non habente potestatem;* Bishop Lightoun, the granter, never having been legally transplanted from the bishopric of Dumblane to the see of Glasgow; without which, by the common law expressing the several solemnities of transplantation, no bishop can have right to the place and office, to which he hath only a right of provision by signature. The second was, That the right of clerkship being made to two conjunct persons, and longest liver of them two, It was a dilapidation of the benefice; and seeing one of them might die before the granter of the gift, so the survivor, without any new title from a new bishop, could never enjoy that office, and the benefit thereof; but ought to be at the disposal of the new bishop.

It was ANSWERED to the *first*, That Bishop Lightoun being transplanted upon the demission of the pursuer, and provided to the benefice upon a signature passed the Great Seal, it was a lawful title, and needed not the ceremonies of a transplantation, which are not ordinary.

It was ANSWERED to the *second*, That a clerk's office being no part of a church benefice; and the fees and casualties belonging to them for their personal service *et ratione officii;* the bestowing of any such place is no dilapidation of the church rent: and it is ordinary and lawful to present conjunct persons, not only to be clerks, but to be commissaries, and to belong to the longest liver of them: and as to the case now in question,—*viz.* the commissariat of Peebles, which is so large, that there being four commissariat committees, at several places, there was reason and necessity for making more than one clerk.

The Lords, as to the first, did sustain the answer, and assoilyied from the reduction; upon that ground, That the canon law, and formal ceremonies of transplantation, being only appointed by the Romish church, and never established here since the Reformation, they found that the king's signature, under the Great Seal, gave a full right to the bishops, without transplantation; especially in this case, where Bishop Lighton's signature was founded upon the same pursuer's

resignation. As to the second, upon the desire of the archbishop, it was ordained to be heard *in præsentia;* though many of the Lords declared their judgment, that as Commissary Falconer, and his son, now Lord Newtoun, were both provided to one place in the commissariat of Edinburgh, and the longest liver of them, so the clerkship of the commissariat being but a naked office, and they having no church benefice, the gift could not be reduced upon that reason of dilapidation.

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1677. *July* 6. THOMAS OGILVIE of LOGIE *against* SIR JOHN and DAVID MOUNTCREIFFS of TIPPERMALLOCH.

IN a declarator of recognition, at the instance of Ogilvie of Logie, upon this reason, That the lands of Logie and Banfarge being held ward of the Marquis of Douglas, by Mr David Mountcreiff, who was heritor thereof, and disponed three parts of five to be holden base of himself, whereupon infeftment followed; and Sir John and David Mountcreiffs, and the Lady Reries, who acquired the said base right, having disponed the same to James Ogilvie of Logie, by double infeftments; one to be holden of themselves and the other of the Marquis of Douglas, by resignation or confirmation, to be passed upon Ogilvie's own expenses; he finding that the Marquis refused to enter him his vassal, was forced to take a gift of recognition; and thereby having good right to the lands, craved, that the same might be declared, and that he should be free of the price of the lands; at least, that they should be liable upon the warrandice.

It was ALLEGED for the defender, That the lands could not be recognosced upon the grounds libelled: 1*st.* Because the seasines whereupon the recognition is craved were lawful; because the same were granted, and the lands disponed to be holden feu, before the Act of Parliament discharging vassals of ward lands, to set the same free without consent of the superior; which was allowed by Act of Parliament King James III. 2*d.* As it was leisome by the law, so the charter granted by the Marquis of Douglas, to Mr David Mountcreiff, did contain a special privilege that it should be lawful to him to infeft tenants in the said lands as freely as Alexander Wishart of Logie might have done by his charter granted by the Earl of Angus *in anno* 1511; in which it was declared that he might do the same without any peril or hazard. 3*d.* The pursuer was expressly obliged to procure his own confirmation upon his own charges and expenses.

It was REPLIED to the *first*, That, by the Act of Parliament James III, when the feudal law, whereby this case must be determined, all subinfeudations must be *ad decorandum*, and making the lands better as to the superior: and, by subsequent Acts of Parliament, the same were declared void being granted without the superior's consent; but so it is that, by this base infeftment granted to the sub-vassal, the feu-duty payable yearly is only one merk Scots; whereas, by our law and practick, the least feu-duty in the case of change was a year's duty, to which the lands were retoured, and so cannot hinder recognition.

It was ANSWERED to the *second*, That, albeit the charter 1511 gives power to dispone to sub-vassals without any peril; yet that could only be interpreted as to the change of the holding: but here, the *reddendo* and feu-duty being so in-