

*orbitas* shall be penal to his subjects. *Vide* Dury, 14th January 1626, *Hamilton*; and 7th July 1629, *Lord Cathcart*.

This decision was thought strange; since they who have componed for their wards and marriage, with the King, are, by the Act of Parliament 1661, secured that no other superior shall claim any right to the casualty of their marriage. Yet the Lords went upon this ground, that they saw not the erection of the principality; and if the King Erector had been asked to whom the principality should belong, in case he had no son or daughter, law *verisimiliter* presumes he would have answered that the Prince's lands in that case should remain with himself and his successors as his own. See the like presumptions in *L. 6 et seq. D. de Pignor.* *Vol. I. Page 72.*

1680. January 6. The DUKE of HAMILTON against BAILLIE of LAMINGTON.

THIS Baillie of Lamington's goodsire having some lands holden ward of the King, and other lands holden ward of the Duke of Hamilton; he disposes the lands holden ward of the King to this Lamington his grand-son, whereupon he is infeft in his goodsire's lifetime; so that the King had neither the casualty of ward nor marriage to seek. But Duke Hamilton craving his marriage, he being the next ward superior after the King, it was ALLEGED,—Where a vassal holds ward of the King as well as of a subject, that then the subject superior could not crave the marriage. Yet here it was found that Duke Hamilton had right to his marriage: and Lamington was forced to compone with him for it, and gave him L.1000 sterling.

If he had taxed his ward and marriage holden of the King, conform to the 58th Act of Parliament 1661, then he would have been free of Duke Hamilton. *Vol. I. Page 73.*

1680. January 6. ANENT APPRISINGS.

ONE apprises ward-lands, and is infeft, and dies: his heirs are pursued for the ward and marriage. ALLEGED,—*Absolvitor*, Because he is but an appriser of the reversion, and for the behoof of another whose trustee he is, and to whom he hath given a back-bond; and there is another who hath a comprising consummated by infeftment before him, and so the first appriser only is the King's vassal. REPLIED,—By apprising the reversion, the second appriser is come in place of the heritor, and so the casualty was opened by his decease.

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1680. January 6. PARK against STORIE.

ONE is cautioner for another *judicio sisti et judicatum solvi*; whereupon being pursued, *pendente lite* the principal party dies, and there is a transferring of

the state of the process raised against his heir. The cautioner compears, and ALLEGES he ought to be freed, because his obligation was personal, and died with the principal party. And the meaning of his accessory obligation is only this, If you had obtained sentence against him in his lifetime, then I was to be liable for it. And where one is cautioner in a suspension, if the decret be turned into a libel, then the cautioner is free. Stair, *tit.* 10.

Though this allegiance seemed unreasonable to some, yet, it being reported, on the 20th January 1680, the Lords found a cautioner *judicio sisti et judicatum solvi*, liberated, in respect the principal debtor died *pendente lite*, though after litiscontestation; and though the cautioner had delayed its coming to a sentence by advocating the cause.

This seems agreeable to the Roman law, *De Fidejussore judicio sisti et judicatum solvi*; see *Bartholus* and *Broderodii de Repertor. item Accurs. Glossar. Vol. I. Page 73.*

1680. January 8. ANDREW CADDEL *against* ALEXANDER RIE [OF REATH.]

ALEXANDER Rie marrying Andrew Caddel the vintner's daughter; in the contract of marriage Alexander's father is obliged to lay 3000 merks to her tocher, and to provide it to the married couple in liferent and conjunct fee, and to the bairns of the marriage in fee. Within half a year thereafter, the father impleads a discharge of this 3000 merks from his son. Which discharge being quarrelled by the wife and the son's creditors, Lord Saline found the discharge null and fraudulent, *et contra fidem tabularum nuptialium*, unless Alexander Rie, the father, would either prove the numeration of the money, or the giving his son assignation to sufficient bonds or merchant ware; or, *2do*, will prove that the said sum was reemployed for the wife and bairns' use, conform to the destination of the contract of marriage. *Vide supra, 19th November 1679, Wemyss: and 8th January 1679, Lady Knox.* The father not resting satisfied with Salin's interlocutor, he, on the 21st of January, reported it to the hail Lords; and they found the son's discharge to the father might prejudice himself, but not the obligation for the wife's liferent, nor the son's creditors, though they became only creditors after the discharge was granted; they proving that it was comuned betwixt the father and the son, that he should give the father this discharge, (which they referred to the father's oath,) or proving any other collusion betwixt them, which may render the discharge fraudulent; in which case the Lords would not regard it as *contra fidem pactorum dotalium*.

If a man or a woman do any deed betwixt the contract and marriage, derogating from and altering the solemn stipulations contained in the contract matrimonial, the Lords distinguish thus:—Either he or she are free persons, whose parents are dead, and have the disposal of their means in their own hands, and are majors, and have contracted for themselves; or they are minors, and *sub potestate parentum*, and their portion or tocher is *peculium profectitium* from the father or other friend who contracts in the *tabulæ nuptiales*. In this last case, any second latent paction betwixt the contract and marriage, innovating the conditions of the contract, without the consent of the whole other parties contractors and friends, the Lords will incline to find them null; but in the first