avail of the tocher, but also the defenders personally to pay the same; *thirdly*, Absolvitor; because, the Earl of Marshall consented to the defender's marriage, in so far as he is witness in the contract.

No 29.
The ground may not only be poinded for the avail of marriage, but the vassal is personally liable.

THE LORDS repelled all these allegeances; the *first*, In respect that ward is presumed, where the contrary is not alleged, and the defender did not disclaim the Earl of Marshall as his superior; the *second*, Because, they found that the avail of the marriage did not follow the value of the land holden ward, but the parties' other means, and estates also; so that the avail of the marriage might be much more worth than the profit of the ward land; and, therefore, behoved not only to affect the ground, but the heir, or apparent heir personally: And, as to the other defence of the Earl's consent, it was after this gift granted, and was only as witness; neither is the profit of the marriage, as to the single avail, taken away, by having of the superior's tacit consent, but is a casualty simply belonging to him, which cannot be taken from him, unless *id agebatur* to renounce the benefit thereof; yet it seems, that the superior, consenting to his vassal's marriage, can crave no greater avail than the vassal gets of tocher.—*See* PRESUMPTION.

Fol. Dic. v. 1. *p.* 568. *Stair, v.* 1. *p.* 104.

1667. *February* 20.

LORD TREASURER and LORD ADVOCATE *against* LORD COLVIL.

No 30.
Found in conformity with the King against Cairns, No 3. p. 8517. that the marriage of the apparent heir, while the predecessor was *moribundus*, was in *fraudem* of the superior.

THE Lord Treasurer and Lord Advocate pursue the Lord Colvil for the single avail of his marriage, in so far as he was married when his predecessor was on death-bed and was *moribundus*, and was married without proclamation within seven or eight days before his predecessor's death; which precipitation of his marriage did manifestly presume that it was of fraud to seclude the King from the benefit of the marriage; and so it was in the same case as if he had been married after his predecessor's death, and repeated the opinion of Sir John Skene in his explications upon *Quoniam Attachiamenta de Maritagio*, bearing that it was *praxis fori*, that if the vassal gave his heir in marriage upon death-bed it was esteemed a fraudulent precipitation in prejudice of the superior, and gave the superior the single avail of the marriage; and sets down three decisions whereby it was so found. It was *answered* for the defender, absolvitor, because there is neither law nor custom gives the superior the avail of the vassal's marriage, if he be married before his predecessor's death; but Craig, and other lawyers, do define this casualty to be the avail of the apparent heir of the vassal's marriage marrying after his predecessor's death; and as to the ground insinuated of fraud by precipitation, it is noways relevant; 1*mo*, Because, albeit it did appear, that the defunct vassal had married his heir of design to prevent the marriage, yet here is no fraud but a warrantable providence, which is not *dolus*

No 30. *malus sed dolus bonus*, for fraud is never understood but when it is *contra jus delatum*, and not of the prevening of *jus deferendum*, for thereby only the right and interest of another is taken away; as for example, any heritor may dam or divert the water upon his ground as he pleases and cannot be hindered, upon pretence that his neighbour might thereafter make use of that water for a mill to be built; and yet if the mill were built, he could not thereafter alter the course of the water; so here the superior having no present right but in *spe*, the vassal endeavouring to prevent the casualty, commits neither fraud nor fault; otherwise, upon pretence of fraud, a marriage might be claimed when the predecessor resigns in favours of his apparent heir, or suffers his land to be apprised in name or to the behoof of the apparent heir, which yet was never challenged, neither hath a marriage been obtained or demanded upon this ground by the space of these three score years. *2do*, Albeit prevention could be fraud, yet here is nothing alleged to infer fraud, which is never presumed unless it be evidently proven; and when any other cause is possible, the effect is never attributed to a fraudulent cause; but here there is a most probable cause, viz. that the defunct desired to see his successor married to his satisfaction, it being very ordinary that the ruin of families arises either through the not marrying, or marrying unfitly of the heir. And as for the presumptions of fraud, here they are neither evident nor pregnant. As to the decisions, no respect to them; *1mo*, Because they are threescore years in desuetude; *2do*, There is here nothing but the very instancing of the practiques, without deducing the case disputed and reason of decision; neither can Skene's conclusion take place in all the largeness he sets it down, or else there shall need no more to infer a marriage but that the vassal was in *lecto ægritudinis*, albeit he had so continued of a lent disease above a year, nothing should capacitate him to marry his heir, although he used all the solemnities of treaty, contract, and proclamation; so that the law *de lecto ægritudinis*, which is only introduced in favours of heirs, that their predecessors shall not prejudge them, shall now be made use of against the heir, that his predecessor can do nothing to his benefit on death-bed. The pursuer *answered*, That the feudal contract being of its own nature gratuitous, and most favourable on the part of the superior, that which he hath for his fee being ordinarily the service of the vassal and the profit of the fee when the vassal is unserviceable through minority (reserving the vassal's own aliment) and the profit of the vassal's tocher; the vassal ought not to defraud or prejudge him therein. And albeit custom hath introduced an exception, that the tocher is not due to the superior which was gotten during the predecessor's life, it being ordinarily consumed and applied to the predecessor's use; yet that by precipitation the apparent heir should enjoy the same and not the superior, is against the gratitude, amity, and obligement of the vassal; neither is there any parity in the case of a resignation to which the superior consents, or in the case of an apprising, wherein the superior must receive by the force of law; nor can the forbearance of sixty years infer a contrary custom, because this is a

No 30.

case rarely contingent and oft times not known to the King's officers; and though it were, their negligence prejudges 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.

No 31.
The more ancient superior is preferred in the avail of the vassal's marriage.

EARL of QUEENSBERRY pursues Scot of Chamberlain Newtoun, 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 Newtoun ward, and that by a progress from Turnbull of Chamberlain Newtoun, his author, whose infeftment 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 infeftment 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 Newtoun, is an original right granted by the Earl of Buccleuch, which is much later than the original infeftment 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 infeftment 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 infeftment by the King to the sub-vassal, but his passing from the forfei-