

All who understood law and the former practice of the bench, were much affected at this procedure of the Lords ; seeing them so influenced and bowed from above, to go over a practise so clear as that in 1612 is, and whereof the principal decret was produced, and over so much reason as was adduced, from the unsecuring of the lieges.

Sir George Lockhart violented himself much in the affair, he never pleading cheerfully against his own judgment. When some of the Advocates were asking him what could be said against so clear a principle as that defence of my Lord Weimes' was, he faintly replied, The other opinion wanted not its own colour.

The Lords ran much divided in it, through my Lord Chancellor's interest in Weymes, who far and wide complains of the unjust measure he has got from the Lords' partiality or timorousness. *Advocates' MS. No. 372, folio 150.*

1672. *November.* MR. ALEXANDER GIBSONE against JANET RAMSAY.

IN the actions of declarator of ward and marriage pursued by Mr. Alexander Gibsone, donatar thereto, against Janet Ramsay, as heir to John Ramsay of Brackmont, her father, or George Ramsay, her brother-german, it was thought by the defender's lawyers, (and the pursuer's procurators in the debate did not controvert it,) *1mo*, That though the ward of a man, or heir male lasts and continues till he be of the age of 21, yet that it ceased and expired in an heir female at fourteen, and that she was then major *quoad* a ward ; and which is Craig's opinion, and seems suitable and consonant to the nature of ward holdings, and the superior's interest in the same. (See *Craig*, pag. 285, and the fifth Act of the Parliament in 1547, there cited, which seems to favour Craig's opinion.—See *Dury*, 19th June, 1630, *Somervell* against *Gordon*.) *2do*, It was resolved, that in the modification of the avail of a marriage, as the same will be taxed with respect to the whole estate, both personal and real, that the heir may succeed to, though even but temporary rights, such as tacks of teinds, &c. ; (teinds are to be deduced in the making up the avail, considering only the benefit of the tack, with deduction of the tack-duty for the years the tack hath to run : so all the personal or real debts and liferents that do or may affect the heir or his estate must be considered and defalked, to lessen the avail ; which must only be modified with respect to the free estate, all burdens laid aside. *3tio*, That Craig's opinion was absurd, and never came in practice, where he thinks the marriage of an heretrix of ward lands must be estimated according to the avail of her hail estate : which would not make the marriage a casualty or an obvention arising to the superior by the decease of his vassal, but rather a loss or extinction of the feu ; and so ought to be ranked in, not amongst the profits of superiority, but amongst the ways by which a fee opens and returns back to the superior, and is amitted ; and therefore the Lords have never been in use to modify it much higher than if it were the marriage of an heir male. *4to*, It was thought, seeing the apparent heir wanted but three months of fourteen at her predecessor's decease by which the lands warded, that the donatar to the ward and non-entry, would fall only a term's rent ; and as to that it was a question if it ought to be

any more nor the retoured duty, because it became only due by reason of non-entry, the donatar to the ward never having attained to the natural possession of the lands. And which reason seems likewise to make, why there should be no relief in this case. *5to*, They inclined that where an heir of ward lands was within twelve or fourteen, the avail of the marriage was not due till they had arrived at the said respective years; and therefore they could not be liable for the same, whether it was taxed ward or not, till it be constant if the heir shall attain to that age or no, to make it due; and that no declarator ought to be sustained or pass thereupon before they be come to the years whereat the law allows them to marry: at least it ought to be conditionally.

When the action was called, it was alleged, *Imo*, Absolvitor as to the ward of the lands of Lucklaw, holden by that service of his Majesty, because the King has a vassal, in so far as in the infeftment of the fee given to George Ramsay, (by whose death the ward is pretended to have fallen and existed in his Majesty's hands,) there is an express reservation of his father and mother's liferent; but so it is, the mother is yet alive, and so, by virtue of the said reservation, is the King's immediate vassal, seeing she must be in the same case as if she stood infeft holden of the King, or had an infeftment confirmed; all which cases would uncontrovertedly stop and hinder the ward; and therefore this reservation of liferent being constituted and acknowledged by the superior, must stop the ward.

To which it was REPLIED,—That a reservation *non relevat*, unless we could say either a public infeftment or an infeftment confirmed; seeing his Majesty must not be presumed to give away or dispoise his casualties without knowing them: and opposed My Lord Treasurer Depute's practise against the Earl of Northesk, where a *novo damus* was not found to carry casualties that were not expressed; much less then could his Majesty or his donatar be in law debarred and secluded by a naked reservation of liferent adjected to a charter of the fee, and which pass of course unnoticed, and which is scarce a real right, and which, by no presumption, could bear that interpretation.

Gosfuid was clear to have sustained our defence; but, in regard the pursuers were instant, he was to give us the Lords' answer upon it.

We not being curious of tempting the Lords with novelties, or of affording them opportunities to forge new interlocutors, and mainly because Sir George Lockhart was diffident what might be the event; we found the mother stood infeft in liferent upon her husband's resignation, beside the reservation in her son's right: whereupon, at a new hearing, we positively proponed upon her public infeftment, and which was sustained as relevant of consent.

In the declarator of the avail of the marriage, in regard they had most exorbitantly condescended upon her estate in their libel to be the rule and standard of the Lords' modification, viz. 50,000 merks, as also most ridiculously concluded that her marriage might be taxed at that total, and that she might be decerned to pay the said sum of 50,000 merks to the pursuer, as the worth of her marriage; therefore we urged for the benefit of a conjunct probation as to the value of the estate, and the debts and burdens, personal and real, that are thereupon. But it was refused us, by which we suffered; in regard, when it came to the advising,

our defalcations were not so clearly instructed as to make full faith to the Lords.

He did also pursue an exhibition against the lady, for producing the tenants' tacks, with the bonds and all other writs which might instruct his action of declarator of the avail of her daughter's marriage. Which action, though contrary to that received maxim, *nemo tenetur edere instrumenta contra se*, yet was sustained, and he found to have sufficient interest to call for them; and, therefore, the lady produced them all upon oath.

The probation used in the declarator of the avail of the marriage, coming to be advised on the 18th of June 1673, it was then ALLEGED, for the defender, that, before they entered upon the matter, there were two preliminaries they would offer to their Lordships' considerations. The first was the extreme precipitation was used in the procuring and expeding of this gift now pursued upon: Jo. Ramsay not yet buried, scarce known in the city to be dead, the first Friday thereafter is a signature stolen up upon the Exchequer wall, revised in Treasury, passed in Exchequer, directed to the privy-seal by the signet, and passed there, and its seal appended, all in one day; express contrary to the just and rational statutes of the Exchequer, discharging any signatures to be revised or passed that day they are first affixed, but to stand till that day eight days, that nothing be huddled up, and none be hurried and surprised. If the common law punished that creditor who molested or unquieted the heir, or moved any thing against him, before nine days were elapsed from the defunct's death, by the loss of his debt; if it used a stranger thus, how much more severe would it have been to this pursuer and his brother, (for whose behoof this plea is carried on and managed;) considering thir two aggravating qualities, first, that he is son-in-law to the defunct, and so, by his forbearance, should have paid more reverence to the ashes of his father-in-law, and not have thus, for his own gain, so quickly contradicted his will and lacerated his family. But, next, he should have remembered that his being a member of this house, demanded of him more candour and ingenuity than any he has shown in this affair. The whole country is full of murmurings and complainings at the indirect usage and trepans they meet with when they have to do with members of the Session. And when they see such traits of legerdemain as this, will not all then conclude these rumours to be too true? So that I really think, that all persons of honour belonging to this house should be so far from taking such advantages, which justly open the mouths of the people against us, that whatever favour is to be indulged, in point of dispatch or otherwise, is less to be used by them than any others. *Vide infra, Sibbald of Kair and Glenfarquhar, [No. 729, 26th February 1672.]*

The next thing I have to represent to your Lordships is, that the same day this pursuer's gift is here passed in Scotland, there is a signature passed, under his Majesty's royal hand, at Whythall, (for both are dated 23d of February 1672,) disposing the lands of Lucklaw to the deceased Jo. Ramsay in liferent, and to this defender, his daughter, in fee, containing an ample *novo damus*, (*nota*, it wanted the word "marriage," and so would not sustain, because of Halton's practise; *2do*, Not passed in Exchequer, so that the pursuer's was the first complete gift,) and therefore must be a discharge of any ward or marriage that was fallen by the decease of George Ramsay, who died five or six months before that, and which are the casualties now insisted on and sought to be declared; es-

pecially where they are gifted to the party's self, who, of all others, is most favourable, as having most interest; as may be gathered from Hadington, in a very like case between *the Earl of Argyle* and *Ardkinlas* at the last of November 1609, it is *numero* 31. This being permitted, it is humbly desired your Lordships may seriously consider and ponder, in the taxing and modifying of the avail of this young gentlewoman's marriage, that we should heartily thank thir pursuers for the high estimate they put upon her estate, if we could be persuaded that it proceeded from any kindness and good intention to her ward; but they must not be offended at me if I shall bring it down to the half, and make them a frank offer of the hail at that rate; which will be very easy to demonstrate from these particulars,—that the said land is so miserably racked, and the tenants thereof so impoverished and harassed, that albeit it may be it is proven to be set at present for twelve chalder of victual, yet any who have a solid and clear rent will never extort beyond ten. Next, it lies in Fyffe, and in the midst of it, in a country all sanded and overblown, producing nothing but oats, and these not worth eighty merks the chalder; it holds ward; and they have no other right to their teind but a tack within eight or nine years of the expiring, and they pay one hundred merks yearly of tack-duty. Besides, much of it is casual rent, viz. the rent of a miln. It is true, this might seem an opulent and considerable fortune were the heir in possession of it; but here she cannot get possession of a fur of it; her mother liferenting the whole, who is a person who, in all probability, and according to the course of nature, may live these twenty years. Neither is she in a whit better case as to her estate in money; for beside that some of it is desperate, and so in no reason can augment or inflame this count, it is all liferented by the mother as well as the land is: so all her estate can be looked upon no otherwise but as a naked fee, and wherefrom she may be long enough secluded. In respect whereof, it is humbly expected that the Lords will mitigate and moderate this avail, and decide *secundum bonum et æquum*, following that common standard they have set up to themselves heretofore in cases of this nature, viz. two years rent of that estate which is the subject of the modification, and which they seldom ever exceed:* and in regard the heir hath nothing actually, that the payment of the sum so to be decerned may be superseded till she get possession of her estate; else it shall force her to sell her heritage to her great detriment, seeing she will not be able to satisfy the same *aliunde*, and to which she will find no buyer, being a minor, unauthorized, and wanting a sentence of the Judge Ordinary finding the alienation to be necessary and to her seen weil and utility: to which sad dilemma it is hoped the Lords will not expose her, but rather find out such just remedies as may tend to the preserving her heritage from being totally swallowed up; and which makes a part of that trust in their office, for inspection over orphans and minors, that the law and the people hath reposed in them.—See the full informations beside me.

The Lords, in regard they were informed that, at a communing, 8000 merks was offered by the defenders, and 9000 was craved by the pursuers, they, in a trysting manner, divided the odd 1000 merks contraverted, and modified the avail of her marriage to 8500 merks.

* This method is used by the Lords when the double avail is decerned. See 8th March, 1627, *Earl of Rothes* against *Balfour*.

And though the Lords have a great latitude in thir cases, yet this modification, all things being rightly considered, was most exorbitantly high as any that had been of a long time decerned.

Though we dealt to have this declared to be in satisfaction to him, not only of the marriage, but also of the ward and non-entry, to which he was also constituted donatar; yet we could not prevail: only it was not very material, seeing the ward and non-entry, as I have told before, will resolve in a very mean matter. And, in regard, this sum decerned is in law *debitum fundi*, so that the donatar might point the ground for it; therefore, the mother for her right of liferent, and the daughter as fiar, assented to assign him to as many bonds as would make up the sum decerned: and which he accordingly accepted of: and the mother protested that her daughter, as heir to her father, should be liable to make up that loss she had sustained in quitting her liferent of the sums assigned; and which protestation the Lords admitted.

In the canvassing of this affair, the following case fell transiently in: John Ramsay had granted a bond to Mr. George Gibsone, his goodson, for 6000 merks; this bond he kept beside him till near his death, at which time, for reasons known to himself, he cancelled the bond, with this elogium on the back of it, that the said party had disobliged him, and deserved no favour at his hand: the question moved was,—if a man may, upon death-bed, cancel an heritable bond (whether it bear a destination for infestment, or only a clause for payment of annual-rent, *non refert*,) lying beside him in his own custody, and which was never delivered, but bore a clause dispensing with the not delivery. I thought it very lawful; for, if the law hath had so special a care of heirs, that it incapacitates any to do deeds to burden them, or to their prejudice, while they are in *lecto*, then certainly, *a contrario sensu*, it approves of any deeds he shall then do to liberate his heir of a debt, such as this deed is: that the whole strain of law is so contrived that it may be ever *pronior ad liberandum quam obligandum*, *l. Arrianus, 47 D. de obligationibus et actionibus*. Likeas, who can dispose so well and adjust so rationally the portions and several distributions of children as the father, and who can justly impede him in abstracting his favours from those whom he has found ungrate and impious, and whereof he must be presumed absolutely the best and most knowing judge?

Advocates' MS. No. 373, folio 151.

1672. *January and November.* JAMES DUNDAS and OTHERS, Creditors of PARK WHYTHEAD, *against* THE TOWN OF EDINBURGH.

January.—In January this Session, was called the action pursued against the Town of Edinburgh by James Dundas and other the creditors of Park Whythead, for payment of their respective debts, because he having been incarcerated within their tolbooth of the Cannogate, he had escaped.

Against which it was ALLEGED, that the 173 act of the Parliament 1597, appointing all burghs to have sufficient gaols for detaining of prisoners, must only be understood of burghs royal (who, in regard of the many privileges granted to them by the King and his ancestors, must not complain of this burden imposed on