1680. *January* 9. PURVES *against* THE LAIRD of LUSS.

No 40.
Marriage found due to the King by a vassal of the principality, in respect of the non-existence of a Prince, during which the King is *proprio jure* Prince.

SIR WILLIAM PURVES having obtained the gift of the marriage of the Laird of Luss, by holding the lands of Dinnerbrook, &c. of the King, as Stewart and Prince of Scotland, thereupon pursues declarator for the avail of the marriage.—The defender *alleged* absolvitor, because he holds the barony of Luss tax-ward of the King, who by his royal prerogative excludes all other superiors from the marriage of the King's ward-vassal, and so doth exclude any marriage due for lands in the principality, which is a feu holden of the King, in which the Prince is his vassal, and so a subject.—It was *answered* for the pursuer, That when the Prince is existent, he is a subject, and would be excluded from a marriage of his ward-vassal, if that vassal hold any ward-lands of the King, taxed or untaxed; but when there is no Prince existent, the principality belongs to the King, and all the casualities thereof fall to the King *proprio jure*; so that there being a simple ward and tax-ward both due to the King, the one excludes not the other.—The defender *replied*, That it being beyond doubt, if there was a Prince existing, no marriage would be due out of these lands holden of the Prince, the accident of his non-existence being without the vassals' fault, can import no prejudice to them by making them liable in a marriage to the King; for albeit it be true that the marriage of ward-vassals, not being due to every superior, but only once to the preferable superior, who, among subjects, is the eldest superior; but when the King is in competition, by the eminency of his dignity he hath the marriage, though he be not the most ancient superior; yet that is only as King by the prerogative of his Crown; but he hath no right to the principality as king, but as Prince and Stewart of Scotland, when there is no Prince, *supplendo vicem* of the Prince; for, when there is a Prince Pupil, the King's acts, as lawful administrator to him, and when there is no Prince, the King acts *in vice* of the Prince, that the Prince's vassals may not want a superior; and therefore, gifts granted by the King, of the casualities of the principality, would be postponed to gifts granted by the same King as Prince and Stewart of Scotland, which is the only habile way; so that the prerogative of the Royal dignity takes no place as to the principality, more than if a superior lie out and enter not his vassal, whereby he might recur to the King, and be infeft by him *supplendo vicem* of the immediate superior, who thereby would lose the superiority during his life, and the casualities thereof would belong to the King; so that if that vassal's heir fell in ward, his marriage would belong to the King, and yet the King would not exclude a more ancient superior, because his interest is but *supplendo vicem* of a subject, and therefore it must be so in the principality; for though the erection of the principality be not extant, yet there is sufficient ground to know, that it is a feu holden of the King, and that it was the estate of Walter, Stewart of Scotland, whose posterity coming to the Crown by the marriage of Lady Mary Bruce, daughter to King Ro-

bert Bruce, the estate of the Lord Stewart was erected in a principality for the King's eldest son, comprehending the barony of Renfrew, the bailiaries of Kilstewart, Cunninghame and Carrick, and all the stewartries of Scotland, and many other lands dispersed through the kingdom, whereof the Prince, when major, had the full dominion, and could have changed wards, given custodies of castles, dowries to the Princess, pensions, and the like, all which are deeds of property. Neither was ever the principality annexed to the Crown; so that if the King might act as *dominus* during the not existence of the Prince, he might, without dissolution, alienate the whole principality, which will not be pretended; and therefore the King's acting during the non-existence of the Prince, is not as King, but as Prince and Stewart of Scotland, and so but *supplendo vicem*, or as *curator hæreditatis jacentis*. Neither was there ever any such casuality claimed of any person holding ward, both of King and Prince.—It was *duplied* for the pursuer, That no erection of the principality being extant, it must be presumed to have been according to what was rational for the King to give, which could be no more but as an Apanage to a Prince when he should exist; or though it had been a fee to the Prince, yet it must have been presumed to have been with the reservation to the King of all the casualities, during the non-existence of the Prince; which reservation remains as a part of the Royal interest, in the same way as persons use to infeft their eldest sons, reserving their frank testament, and all casualities during their life, whereby they receive vassals, and enjoy all profits, not by the son's infeftment, but by their own infeftment, which stands undenuded *quoad* the reservation; and it cannot be imagined, that the King would otherwise give a fee to the Prince, who oft times exists not; albeit during the not existence, the King act as Prince and Stewart, yet that is not *supplendo vicem*, but as administering his own proper right, albeit distinct from his annexed property, and acted under the name of Prince; so that the personal dignity that prefers the King to other superiors, *in jure indivisibili*, is as well competent to him as King as Prince; and it is a groundles imagination, that the King can act as a subject, which is incompatible with his Royal dignity, although it were true that this prerogative extends not to the wards of subjects, who through their default have lost the same during their life, and the superior enjoys the profits *supplendo vicem*, and so acts not *jure proprio*, that cannot be drawn in consequence to the principality, when there is no Prince, where the King acts *jure proprio*, and not as administrator to the Prince, or the principality, for thereby the King would be liable to account to the Prince, when he became to exist, in the same way that the King's officers are accountable to the Prince when existent, for what is acted by the King as administrator for the Prince, which was never pretended as to the actings in the non-existence of the Prince; and there is a pretended decision of the Lords, That during the non-existence of the Prince, the gifts given by the King, though not as Stewart and Prince of Scotland, are valid; and albeit a gift by the King as Prince were preferable, as more habile, yet still it is gifted by the King *jure proprio*, and as

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Sovereign Prince, whereas the King's eldest son is a Prince *agnoscens superiorem*, and so is no Sovereign Prince; yet it is the sovereignity, which by his dignity gives the preference, whether his title be Emperor, King, Prince or Duke; for the sovereignty is compared to the sun, and the subjects to the stars, which will all disappear when the sun shines; and to show that this keeps an exact analogy with the laws of the kingdom, by the 16th act, Parl. 1489, it is declared, That the vassals of the Prince shall be members of Parliament, till the King should have a son that should be immediate betwixt him and them, to answer for them; so that when the Prince is not, his vassals are immediate vassals to the King; and by the late act for changing of ward to feu, and the revocations of all the Kings, the same things are enacted anent the principality as anent the royalty. —It was *triplied*, That these statutes are *stricti juris*, and cannot be drawn in consequence, and do but constitute *jus novum*.—It was *quadruplied*, That they are rather declaratory of what was the King's right, than constitutive of any new right; and as to the favour of the defender's interest, that it is hard that without the vassal's fault his condition should become worse by an accident, and that this may be drawn in example to the prejudice of the lieges;—it was *quintuplied*, That this case is very rare, that one person should hold tax-ward of the King, and simple-ward of the Prince; and that the vassal's condition may become worse without his fault, is evident; for though a superior hath had a ward-vassal for hundreds of years, and thereby his marriage, yet if that vassal acquire any ward-land holden of the King immediately, the King, though the later superior hath the marriage; or if a vassal hold ward of two subjects, whereof the elder superior is preferable, yet if the younger superior resign his superiority to the King, the eldest superior is thereby excluded, so that it is the Sovereign dignity that makes the preference, which holds not only in the royalty and principality, but in all lands whereunto the King doth succeed, as by forefaulture or recognition, or which he may acquire by excambion or vendition.

The Lords repelled the defence, in respect of the reply, of the non-existence of a Prince; and found, that the King had right to the simple marriage holden of him as Prince, while there is no Prince existent. See Prince of Scotland.

Fol. Dic. v. 1. *p.* 569. *Stair, v.* 2. *p.* 734.

1681. *January* 5. Lord Dun *against* Viscount of Arbuthnot.

No 41.

The heir is only liable for the avail of his marriage, effeiring to the estate he got from his predecessor, without considering the value of his tocher.

An apparent heir, though married, was found not personally liable for the avail of his marriage, not having entered into possession of his predecessor's estate.

Fol. Dic. v. 1. *p.* 570. *Stair.*

*** This case is No 4. p. 4417. *voce* Feu.