

No 9.

The avail is to be considered according to the rental of the minor's free living, deducting the relict's terce and conjunct fee, but the rentals of all other lands as well as those that hold ward, are to be computed according to the profits they may yield, and not as they are let.

1593. *March.*DOUGLAS *against* GELSTON.

DOUGLAS, sister to the Laird of Drumlanrig, pursued the Laird of Gelston for the double avail of his marriage, because she being donatrix to his ward and marriage, she had made lawful requisition to him, notwithstanding whereof, he had married without her consent. The rental of his living being given in, extending to threescore and fifteen chalders victual, and three hundred merks in silver, it was *alleged*, that defalcation behoved to be made of the third of his lands, whereunto his mother was kened, which the Lords declared they would consider, *cum processu*.

Thereafter, it was *alleged*, that the defender having excambed the lands of ——— with the lands of ———, no consideration could be had of the rental of the said lands analized by excambion. THE LORDS found that they would respect the rental of the lands received for the excambed old heritage, albeit it was not libelled, because this defender might, by his deed, prejudice the donatrix by no posterior alienation whereby his living was altered or deteriorated. As also, they declared, that they would consider the marriage according to the avail of the hail heritage, and not only of the ward lands, albeit the marriage only fell by them. *Item*, They would consider the rental not according to the present duties, but as the pursuer might prove the lands to be worth, and to have them of before. *Item*, That requisition made to the minor having curators, put him in *mala fide*, and that the single avail fell, albeit no requisition was made.

Fel. Dic. v. 1. p. 570. Haddington, MS. No 399.

No 10.

In modifying the double avail of marriage, the present rent of the lands found to be the rule.

1604. *February.*LORD PRIVY SEAL *against* MAITLAND.

IN an action of declarator pursued by my Lord Privy Seal, against James Maitland, for the double avail of his marriage, the LORDS found, that the rental of the defender's living, which was used as a part of the pursuer's libel, behoved to be set down expressly in these terms, "whilkis lands payed and pay," and would not sustain the libel in these terms, "whilkis lands were worth," because the defender offered him to prove, that before the gift, and continually since, the lands were set for a less duty than was libelled.

Fel. Dic. v. 1. p. 570. Haddington, MS. No 702.

No 11.

Found in conformity with the King against Cairns, No 3. p. 8317.

1606. *February 20.* KING'S ADVOCATE *against* LUNDIE.

THE Treasurer and Advocate pursued the Laird of Lundie for the single and double avail of his marriage, because his father, to whom he was heir, at the