

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

least apparent, held the lands and barony of Lundie ward of the King, and this Lundie was unmarried at the time of his father's decease, at the least he was married, within ten or twelve hours, immediately before his father's decease, after that he had contracted his deadly sickness, and after his speech was laid, the said marriage being precipitate, but proclamation of bands of a preaching day, against the common law, practice of the realm, and constitutions of the kirk, and done precipitately, unlawfully and clandestinely, manifestly to defraud the King of his right of the marriage, whereby he had taken from the King all occasion to make him a lawful offer of a party agreeable, and from himself all possibility to accept of a lawful offer of any party; and therefore seeing his fraud should neither profit him nor hurt any other, therefore he should be decerned to pay the single avail of his marriage, extending to L. 10,000, and the double avail thereof, extending to L. 20,000. The parties compearing, and their allegations heard and considered, the LORDS found the summons relevant, repelled the whole exceptions, and admitted the summons to probation. It was affirmed by some of the Lords, that the like was decided betwixt the Treasurer and the Laird of St Monans, and betwixt the Treasurer and the Laird of Badinraith; and the said practices were extracted by my Lord Elphinston, and in the hands of James Fogo his servant, to have been produced in the action intended against the Laird of Rossie for the like cause. This litiscontestation was made in Lundie's cause.

Fol. Dic. v. 1. p. 570. Haddington, MS. No 1059.

1610. *January 27.* KELBURNE *against* FAIRLIE.

IN the action pursued by Kelburne against the heirs of Fairlie, it being *alleged*, that one of them being little more than twelve years of age, and so not able to enter to her lands, which would pertain to the King and his donatar, until she were fourteen years of age, she could not be compelled to pay the avail of her marriage, she being unhabile to do the same, wanting the infestment, possession, and profit, until that age; and where, as I proponed that that was more proper by way of suspension than by exception, and that if that were admitted in women till they were fourteen years, it would be relevant in men till they were twenty-one years, which was an extraordinary prejudice to the King, and all superiors of ward lands; especially seeing the vassal having other goods, or blench, or feu lands, his marriage was restricted according to the avail of his hail rental; notwithstanding whereof, my Lord Chancellor altered not the former interlocutor, bur rather blamed me for insisting to the contrary.

Fol. Dic. v. 1. p. 568. Haddington, MS. No 1763.

No 11.

No 12.

No execution can pass for the double avail, so long as the heir female is unmarried, she finding caution to pay if she marry.

Women minors are not liable for the avails of their marriages till they are 14 years old.