

No 24.

The superior has right to the avail of the marriage of every apparent heir, however many may die before entering, or before majority.

1622. July 11.

FRENCHLAND *against* The HEIRS of THORNYDYKES.

IN the action betwixt Frenchland and the Heirs of Thornydykes, the LORDS found, that, albeit the King had given the gift of Adam French his marriage, as apparent heir of Robert French of Thornydykes, his father, and that Sir John Home of North Berwick, donatar, had obtained decret of the single avail of the said Adam's marriage, *tanquam onus reale* of the ward-land, and that the land was ordained to be poinded therefor; which decret was obtained against the sisters of the said umquhile Adam, who were daughters and apparent heirs of their father, Robert, that the King's second donatar had also good right to marriage of the said daughters, as apparent heirs to their father, Robert, by decease of their brother, Adam, notwithstanding that Robert's marriage was gifted and declared; and thereby found, in effect, that, if the King's vassal of ward-land died, and left an heir minor, unmarried, his marriage should vaick, and that the laird might be paid for it, after decret; and he marrying before his perfect age, and entry to his land, if his apparent heir were minor, his marriage should fall of new; and, being decerned, the land might be poinded for it, *et sic in infinitum*.

Fol. Dic. v. 1. p. 568. Haddington, MS. No. 2645.

* * * The preceding case by Durie contains likewise the matter of the above.

No 25.

1622. July 25.

FRENCHLAND *against* HEIRS of THORNYDYKES.

IN a pursuit by Frenchland against the Heirs of Thornydykes, for the avail of their marriage, albeit the rent of the land was proved to be 2500 merks, or thereby, yet the LORDS ordained only L. 1000 to be paid, in respect of the rigorous decision whereupon the litiscontestation was grounded.

Fol. Dic. v. 1. p. 570. Haddington, MS. No. 2663.

No 26.

1627. March 8.

E. ROTHES *against* BALFOUR.

A requisition was sustained, which bore, that the defender was desired to come and treat with the party offered.

IN a pursuit at the Earl of Rothes's instance against Balfour, for the avail of his marriage, single and double, the LORDS found, that, albeit the premonition made to the vassal, to come and treat, and to marry, bore not that the procuratory was then shown to the vassal; yet that the same was sufficient, and sustained the same, both for the single and double avail; for nothing was then shown to declare, that the defender doubted of the procuratory, or desired then to see it. *Item*, They sustained requisition, bearing, that the defender was desired to come and treat with the party offered, albeit it bore no special day, against, or at the which he was required to come and treat, seeing

he was desired to come and treat before the marriage, and the day against which he was desired to come and marry was special in the instrument ; which day the LORDS found the superior and his procurator might appoint to the vassal to come and accomplish the marriage, and that he needed not to require the vassal to appoint the day ; and upon his refusal, that then, *eo casu*, the procurator for the superior might appoint the same, but the superior and his procurator might appoint the day to the vassal themselves ; and found it not necessary that the party offered should have declared, at the day prefixed for the marriage, that she was then content to marry the vassal ; neither needed the instrument to purport the same, the same bearing, that she was then present in the Church to have completed the marriage ; and also the LORDS found, that, albeit the vassal was not yet married, yet that they would decern for the double ; but superseded the execution for the double, until the same should fall by the vassal's marriage ; for, so long as he remained unmarried, there was no contempt done to the superior ; and so, in the mean time, no execution could pass for the said double.

Act. *Aiton & Stuart.*

Alt. *Nicolson.*

Clerk, *Gibson.*

Fol. Dic. v. 1. p. 567. & 568. Durie, p. 286.

* * * Spottiswood reports this case :

IN the action pursued by the Earl of Rothes against Balfour, for the single and double avail of his marriage, it was found by the LORDS, that it was not necessary to the procurator constituted by the pursuer to require the defender to accept of the party offered, to show his procuratory at the time of the making of the requisition, except the defender had required a sight of it.

Spottiswood, (MARRIAGE.) p. 205.

1630. June 19.

SOMMERVILLE *against* GORDON.

LEWIS SOMMERVILLE, donatar to the marriage of William Gordon, pursuing for declarator of the single avail of his marriage, according to the rental of the lands given in by him, and the defender desiring defalcation, in respect of the burdens on the lands, and other personal debts owing by him, whereon he was ready to condescend ; the pursuer *answering*, That no respect ought to be had to any of his burdens, because the superior, who disposed these lands to his predecessors, gave them free of burdens ; so that his casualties ought to be respected, according to the estate of the lands wherein they were, when the superior conferred the same, and not according to the burdens, which flowed from the vassal's deed ; specially no respect could be had to the

No 27.

Modification of single avail is to be made of the whole estate, real and personal, whether it hold of the superior or of others ; and the whole debts, real and personal, whether confirmed by that superior or not, are to be deducted.