

No 27. personal debts contracted by the defender or his predecessors, nor to real burdens not acknowledged or confirmed by the superior, nor to no other burdens whatsoever. This allegiance was sustained, notwithstanding of the answer; for the LORDS found, that no sum could be modified for the defender's marriage, but with respect to defalcations of his fent and estate of the burdens, under which the defender lay, whether the same were real or personal, or whether the real were confirmed by the superior or not; for, if they were not confirmed, the superior had his other casualties thereby; but, in this pursuit for the marriage, which was personal, and respected the person of the vassal, and not real, for the paying of the profits of the land to the superior, the LORDS found, that consideration ought to be had of all the vassal's true debts, either personal or real, and that, according to his free estate, a modification might be decerned for the marriage, and which modification would be made, not only according to the avail of these lands, which he held of that superior, but according to his whole estate of lands, albeit holden of other superiors, if he had any, and also according to the sums, and other moveables, which he had beside his lands; so that, as all came under consideration in the valuation of his estate, to make up the modification, so all should, in like manner, come under consideration, which might justly defalk and lessen the quantity thereof.

Act. *Nicolson.*Alt. *Aiton.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 570. Durie, p. 520.*1631. *June 20.*ANDREW DICKSON *against* Dr SCOTT.

No 28.

THE gift of marriage of an apparent heir falls to the donatar, and may be pursued against a singular successor, if the said apparent heir died infert, although unmarried, if he dispensed the land to a singular successor.

*Auchinleck, MS. p. 124.*1662. *February 25.*ALEXANDER ARBUTHNOT of Fiddes *against* KEITHS.

No 29.

The superior's consent to his vassal's marriage, by being a witness in the contract, excludes him from the single avail.

ALEXANDER ARBUTHNOT of Fiddes pursues Keiths, the two daughters of John Keith, and their husbands, for the avail of their marriages, belonging to him, as donatar, by the Earl of Marshall, their superior. The defenders *alleged, first*, No process; because, nothing produced to instruct that the lands were ward, or that the Earl of Marshall is superior; *secondly*, Absolvitor from that conclusion of the summons, craving not only the ground to be pointed for the

avail of the tocher, but also the defenders personally to pay the same; *thirdly*, Absolvitor; because, the Earl of Marshall consented to the defender's marriage, in so far as he is witness in the contract.

THE LORDS repelled all these allegiances; the *first*, In respect that ward is presumed, where the contrary is not alleged, and the defender did not disclaim the Earl of Marshall as his superior; the *second*, Because, they found that the avail of the marriage did not follow the value of the land holden ward, but the parties' other means, and estates also; so that the avail of the marriage might be much more worth than the profit of the ward land; and, therefore, behoved not only to affect the ground, but the heir, or apparent heir personally: And, as to the other defence of the Earl's consent, it was after this gift granted, and was only as witness; neither is the profit of the marriage, as to the single avail, taken away, by having of the superior's tacit consent, but is a casualty simply belonging to him, which cannot be taken from him, unless *id agebatur* to renounce the benefit thereof; yet it seems, that the superior, consenting to his vassal's marriage, can crave no greater avail than the vassal gets of tocher.—See PRESUMPTION.

Fol. Dic. v. 1. p. 568. Stair, v. 1. p. 104.

1667. February 20.

LORD TREASURER and LORD ADVOCATE *against* LORD COLVIL.

THE Lord Treasurer and Lord Advocate pursue the Lord Colvil for the single avail of his marriage, in so far as he was married when his predecessor was on death-bed and was *moribundus*, and was married without proclamation within seven or eight days before his predecessor's death; which precipitation of his marriage did manifestly presume that it was of fraud to seclude the King from the benefit of the marriage; and so it was in the same case as if he had been married after his predecessor's death, and repeated the opinion of Sir John Skene in his explications upon *Quoniam Attachiamenta de Maritagio*, bearing that it was *praxis fori*, that if the vassal gave his heir in marriage upon death-bed it was esteemed a fraudulent precipitation in prejudice of the superior; and gave the superior the single avail of the marriage; and sets down three decisions whereby it was so found. It was *answered* for the defender, absolvitor, because there is neither law nor custom gives the superior the avail of the vassal's marriage, if he be married before his predecessor's death; but Craig, and other lawyers, do define this casualty to be the avail of the apparent heir of the vassal's marriage marrying after his predecessor's death; and as to the ground insinuated of fraud by precipitation, it is noways relevant; *imo*, Because, albeit it did appear, that the defunct vassal had married his heir of design to prevent the marriage, yet here is no fraud but a warrantable providence, which is not *dulus*

No 29.

The ground may not only be pointed for the avail of marriage, but the vassal is personally liable.

No 30.

Found in conformity with the King against Cairns, No 3. p. 8517. that the marriage of the apparent heir, while the predecessor was *moribundus*, was in *in fraudem* of the superior.