

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and also the LORDS found, that, albeit the vassal was not yet married, yet that they would decern for the double ; but superseded the execution for the double, until the same should fall by the vassal's marriage ; for, so long as he remained unmarried, there was no contempt done to the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.

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