

No 33.

an abatement of the avail of the marriage, as to the sum due to the King by the taxed marriage; for the ground of the avail of a vassal's marriage being, that the vassal should not contract affinity without consent of the superior, the marriage due to the King being taxed, the King hath thereby allowed the vassal to marry as he pleases; so that his other most ancient superior, of whom he holds ward, ought not thereby to lose his privilege of offering him a wife, and of the single avail of his marriage, if he marry without his superior's offer, and of the double avail, if he marry contrary to his superior's offer; otherwise it will be easy to evacuate the interest of all superiors as to their vassal's marriage, by infestments of tax-ward holding of the King; and as the King, if he had given several charters tax-ward, might claim the tax-marriage by all the charters, so the marriage due to the King and this superior being both taxed, both claim the taxed avail.

THE LORDS sustained the defence, and repelled the reply; and found, That one marriage was only due by a vassal, and that albeit the King might claim the greatest taxed duty in any infestment, yet he, nor no other superior, could claim but one taxed value for the marriage of the same vassal, and so found the King only had right to this marriage.

Fol. Dic. v. 1. p. 569. Stair, v. 2. p. 106.

1673. June 14

GIBSON *against* RAMSAY.

No 34.
Marriage of
an heretrix
found not to
reach the
whole value
of the fee,
but modified
as in the case
of an heir-
male.

UMQUHILE John Ramsay having only two daughters, one of the first, and another of the second marriage, Mr George Gibson married the daughter of the first marriage, and John Ramsay provided his whole estate to the daughter of the second marriage, but drew up a bond in favour of Mr George, of 6000 merks, which he did not deliver, but cancelled it a little before his death; whereupon Mr George obtained a gift of the ward and marriage of Janet Ramsay, daughter of the second marriage, and pursued declarator for the avail thereof, and instructed the estate to be twelve chalders of victual, and L. 150 of silver rent, and 12,000 merks of money, burdened with a liferent of nine chalders of victual, and 300 merks of annualrent, and thereupon craved that the whole free estate might be declared to be the avail of the marriage, in respect the defender is a woman, and so her marriage is the worth of her estate; that he was most favourable, his wife being heir-portioner, and excluded, and the defunct being induced by his wife to cancel a bond of 6000 merks in his favour, upon death-bed, in favour of her daughter. It was *answered*, That law and practice had stated the avail of a marriage alike, whether the party was man or woman, and otherwise the marriage of an heretrix would not be a casualty but an extinction of the fee, which were so hard, that nothing but a positive statute, or uncontroverted consuetude could infer it.

THE LORDS, considering the favourableness of the case upon the pursuer's part, modified the avail of the marriage to 8,500 merks.

No 34.

Fol. Dic. v. 1. p. 570. Stair, v. 2. p. 188.

1674. December 12.

MOUBRAY against ARBUTHNOT.

No 35.

IN a process for the single avail of a marriage, the LORDS modified 9000 merks, the rent of the lands being proven to be 3000 merks; and it was thought that the avail of the marriage should be in all cases of that nature, three years rent.

Fol. Dic. v. 1. p. 570. Dirleton, No 202. p. 90.

1675. February 24. KING'S ADVOCATE contra the LAIRD of Innernytie.

No 36.

THE King's Advocate having pursued for the avail of the marriage of the Laird of Innernytie, he *alleged absolutor*, because he held a part of his estate taxed ward of the King, in which his marriage was taxed to L. 1000, which he had paid to the Sheriff of the shire, which was counted for, and allowed in Exchequer. It was *answered*, That the allegiance is not relevant, for if the defender had twenty several taxed wards, he would be liable for the taxed avail of his marriage for each of them, and having a simple ward, he is liable for a marriage according to the full avail.

Marriage found due to the King as superior, where the vassal held simple ward, altho' he had lands also taxed ward.

THE LORDS found the defender liable for the full avail of a marriage, abating the L. 1000 for his taxed marriage, as a part of the full avail; and having considered the defender's oath, expressing his rental, deductions thereof, sums due to him, and by him, and his moveables, amongst which deductions, his mother's liferent was estimated, as it was worth in buying and selling, according to her age; and the pursuer's insisting for the single avail, and desiring a reservation to insist for what further should be found due for a double avail, upon the offer and refusal of a suitable match, the LORDS moved to the donatar and defender, that they should modify in consideration of the whole; which being agreed to, the LORDS modified for all three year's rent of his estate and money, *deductis deducendis* as aforesaid.

Fol. Dic. v. 1. p. 570. Stair, v. 2. p. 328.

1677. January 3.

CAMPBELL against M'NAUGHTAN.

No 37.

ARCHIBALD CAMPBELL, as donatar by the Earl of Argyle, pursues M'Naughtan for the single avail of his marriage, who *alleged absolutor*, because he married in the time that the Usurper, by act and proclamation, took away

Single avail found due ex contractu feudali, and