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

THE King's Advocate having pursued for the avail of the marriage of the Laird of Innernytie, he *alleged absolvitor*, 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 allegeance 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.

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.
Single avail found due *ex contractu feudali*, and

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

No 37.
not as a penalty for failing to ask the superior's consent.

ward and marriage; and albeit recognitions falling in that time have been sustained against that act, because the vassals did not require confirmations from the superiors returning to their right, yet this can take no place in marriages; for as the superior, if he were pursuing for the ward duties, would by that act and custom of the Usurper's, be excluded, so ought he to be in the marriage, which is only penal, in case the vassal neglect or contemn his superior; for if the vassal should require of his superior to give him a wife, and show him he would marry such a one, against whom he could have no just exception, the vassal would be free. It was *answered*, That the single avail of the marriage is not penal, but is imported by the feudal contract, which implies, that during the minority of the vassal, the superior shall have the whole profits, and that he shall have the vassal's tocher, such as was competent to him, conform to the avail of his estate; and therefore if the vassal be marriageable, though he die unmarried, and unrequired by the superior to marry, he will have the simple avail of his marriage; which the LORDS did not only expressly decide upon full hearing, but declared it to stand as a rule, and therefore it cannot be penal. And though the Usurper's act liberates from the double avail, and that the Lords may modify the single avail the more soberly, yet there is no reason to evacuate it, neither is it in the case of ward-duties, which are *fructus bonæ fidei consumpti*, but a tocher is a stock which no man is presumed to consume. There was also an allegeance proponed upon a letter of the Marquis of Argyle's, approving M'Naughtan's marriage with Ardkinley's daughter.

THE LORDS proceeded no further, but to determine, whether the single avail was penal or not; and found it was not penal.

Fol. Dic. v. 1. *p.* 568. *Stair, v.* 2. *p.* 486.

*** Gosford reports this case:

IN an action at my Lord Argyle's instance, as superior to M'Naughtan, of whom he held his lands ward, for the avail of his marriage, to be liquidate by the Lords, it was *alleged* for the defender, That there could be nothing due to the superior *pro maritagio*, in so far as he had acquainted the late Earl of Argyle, who was then superior in the year 1655, that he intended to marry a person of near relation to my Lord, and hoped that he would be well pleased therewith; and, by a missive letter, it pleased his Lordship to declare, that he was well content with that match, so having consented thereto, could crave no avail of his marriage. It was *replied*, That albeit that letter could import a consent, yet being written during the usurpation, and when all superiorities of ward lands were expressly discharged by the usurpers, and when the superior could not own his own interest, it could not now be obtruded against him after the act of restitution by Parliament; so that unless, after the said act, the vassals had applied themselves to the superiors, and obtained their ratification of

any infeftment they had in the English time, as has been found by several practics, not only of vassals holding of the King, but of other vassals holding of their superiors; and as to the letter, it could imply no consent to take away the avail of the marriage, being granted when none was due by an act of the usurper's, especially the letter founded upon bearing nothing but a willingness to marry such a person, but nothing of his superiority, or that he did dispense therewith. THE LORDS, upon report of the case, did much debate among themselves upon the nature of ward holding, as to the casualty of the avail of the marriage, and especially upon that ground, if the simple or double avail of the marriage were both of the nature of a penal action by our law, for which several were of the opinion, and did argue, that not only the double avail upon their refusal of the superior was due, as to which they did all agree; but they urged farther, that the single avail was likeways of the nature of a penal action, upon the ground that marriage being free by the common law the not requiring of a superior could only make them liable, so that the neglect or contempt of a superior was the only ground for a simple avail, without which it could not be due, and so could only infer a penal action; others who were of a contrary opinion, whereof I myself was one, did urge, that the single avail was not of the nature of penal actions, but belonged to the superior as a casualty of the superiority, upon this ground of law, that it was done *ex contractu feudali*, for all superiors before dispositions to vassals of these lands to be holden ward by the vassals, being proprietors, *et habentes plenum jus dominii et proprietatis*, having disponed the same to be holden of them and their heirs, with an express *reddendo* of ward and marriage, that right of marriage was a real right, and did affect the lands, and was due to the superior by a special contract, which did absolutely oblige them, unless they had the superior's consent to the marriage; and so was not of the nature of a penal action, which only could be alleged in the case of a double avail, when the superior was contemned, having offered a sufficient person to his vassal for marriage; whereas, by our law, the apparent heir of a vassal for ward lands, if he remained unmarried, and never required the superior, and died after lawful age, it hath been decided, that the superior hath right to the avail of the marrriage; and if the superior himself should be minor, and not capable to make a choice, or offer a fit person to the vassal, and so could never be required to consent, then a vassal, being married, who could not be obliged to require him, and so could not be guilty of any contempt or neglect, notwithstanding thereof, the avail of the marriage would fall and belong to the superior, as being due by the *reddendo* of his charter *ex contractu feudali*; which being put to interlocutor, it was so found; but as to these points, if marrying during the usurper's time should seclude the superior from that benefit, or missive letter whereupon the defence was founded, should free the vassal, the decision of these points was continued; but upon the 26th January 1677, it was advised that the missive letter, albeit it was subscribed during the English usurpation, was a valid consent, and so did prejudge

No 37.

No 37. the superior for the avail of the marriage due by the vassal, upon that reason, that the vassal did desire the superior's consent, which he needed not at that time, being secured by the standing law of the usurper, and that the superior, not being necessitated to prejudge himself, did, not only not delay, but give positively consent to the marriage, and so could never crave the avail after the King's restitution, which was the only ground whereupon the practics cited were given in favours of the King or his vassal.

Gosford, MS. No 929. p. 606.

*** This case is also reported by Dirleton:

1677. *Jan.* 3.—In a pursuit at the instance of the Earl of Argyle against the Laird of M'Naughton, who held some lands of him ward, for the single avail of his marriage; it was *alleged* for the defender, 1*mo*, That the defender had married the time of the usupation, at which time the casualties of ward and marriage were taken away by an act and proclamation of the usurper, whereby the defender was secured and was *in bona fide* to marry without requiring the superior's consent; 2*do*, *De facto* the superior had consented to his marriage, in so far as the defender having given notice to him by a letter, the Marquis of Argyle being then at London, that he was to marry with a gentlewoman, who is now his wife, the Marquis did return a letter (which was produced) showing that he could not but approve his matching with the said gentlewoman, being the Laird of Ardkindley's daughter, and if they should proceed to the marriage, that he wished them well.

Whereunto, it was *replied*, That the usurpers, by their act, could not prejudge the pursuer, or any other superior, but that they might claim the obventions and casualties, that did fall unto them, by the nature of their vassal's right; as it was found in the case of Sir George Kinnaird and the Master of Gray,* that lands holden in ward being disponed in the time of the usurpation, without the superior's consent, did recognosce notwithstanding of the said act; and as to the said consent, it was *replied*, That the said letter was but a civil compliment, without any mention of the Marquis his interest as superior, and without an express licence to marry, and discharging any interest or pretence that he had to the defender's marriage.

Upon debate at the bar and among the Lords, some were of the opinion, that there being no contempt that could be alleged of the superior; and the vassal having so much reason to think, that he needed not his consent, in respect the said act was a law *de facto*, and for the time; the whole country being forced to submit to the usurpers, and to acquiesce to their orders; that *communis error facit jus*, and *quævis causa excusat* as to casualties arising upon feudal delinquency or contempt; and the superior's interest, that was intended of the law, was not that he should have a sum of money, but that his vassal should not marry without his consent, and match with families either disaffected, or

* Examine General List of Names.

in which the superior could not have confidence; and the avail of marriage is penal in case the vassal should either marry without the superior's consent, or should refuse to marry a person proffered by the superior to be his wife. No 37.

Upon the foresaid considerations, they were of opinion, that the defence was relevant, and that there was a great difference betwixt the case of recognition and marriage, in regard the reason of the decision in the case foresaid, was, that the vassal did upon the matter contemn the superior, after the King's restitution, seeing he did not apply for a confirmation; whereas the vassal, being once married, it were to no purpose to desire the superior's consent.

On the other part, some of the Lords argued, that the single avail is not penal, but only the double; seeing the vassal attaining to the age of marriage, if he should die unmarried, yet the single avail would be due; whereunto it was *answered*, That *pœna* is in law, when a person is liable to pay a sum, either for doing or not doing a deed; and as the vassal is liable to the double avail, for refusing the person offered by the superior, so he is liable to the single for not marrying, and though *matrimonia* are *libera*, so that a person may marry or not as he pleases, yet *causative* many things are allowed, which cannot be directly; and it being the design of the feudal law and superiors in giving out their lands, to have still vassals to serve them and their family, the apparent heir is obliged by the nature of his holding to marry, or *in pœnam* to pay the avail; and if the vassal should desire his superior to offer him a person that he might marry, or to consent that he should marry such a person as he thought fit for him; and the superior should refuse both, it were hard, that notwithstanding the vassal should be liable to pay the avail of his marriage.

The Lords nevertheless found, that the single avail of marriage is not penal.

Act. *Lockhart and Hamilton.* Alt. *Cunningham.* Clerk, *Hay.*

1677. *January* 23.—In the case above mentioned, Earl of Argyle *contra* M'Naughton, it was found, that M'Naughton having acquainted the deceast Marquis of Argyle, that he was to marry with his Lady; and that the Marquis having returned an answer by his letter of the tenor above mentioned; the said letter imported his consent to the marriage; and that the Marquis having consented, he could not claim the benefit of the marriage.

Dirleton, No 415. *p.* 203. & *No* 434. *p.* 213.

1678. *February* 1. King's Advocate *against* Fairlie.

No 38.
Found that the avail could only affect the feu-duty, exceeding the retour duty.

The King's Advocate pursues Fairlie of Burntsfield, for declaring 'that the 'lands of Hatton were holden ward of the King, and that by the marriage of 'the heir of Hatton, the ground of the land of Burntsfield was to be poinded 'for the avail of the marriage.' The defender *alleged* absolvitor, because he