No 3. which the Lords had decided formerly, 12th February 1674, Marquis of Huntly against Gordon No 2. p. 4170; but if ward-lands were given out by a subaltern blench holding, this would not defend against any of these casualities.

*Fountainhall, MS.*

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1680. *December* 2.

ERSKINE of Dun *against* ROBERT VISCOUNT of ARBUTHNOT.

No 4.
Feu rights granted before the act 1606 are valid to exclude ward, recognition, &c. unless the pursuer could allege, that the feu-duty was with diminution of the new retoured duty.

'THE LORDS found there was an avail of the Arrat's marriage due, because the said Arrats had the superiority of the ward-lands yet standing in their person unresigned, notwithstanding it appeared there was an obligement upon them to resign it in the King's hands, which was a debt as large as the superiority was; and the Lords modified the said avail to two years feu-duty, which was 20 pound Scots; and allowed Dun to condescend upon any other estate they had beside that superiority; in which case the Lords would yet modify more.' Though the smallness of the sum modified did not make it worth the pains to reclaim, yet the preparative of the interlocutor, and the reason of it, may prove very dangerous; for, where a man stands under an obligement to dispone lands, the estate which he is bound to denude himself of cannot be looked upon as his estate, nor fall under consideration to enhance or raise the valuation of his marriage, when the donatar pursues. Only, he is the King's vassal till he be denuded formally.

The 2*d.* point reported was, that Dun's gift not being a gift of non-entry *per se*, but a gift of ward, marriage, and non-entry *conjunctive*, it extended to no other non-entries, but allenarly to three terms subsequent to the ward; and as to these, it was only the retoured duty, which in feus is the feu-duty, as Durie and Hope tell us.—But the Viscount's prior gift of non-entry will even cut down from these three terms.

1681. *January* 5.—In Dun's case against Arbuthnot, (2d Dec. 1680,) the Lords, in valuing the marriage of an apparent heir of a ward-vassal, would not regard what tocher he had got abroad out of the kingdom as a soldier, or for other personal merits; but would only modify with consideration to what estate he had within Scotland, especially he not being served, entered, nor infeft, but only apparent heir; which moved the Lords much more than his being married abroad. 2*do*, Where ward-lands are feued *tempore licito* before the act of Parliament 1633, (in which case it is required by law that the feu-duties shall not be beneath the old valued retoured duty) the vassal needs not prove that it is conform and proportional to the retoured duty; but the donatar of the recognition, (who quarrels the feu,) must prove there is a diminution; else it is presumed to be legal. Yet we say, *qui excipit, probare debet exceptionem.* Anent the retouring of lands not yet retoured, see the last of the unprinted acts in 1597.

*Fol. Dic. v.* 1. *p.* 295. *Fountainhall, v.* 1. *p.* 120. & 124.

*** Stair reports the same case:

No 4.

THE Laird of Dun, as donatar to the recognition of the lands of Arrat and others, and of the marriage of William Arrat, apparent heir of the King's vassal, pursues declarator of recognition, because the lands were disponed to the Viscount of Arbuthnot, without the King's consent or confirmation, the lands holding ward of the King; and also for the avail of the marriage of the apparent heir of the King's vassal; and condescended, that he was married in Holland, and had got 10,000 merks of tocher, and craves that sum to be modified for the avail. It was *alleged* for the Viscount of Arbuthnot, (who had bought the lands from Arrat, and had a disposition bearing infeftment of the King, or of Arrat, but was only infeft feu of Arrat), Absolvitor from the recognition, because the lands were feued by the King's vassal to the defender, conform to the old act anent feus, and before the rescinding thereof in *anno* 1633. It was *answered*, *non relevat*, unless the defender instruct that the feu was for a competent avail, according to the tenor of that old act; which avail is by custom interpreted to be the new retour-duty. The defender *replied*, That his defence, in the terms proponed, is constantly admitted, which, though it occurs seldom in recognitions, yet frequently in ward and marriages, in which no feuer was ever put to prove the competent avail; but both in these cases, and in kirk lands, it is sufficient to say, that the feu is without diminution of the rental, which is negative, and proves itself, and therefore was ever sustained, and a competent avail presumed, though it might be elided, by alleging that the avail was with diminution of the new retour-duty, and so not competent, in which case *affirmanti incumbat probatio*.——THE LORDS sustained the defence upon the feu, unless the pursuer alleged that the feu-duty is with diminution of the new retour duty. As to the marriage, the defender *alleged*, That the condescendence of getting such a tocher could not infer a modification equivalent thereto, but the modification can only be according to the estate the vassal's apparent heir had the time of his predecessor's death, and so could not extend to the tocher he got after his predecessor's death. 2*do*, The apparent heir is a residenter in Holland, and hath never owned, nor will own, this infeftment, by which he can have no benefit, his predecessor having sold the land to be holden of the King and therefore his marriage can be but estimated according to the estate he had in Scotland when his predecessor died, and therefore he cannot be personally liable for any modification, seeing he enters not nor possesses.

THE LORDS found, that the apparent heir could not be liable, he not being entered nor possessed, and that he could only be liable for a competent avail, effeiring to the estate of the apparent heir, which he had the time of his predecessor's death, without consideration of the tocher he got after his predecessor's death. *See* MARRIAGE (AVAIL OF).

*Stair*, *v.* 2. *p.* 825.