

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.

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 condemn 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.

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

1678. *February 1.* KING'S ADVOCATE *against* FAIRLIE.

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 poided for the avail of the marriage.' The defender *alleged* absolvitor, because he

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Found that the avail could only affect the feuduty, exceeding the retour duty.

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bruiked the lands by a feu infestment granted by the Lairds of Hatton, and thereby was secure by the act of Parliament 1457, cap. 71, anent setting of ward lands feu, wherein the King declares ' he will confirm such feus, or ward lands, as are set to a competent avail ;' which custom hath declared to be the new retour duty, which at that time was a valuation of the true worth of lands, as they then paid ; and declaring ' the feuars shall continue during the ward, ' unremoved, paying their feu-duty to the superior by the ward,' which hath been unquestionable till the act of Parl. 1633, ' annulling feus set thereafter of ' ward-lands, without their consent or confirmation.' It was *replied* for the King, That the act of Parliament founded upon, doth secure against recognition, forefaulture, and removing by the ward, or paying a greater feu-duty than the retour mail, but mentions nothing of the marriage, which is a distinct casualty from the ward, and passes by a distinct gift, and there is no reason to extend it to the marriage, because for the ward-duties, the King hath the retour duty, but hath nothing for the marriage, which therefore must remain entire. *2do*, The defender hath taken a confirmation of the King, bearing ' an ' express reservation to the King of ward and marriage, which is produced. The defender *duplicated*, That feus were but heritable tacks or locations, and the retour duty was the full rent, as it was the time of the old act ; and therefore the feuar can be liable for no more than the feu-duty. *2do*, It is beyond question, that if the King or other superior consent to a feu, granted by a ward-vassal by confirmation, or otherways, that he cannot quarrel that feu upon pretence of ward, marriage, or any other casualty ; but the foresaid act of Parliament hath ever been found to import the King's consent, without necessity of confirmation ; and though multitudes of cases have occurred for claiming the marriage of ward-vassals, to affect such feu-lands, yet no King's advocate, or any other superior, hath ever so much as raised a pursuit upon that ground, though it were of great advantage to them. It is true a marriage will be due to the King by his immediate vassal Hatton, which will affect him personally, or any estate of his, but cannot affect this further than the King's vassal had right, viz. the feu-duty, which exceeds the retour-duty, and as to the reservation, it bears expressly, as accords of the law ; so that if the defender be secure by law, he cannot be reached by the reservation in his confirmation.

THE LORDS were clear that the defence on the old act of Parliament was relevant, ' that the marriage could only affect the feu-duty, exceeding the retour-duty ;' and desired that the Advocate might instruct any one decision in the contrary.

*Stair, v. 2. p. 606.*