

of the Marriage at expiring of the Ward. And to hear and see it verified and proven, that the Defender hath an Estate whereof the particular Lands Annual Rents and Sums of Money render of Rent and Profit the sum of £l. yearly conform to a particular Account thereof produced herewith and repeated as a Part of the Libel brevitatis causa, according to which Rent the Avail of the said Marriage ought to be modified conform to the Laws and daily Practick of this our Realm according to Justice &c. This Summons requires two Dicts: Because the Estate of the Vassal is to be proved by Witnesses or Oath of Party, for their Oath is not convenient in a Declarator of the Avail of Marriage, without calling any to represent the other Heir Portioner who was dead, in Respect a Bond of the said Marriage against the one would not wile Prejudice to the other, against whom new Proof ought to be used 23 June 1566. Arbuthnot contra Heith. The proper Exceptions to be proponed in a Process for declaring the Avail are the Debt and Burdens upon the Vassal's Estate at the Time, For proving whereof the same Sum will be assigned to the Defender, that the Superior gets to prove the Rent of the Estate that the Vassal's free Rent may appear. Stair Hed. §. 64. This Casually of Marriage seems debitum fundi is not excluded by a preposterous Judgement 17 Decem. 1773. Term contra Heir

The Lords of Session in modifying the Avail of Marriage remitted to their Cognizance take a Latitude according to the Vassal's Circumstances and estimate the Avail of the Marriage not only with Respect to his Ward Lands, but also to his other Estate, real or personal 25 Feb. 1662. Arbuthnot contra Heith 24 Feb. 1665. He's Jurate contra L. Invernytie. Stair Hed. §. 4. & Lib. 2. Tit. 4. §. 47. 48. But in the Casuality of Marriage is considered with Respect to the Vassal's whole Estate: yet if he have only a mean Ward Interest and a vast other Estate, the Modification of his Avail will be the less. Stewart Answer to Dr. Let. Duple Tit. Marriage. The Fee of an Heirship albeit she gets no Fee, is not wholly affected for her Marriage. Ramsay Stair Hed. §. 56. And she a Woman should get never so great a Fee, with her Wife, or should marry an Heirship of an equivalent Estate who dispensed it to him, he pays no more than the ordinary Avail for his Marriage the Fee being received no Part of his Estate 5 January 1605. L. Dun contra G. Arbuthnot Stair Hed. §. 47. Nor is the Modification of the Avail raised upon the Account of his personal Qualifications of Birth Beauty Vigour or Fame, Stair Hed. As in modifying the Avail of Marriage, the Vassal's whole Estate real and personal comes under Consideration to make it up: So Consideration is had of all the Vassal's true Debts whether personal or real to lessen the Avail 19 June 1630. Summervel contra Widdow. The Exchequer did set a Rule for modifying the single Avail of Marriage Stewart Hed.

In England there lies a Writ called Forisfactura Maritajij Forfeiture of Marriages against him who holding by Knight Service and being under Age and unmarried, refused her whom the Lord offered him without his Disparagement, and married another.

The Avail of Marriage is debitum fundi affecting singular Successors Spotswood Oratt. Tit. Marriage Stair Hed. §. 39. Stewart Hed. Tit. Ward Lands. Therefore Appropriation or Application for the modified Avail of an Heir's Marriage, is drawn back to the Time the Marriage fell due; and preferable to Appropriation or Judications for personal Debt, or other ~~real~~ Rights prior to the Appropriation for the Marriage Casually, if posterior to the Declarator thereof 17 Decem. 1673. Heith contra Heir Stair Hed. §. 40. Where the Marriage of an apparent Heir is fallen and due, before an Application laid against him at the Instance of a Creditor, the Avail of the Marriage will ad debitum fundi affect the Creditor. But an Application against an apparent Heir in his Supplicavit before the Marriage fell due with a Charge against the Superior, will, tho' it doth not hurt his Right to the Ward fallen before his Claim to a Marriage not then due, yet if such Application be satisfied within the Legal and the Person against whom it was laid be still unmarried, the Marriage of the latter will be due, Stewart Hed. Judications. But this Casuality has modified with Respect to the Vassal's whole free Estate, affects really no Part of it save the Ward Fee or other Fee granted cum Maritajio. And tho' the Avail of a Ward Vassal's Marriage exceeds the Value of his Ward Lands was once found to affect him proportionally quoad the Excess 25 Feb. 1662. Arbuthnot contra Heith. That Decision is a very singular, but it hath never been seconded and should not be drawn in Example. Stair Hed. §. 41. Therefore the Avail of an Heir's Marriage was found not to affect him personally 5 January 1605. L. Dun contra G. Arbuthnot. In this Heith Doubts and Questions of the Law Tit. Marriage thinks that the apparent Heir by refusing to enter Heir to the Ward Lands will free his Condition from the Casuality fallen, without Prejudice to the Superior to affect the income: But that if the apparent Heir is well settled, he will find himself personally liable to the casualties fallen.

Having cleared the respective Rights of Vassals and Superiors, I shall in the next Place consider the Burdens wherewith real and heritable Rights may be affected: Which are either private or publick. The latter are Taxes levied by Authority of Parliament, or a Convention of Estates, for supplying the Wants of the Government, and other publick Burdens to which Heritors and Inhabitants of particular Shires and Burghs are liable, for the Benefit of the Place where they reside, or their Lands lay; whereof some are inherent, and others imposed by the respective Communities. But such publick Burdens falling more properly to be considered elsewhere, than in this Volume of the private Law, I shall here confine my self to treat of private Burdens upon Property.