

1680. December 2. The LAIRD OF DUN *against* the LORD ARBUTHNOT.

No 7.

A gift of ward was found not to give right to three terms full rent, the donatar not being in possession during the ward.

THE LAIRD of Dun as donatar to the ward and marriage of ———, pursues for the avail of the marriage, and for the duties of three terms after the expiring of the ward, in respect his gift bore not only the ward, but an non-entry till the entry of the next heir, which by act of Exchequer, is restricted to three terms after the ward. The Viscount of Arbutnot having taken a feu of the ward-land from the ward-vassal, *alleged*, That his feu being before 1633, the land is liable for no more but the feu-duty by the act 7th Parliament 1457, anent feus, and therefore though a marriage should be found due by the ward-vassal Arbutnot's superior, it could not burden his feu, but *quoad* the feu-duty; neither can the non-entry by the gift of ward extend to the full rents, but only to the feu-duty, which is in place of the retoured duty; for albeit a superior or his donatar being in possession by the ward, may continue his possession of the whole duties for three terms thereafter, and needs no declarator, yet he can have no more but the feu-duty till declarator; and as to the avail of the marriage, it is always in the single avail modified not to exceed three year's rent, or annualrents of the vassal; but here the vassal hath nothing free, for this land is disposed by his predecessor, to be holden of him or the superior; and the resignation was not made in his life; yet his apparent heir hath no more *in bonis*, but that he is not denuded of the superiority; and being obliged to denude, his debt is equivalent to his estate, so that there can be no modification. It was *answered*, That the marriage of ward-vassals is a casualty of the superior; and if he were married, and had gotten a tocher, the Lords would modify even in that case; and therefore there must still be a modification of what such a person might get in tocher, albeit he had no free estate, as if he had a calling.

THE LORDS found; that the donatar's gift could not extend to three terms full rent after the ward, seeing he neither was nor could be in possession during the ward; and therefore modified the avail of the marriage only to two years feu-duty of the lands in question.

Stair, v. 2. p. 810.

See WARD.

See APPENDIX.