

rator, whereto he was not specially called, and so no respect was had thereto, and the same was also only lately recovered in *anno* 1634. Therefore he was affoilzied from the bygones; for he could not be in any worse case than a tenant, who paid his farms yearly to his master, albeit rebel, yet not being specially intimated to him, that payment would ever have freed him from the donatar for bygones. *Item*, THE LORDS found, that the liferent pertained to the same pursuer's author, albeit the rebel was not rebel a year since he acquired the right of the superiority; for the Lord Sanquhar was superior the time when the rebel was at the horn year and day; and before he sold the lands to Rome, the rebel was relaxed: Whereupon it was *alleged*, that Rome could not have right to the liferent of the vassal, who, since his right, was not rebel, being relaxed, as said is, before his right: Which allegiance was repelled, seeing the vassal was rebel a year unrelaxed, which made his liferent fall to his superior; and seeing the Lord Sanquhar was superior when it fell, and that he sold all his right which he had to the lands to Rome, and had not gifted that casualty before to another; they found that it pertained to Rome, notwithstanding that the vassal was relaxed before the right was acquired by him, seeing the year was expired before he was relaxed. See IMPLIED ASSIGNATION.

A. & ———.

Alt. Gilmore.

Clerk, Scot.

Fol. Dic. v. 1. p. 107. Durie, p. 756.

1635. December 2.

HUME against LA. HADINGTOUN.

GEORGE HUME, son to Sir George Hume of Manderston, being infeft in the lands of Slegden, pursues the Lady Hadingtoun for payment of the duties of the saids lands, for some by-past years; and she *alleging*, that she had lent 5000 merks to the pursuer's father, for the profit and security whereof his father put her in possession of the lands, conform whereto she uplifted the duties thereof the years by-past, now acclaimed, and received acquittances thereupon from the father, who is, in law, administrator to his son, the son being for these years minor, whereby for these bygones she must be liberated, having done that *bona fide*, the son's right never being intimated to her; and the father having purchased the right of the lands himself, without putting the son's name in the security, to whom also he was administrator in law, which gives him right to intromit with the son's estate. And the pursuer *answering*, that his father, albeit he were administrator, yet by that title he can have no right to meddle with the rents, especially to convert the same for payment of his own debt, which is not in law admissible; so that the defender hath her action of warrandice, or other pursuit, against the father, as in law may be best competent to her for repetition thereof, or for recovery of her debt; but it cannot defend her against this pursuit.—THE

No 18.

No 19.

A father had put a creditor in possession of lands belonging to his son, for whom he was administrator. *Bona fide* consumption was sustained to the creditor till the son's right was intimated.

No 19.

LORDS found this defence sufficient to exclude the pursuer from seeking of these bygone duties, which were intromitted with by the defender by warrant of the father, he being in law administrator to his son, who was minor all the years libelled, and was minor the time of the acquiring of the right to the lands libelled; so that these being *fructus præteriti & percepti, & bona fide consumpti*, and not interrupted before the uplifting thereof; THE LORDS found, the defender ought to be affoizied from bygoness.

A&C. ———.

Alt. Stuart & Belsbet.

Clerk, Gibson.

Fol. Dic. v. 1. p. 108. Durie, p. 781.

No 20.

A husband not having claimed his right of courtesy during his life; his executors could not claim it in prejudice of a singular successor from the heir of the heirs.

1636. January 19.

M'CAULA against WATSON.

THE husband of an heretrix of a tenement of land in Edinburgh, who, surviving his wife, had the right and benefit of curiality competent to him, and who survived his wife 30 years after her decease, during all which time he never claimed the benefit of his curiality, but was silent; after his decease the executor confirmed to him pursuing M'CAULA, who had bought the land from the heir of the heretrix, and who all this time had, by virtue of his right foresaid, intromitted with the mails of the said land, for refunding of the mails so intromitted with by him; and he *alleging*, that the curiality never being fought by the husband, during the space foresaid of 30 years at least, which space he outlived after his wife's decease; it must be presumed thereby in law, that he *tacite* had renounced and quitted that benefit, and that the said bygone mails being *fructus bona fide percepti & consumpti*, by virtue of a right never interrupted by the husband's self; therefore the same cannot be craved by any, as either heir or executor to him; his right being only a personal privilege, competent allenarly to himself to have fought it, if he pleased, and not having done it, it must expire with himself: even as if a lady tercer, who had right to claim her terce, if she had deceased, never having fought it, not being served or kenned thereto, her executors or heirs could never have right after her decease to claim the same. And the other party *answering*, that this was such a right competent to the husband, that needed no other title or declarator, but belonged to him *hoc nomine*, as husband, and so being his properly, it must pertain to his executors, even as the duties owing to a liferenter pertain after the liferenter's decease to the liferenter's executors, which must be alike here, the husband being a liferenter by the law of Scotland without any other title: and the living of the husband so long, and not claiming the same, could not have prejudged himself, if he had claimed it in any year before his decease, for all the bygoness where-with he had intromitted, to seek the years preceding, and so it must be also proper to his executors as to himself; and the similitude of a terce holds not, be-