

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 bygones.

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 bygones 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-

cause the lady, who might pretend the right, never being served nor kened, would not have had right in her own time to pursue thereof herself, and far less her executors could do the same, seeing there is required a brief out of the Chancellery, and a kenning by the Sheriff for her title; but here there is no necessity of a title, but only that he was husband, and for the husband's cessation he was all that space out of the country. THE LORDS found the allegiance relevant, notwithstanding of this reply; for they found, that this courtesy being a benefit competent to the husband, who sought not the same, conform to the law and consuetude of this realm, therefore his executors could not seek the same, especially after so long a time, where the mails of the house libelled were uplifted and spent, by virtue of an heritable title, never interrupted within the space of the years acclaimed, and therefore affoizied.

Act. *Stuart & Sandilands.*Act. *Nicolson & M'Gill.*Clerk, *Gibson.**Fol. Dic. v. I. p. 108. Durie, p. 788.** * * See This case by Spottifwood *voce* COURTESY.1637. *March 21.*LADY MANDERSTOUN *against* L. RENTOUN.

LADY MANDERSTOUN being provided by her husband in her contract of marriage, to her liferent of some teinds, whereof the right was in her husband's person for long spaces to run, and being lawfully divorced from him, she pursues the Laird of Rentoun for payment of the duties of the said teinds, of all years since her divorcement, viz. by the space of three or four years by-past, whereto she acclaimed right, as if her husband were naturally dead: And Rentoun *alleging*, That he had lawfully comprised her husband's right of these teinds, albeit after the contract of marriage, yet before the divorcement, in respect whereof he bruiking by virtue of his public right, *bona fide fecit fructus perceptos et consumptos suos*:—THE LORDS found this allegiance relevant, to import liberation to him from these bygone years acclaimed, notwithstanding that the pursuer's right was by virtue of a preceding contract of marriage.

Act. *Stuart.*Act. *Nicolson & Craig.*Clerk, *Scot.**Fol. Dic. v. I. p. 108. Durie, p. 840.*1685. *November 27.*HEIR of Kirkland *against* His MOTHER.

FOUND, that an heir pursuing a process of aliment against his mother liferentrix, will get nothing modified for the years preceding the summons, the defender having *bona fide* consumed her whole annuity, these years; and the life-

No 20.

No 21.

A lady was provided by her contract of marriage to the liferent of teinds. Having divorced her husband, she claimed from a creditor who possessed by apprising. As to bygone years he was found in *bona fide*.

No 22.