

bel was year and day at the horn, whereby the right of his liferent of these lands was acquired to the King, and so that no deed could be done in the King's prejudice, which might make the liferent unprofitable to him; yet that the same was sufficient; likeas the LORDS sustained the same to liberate the defender, who had acquired the infeftment, for all the duties acclaimed of these lands, of all years preceding the intending of any declarator, upon that rebellion; and that the defender was *in bona fide*, to intromit with the same duties of the saids preceding years; and therefore he could not be compelled to refund the same, seeing they were *fructus bona fide et percepti et consumpti*, and so could not be repetit from him, and therefore assoilzied him therefrom.

In this process it was found, that the liferent of him who was apparent heir to a defunct, who died infeft in lands, fell to the superior, by the apparent heir's rebellion year and day, albeit that the apparent heir was not infeft in the lands.

In this process also, a tack being quarrelled as null, because it was conferred to a time of entry unlawful, and so behoved to be respected as wanting an entry, in which case it would be null, by reason the words of the tack bore; 'That the tacksman's entry is, and shall be at a year therein expresst,' which year was bye-past many years before the date of the tack, the tack being set long after that year, to the which this entry was conferred; which allegiance was repelled, and the tack sustained, in respect it was but the incongruity, or informality in the writing thereof, in these words, 'is and shall be,' respecting the future time, whereas it should have said, the entry was at that time, respecting the preterite; for the which, the LORDS found no cause in substance to annul the tack, or which might derogate therefrom. See LITIGIOUS. See TACK.

Act. Hope & Nicolson, jun.

Alt. Nicolson, sen.

Clerk, Gibson.

Fol. Dic. v. 1. p. 254. Durie, p. 137.

1675. July 22.

MENZIES against KENNEDY.

THERE being a decret obtained against Menzies of Castlehill, as heir to his father, and the Lady Castlehill, as executrix or intromitter, they were both denounced, and a gift of the escheat and liferent taken of the Lady and her second husband, who was denounced and decerned for his interest by Kennedy of Auchtifardel. There is now a reduction at the instance of an assignee against Kennedy, for the reduction of the horning and gift, on these reasons; *imo*, Because the gift of liferent granted by the King is null, because the Lady was provided to be infeft in liferent of lands holden of other superiors. It was answered, *non relevat*, unless it were alleged that the Lady had been infeft; for, a liferent provision without infeftment could only befall to the King, and to no other superior,

No 34.

Found in conformity with No 32. p. 3637. Liferent escheat falls always to the King, where there is no superior, and there cannot be a superior without infeftment.

No 34.

Which the LORDS sustained, unless the pursuer allege actually infest.

And that being alleged, the defender *answered*, that it ought to be repelled, because both the wife and husband being decerned and denounced ; and the defender being donatar to both the single escheats and liferents, the husband's *jus mariti* fell under his single escheat, and carried therewith the benefit of the wife's liferent during the marriage. It was *replied*, That the denunciation, as to the wife was null, because she was *vestita viro*, and could not defend or suspend ; and the husband being only decerned *pro interesse, sublato principali tollitur accessorium*.

THE LORDS found that the denunciation against the husband, though *pro interesse*, was valid, and carried his *jus mariti* to the wife's liferent.

The pursuer did further insist on this reason, that the gift, although in the the name of Kennedy, yet was taken to the behoof of the heir, who was obliged to relieve the liferenter, in so far as the decret, which is the ground of the horning, being both against heir and liferenter, it was intrinsically null without probation of these passive titles, and there was no ground to reach the liferenter ; yet if she had paid, she would have had recourse against the heir, because she had paid his debt, who was liable both as heir and executor ; and therefore if the heir, who is obliged to relieve, were donatar, he could not make use of the gift against the person whom he was obliged to relieve ; for if a principal debtor should obtain the gift of his cautioner's escheat, upon the debt in which he was cautioner, he could not thereby distress the cautioner, whom he was obliged to relieve. It was *answered*, That an express clause of relief ' of cost, skaith, and damage,' could not be extended to the cautioner's rebellion, which was his fault, and voluntary, and therefore the escheat being the King's right, any donatar might make use thereof.

THE LORDS found, that albeit the relief would not extend to the rebellion, yet it was a relevant personal objection against the party obliged to relieve, that he could not make use of the escheat in his own name, or in the name of another to his behoof, against that party whom he was obliged to relieve.

*Fol. Dic. v. 1. p. 254. Stair, v. 2. p. 358.*