

No 22. rented lands not being ward lands, which by act of Parliament are burdened with the heir's aliment, but land feu or blench, to which the act is extended by practice only.

Fol. Dic. v. 1. p. 108.

* * * See The particulars *voce* ALIMENT, p. 403.

S E C T. VI.

Possession upon a Right null *ex facie*.

1629. June 26. K. ADVOCATE *against* SOME EXCOMMUNICANTS.

No 23.
Persons excommunicated possessed lands, &c. for long after the excommunication. In a process at the instance of the King's Advocate for the value of the fruits, they were allowed deduction of actual outlay, but nothing for the maintenance of themselves and families.

SEVERAL persons excommunicate, being pursued upon the act of Parliament 1609 for payment of certain corns growing upon the mains posselt by themselves, of diverse years after the sentence of excommunication, and now by-past, before the intenting of this pursuit; and the defenders *alleging*, that the pursuit being for the growth of corns of by-past crops, which were consumed, and not now extant, the same ought not to be sustained; for reason could not enforce, that they should be decerned to pay that which was *bona fide* spent diverse years since, being corns which could not be kept. Likeas the same being spent in servants fees, and others, who laboured the ground; and in the maintenance of themselves and their families, which rested out over the seed, and teind, which also ought to be deducted, therefore the same being so spent for maintaining of their lives, and for their entertainment, it ought to be allowed, as both *bona fide* consumed, and necessarily done, and therefore ought not to be repeated, nor they subject to pay the same. THE LORDS found, that the seed, and teind, and servants fees, and other expences made in labouring of the ground, and mains, and winning of the corns growing thereon, ought to be deducted off the corns foresaid, growing the years libelled, for which the defenders were convened, the same being made special; but as for that part of the allegiance, anent the corns spent upon their own entertainment, being, as they alleged, the only means whereby they lived, and so necessarily alleged to be consumed: THE LORDS repelled that part of the allegiance, and would not allow the same; but sustained the action for the corns foresaid, growing, and intromitted with by the defenders, as said is, except only for teind, seed, and servants-fees, and expences of the labouring and winning thereof, for which defalcation was made, and no further; for it was found, that the action was all good for the by-gones, since the excommunication, which took away *bona fides*. albeit they were consumed, as it is for time coming, so long as they stand excommunicate; for that same necessity

alleged, for entertaining for by-gones, holds also for time to come, which, if it should be admitted, would elide the act of Parliament. But I think the reason holds not, for in by-gones they are spent, and not so in years to come, whereby they are extant. And, upon the 11th December 1629, betwixt the same parties, the excommunicants and their tenants being both convened, each one of them *in solidum*, to pay the farms of their lands, being both holden as confessed, decret was given against them, and each one of them, *in solidum*, but once payment was declared, should only be taken from one of them to liberate both.

No 23.

Act. *Advocatus.*Act. *Aiton, M'Gill, & Hope.*Clerk, *Hay.**Fol. Dic. v. 1. p. 108. Durie, p. 451.*

1633. November 16.

GRANT against GRANT.

ONE Grant, by his contract of marriage with ——— his future spouse, being obliged to infest her in lands which he had in wadset from the Laird of Grant, and the contract bearing, that he should take a new security of the lands from the L. of Grant, to himself and to her, and the longest liver of them, and the heirs to be procreate betwixt them, which failing, to his heirs; and, after the perfecting of the marriage, he having, within three or four months thereafter, obtained infestment thereof to him and her in liferent, and to his heirs, failing of heirs betwixt them; which infestment had no relation to the said contract, nor made mention thereof: Thereafter the husband dying within the year after the said marriage, and another Grant being infest by the superior in that land, as heir to that husband deceased, being his brother, or uncle, there being no bairns of the marriage; which infestment was granted upon the superior's precept of *clare constat*, and not upon retour; and this heir, diverse years thereafter, pursuing the relief for the mails and duties of the lands foresaid, of all the years after her husband's decease, and which were intromitted with by her, and which she had good right to uplift, as she alleged, by virtue of the said sasine, both for by-gones, and also in time coming: And the pursuer *replying*, that her sasine was become invalid and extinct by the husband's decease within the year, as said is, which put both parties in that case for conjunct fee and tocher, as if no marriage had ever been contracted, and restored them to their own rights thereof *hinc inde*: And she *duplicing*, that her sasine had no relation to that marriage, nor depended thereon, and albeit it should depend upon that contract, yet it was sufficient for all by-gone years before this pursuit, which she had uplifted and consumed, and must of reason be reputed to have been uplifted *bona fide*, by virtue of her right foresaid standing unquarrelled, and she never being interrupted in her possession before this pursuit.—THE LORDS repelled the exception and duply, and found the reply, upon the husband's decease within the year, relevant; which reply was

No 24.

A wife's right in lands by infestment, in terms of her contract of marriage, extinguished by her husband's death within year and day, found not to afford such a colourable title as to infer *bona fide* consumption of the fruits.