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been in possession, by setting the tack produced, which is sufficient as to possession, albeit it were null by exception, as it is not; and the nullity thereof is only competent to the person of the granter, and not to this pursuer.

“ THE LORDS found the King’s gift and decret conform, with institution and collation was not sufficient, unless either the mortification of these teinds or the prebendar’s possession were instructed.

*Stair, v. 1. p. 287.*

1665. July 21.

GAVIN HAMILTON *against* DUKE HAMILTON and BISHOP of EDINBURGH.

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GAVIN HAMILTON, as assignee by the collector of vacant stipends, charges the parishioners of Crawford. Compearance is made for the Bishop of Edinburgh, *alleging*, that this was a patrimonial kirk of the bishoprick of Edinburgh, and so was not comprehended in the late act of Parliament anent vacant stipends.

THE LORDS repelled the defence, and preferred the collector of the vacant stipends; for they found the act was general, without any such exception.

*Stair, v. 1. p. 400.*

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1676. July 11. The BISHOP of DUMBLAIN *against* KINLOCH.

A party held an annualrent right over lands, which were afterwards resigned to the King, and by the King mortified to a bishoprick. The bishops were suppressed, and afterwards re-established. While suppressed, the debt was paid to the King, who gave a grant of redemption. The grant of redemption was sustained, tho’ without the consent of the Officers of State.

IN *anno* 1596, the Earl of Bothwell having borrowed, from one Thomas Craig advocate, 7000 merks, did, for security thereof, infest him in ten chalders of victual out of his lands of Hails and Truprain, redeemable upon payment of 7000 merks, by a clause of reversion in the contract, obliging himself to a reversion, being infest. This annualrent was acquired by John Murray, thereafter Earl of Annandale, and by him resigned to King James VI. who, in *anno* 1620, mortifies the same to the Bishop of Dumblain, as Dean of the Chapel Royal, who possessed the same till the expulsion of Bishops in *anno* 1638. The Earl of Bothwell being forfeit, the right of these lands, out of which the annualrent was payable, came by progress, in the person of Sir George Seaton, who, in *anno* 1651, paid the 7000 merks to the King, and obtained from his Majesty a grant of redemption at Stirling, immediately before he went to Woster; yet the King having given an assignation to his chaplains, they continued to possess; and, after the restitution of Bishops, Bishop Leighton did possess; and now Bishop Ramsay succeeding, charges Francis, who has succeeded to Sir George Seaton in the lands, out of which this annualrent is payable, who suspends, on this reason, that his author had redeemed the annualrent from the King in *anno* 1651, when the Bishops were suppressed, and the King had the only title. It was *answered* for the charger, *imo*, That this annualrent being

mortified by King James to the Bishop of Dumblain, as Dean of the Chapel Royal, and thereby become a part of his benefice, he was *decennalis et triennalis possessor, qui per regulam cancellarii non tenetur docere de titulo; sed possessio habetur pro titulo*, which, upon good ground, was received by all Christian nations, church-men being but administrators and usufructuaries of their benefices, their mortifications and evidents were subject easily to be lost; and, therefore, as prescription, with any colourable title, and forty years possession, makes a full right in temporal lands; so thirteen years possession doth the like in benefices. *2do*, By an act of sederunt, it is declared, 'That twenty years possession before the Reformation, or thirty years of kirk-lands after the Reformation, should be holden as a right;' and this annualrent has been possessed as a part of the benefice above fifty years. *3tio*, By the act restoring Bishops, they are restored to all they had in *anno 1637*, and so to the right and possession of this annualrent; and, as a redemption made by a donatar of forfeiture would be void, if the forfeiture were rescinded, and the forfeit person restored *per modum justitiæ*, so much more the Bishops being restored *per modum justitiæ*, they returned to their right and possession, and the suspender can have only access to the King for repetition of his money. *4to*, Though this annualrent were redeemable, as it is not, yet it was not lawfully redeemed, because there was no order of redemption or declarator; and this grant of redemption was without consent of the Officers of State, and was not registrate. It was *replied* for the suspender, to the *1st*, That the rule of the Chancellary is not in vigour amongst the Protestant nations, otherwise the act of sederunt would not have pitched upon twenty or thirty years as a title; but though it were, it is but a presumptive title, which, though it be sufficient, both *active* and *passive in possessorio*, yea though *in petitorio* in reduction, improbation, or declarator, it might hinder certification; yet, where the mortification does appear, and is produced by the suspender, *præsumptio cedit veritati*; and it is evident that the mortification relateth Mr Thomas Craig's right, as acquired by the King and mortified. Likeas Mr Thomas Craig's right is produced, which bears a clause of reversion in its bosom, which is all one as if Mr Thomas Craig's right had been deduced verbatim in the mortification; so that the mortification had comprehended a reversion, which therefore might be founded on, and made use of, though the kirk had possessed 100 years. For reversions *in gremio juris* prescribe not. And as to the act of sederunt, it can be no more but the like presumptive title, and relates particularly to the time of Reformation, when the Popish clergy, being become desperate, did dilapidate their benefices, and suppress their rights. Neither can the act restoring Bishops import any thing as to the point in question; for it is undeniable, that Sir George Seaton, having a right to the reversion, might have redeemed this annualrent at any time he pleased, by payment, or consignment of 7000 merks. And at the time Bishops were suppress, he could pay or consign to none but to the King; and seeing the King accepted the money, he needed not use any order by premonition and

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consignation, neither needed he declare the order; and yet, *ex abundante*, the defender raised a declarator against the late Bishop of Dumblain, and has renewed it against this Bishop, for declaring, 'that, by the payment made to the King, the right of annualrent was redeemed and extinct.' And though the redemption had been granted by a donatar of forfeiture, it would be effectual against the forfeit person, though restored by way of justice, as being payment made *bona fide* to a party in title for the time, and the restored person would have only recourse against the donatar who received the money. Neither doth it import any thing that the Officers of State do not consent, because this annualrent was no part of the annexed property or patrimony of the kingdom, but of the private patrimony of the King, *in quo jure utitur communi*; nor doth the want of registration operate, which, as it is clear by the act, so it is only in favour of acquirers; but it cannot be said the Bishop acquired from the King since the redemption, neither can the charger plead a possessory judgment, either by the common law, because annualrents have not the benefit, or by the special privilege of church-men, seeing redemption has been obtained, which evacuated the right, and left neither real nor presumptive title, without which no possessory judgment can defend, much less can it affect the right of another by an annualrent, which is extinct, as being redeemed. It was *duplied* for the charger, That if the possession of churchmen make only a presumptive title, it will evacuate all the benefices of the church; for it were easy for the heirs of the mortifier to infest themselves upon their right, and to declare the same against the beneficed person, and though it be true where the mortification is extant, and any intrinsic restriction or qualification thereof may be founded on, yet, in this mortification, there is no mention of a reversion, albeit it bears, 'that the right mortified was Mr Thomas Craig's right,' whereof the reversion might have been discharged thereafter; or when the King had the right of reversion by the forfeiture, he might have reserved it from the donatar in favours of the Bishop.

THE LORDS found, that seeing the mortification bore expressly Mr Thomas Craig's right to be the right mortified, and that Mr Thomas Craig's right had a reversion *in gramio*; they found it intrinsic to the mortification, and that thereby the right was redeemable, and that it was redeemed; and that, after the redemption, there was no place for the privilege of any possessory judgment.

*Stair, v. 2. p. 444.*

\* \* \* Gosford reports this case :

1676. February 18.—THE Bishop having charged Gilmerton for the rents of teinds lands of Murkle, which were mortified by King James VI. to the Chapel Royal, and annexed to the Bishopric of Dumblain, in *anno* 1620 there was suspension raised, upon this reason, that any right the King had, being but a right of wadset, redeemable upon payment of 7000 merks, the Bishop, by the morti-

fication, could be in no better case; but so it is, that Sir George Seaton, as having right by progress from the Earl of Bothwell, granter of the first wadset to Mr Thomas Craig, who had disposed the same to the King, did, in *anno* 1650, upon payment of the said 7000 merks, obtain a declarator of redemption under the King's own hand; and thereafter his Majesty did give an order to the Exchequer to provide the Bishop of Dumblain, out his own rents and feu-duties, with as much as did amount to the yearly rent charged. It was *answered*, That the reason founded on in the said letters of redemption was noways relevant; because it was only used and declared by the King during the suppression of Bishops, against which, they being restored, by the late act of Parliament, to their whole rents, as they were enjoyed in the year 1637, they ought to enjoy the same as full as if they had never been suppressed; and the redemption, being only alleged to have been during that time, is taken away by a public act of Parliament. Likeas, not only the Bishops of Dumblain were in continual possession from the date of mortification until they were suppressed, but likewise since their restoration; this same suspender, notwithstanding of the redemption, did make yearly payment to the last Bishop of Dumblain.—THE LORDS having long debated amongst themselves, upon this reason and answer, it was carried by plurality of votes, that the reason was relevant, and proven by the King's declaration, subscribed at Stirling *anno* 1650, being moved upon that reason, that the redemption might be used against the King, being author to the Bishop; but some others, whereof I myself was one, were of another opinion, that the King's declaration could not take away the Bishop's right of mortification, not only because it was granted during the suppression of Bishops, against which they were restored by a public law, but likewise upon this reason, that the King being divested of the wadset by a mortification, which is a public right, and clad with possession since 1620th year of God, except the years that they were justly suppressed, against which they were restored, and so ought to be looked upon as lawful possessors, during that time, any private declaration from the King, bearing payment of money, could not take away the Bishop's right; and albeit the right of itself be redeemable, yet the order of redemption cannot be used but against the Bishop, as having the only right and possession which hath been acknowledged by the suspender and his predecessors, in making constant payment without interruption. Thereafter, there being a bill given in, the cause was ordained to be again heard, notwithstanding of the said interlocutor.

1676. *July* 12.—THE Bishop and his advocate being of new heard, notwithstanding of the former interlocutor, did insist upon these reasons, as not formerly debated: *First*, That he and his predecessors being in possession of this mortified annuity of ten chalders of victual since the year of God 1620 to the year 1672, by the space of 50 years, by virtue of the mortification, they were not at all obliged to debate upon their title; because, by the canon law and common

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law of our kingdom *decennalis et triennalis possessio habetur pro titulo*, and by an act of Sederunt, 20 years possession before the Reformation, and 30 years after, is declared to be a sufficient title to all churchmen: *2do*, The Bishop ought to have the benefit of a possessory judgment, since he and his predecessors have been in a constant possession, by receiving payment of this annuity since Bishops were restored by act of Parliament, which expressly declares that they shall have right to all rents which their predecessors did enjoy in the year 1637; which being a public law, without any exception, is of far greater force than any private declaration of redemption, granted by the King when their Bishops were outed of their places, and the King and his government under great hazard and trouble, without any consent of the Commissioners of the Treasury or Exchequer, and thereupon craved that the letters might be found orderly proceeded.—It was *replied* for Gilmerton, That the letters ought to be *simpliciter* suspended, notwithstanding of these answers now insisted on, for as to *regula cancellarii*, it was only a popish institution, and was not revived here after the Reformation, as appears by the act of Sederunt, which was cited, making 20 years and 30 years possession to be the rules; neither doth that *regula* or act of Sederunt meet this case; for they were only made when, by the change and revolution of times during the reformation and intestine wars in popish kingdoms, the writs and securities were destroyed in the combustions, or the incumbents and administrators of benefices did carry them away, so that no evident could be produced, and therefore *loco tituli decennalis et triennalis possessio* was found sufficient, whereas in this case the rights of the mortification are all clear and extinct, expressly relating to the right of wadset in the person of Mr Thomas Craig, the Earl of Annandale, and from him to the King. It was *replied* to the second, That the Bishop could not plead the benefit of a possessory judgment, because that is only granted in a competition betwixt absolute and irredeemable rights, but was never pretended to in any wadset, which were by seven years possession to destroy all reversions; and as to the act of Parliament, he opposes the Lords' former interlocutor, finding, notwithstanding thereof, that the grant of redemption made by the King for payment of 7000 merks did extinguish the wadset.—THE LORDS did again find, that the mortification was redeemable, and lawfully redeemed from the King in *anno* 1650, and that notwithstanding of any possession by the Bishops of Dumblaine, or Deans of the Chapel Royal, after suppression of Bishops, as likewise, notwithstanding of the late act of restitution of Bishops for payment making to them, that the letters ought to be *simpliciter* suspended. The chief reason of those who were of that opinion was, that by the suppression of Bishops their mortifications fell in the King's person *jure devoluto*, and by the forefaulture of Bothwell the right of reversion did likewise belong to the King, which being disposed, and coming by progress in Sir George Seaton's person, who used the order of redemption, and obtained a grant from the King, he did thereby ex-

tinguish the wadset, and gave an absolute and irredeemable right to Gilmer-ton the suspender; and as to the act of restitution, it could not prejudice, the right being long posterior, and could not be drawn back to the year 1637, there being *medium impedimentum*; and as to any possession made by the Bishop of Dumblaine, it was only *turbata possessio*, the full duty never having been paid, or acknowledged, but only a part thereof, that they might jointly concur for obtaining a warrant from the King to the Exchequer, to settle as much rent upon the Bishop of Dumblaine. But others were of another opinion, that the letters ought to be found orderly proceeded, with whom I was agreed upon these reasons; that the King being denuded of that annuity by a public mortification, making it a part of an ecclesiastical benefice, by a deed under the great seal, and the titulars by the space of twenty years, and the Kings chaplains, after suppression of Bishops, having been in constant possession by the space of fifty years, and the bishops being restored to the same rights and possession which they had when they were suppressed, which was a public law without exception of any private declaration of Kings, whereupon never any declaration or ratification followed with consent of the Treasury, was not a sufficient *medium impedimentum* to take away the possession by way of suspension, which could only be done by way of reduction or declarator; and that the act of restitution being founded upon the injuries done to the bishops in the year 1637, and restoring them as a just remedy, by this interlocutor, the benefit thereof was taken from them; so that in this case my judgment was, that it being clearly made appear, that the mortification was only of a wadset bearing a reversion, albeit never so long, did hinder the suspender having the right of reversion, to redeem the same; but that the order could never be used but against the bishops who were in present possession of the benefice, and who were only capable to receive the sums lent upon the wadset, and grant a redemption; and, the act of restitution being a public law under the Royal Sceptre before any declarator of redemption, and bearing no exception, the bishops ought to have the benefits thereof, seeing the King declares, that it was unjustly taken from them, and rescinds that authority whereby they were suppressed.

*Gosford, MS. No 855. p. 540. & No 878. p. 559.*

1682. March 20. MR JAMES GRAHAME against ELIZABETH OGILVIE.

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FOUND, that though a minister's thirteen years possession of lands, as part of a parsonage, was a presumptive right, yet *cedit veritati*, and might be convell'd by the heritor's producing his rights and infestments; but the minister, after the thirteen years, coming in place of the heritor by a purchase, and continuing to be minister forty years, the LORDS, before answer to the prescription for the