

1676 and 1677. JAMES RAMSAY, Bishop of Dumblaine, *against* FRANCIS KINLOCH of Gilmerton.

1676. *July*.—MR JAMES RAMSAY, Bishop of Dumblaine, having charged Francis Kinloch of Gilmerton, upon his general letters, to pay him eight chalders and a half of victual, being an annuity mortified by King James in 1620, furth of the lands of Markill, whereof the said Francis is heritor, to the deanery of the chapel-royal, which is annexed to the bishopric of Dumblaine;—he suspended upon this reason, that the annuity was originally granted in 1587, furth of these lands, by the then Earl of Bothwell, to Mr Thomas Craig, advocate, redcemable upon the payment of 7000 merks, and upon Bothwell's forfaulture, fell to Lennox, then to Buccleuch, the donatars. Buccleuch disponed these lands to the Earl of Winton, for the behoof of Sir George Seton; which Sir George paid the 7000 merks to the King, and got a grant of redemption; which right is now in the suspender's person by progress. So it being extinguished, the suspender's lands are free; and the King being sensible thereof, wrote to his Exchequer, that an equivalent annuity, in place thereof, might be settled upon the said deanery, furth of his feu-farms. See *13th January, 1680, Nunton and the Town of Kirkcudbright*.

To which it was ANSWERED for the bishop, that the reason ought to be repelled, in regard, he and his predecessors have peaceably bruiked the said annuity by the space of fifty years, from 1620, till 1672; and that Francis the suspender paid peaceably from 1661, till 1672, by the space of eleven years. That after so long possession he was not holden to debate what right his Majesty, who founded the said annuity, had thereto; but it was sufficient for him, being a beneficed person, to prove this annuity was a part of his benefice, and possessed so; *et secundum regulam cancellariæ apostolicæ,\* (super qua vide Gomezium, in commentario ad dictas regulas,) in beneficiis triennalis et decennalis possessor non tenetur docere de titulo*, but that possession *habetur pro justo titulo*. And the pretended redemption falls within the time of the act of Parliament, restoring bishops, in 1662, rescinding all acts done to their prejudice, and restoring them to whatever they possessed in 1637.

REPLIED for the suspender,—That the rule anent *decennalis et triennalis possessio* is but a presumptive right; and though it may maintain beneficed persons, where they are not able to shew any more, yet where his right can be condescended on, is founded upon, and produced, as here in this case, and is found to be null and extinguished by payment,—that rule will not proceed; and it is just of the nature of the act of Parliament in 1584, anent retouring quinquennial possession in favours of the King, which proceeds *presumptive*. *2do*, The rule of the chancery is derogated from by an express act of sederunt, altering the space, and settling twenty years possession of benefices to be the rule before the Reformation, and thirty thereafter. *3tio*, Rights of lands, in our law, cannot prescribe with less than forty years possession. *4to*, Possession that induces a right and clear title in favours of church-

\* *Vide* Stair's System, Tit. 12, *Of real rights*, No. 25, page 181; where, in my animadversions apart, see two difficulties against this *regula cancellariæ*. *Imo*, It seems contradictory why *triennalis*, and again *decennalis*; that is unintelligible. *2do*, It seems dissonant to our law, and contrary to that Act of Sederunt in December, 1612, appointing ten years' possession before the Reformation, and thirty since; *viz.* August 1560, as the 55th act of the Parliament in 1573 bears.

men or others, must be peaceable and uninterrupted; but the charger's was *turbata*, by declarators, &c.

DUPLIED,—The *regula cancellariæ* was not merely a presumptive, but a full and complete title; because, where a beneficed person possesses lands or rents during that space as a part of his benefice, *lex statuit super presumpto tanquam vero presumptione juris et de jure, quæ omnem probationem in contrarium respuit*; for if beneficed persons were obliged to debate their founders' rights, it would shake the foundations of the most part of benefices in Scotland, who have nothing to shew but a provision and possession conform; a preparative that all our bishops and clergy are concerned at in the highest degree. Neither does any defence arise *ex gremio* of the charger's title and right; the same being by his Majesty purely, simply, and absolutely constituted, without any qualification or reversion; so that he can never be obliged to debate upon extrinsic grounds not contained in the foundation, especially *hoc loco* in a suspension, since it cannot be presumed he knows the conditions of his author's rights. And, notwithstanding of the grant of redemption, Francis still continued to pay; and, being conscious of the invalidity of his own right, he procured from his Majesty a precept upon the Exchequer for L.1000 sterling in lieu of it; and if he had gotten payment of that, he would never have made contradiction to the bishop's right; likeas he paid not a sixpence to White for that annuity, so that he is *in lucro captando*.

The Lords, by their interlocutor, suspended the bishop's letters *simpliciter*, and found he had no right to the said annuity; and therefore assoilyed Francis, and declared his lands free thereof.

This decision made all people to talk largely of bribery and partiality; for, at this time, Francis, and Mr Roguehead, the clerk, his son-in-law, were contriving to give Halton, and some other persons, L.5000 sterling, in gratuity, out of the town of Edinburgh's revenue and cash; which as it made this go smoothly, so it also anointed the wheels of the following cause between the same Francis and Abotshall. The bishops were aghast at the interlocutor; for it is undoubtedly of bad influence and example to teach men to brangle their rights, the most of them leaning merely upon possession. The President took pains to appease and mitigate them, and drew up reasons in fortification of the Lords' sentence, (which was stolen through at an unfrequent afternoon's meeting,) proving the justice and legality of it; and gave the Bishop of Galloway, Mr Jo. Paterson, a copy of them; and which softening plaster, knowing many watch for their halting, he uses in any other controverted interlocutors. *Supra, numero 446*. But it seemed very unjustifiable that in a suspension, rights of land, and such like titles, should have been so summarily discussed and annulled; for old form dictates that possession is to be continued, *Interdicto uti possidetis*, and the validity of the right remitted to a reduction. Dury, 12th March, 1629, *Marshall* against *Drumkilbo*. But their answer to this is, that they could not have legally nor warrantably judged upon his title and right, if it had not been produced, which they could not have forced him to have done in a suspension; but they being once produced, and *in campo*, and found invalid, the Lords might instantly judge upon them, as if they had been in a reduction. And if he had defended on his naked possession, without founding on a title, it had been more secure for him, for that would have burdened Francis with the producing and proving the nullity and invalidity of his title. This is warranted from Antonius Faber, *in Codice Sabando, Tit de sacro-sanctis ecclesiis, definit. 5. Triennialis possessor exhibens titu-*

*lum invalidum vel vitiosum non juvatur ; Regula cancellariæ de triennali, ex Gomesio.*

Yet on the 21st February 1677, the Bishop of Dumblaine having produced a clear and undoubted right and progress to that reversion, he gained the cause against Francis, and the letters were found orderly proceeded.

*Advocates' MS. No. 487, folio 251.*

1677, *June 5.*—THOUGH in February last, the letters were found orderly proceeded, at Mr James Ramsay, Bishop of Dumblaine, his instance, *contra* Francis Kinloch ; yet he had got it stopt to the 1st of June ; and now again, upon a bill pretending he would take off their forty or rather eighty years peaceable possession by interruptions, (without condescending on any in particular,) Francis prevailed so far as to get a new stop, for producing his interruptions, till the 16th of July.

*Advocates' MS. No. 566, folio 284.*

1676, and 1677. MATTHEW LAURY *against* JAMES BROWN.

1676, *February.*—MATTHEW LAURY, Fletcher in Dalkieth, having charged James Brown, Cordiner there, upon a bond of 300 merks, Brown suspends, and raises reduction upon this ground, that he offered to prove by the charger's oath, that the true cause of the granting of the bond was not borrowed money as it bore ; which being once confessed and acknowledged by him, then offered to prove *per testes instrumentarios* inserted, that the true cause of the granting the said bond was, that the charger having married the suspender's sister, by contract of marriage, the suspender and his mother became obliged, *nomine dotis*, to pay to the charger 500 merks in two moieties, 200 merks at one term, and the remanent 300 at another. And though the charger's mother having given bond for the last 300 merks, did pay it, but contented herself with a discharge of it, (as she had also taken of the 200 merks preceding,) without getting up her bond ; when she is dead, Laury, the charger, most fraudulently affirms to this suspender, who knew no better, that the 300 merks in the bond (which he shewed him) were still owing to him ; whereon Brown the suspender, being a simple and ignorant man, retires his mother's bond, and grants this new one charged on, and afterwards finds the discharges of the tocher. And so it being proven by the writer and witnesses inserted, that the cause of the granting this bond, was for a remain of that tocher ; then offers to prove, *scripto vel juramento*, that the whole 500 merks of tocher was paid. And so the bond being granted by error and simplicity on the one hand, and evident circumvention and dole upon the other ; and being granted for the same cause for which the mother's bond was given, and that being extinguished by payment and satisfaction, and reduced *ad non causam* ; this bond must fall *in consequentiam*, as being in the charger's hands and custody *indebite et sine omni causa*, and therefore ought to be delivered up to the suspender, to be cancelled by him.

To this it was ANSWERED, that the reason was very relevant if true, but the *modus probandi* was nowise allowable, since his bond could be nowise taken away but by his own oath, or a contrary writ.