

Edmondston the patron, who presented him: And the Lords found no defect in the presentation, albeit collation and institution followed not thereon, as was alleged by the pursuer against the excipient's presentation, produced by him; for it was found, there was no necessity of collation nor institution, in such presentations made by laicks, for which *vide* July 4th 1627, M'Kenzie, Minister, See APPENDIX. And it was not respected what the excipient duplied, that there was no necessity now, after so long time, to prove delivery of the Preceptor's presentation, seeing it was extant, and must be presumed to have been delivered; likeas, without delivery, it is sufficient in respect of the 25 years possession, as said is, seeing in *beneficialibus, decennalis, et triennalis possessio pacifica* is enough, *etiam sine titulo, vel præsunit titulum*; especially the Preceptor being yet living, and in possession, and against another Preceptor so lately presented by this compriser; and the patron's having of the presentation is no impediment, nor the Preceptor's paying duty for a part of the lands; for the patron, upon any condition betwixt him and the Preceptor, might keep this presentation, that it might appear on all occasions requisite, that he had made bargain with one who was Preceptor. Likeas, it is no impediment, but that the patron might suffer the Preceptor to bruik, and pay duty for a part of the land, after that he had covenanted therefor with the Preceptor, and that the same Preceptor had received duty for the rest of the lands belonging thereto: Notwithstanding whereof, the exception and duply were repelled. And thereafter the defender eiking to his exception, that the said Preceptor had set a feu of these lands to another, to the behoof of the L. of Edmondston, whereby he had done all deeds requisite to make a Preceptor; this was sustained, albeit this right was made since the comprising, because the defender offered instantly to pay to the compriser all the sums for the which the comprising was deduced, which was instantly permitted, without necessity to put the party to a redemption.

Act. Stuart.

Alt. Nicolson.

Clerk. Scot.

- Durie, p. 657.

1666. July 6.

PARSON OF MORHAM against LAIRD OF BEARFORD and BEINSTOUN.

THE Parson of Morham pursues reduction of a tack set by the former Parson to Bearford and Beinstoun, as being granted without consent of the patron; the defenders *alleged*, Absolvitor; because the tacks were set by the Parson, who had commission from the Earl of Buccleugh, patron, to set tacks; *2do*, The tacks were set with consent of Francis Steuart, Lord Bothwel, expressly, as patron, which Francis Steuart had right to the patronage, in so far as this

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Patronage is transmissible without investment.

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patronage, with the rest of the estate of Bothwel, being forfeited, the Earls of Buccleugh and Roxburgh got gifts thereof; but, by the King's decret-arbitral betwixt Francis Steuart and them, Buccleugh was ordained to denude himself of this patronage, and others, in favour of this Francis. The pursuer *answered, first*, That no commission, granted by the patron to the Parson himself, could be sufficient; because, the intent of the act of Parliament, requiring the consent of patrons, was not for any advantage or interest of the patron, to his own behoof, but to the behoof of the benefice, that the incumbent might meliorate the same; and so the patron was, by his right of patronage, as *curator Ecclesie*; but curators cannot authorise their minors by commission, at least the patron cannot give commission to the beneficed Parson himself, no more than he could renounce the benefit of the act of Parliament, and leave the Parson to himself; *2do*, Before the tack was set, the Earl of Buccleugh, granter of the commission, was dead, *et morte mandatoris perimitur mandatum*. As for Francis Steuart's consent, he was not patron, not being infest; but the King's decret-arbitral imported only a personal obligation for Buccleugh to denude; so that if Buccleugh thereafter should have consented to another tack, that would have been preferred,

THE LORDS found that member of the allegiance of Buccleugh's being dead before the tack, not relevant to annul the same, as depending on his commission; but decided not the first point, whether commission could be granted by the patron to the Parson himself; but found the last member relevant to defend the tack; for the right of patronage being *jus incorporale*, might be transmitted by disposition, without infestment; and albeit Buccleugh was not formerly denuded, even by disposition, so that if he had consented to another right, that, as more formal, would have been preferred; yet, there being no competition, the Parson cannot quarrel the want of the patron's consent upon that ground.

Fol. Dic. v. 2. p. 48. Stair, v. 1. p. 390.

. Dirleton reports this case.

1666. *July 19.*—THE Minister of Morham having pursued a reduction of a tack set by his predecessor, upon that ground, that it was above three years, without consent of the Earl of Buccleugh, patron for the time; the tack was sustained, in respect Francis Steuart had consented, in whose favour Buccleugh, by a decret-arbitral, was obliged to denude himself of the patronage.

This decision seemeth to be hard, seeing Buccleugh was full patron, and was not denuded by the said decret; and the right of the patronage might either have been comprised from him, or disposed by him effectually, notwithstanding of the said decret, which did not settle the right of the patronage in the said Francis his person, but was only the ground of a personal action

against Buccleugh, for denuding him of the right of the patronage; and as Francis could not present, so he could not consent as patron to tacks. Upon these considerations, diverse of the Lords were of the contrary opinion.

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Dirlston, No 25. p. 11.

* * * A similar decision was pronounced, 5th July 1632, Sheriff of Forrest against Town of Selkirk, No 4. p. 6886. *voce* INFERTMENT.

1677. *January 24.*

The LAIRD OF INNERNYTIE *against* Mr WILLIAM NAIRN, Minister of Capoch.

In a double pointing, raised at the instance of the Tenants of Russil, who were pursued for their duties by the said parties, it was *alleged* for Mr William Nairn, That he ought to be preferred; because, after the death of Sir William Stewart, who was Prebend, presented *in anno* 1664, he had a right from the Bishop of Dunkeld to the said prebendary, and rents thereof. It was *answered* and *alleged* for Innernytie, That, notwithstanding, he ought to be preferred; because, the gift and presentation, granted *in anno* 1664, which was long prior to the Minister's right, was not only made to his father, but, failing of him by decease, to his son, who now pursues; and, by virtue thereof, his father did possess, during his lifetime, and the Innernyties since his decease, and so had the benefit of a possessory judgment; but, albeit they were contending upon right, yet they ought to have preference; because the Bishop, who granted their right, being undoubted patron of the prebendary, which was not a benefice of cure, being neither a collegiate kirk, nor liable to any ecclesiastical service, the Bishop, as he might have granted a joint right to the father and son, and longest liver of them two, so he might lawfully grant a right to the father during his life, and, failing of him by decease, to his son, as is ordinary to all Bishops to grant a right of the Clerk's office of Commissaries to father and sons; likewise, the King, as patron of the Chapel Royal, doth grant such right to laick persons, neither can this be called a dilapidation of the benefice, in prejudice of the Bishop's successors, seeing they have only *nudum jus presentandi*, and do not thereby take away any of the rents of the benefice. It was *replied* for the Minister, That, notwithstanding, he ought to be preferred; because, after the death of Sir William Stewart, the benefice was then vacant, and his son, having only possessed by the space of three years since, cannot crave the benefit of a possessory judgment, as if his father had been only liferenter, and he fiar, and so might make use of his possession, to defend as in a possessory judgment, seeing his father had a full right, by his presentation, to the whole benefice, and the son had no pretence of right but by sub

No 5.

A patron granted a presentation to a man, and, after his death, to his son. Found, that the presentation was ineffectual *quoad* the son's right, after the patron's death.