

1631. February 23.

L. FREELAND *against* MURRAY.

No 9.

Import of act  
101, Parl.  
1581, relative  
to pensions to  
beneficed per-  
sons.

L. FREELAND, as having right to a pension of a chalder of victual, granted by the Provost of Methven, with consent of the prebendaries, and of the Duke of Lennox, patron of the benefice, to Mr John Moncrieff, and which was assigned by him to umquhile L. Freeland, to whom this pursuer was heir; and as heir having so right, pursuing one Murray as intromitter with the teinds of the lands of Tassoquhy, which were specially assigned by the pension, for payment of the same; after inhibition served upon the said teind-sheaves, pursuing them as intromitters therewith, for payment of the years 1628 and 1629; and the defender having acquired from the new provost of Methven a tack of these teinds, being the teinds of his own lands, and by virtue thereof being diverse years in possession, alleging that this pension was null, because by the act 101. Parl. 1581, all pensions set by beneficed persons under prelates, in diminution of the rental, and to the hurt of their successors, are null; and this was of that nature; and the pursuer *replying*, that the act meant only of pensions granted by inferior beneficed persons, which were at the King's presentation, and extended not, nor meant not of benefices at the presentation of laick patrons, as this was: THE LORDS would not decide this while they were further advised, seeing it tended to annul all pensions, and whatsoever deeds done by inferior beneficed persons, as well tacks as other rights; for by setting of tacks the successor was also prejudged, and the rental of the benefice diminished. And albeit it might appear, that this act could not receive so large extent of interpretation; for thereby a provost, albeit with consent of the chapter and patron, might neither set tack nor give pension; and by the said act, there cannot be any pension which may subsist, but all are unlawful; notwithstanding that by the act of annexation, pensions set by inferior beneficed persons, clothed either with decret or possession, are excepted therefrom; and by the 62d act of the 11th Parliament 1587, it is evident also, that some such pensions are lawful and valid; for if all were null, as the act excepted upon bears, these other acts made *anno* 1587 were needless, and would never been made; likeas by the act 1594, tacks set for longer space than three years, without consent of the patron, are null: Yet the Lords were almost all of one mind, that by the foresaid act the pension was null, but it was not voted as said is; and they thought this nullity might be received, by way of exception, without pursuit of reduction, and was receivable being proponed by this tacksman, whose tack, albeit the pursuer alleged it was also set to the hurt of the benefice, and so had the same fault which his pension had; yet the Lords thought it was good enough to maintain the possessor, being a tack of the teinds of his own lands, and would defend against the setter, who so long as he lived, could not quarrel his own deed. Neither was it respected, that it was only now questioned betwixt the prior pensioner, whose pension was also clothed with diverse years possession, and the posterior tacksman; and that

the pursuer replied, that the beneficed person had only place to quarrel his right, and that not summarily, but by pursuit of reduction, seeing it was clothed with possession; in the which action he might then qualify, (which is not proper to be done here) that there is no diminution of the rental; and where he would dispute, that the rental is not to be considered, according to the avail and rent of the benefice, as it may yearly yield, but according to a constant recorded rental in writ, given up and authorised for a rental; likeas he would then allege great difference betwixt pensions flowing from a stipendiary minister or titular, and a beneficed person, having patron and chapter consenting to his deed, and which is *ecclesia collegiata, habens capitulum et præbendam cum dignitate*; but this was not decided as said is.

*Durie, p. 574.*

No 9.

1662. July.

CLAPERTON against LADY EDNEM.

UMQUHILE John Edmiston of Ednem gives a pension to Jean Stirling of two bolls wheat and ten bolls oats, payable yearly out of the mains of Ednem, whereunto George Claperton her son being assignee, pursues the Lady Ednem and the tenants for payment, from crop 1647 to 1661 inclusive. It was *alleged* for the Lady, She stands infeft in the mains, and by virtue of her infeftment, in possession, continually since the death of her husband: And the pension is no real right, especially being granted by a laick, and whereupon never any decreet followed against the tenants. It was *answered*, That the pension was clad with possession by payment made by her husband in his time, and by the defender herself for the year 1647. It was *replied*, That the pension is but a personal obligation by which the defunct did oblige him and his heirs to pay the same out of his rents of the mains; which personal obligation cannot carry a real right as an infeftment; and any payment made by the defunct was only for fulfilling his personal obligation: Likeas, the payment made by the defender was as executrix, for fulfilling her husband's obligation, out of his moveables, which cannot be a ground to affect the rents therefore.

THE LORDS found the allegiance and reply relevant.

*Fol. Dic. v. 2. p. 55. Gilmour, No 52. p. 37.*

\* \* \* Stair reports the same case:

1662. December 11.—IN anno 1621, umquhile Sir John Edmiston of Ednem granted a bond of provision to Jean Stirling of two bolls of victual, which he obliged himself to pay to her out of the mains of Ednem, or any other of his lands, by virtue thereof she was in possession, out of the mains of Ednem, till the year 1640. Andrew Claperton her son and assignee pursues the Lady Ed-

No 10.

A pension of victual out of lands, made by a laick, was found no real right, but a personal obligation, not binding upon singular successors.