

fore that assignee's death, in the person of any other, who should also bruike the same, during the lifetime of him who should receive the last translation ; which pension being transferred by umquhile Mr John Arthur before his decease, in favours of his wife, and she having transferred the same in favours of her son ; who pursuing letters conform to the said pension ; the Bishop of St Andrew's compearing, and alleging the nullity of that pension, as being given in prejudice of the successors of the granter thereof, and in diminution of the rental of the benefice, and to the hurt of the kirk ; this allegiance was repelled, and the pension sustained.

Act. Hope.

Alt. Mowat et Primrose.

Clerk, Gibson.

IN this above written process of Patrick Whitelaw, there was produced for the minister of Stow, a decret given by the Commissioners of Parliament, appointed for modification of the minister's stipends, conform to the act of Parliament *anno* 1617 ; by the which decret, the foresaid pension of L. 100, granted to the said Mr John Arthur, *cum potestate transferendi*, as said is, was appointed to remain with Mr John Arthur during his lifetime, and after his decease, so much of the said pension as was paid out of the parish of Stow, viz. L. 50 thereof, was ordained to be paid to the minister of Stow, for a part of his stipend in all time coming ; which decret being quarrelled by Patrick Whitelaw assignee foresaid, as null, because before that sentence, the said Mr John Arthur had transferred his right of the said pension to his wife, he being obliged to do the same to her, by an express clause contained in the contract of marriage made betwixt them ; and so she not being called to that sentence, who was a party hurt thereby, and having right to the said pension, the said decret could not be sustained ; especially seeing the Commissioners, givers of that sentence by the act of Parliament, which was the warrant of their proceedings, had no power granted to them to take any man's right from him : Which allegiance was repelled, in respect Mr John Arthur the husband was called, and compeared in that decret ; and the LORDS finding that this was a decret of Parliament, they thought themselves not Judges to annul a sentence of Parliament so summarily by way of exception.

Fol. Dic. v. 2. p. 55. Durie, p. 180.

1628. December 17.

CHALMER against L. CRAIGIEVAR.

THERE was a pension granted by Patrick Abbot of Lindores to Mr William Chalmers out of his abbacy, for Mr William's lifetime, with power granted to him to make assignation of the said pension *in articulo mortis* to any he pleased. Mr William assigneth the pension to his son three years before his decease, but remained in possession thereof all his lifetime ; and after his decease, his son enjoyed the same, by virtue of the same assignation, for the space of thirty

No 6.

in articulo mortis, but with the same power to the assignee. This pension, though given in prejudice of the successors of the granter, and in diminution of the rental and hurt of the kirk, was sustained.

No 7.

Found in conformity with Bishop of Aberdeen against his Tenants, No 4. p. 10058.

No. 7. years and more. This pension being called in question, in a double poinding raised by the tenants against the pensioner on the one part, and Craigievar on the other; the LORDS would not sustain the assignation, in respect that the cedent remained still in possession, *et sic dans et retinens*.

The reason why this former assignation was not sustained was this, because the entry thereto was referred to the time of the cedent's decease, which the Lords thought no ways lawful. But in another action of the self same nature, pursued by the Bishop of Aberdeen against William Douglas son to the Laird of Drumlanrig, assignee to a pension out of the bishoprick of Aberdeen, granted to the umquhile provost of Lincluden, the assignation was found null, because the cedent remained still in possession till his decease. (No 4.)

Fol. Dic. v. 2. p. 55. Spottiswood, (PENSION) p. 228.

* * * Durie reports the same case :

IN a double poinding, Chalmer against Craigievar, for the feu-duty of certain lands held of the abbacy of Lindores, which were claimed on the one part by him who had the right of erection of that benefice, and on the other part, by a pensioner of the abbot's, to whom these feu-duties were specially assigned, for payment of the pension, the pension being granted to the pensioner for his lifetime, *cum potestate transferendi in articulo mortis*, and to endure for the lifetime of that assignee; and the pensioner having transferred the same in the assignee, three years before his decease, and the translation appointing his entry to be immediately after his decease, the cedent's self retaining possession after his translation, all the time of his lifetime: THE LORDS found the translation null, because it was made to the assignee, as said is, to begin after the cedent's decease, and so was conferred to an unlawful time of entry, at which time it could not have beginning; for it was found, that it should have been conferred to a time, which should have begun to the assignee, in the cedent's own lifetime before his decease; neither was it respected which was alleged by the assignee, That seeing the pensioner had power to transfer *in articulo et ipso momento mortis*, which if he had done, the assignee could not have had thereby an effectual entry, but after his decease, that therefore the translation to begin immediately after his decease was alike, and could not make it null therefore; and also he alleged, that the assignee, since the cedent's decease, had both a decret of letters conform standing, and also conform thereto had been thirty years in possession, so that in this possessory judgment, his right, after so long time, could not be summarily annulled; which allegiance was repelled, and the assignation found null, because the beginning thereof was not at a time before the decease of the cedent. In this process, the principal pension being quarrelled, because conform to the act of annexation 1587, it was not clad with possession or sentence before that act, as is thereby required, and as is provided by the acts of Parliament 1592 and 1594, which acts declare pensions null

out of benefices and kirk-lands, not authorised with sentence or possession before the year 1587; the LORDS found, that either decret or possession of the pension ought to be alledged, (if it should be sustained) before that year 1587. And because the pensioner alleged his possession of a part of the pension out of the duties assigned of a term before that year, the same was sustained, and it was not found necessary to allege possession of the whole pension, and of more years before that year; and this possession of one part, viz. that one part of the feu-duties assigned for the pension was paid to him, was found probable by witnesses, without necessity to prove the same by discharges or writs; and also the feu-duties of the pensioner's own lands, being assigned to himself by the pension itself, in satisfaction of the pension *pro tanto*, his retention thereof in his own hands, was sustained as a sufficient possession; neither was it found necessary that the pensioner should be compelled to say, that he had possession of the whole pension before the year 1587; for the possession of one part thereof was found sufficient to sustain the pension for the whole, and to exclude the nullity objected by the acts of Parliament foresaid. See PROOF.

Act. *Advocatus & Nicolson.*Alt. *Stuart & Baird.*Clerk, *Scot.**Durie, p. 410.*

1629. July 9. URQUHART against E. CAITHNESS and DICK.

A PENSIONER to the Earl of Caithness having the duties of lands assigned in his pension to him; for satisfaction whereof, having obtained a decret and letters conform against the Earl, granter thereof, and against the tenants of the lands assigned, and conform thereto being diverse years in possession of the duties from the tenants; thereafter the lands being comprised from the heritor granter of the pension, which compriser was infest by public infestment, and in possession of the duties of these lands assigned, and he being convened by the pensioner for payment of the said duties to him the years intromitted with by the compriser; it was found, the said compriser was not holden to restore the same, and that the said pension being granted by a laick, and not by an ecclesiastical person, was not real, and did not affect the ground against a singular successor, but would only produce personal action or execution against the granter's self and his heirs, for the years since he was denuded of his heritable right by comprising and infestment.

Act. *Nicolson.*Alt. *Stuart.**Fol. Dic. v. 2. p. 55. Durie, p. 459.*