ing of this charter to his son; and, *currente rebellione*, the king could not be prejudged. The Lords repelled the exception in respect of the reply.

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1636. *January* 20 *and* 21. WILLIAM OLIPHANT *against* WILLIAM OLIPHANT of GASK.

A Proposition not unfit to be motioned in Parliament.

To reform the 49th Act of the 3d Parliament, James VI, whereby it is enacted, that possessors of benefices, or ecclesiastical rents, shall tyne and lose their liferents, being year and day at the horn.

There was a great question moved about this, 20th and 21st January 1636, betwixt Mr William Oliphant and William Oliphant of Gask: Mr William having been presented, by the Marquis of Douglass, to a prebendary of the college-kirk of Aberdeen, was denounced rebel, and remained year and day at the horn; upon which the Marquis gifts his liferent-escheat to William, and, besides, gives a new presentation of the said prebendary to the said William, his son, as vacant in his hands by the rebellion of the said Mr William. There is raised by the tenants, owing the mails and duties of the said prebendary, a multiplepoinding, where all pretending right to the same,—as also the Laird of Panmure, who had gotten from the king a gift of Mr William, his escheat and liferent,—compeared. The first dispute was betwixt them and the Marquis's donator, for the mails preceding the date of the presentation given to William his son; to which the king's donator pretended right, as, *jure coronæ*, belonging to his Majesty, where there was no other superior to claim it. The Marquis, his donator, alleged for him this Act of Parliament; in the end whereof it is said, That possessors of ecclesiastical rents, remaining year and day at the horn, shall lose their liferent-escheat, sicklike and in the same manner as was statute in the 30th Act of Parliament, 4th James V, that temporal men should lose their liferents: But that Act, James V, makes temporal men's liferents fall to their superior; *ergo*, sicklike, churchmen's liferents, by the Act, must fall to their spiritual superiors, *viz.* their patrons. The king's advocate Alleged, That the similitude betwixt these two acts was only in this, that beneficed men's liferents should fall, as well as temporal men's; but that, in this last Act, 1572, it was not determined to whom the beneficed men's liferents should fall and belong; as was done in the former Act, 1535, anent temporal men's liferents, to which this second is relative. For this point the Lords found that it did belong to the king and his donator, notwithstanding of the said words of the act, in respect that the patron has only *nudum jus præsentandi*, but can never have any right to the fruits of the benefice. But, for the next point brought in question betwixt the king's donator and the person presented by the Marquis to the chaplainry, upon Mr William his rebellion, attour year and day; it was thought of more difficulty; whether a benefice did fall by the rebellion of the incumbent attour year and day, so that the patron might present another; wherein the Lords differed in opinion, some being for the affirmative, but most part for the negative; who alleged for them these inconveniences, that, if the liferent-escheat fall to the king, *frustra* should the patron present another, during the lifetime of the rebel; for that were to confer *beneficium sine officio*; and, *in*

beneficiis curatis, (which we as well comprehend under this Act as these *sine cura*,) no man will embrace the title whereof the king had the rents; and so the people should be destitute of a pastor. Again, it were an absurd thing that one being admitted to a benefice by his ordinary, should be put from it without his ordinary's knowledge or consent. *3tio.* There are but three ways of vacation of benefices, *viz.* by death, deprivation, or demission. And this can fall under none of these three.

Yet this last point was not discussed by the Lords, neither was the other first point pronounced, although it was voted. About this second point, some were of opinion that the patron had place to present; and, after he had presented, the king should have no further right to the liferent: Others thought, that, though the rebel lost his liferent, yet it could not be applied to any person's use, but should be lifted by the patron or ordinary to be given *ad pios usus*. Upon the account of these difficulties and inconveniences, this act would needs be abrogated, or at least helped. *Page* 364.

1636. *January* 26. LADY BORTHWICK *against* SIR MARK KER.

THE Lady Borthwick pursued her brother, Sir Mark Ker, for the mails and duties of the Lands of Torcraick, wherein she was infeft by her husband, for the years 1623, 1624, 1625, and for all years to come. The Lords would not sustain that conclusion of the summons, for all years to come, against possessors of lands, except it had been libelled particularly, and offered to be proven, that they possessed them the said years; notwithstanding that the pursuer alleged, he might reply upon it, and offer to prove the defender's possession: for they thought, if the defender had been absent, they could never have admitted that to the pursuer's probation; *ergo* no more compearing and replying upon it. It is true, that, in real and petitory actions *quæ afficiunt fundum*, as in poindings of the ground, such conclusions are sustained for all years to come, the terms of payment being bypast; and sicklike against tacksmen; but never against simple possessors, except it be both libelled and proven that they possessed these years.

Afterwards, Alleged absolvitor for all the years libelled before the intention of the pursuer's cause; because the defender was long before infeft in the lands libelled holding of the king, upon a comprising, and by virtue thereof in possession; so that he ought not to be countable for the fruits, which were *bona fide percepti*. Replied, He cannot allege *bonam fidem;* because any infeftment he had was upon a comprising led against her husband, upon a bond granted by him and her *durante matrimonio*, whereupon he could never comprise her conjunct-fee lands, in respect that the said bond was, *ipso jure*, null, in so far as concerned her, and no way obligatory; and so the defender, not being ignorant of the nullity of his own right, and of her perfect infeftment standing confirmed by the king, was *in pessima fide* to possess her lands, and ought to restore her to the mails and duties thereof, the years libelled. Duplied, He was not obliged to know her right, but was *in optima fide* to continue his own possession, aye and while she had used some lawful interruption against him. The Lords found this allegeance relevant.

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