

*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. *Stio*. 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.

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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 infest 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 efficiunt 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 absolutor for all the years libelled before the intention of the pursuer's cause ; because the defender was long before infest 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 infestment 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 infestment 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 allegiance relevant.

Page 202.