

1684 and 1685. THOMAS PATERSON, Minister of Borthwick, *against* MARGARET BANNATYNE, Lady Newhall.

1684. *February 22.*—IN Mr Thomas Paterson, minister of Borthwick, his improbation against Margaret Bannatyne, heretrix of Newhall, and others; Pit-medden having given only eight days for the second term in the improbation, and the Lords' answer being craved, because of the shortness; they ordained the said Margaret's tutors to depone, if they could command the tack and writs called for; and enlarged the *dilatatio legalis* to 14 days. This was *casus vere arbitrarius*; but the certification in improbations being very severe, and she a minor, (though the maxim *quod non tenebatur placitare* took not place here, it not being an infestment,) it was too short. *Vol. I. Page 273.*

1685. *March 17.*—Mr Thomas Paterson, minister of Borthwick, his reduction of a tack of the teinds of the prebendary of Vogrie, *alias* Lochquharret, in 1610, against Margaret Bannatyne, Lady Newhall, mentioned 22d February 1684, was advised.

His reasons of reduction were,—1mo, It was set *a non habente potestatem*, the prebendary of Vogrie being suppressed by the erection of it into the kirk of Borthwick, by K. Ja. VI. in 1596, as come in the Pope's place, and being in his hands by the annexation of kirk-lands to the Crown in 1587; so that Mr Patrick Bannatyne, prebendary of Vogrie, whose liferent was only reserved by the said erection, could set no tack of these teinds in 1610, to last longer than his own lifetime. 2do, The tack-duty being only £20 Scots yearly, and that also payable to the prebendary of Vogrie, and not to the parson of Borthwick; and the teinds being worth 1000 merks *per annum*,—it is a clear dilapidation of the patrimony of the kirk of Borthwick; and yet, by virtue of this null tack, thir teinds have been sacrilegiously detained in laik hands from the church ever since 1610.

ANSWERED,—The said erection was null, being without the consent of the Lord Baccleugh, the Lord Crichton and Bothwell's successor, who was patron of the collegiate kirk of Crichton, whereof the prebendary of Vogrie was a part, and without the demission of Bannatyne, the titular of the said prebendary; and so there was no *modus vacandi* in the king's hands; which is either by deprivation, death, demission, transportation of the incumbent, or excambion and permutation, or by suppression or union of benefices with consent of the titular; as the canon law requires. 2do, It came not to the king's hands by the Act of Annexation in 1587; for though, at the reformation of religion, collegiate churches became suppressed *quoad officia divina*, as being a mere popish institution, appointed for singing of soul-masses, yet not *quoad beneficium*, seeing the said Act of Annexation excepts laik patronages *per expressum*, whereof this was certainly one; for Chancellor Crichton, in 1449, having founded this collegiate church out of his own revenue, he became patron by all the titles by which patronage is acquired in law; *nam patronum faciunt dos, ædificatio, fundus*. 3tio, *Consuetudo est in dubiis optima interpres*, and they have been *in possessione præsentandi* ever since. 4to, The Archbishop of St Andrew's, by the erection, is only patron of the vicarage, and not of the prebendary of Lochquharret. 5to, *Esto* he were Patron, it is expressly reserved by the 2d Act, Parl. 1606. 6to, That Act, 1587, only annexes the temporality; but this pre-

bendary of Lochquharret consists of teinds only, which is spirituality. *7mo*, This erection is prescribed, nothing being done on it for 40 years. *8vo*, The prebendary of Vogrie had prescribed a right, being in possession 40 years. *9no*, The tack itself is prescribed, not being quarrelled within that space.

REPLIED,—It is a mistake to think, because the collegiate kirk was of the Lord Crichton's laik patronage, that therefore he was patron of all the parts of that benefice; which runs upon this error, that a collegiate church must always be considered as one individual benefice, so as the Lord Crichton, who was patron of the provostry of the said collegiate church, should be also patron of the haill members thereof; which was the case of sundry collegiate churches in Scotland, as Lincluden, founded by the Douglasses, &c. But, in this collegiate kirk of Crichton, there were *diversa beneficia et prebendæ*; and though the Lord Crichton was patron of the provostry, yet the prebendaries of Vogrie, Arniston, Middleton, &c. were mensal and patrimonial churches of the Archbishop of St Andrew's; and because he consented to the erecting them as parts of the said collegiate kirk in the Lord Crichton's foundation, therefore he reserved to himself the right of presentation to them; so the Acts of Annexation except only the rents, in so far as Crichton was patron, and no farther. See Act 61st, Parl. 1587, and Act 158, Parl. 1592. *2do*, This erection is ratified by the 55th Act of Parl. 1606; the validity whereof cannot be drawn in question before the Session, as was found, Dury, *23d July 1625*, *Minister of Kirkliston*, and *penult.* of June 1627, *Stuart*; though they be only private Acts, without citation of parties, and fall not under the Act *salvo jure*; *nam par in parem non habet imperium*; *multo minus* the Session, which is inferior, *in superiorem, viz.* the Parliament; and where the Parliament statutes *super nullitate alicujus juris*, and supplies it, as here in this tack, then that right cannot thereafter be quarrelled on these defects of the want of the patron's or titular's consent. *Stio*, This erection could not prescribe, because the presentations from time to time to the kirk of Borthwick stopped it, no more than a modified stipend could prescribe, though neglected to be exacted from one of the heritors for 40 years. And, *4to*, They were *non valentes agere* during all the lifetime of Turnet, minister of Borthwick, who consented to the said tack, and so could not quarrel it. And whereas it is pretended that Turnet, minister at Borthwick, having consented, it was all one as if he had principally set the tack; in which case it would have been valid, as being before the Act of Parliament 1617, restraining such long tacks: it was answered,—It is against reason and the canon law, that the titular of one benefice should, by his consenting to a tack set by a titular of another benefice, dilapidate his own; because he must do it as having right, *et perpensâ ecclesiæ utilitate*; though the personal objection may operate so far as to exclude himself. And it is an immoveable maxim, that prescriptions run not from the date of the right, but only from the term of payment, the existence of the condition, or the ceasing of a reserved liferent, or removal of other impediment; as was found *23d June 1675*, *Brown against Brown*. And yet, to take off this, declarators have been sustained, that the debt shall be due at the existence of the term, &c. Even so here, either the minister himself, or the Bishop his ordinary, might have intented an action, that, after him who had consented, these teinds should belong to his successors, ministers

at that kirk. Only, it is to be feared, a minister who has been unfaithful in dilapidating, will neither quarrel it nor reveal it to the Bishop. And, as to the brocard *non valens agere*, it takes only place *in impedimentis juris*; as minority, absence *reipublicæ causâ*, forfeiture, and where there is a *defectus tituli*; but not where the *impedimentum agendi* arises *ex facto proprio*, as here by Turnet's consenting. *Vide* Anton. Faber. *in Cod. Sabaud. lib. 7, tit. 9*. Yet the decision in Stair, *last of February 1666, Earl of Lauderdale* against *The Viscount of Oxenford*, seems contrary to this; where it was found, that prescription ran not against the Lord Thirlston, because he was excluded during Queen Anne's lifetime, by her liferent, to which he had consented. And for the practick of the *Minister of Prestonhaugh* against *his Parishioners*, it is impossible the Lords could find that prescription ran to save a null tack, without subducing the setter's lifetime; for then, if a minister sets a tack of his whole benefice for a small duty, and continued minister there 40 years, his successor should be debarred by prescription; which were absurd: and the prescription there was only of vicarage teinds. And, as to the dilapidation, though a greater rental cannot be proven to have been rentalled before this tack, and though every disproportion is not sufficient whereon to question ancient tacks on the head of diminution; yet, where the inequality between the value of the teinds and the tack-duty is so vast as here, *rejecit onus probandi* on the tackman. See Act 11th 1585, anent dilapidations. And though the prebendary's liferent be reserved in the erection, yet that does not give him *liberam beneficii administrationem*, so as to set tacks after his death; for the Act of Parl. 1606, uses the taxative words, "during his life allenarly;" and so, *resoluto jure dantis, resolvitur et jus accipientis*.

The Lords, having advised this debate, with the rights produced, found that the tack quarrelled being granted to the defender's predecessor, Newhall, by the prebendary of Vogrie for the time, with consent of his patron Lord Baccleugh, and with the consent of Sir Gideon Murray of Elibank, then provost of the collegiate church of Crichton, and of the prebendary thereof, (but the major part of the prebendary did not subscribe,) and with the consent of Mr Turnet, then parson of Borthwick, and of the Archbishop of St Andrew's, his patron, amongst whom, or either of them, the right of the teinds of Vogrie behaved to reside, albeit the setter had only a liferent-right himself, that the tack set by them all jointly is valid; and therefore sustain the same, and assoilvie from the reduction: but, in respect the right of the prebendary of Vogrie, the setter, was but a liferent, and that after his death the right of the prebendary came to the parson of Borthwick, (*nota*, the prebendary was always kept up as a distinct benefice, even after the death of that prebend who set the tack; and another was presented who lived till 1674;) therefore find, that the tack-duty of L.20 Scots yearly is payable to the pursuer, parson of Borthwick, since the date of his admission, and in time coming. But, upon a bill of the minister's against this interlocutor, the extracting of the decret *absolvitor* was stopt till November. And the Lords, having advised the bill and answers, on the 14th November, they refused the same, and adhered to their former interlocutor, unless he would allege something new, and not contained in the former debate.

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