

1715. June 25.

Mr GEORGE OGILVIE, Minister of Kirriemuir, *against* The HERITORS of the said Parish, the EARL of PANMUIR, JOHN LUMSDEN, and Others.

THE church of Kirriemuir, becoming vacant by the decease of the incumbent, in May 1713, the Duke of Douglas presented the said Mr George Ogilvie, then minister of Benvie, to supply that vacancy in July thereafter; and both Benvie and Kirriemuir being within the said presbytery; Mr Ogilvy was transported on the 26th of August, and admitted minister of Kirriemuir the 17th of September.

The Earl of Panmuir and John Lumsden his assignee, claimed right to the patronage of that church, and gifted the vacant stipend to one Mr Rait an Episcopal minister; and likewise presented Mr Willison minister at Brechin, a church within another presbytery; and there happened some obstruction in the admission of Mr Ogilvie, the church-door being kept shut, notwithstanding the presbytery proceeded to his admission elsewhere.

Mr Ogilvie being thus admitted, has raised a process for delivering to him the keys of the church and manse, and for putting him in possession thereof, and of the glebe, and for payment of his stipend since his admission, and during his incumbency, calling the Heritors of the parish, and the said Mr Rait.

It was *alleged* for the said Earl and his assignee, That the pursuer was not duly admitted, in as far as the Earl has produced a long progress of right to the patronage, by virtue whereof he had offered a presentation to the presbytery within six months after the vacancy happened, and the presbytery, to avoid the effect of the said presentation, had shifted their ordinary diets of meeting, nevertheless the Earl had intimated his presentation to Mr Willison, the person presented, and to the moderator of the presbytery, whose duty it was to have called the presbytery *pro re nata*; yet the presbytery proceeded to transport and admit the pursuer upon a popular call in reality, though possibly they may have taken the cover and shew of the Duke of Douglas's presentation, who had no right to the patronage; which proceeding could not prejudice the Earl of Panmuir's right of patronage, nor to the vacant stipends; ay and while a minister should be duly and lawfully admitted; upon all which the Earl had raised a declarator of his right.

It was *answered* for the pursuer, That he had acted nothing but according to his duty, and in subordination to the presbytery of the bounds where he was and is minister; and conceived also, that the presbytery had proceeded very regularly, for the Duke of Douglas having presented the pursuer to the presbytery in July, he was regularly and orderly transported upon the 26th of August thereafter, before ever there was any intimation or mention of the Earl of Panmuir's claim to the patronage; and, by the act of transportation, his relation was loosed from the parish of Benvie, and his admission thereafter was but

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A minister having been presented to a church, and the patron's right having been called in question, it was found, that the minister thus presented ought to enjoy the stipend, manse, &c. by virtue of his admission, without prejudice to the right of the competing patrons; but no decision was given as to what might be the effect, if the patron who had presented him should be found to have no right to do so.

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the execution of the former act; and denies, that he was admitted upon a popular call, but conceives that a minister having a presentation may very lawfully accept of a popular call likewise, to testify the concurring desire of the people in the choice of their minister, which is and ought to be very desirable and comfortable to every minister of the gospel. And as for the presentation by Mr Lumsden after the transportation, *imo*, It was never presented presbyterially, nor was the moderator required to call a presbytery *pro re nata*. And *2do*, The minister called had altogether refused and declined to accept, which was likewise made known to the presbytery in as far as the instrument of intimation to Mr Willison did bear his refusal; neither was he within the same presbytery, and was placed in a more considerable post; so that the call was not, nor could be expected, to take any other effect, than to give disturbance and create difficulties in planting of the church.

*3tio*, The Earl having never any possession of the patronage, the presbytery was *in bona fide* to proceed, upon the first presentation, as they did; and being no competent judges of the right of either party, they had no reason to delay the admission till the right of patronage should be determined, which will depend upon the parties claiming right thereto, and may not happen for the course of several years.

*4to*, The Duke of Douglas, the other party claiming right to the patronage, is not cited; and it does not belong to the pursuer and presbytery to dispute the Duke's right; nor can they do it, knowing nothing of the right or possession of either party. Nor does the pursuer his process or possession determine or prejudge, or carry any benefit to the right of patronage, either to the one or the other; but what he pleads is, that he is admitted by the presbytery of the bounds to whom the right of admission of ministers to vacant churches does belong, and that the presbytery acted *bona fide*, at least upon probable reasons, and consequently that the pursuer ought to be possessed of the church, manse, and glebe, and enjoy the stipend in the interim without prejudice to the right of either party, reserving to them to prosecute and declare the same as accords.

“ THE LORDS found, That the pursuer ought to be possessed of the church, manse, and glebe, and enjoy the stipend, by virtue of his admission during his incumbency, without prejudice to the right of either party, after the same shall be established and cleared by decreets; and the LORDS did not judge what might be the effect in case the Earl of Panmuir's right might be found to be preferable in the event; whether the pursuer's right to the benefice should cease from that time, or if the Earl's right should only take effect after the pursuer's decease or transportation.

*Dalrymple, No 148. p. 203.*