

to vicarage teinds, where there is not a perpetual vicar, who makes a separate titularity; and before this decret, part of the minister's stipend was paid out of Old-Hamstocks; which can only be accounted for, by the parish having made part of that parsonage.

On the report of this pleading, it was remitted to the LORD ORDINARY to hear parties' procurators on the right to the teinds, and from what parties they did flow.

*Pleaded* for the defenders, The right of three-fourths of the teinds of the parish belonged to the nunnery of St Bathans, and were set in tack to the Earl of Home in the year 1613, for his life and the lives of three heirs, and thrice nineteen years, by the prioress, then become a protestant and married, with consent of her husband the Commendator of Bewlie; and a decret of transumpt, 1632, of the said tack was obtained at the instance of Nicolson of Cockburns-path, assignee thereto.

The prioress also dispoñed these teinds, 1622, to David Lindsay, son to the Bishop of Ross, who was infeft therein 1623.

For the pursuer, There was never any possession upon this tack, and consequently it is but a slender evidence of the right of the teinds; on the contrary, the teinds of Cobkburns-path are partly allocated, as is said, by the pursuer, and partly possessed by the heritors, either without title, or by purchase from him. It appears that the minister was paid by the parson of Old Hamstocks, from a decret of augmentation at his instance, ratified in Parliament 1633, and by the modification 1708, when his whole stipend, as well as part of the stipend of Old-Hamstocks was localled on the teinds of Cockburns-path; and the whole lands in the parish, other than these of Old-Cambus, are burdened with this locality.

THE LORDS found, That the patronage of Cockburns-path belonged to the Crown.

Reporter, *Strichen.*

Act. *R. Craigie.*

Alt. *W. Grant. & Haldane.*

Clerk, *Justice-*

*D. Falconer, v. 2. No 49. p. 47.*

1749. February 25. HAY of Belton against The PRESBYTERY of Dunse.

JOHN HAY of Belton having right to the patronage of the parish of Dunse, by disposition from Hay of Drummelzier to the late Lord Blantyre, the present Lord's retour and disposition, presented 27th August 1748, Mr Adam Dickson probationer, who accepted 3d September of the same year.

The Presbytery of Dunse hesitated on Mr Hay's right, alleging him to be only trustee for Drummelzier, who was not qualified by taking the oaths to the Government, and so not entitled to present; whereupon Mr Hay deponed before them, to this import, that he was no trustee, but had the title for life, and had executed a deed obliging his heir to denude.

No 12.

No 13.

A declarator at a patron's instance that he had presented in due time was sustained as competent.

No 13.

The Presbytery, 6th December, appointed a moderation of a call on 23d January 1749, for supplying the vacancy.

Mr Hay appealed to the synod, pending which he insisted in a declarator before the Court of Session, that he had presented in due time, and that the right of settling a minister had not devolved to the Presbytery: And, the LORD ORDINARY, upon advice, 15th February 1749, "repelled the objections to the pursuer's right, and to the person by him presented, on account of his not having taken the oaths before his first licence; and found that the pursuer had *in possessorio* sufficient right to present, and that the right had not fallen to the Presbytery *tanquam jure devoluto*."

*Pleaded* in a reclaiming bill, Matters proper for the cognition of a presbytery, or other ecclesiastical judicature, and by them determined, cannot be brought under review before a civil court: The trial and admission of ministers belongs to the church, as is declared by act 7th, Parl. 1567, by which patrons are appointed to represent to the superintendant, with an appeal competent to the superintendant and ministers of the province, and from them to the General Assembly, where the case is to take end. This right was always enjoyed by the church of Scotland, excepting that in times of episcopacy, letters of horning were granted against the bishop to collate, but there was never any such practice competent under presbytery. The Presbytery had, notwithstanding the presentation, appointed a moderation, the affirmance or reversal of which sentence was pending by the pursuer's own appeal before the synod; so that they are *functi* till a determination, and cannot admit the presentee, if the LORDS should declare the patron's right; as neither can they proceed to a settlement, if they should assoilzie from the declarator, when perhaps the synod will reverse their sentence.

The petitioners have judged that Mr Dickson has not been duly presented, and apprehend, for the reasons given, their judgment not liable to be reviewed by any civil court; but if it were, they say that the pursuer's right is derived from Lord Blantyre, who derives from Drummelzier; that Blantyre presented the last minister, but subsequent to his title, Drummelzier obtained a decret for the vacant stipends; so that the Presbytery could not but consider him as patron, and, he being unqualified to present, the conveyances are a contrivance to present by the interposition of another person.

The presentee was not qualified by taking the oaths before his licence; but to this it was *answered*, that he had qualified, and got his licence renewed.

The Presbytery acknowledged the competency of a declarator of a right of patronage before a civil court; but apprehend they are not the proper contradictors, as pretending no right to the patronage of any parish.

*Observed*, That a right of patronage was a civil right, and might be declared; as also it might be declared, that the patron had presented in due time; in which action the Presbytery were the proper persons to be called, as having

right after lapse of six months to present, or to settle *pleno jure*; and the Court would not take notice of what method they chose or making the settlement, whether by moderation of a call or otherwise, since that was not prescribed by the law: That the declarator nowise affected their power of trying or admitting a minister; and though taken ill by the Presbytery, was rather a favour to them, in that, by being brought before a final settlement, it gave them an opportunity of being satisfied, whether there was here a regular presentation, that they might not by mistake make a settlement in opposition thereto; the consequence of which would be, that the minister settled would have no legal title to the benefice, as was found in the case of the Minister of Auchtermuchty, though in that case, happily for the minister, there proved to be a defect in the patron's title: That the patron had deponed he was no trustee, and if he were, it did not hinder him to present.

*N. B.* There was another disposition produced from Drummelzier to Belton; to which it was *objected*, that he had not deponed, whether that disposition were in trust.

It was *said* on the Bench, it might be an objection, if a patron held in trust for an unqualified person; and some LORDS doubted of the competency of the action, if the Presbytery had not improperly sisted themselves.

THE LORDS adhered to the Lord Ordinary's interlocutor, (and found that the general words, *decern and declare*, can go no farther than the particulars determined).

Petitioner, *R. Craigie.*

*D. Falconer, v. 2. No 65. p. 68.*

1751. July 10.

LOCKHARTS of Lee and Carnwath *against* The OFFICERS of STATE.

JOHN LOCKHART of Lee, and George Lockhart of Carnwath, insisted each in a declarator against the Officers of State, of their severally having right to the patronage of the parish of Lanark.

*Pleaded for Carnwath*, King James VI., 27th March 1604, erected the priory of Inchmaholm, and the abbeys of Cambuskenneth and Dryburgh, into a Lordship, to be called Cardross, in favour of the Earl of Mar; together with the right of patronage of the kirks belonging to these prelacies; particularly disposing these kirks, and amongst them that of Lanark. The disponsee was infest 1605, and the grant confirmed in Parliament 19th July 1606.

The Earl of Marr 1612 disposed this estate to Henry Lord Cardross, his second son; and David Lord Cardross obtained a charter of *novodamus* 1664 on his own resignation, comprehending *terras ecclesiasticas de Lanark*; together with several kirks mentioned, amongst which Lanark is not named; together with the right of patronage of the kirks and parishes above-mentioned; and he was infest 1668.

No 13.

No 14.

The Exchequer being settled by act of Parliament 1645, with power to expedite new gifts; and having gifted a patronage without warrant from the King; and the rights of private persons being saved by the act rescissory of the acts of this Parliament; the gift was not found good.