the Crown long before the statute, and as these are not annexed, the King is under no limitation, but may dispose of them at his pleasure. No 16.

N. B. With regard to common kirks, such as M'Kenzie observes upon the act 199th, Parl. 1594, were not patronate, but like mensal churches were, from time to time, served by persons appointed, the King, after the abolition of popery, came, from the nature of the thing, to be also patron of these. And accordingly, by the statute now mentioned, these are appointed, like other benefices of cure, to be provided by presentation of the lawful patron.

Fol. Dic. v. 4. p. 53. Sel. Dec. No 72. p. 96.

1758. *January* 17.

GRAHAM of Balgowan *against* The OFFICERS OF STATE.

No 17.
Patronage, whether understood to be dissolved from the annexed property, along with the lands to which it was accessory?

THE patronage of the parish and kirk of Monydie was part of the estate of the family of Gowrie.

Upon the forfeiture of the Earl of Gowrie for treason, his estate was annexed to the Crown, by act of Parliament 1600, cap. 2.; and by this act, 'all 'and sundry the lands, lordships, baronies, benefices, and others particularly 'above mentioned, annexed to his Highness's Crown, are united to the lord-'ship of Ruthven, then and in all time coming, to be called the lordship and 'stewartry of Huntingtower.'

In the year 1606, an act of dissolution was passed, whereby were dissolved from the foresaid annexation 'the hail lands pertaining or belonging to the said 'earldom of Gowrie and lordship of Ruthven, and in special the lands and 'lordship of Huntingtower, and the lands of Strathbran, that the same might 'be let in feu-farm, and heritably disponed, for payment of the old duty, with 'augmentation of the rental.'

By charter and infeftment 1607, referring to the above acts of annexation and dissolution, King James VI. granted in favour of James Graham of Balgowan, a feu of the lands of Nether-Pitcairn, and sundry others, particularly mentioned, 'una cum advocatione, donatione, et jure patronatus ecclesiæ pa-'rochialis de Monydie, rectoriæ et vicariæ ejusdem, cum omnibus et singulis 'censibus, decimis, &c.'—And a merk Scots is added in augmentation of the rental.

The acts of possession that have been had of this patronage by the family of Balgowan since the time aforesaid appear to have been as follow; 1*mo*, A presentation dated the 15th December 1662, granted by Balgowan, bearing, That Mr David Drummond, then minister at Monydie, did succeed to that parish as parson and vicar, after the decease of the last incumbent; and that the said Mr David being established there according to the law of the land for the time; and seeing patronages were revived by a late act of Parliament, giving power to all patrons to present ministers that have entered to their kirks since the

No 17. year 1694, or that should enter thereafter; therefore presenting the said Mr David Drummond, the then incumbent, to the parsonage and vicarage of the said kirk of Monydie; 2*do*, A gift of the vacant stipends of that parish in 1694, granted by Thomas Graham of Balgowan, to certain gentlemen therein named, for building a new bridge upon the water of Schochie, and for the repairing the east bridge of Almond; 3*tio*, A missive letter in 1698, wrote by Mr William Smith, late minister at Monydie, to Balgowan, bearing, That he, in obedience to a charge of horning given him, had removed himself from the manse; and that he had resolved to send his keys to his patron; and therefore desiring to receive from the bearer two keys, the one of the hall, and the other of the church; 4*to*, In the year 1717, upon occasion of a vacancy in the parish. one Gilbert Gardiner, a trustee for Thomas Graham of Balgowan, offered a presentation in favour of one James Mercer; which, however, was neglected by the presbytery, who proceeded to moderate a call at large; and, *lastly*, In the 1754, Mr Patrick Meek having been settled minister, upon a presentation from the King, appearance was made for Mr Graham of Balgowan, and a protest taken, that his not exercising his right upon this occasion should import no acknowledgment of the Crown's right.

On the other hand, it appears, that the two last incumbents, viz. Mr Gilbert Man, in the 1738, and Mr Patrick Meek, in the 1754, were settled upon presensations from the Crown.

Mr Graham now of Balgowan, having brought an action against the Officers of State, for declaring his right to the patronage of this church of Monydie, did *insist*, That the said patronage had been properly and legally established in his ancestor by the charter 1607; that the same had been conveyed down by a connected progress to the present pursuer; and that he and his predecessors had uniformly maintained their right by exercising all the acts of possession which the nature of the thing could admit of; and consequently no dereliction could be presumed in favour of the Crown, whose first attempt to re-assume this right of patronage had been no farther back than the year 1738.

Answered on behalf of the Crown, There are no acts of possession on the part of the pursuer, or his predecessors, sufficient to support their title to this patronage, if their titles in themselves are not sufficient to carry the right to it. The presentation 1662 bears to be in favour of Mr Drummond, the then minister of Monydie; so it is plain, there was no vacancy. And at any rate, this presentation was a latent deed; no public act of possession had followed upon it; nor can it give any strength to a title invalid of itself. The only legal and public act of possession, or rather attempt to possess, upon the part of the pursuer, was the presentation of 1717; but which having been altogether disregarded, must go for nothing.

The question therefore falls to be determined altogether independent of possession; and, upon the part of the Crown, it is *maintained*, That this patronage was not legally conveyed to the pursuer's predecessor by the charter 1607; be-

cause, by the act 1600, it was unalienably annexed to the Crown, and neither was nor could be dissolved therefrom by the subsequent act in the year 1606. The practice of annexing forfeited estates to the Crown, and thereafter dissolving them for particular pusposes, appears pretty early in the parliamentary proceedings of this country. Sometimes estates were dissolved from the Crown, with a view of being restored to those families or persons who had lost them by forfeiture, or given away to others the favourites of the Crown; and in such cases, the dissolution was commonly made as broad as the annexation, so as to comprehend every estate in the forfeiting person. But more generally dissolutions were made for encreasing the King's revenue, by feuing out the forfeited and annexed lands at an easy rent, though higher than formerly payable by the charters of the forfeiting persons; and when such was the intention, the practice always was, to restrict the dissolution to the lands only, without including offices, jurisdictions, or right of patronages, though such had belonged to the forfeiting person whose estate was then to be dissolved, and that although such particulars had been enumerated in the annexing act, as belonging to the forfeiting person. Thus, by the act 112th, Parl. 1487, act 90th, Parl. 1593, act 116, Parl. 1540, act 30th, Parl. 1587, and many others, it appears, that although lands, lordships, and baronies, with the advocations of their kirks, had been annexed to the Crown; yet the acts of dissolution speak of nothing but dissolving the lands, in order to their being feued out for the augmentation of the King's rental, and the increase of policy upon the lands themselves. These were the great objects in view; but as no improvement could be made upon patronages, and no rent could properly arise therefrom, so they are none of the things that were under the consideration of Parliament in these acts of dissolution. By act 1584, cap. 6. these annexed estates, when dissolved, could not be set in feu at a rent under the new retoured duty; but patronages have no retoured duty, therefore could not be meant to be feued out. And indeed, upon looking into the statutes regarding these matters, it appears, that the legislature seldom meant, that patronages once annexed to the Crown should be dissolved therefrom; for in very few instances is it done. And the reason is obvious; the vesting patronages in persons disaffected to the religion of the country, might have been of dangerous consequence to that peace of and unanimity in religion, so much wished for and desired in the earlier times. And therefore it was agreeable to the wisdom of the Legislature, when the right of patronages came once to be annexed to the Crown, to allow them to remain there.

No 17.

This plan appears to have been followed in the present case. The act 1600 expressly annexes the lands, lordship, and barony of Ruthven, &c. with the teinds, advocation, donation, and rights of patronage thereto belonging. The act 1606 simply dissolves the lands; it proceeds on a narrative, 'That consi-' dering the setting of the lands of the annexed property and feu-farm for ' payment of the old rental, with augmentation, is greatly to his Majesty's be-

No 17.

'nefit and profit;' therefore the act dissolves 'the hail lands pertaining and 'belonging to the said earldom of Gowrie and lordship of Ruthven; and, in 'special, the lands and lordship of Huntingtower, and the lands of Strathbran; 'and that to the effect that the samen hail lands might be set in feu, with an 'augmentation of the rental.' But no mention is made of the right of patronage; nor could it be in the view of the Legislature to dissolve any such right of patronage, which could yield no rent or profit by letting it in feu-farm; and therefore both the words and meaning of the act are limited to lands.

2do, et separatim, Supposing patronages had been comprehendsd in the act of dissolution, and thereby become alienable by the Crown, they still remain subject to the rules of law; and it is a rule introduced by act 1593, cap. 172. That patronages belonging to the Crown cannot be alienated without consent of the person enjoying the benefice for the time. In the present case it does not appear that any such consent was adhibited.

Replied for the pursuer, Rights of patronage have been in the law considered as accessory to lands, and a pertinent thereof, insomuch that it has been doubted, if a patronage could be granted without lands to which it was annexed. Where lands, therefore, to which a right of patronage has been always annexed, are in general terms conveyed, the patronage is understood to be included; nor is any separate sasine for the patronage necessary. In the present case, upon comparing the act of annexation with the act of dissolution, it is plain, that in the dissolving act, no reservation is made in favour of the Crown, but that the whole subjects are dissolved which had formerly been annexed. By the former of these acts, the whole subjects which had formerly been in the forfeiting person are united into one lordship, to be called the lordship and stewartry of Huntingtower. By the latter act, not the lands only, but the whole lordship is dissolved; which, in fair construction of language, must mean the whole particulars so united; and one of these particulars was the patronage of Monydie. The notion of the danger of patronages being in the hands of subjects, is of a very late date, and was not thought of for long after the time of the acts now under consideration. At that time, neither our Kings, nor our Parliaments, entertained any such thought; nor was there any instance of the Crown's giving away lands, and retaining patronages, as is now the custom. It cannot therefore be imagined, that the Legislature had any view of reserving this patronage unalienably to the Crown, when his Majesty was entrusted with the disposal of this great estate, consisting of so many lordships and baronies. Nor can it be believed, that the King and his ministers would, within the space of a few months thereafter, have granted a charter of the patronage, if it had not been clearly understood, that the same was dissolved as well as the lands.

Besides, the acquiescence of his Majesty's officers for such a tract of time, without ever bringing any challenge, either of this charter, or of the subse-

quent rights in the pursuer's family, shows plainly the sense that was universally entertained with regard to the validity of these rights. In a question with a subject all challenge would undoubtedly have been cut off by the negative prescription; and it does not appear that the Crown is in a different situation. The act 1600, cap. 14, declares, That the King shall not be prejudged by the negligence of his officers; which relieves the Crown from all objections founded on the forms of judicial proceedings; but does not deprive the subjects of the salutary relief of the negative prescription, as is observed by Sir George Mackenzie upon the said act, in respect it is a general remedy introduced for the quiet both of King and people; and will not be presumed to be abolished by such remote implication. And at any rate, if such challenge could be competent after so long an acquiescence, the ground of challenge ought to be made *luce meridiana clarius*, and not to depend upon imaginary conjectures. No 17.

With regard to the objection founded on the act 1593, cap. 172 (176); in the *first* place, it appears from the narrative of this act, as well as from Sir George M'Kenzie's observations upon it, that it related only to new rights of patronage granted by the King; and therefore does not apply to the present case. And, *2do*, It is well known, that this act went into disuse soon after it was made, and no regard has ever been had to it; accordingly, in a very late case, the very same objection which is now made was solemnly over-ruled, January 1749, Cochran of Culross *contra* the Officers of State, No 11. p. 9909.

'THE LORDS found, that Balgowan had right to the patronage of the kirk of 'Monydie,'

Act. *Craigie, Dav. Greme, Ferguson.* Alt. *King's Counsel.* Clerk, *Gibson.*

W. J. *Fol. Dic. v. 4. p. 54. Fac. Col. No 87. p. 151.*

1762. *February.* LADY DOWAGER FORBES *against* Mr JAMES M'WILLIAM.

No 18.
A minister settled by a liar whose right to the patronage was afterwards found invalid, was found not entitled to the stipend, altho' duly settled by the presbytery.

IN 1720, a contract of marriage was entered into betwixt William Lord Forbes and the Lady, by which she was provided to a total liferent of the estate of Forbes, including the patronages.

In 1731, after her husband's death, she was infeft in the estate, but not in the patronages.

There was only one son of this marriage, Lord Francis, who succeeded his father in 1730, and, dying in 1735, was succeeded by his uncle, James Lord Forbes, who took infeftment in the whole estate, patronages included. Lady Forbes, after her husband's death, executed certain deeds, first in favour of her son, Lord Francis, and thereafter in favour of her brother-in-law, Lord James, which had the appearance of renouncing any right she had by her contract of marriage to the patronages; and, for several years, Lord James, with her