of any dispute betwixt the patron and the church about the admission and collation of a minister, the matter was finally to take end before the General Assembly; and, accordingly, while Presbytery was the established religion in Scotland, there is no example of any such civil process issuing against a presbytery or other church judicature, obliging them to ordain and admit a presentee, or to show cause for their refusal, as was used against the bishops in the time of episcopacy. *3tio*, There was reason to believe, that, in this case, Belton was trustee for Drummelzier, a patron that was not qualified to present by having taken the oaths to the government; and it was not in the power of a patron to evade the law by making such dispositions in trust.

To which it was ANSWERED, *1mo*, That the only design of the declarator was to establish the patron's right against the presbytery, who were by law patrons in case he had failed to present within the six months; and in such a process, to be sure, the presbytery were proper parties. *2do*, That the 7th Act, 1567, plainly related only to the power of examining and admitting ministers, if upon examination they are found qualified, which is certainly wholly in the church; and with respect to it only the appeal lies to the General Assembly, where the matter is to take end; but it cannot be supposed to give an arbitrary right to the church to settle a man other than the presentee, who should have right to the stipend, otherwise the patron's right, reserved by the Act, would signify nothing. Now, as to the church's power of examination and ordination nothing is here concluded: the process only relates to the patron's right to present, and the presentee's right to accept, and whatever be the issue of it, it can never hinder the church to reject the presentee upon trial, or if they please, they may, without giving him any trial, settle another, but then, that other will have no right to the stipend; and this process, is so far as it warns the presbytery of this, and lets them see what they are doing, ought to be reckoned a service to the church, *3tio*, Belton, though he holds this patronage of Drummelzier only during his life, has declared upon oath, before the presbytery, that he was not trustee for Drummelzier. Which the Lords sustained; *dissent.* Arniston, who declared his opinion that an unqualified patron could not elude the law by conveying his right in trust to another. There were other two conclusions of the declarator which the Lords would not meddle with. The one was, that the stipend did belong to the patron till the presentee was settled. This the Lords did not think competent to be declared against the presbytery, who never could have any right to the stipend. The other was, that the presbytery ought to be discharged to moderate a call at large, or settle any other man; because that was interfering with the power of ordination, or the internal policy of the church, with which the Lords thought they had nothing to do.

1749. *June* 13. DUKE of ROXBURGH *against* ———.

* [C. Home, No. 67.]

The Lords in this case found that the Justices of Peace, by virtue of the

Act 41, *anno* 1661, could not give authority to stop up one of two roads leading to the same place, though the one they stopt up was a very bad road, and though it was allowed that they might have turned them both about 200 yards; and they were so near one another, that, without exceeding the legal distance, they might have been laid alongside one of another.

N. B. The Lords, at least some of them, particularly my Lord Elchies, gave it as their opinion that the road could not be turned off one heritor's ground upon another's; because that other might turn it again, and so on, till it might be diverted from its first course never so far.

The Lords were much divided.

1749. *July* 4. Mr Francis Charteris *against* The Officers of State.

[Elch. No. 22; *Tutor, &c.*; C. Home, No. 88.]

Mr Francis Charteris claimed L.10,000 sterling of the forfeiture of his brother, Lord Elcho, upon this ground, that the foresaid sum was left to him by his grandfather, Colonel Charteris, upon this condition, that Lord Wemyss, the claimant's father, should not intermeddle in the education of the claimant, who was the Colonel's heir. In the same deed the Colonel appoints four guardians who were to have the direction of the claimant's education, three of whom were to make a *quorum*, and his wife, who was one of them, to be a *sine qua non*; and then is subjoined the clause, "prohibiting Lord Wemyss to claim any voice or power in directing the place of residence, travelling, or circumstances of the education of the claimant, or that he or any body else should any way interpose to hinder the same, under the penalty of the forfeiture of the ten thousand pounds left to Lord Elcho for the support of Lord Wemyss's family, and likewise of L.41,000 sterling more left to my Lord's other children." Notwithstanding of which prohibition the claimant averred that Lord Wemyss had intermeddled in his education, and therefore the irritancy was incurred, and the L.10,000, which had been paid by the claimant's tutors to the family of Wemyss during his minority must be repeated, the condition of the grant having failed; and a proof being allowed, before answer, both as to my Lord Wemyss's intermeddling and as to the acceptance of the nominees, it came this day to be advised; and the Lords, after a full hearing of the case, which lasted three days, by a majority of votes decided that the claim was not well founded.

It was admitted by all the Lords that spoke in this question, except the Lord President, that this irritancy might be declared, even after the forfeiture, against the crown, who would be considered in no better case than my Lord Elcho would be in if he had not been forfeited; and many cases were cited where it had been decided that such irritancies in entails could be declared after the forfeiture, particularly in the case of *Cassie of Kirkhouse*, *Grierson of Leck*, and *Harry Maule*, all which had happened upon occasion of the Rebellion 1715; and in some of them it was so decided in the last resort. The case likewise of