

1745. February 27.

The RELICT and CHILDREN of ROWAN *against* NEILSON and Others.

By act 1690, when the patron is Popish, he is to apply the vacant stipend to pious uses within the parish, at the sight of the presbytery. Application having been made by the relict and children of Mr Rowan, the last incumbent of the parish of Parton, to Glendinning of Parton, the patron, who was Popish, he recommended to the presbytery to make out a gift of a year's vacant stipend in their favour; which the presbytery having accordingly granted, and the donees having thereupon obtained general letters of horning, and charged Neilson of Corsack and the other heritors; they suspended upon two grounds, *1st*, That the exception in the act 1690 discharging general letters in favour of ministers on their decrees of locality for their stipends, is personal to the ministers themselves, and by no means inherent in the stipend, to be communicated to every person who obtains a right to vacant stipend; *2dly*, That the use for which this grant was made, was not a pious use in the sense of law: That what is to be considered as a pious use, is to be gathered from the 18th act, Parl. 1685, wherein all the particulars are mentioned, viz. building bridges, repairing the church, maintaining the poor, to which the heritors are obliged to contribute out of their own funds, where there is no common fund to be so applied; it being thought reasonable that the heritors, who have the burden of the minister's stipend during the incumbency, should be eased during a vacancy, by having the stipend applied for the public uses of the parish; whereas in this case, the relict and children of Mr Rowan had a free fund among them of at least 6000 merks, and therefore could not be reckoned to fall under the description of the poor mentioned in the statute; and that even some of the children had not their residence within the parish, and the law is limited to pious uses within the parish.

A bill against the interlocutor of an Ordinary repelling these reasons of suspension was refused without answers.

*Fol. Dic. v. 4. p. 52. Kilkerran, (PATRON.) No 1. p. 373.*

1751. June 26. COCHRAN of Culross *against* STODDART.

THE charge of second minister of Culross becoming vacant by decease in November 1746, Mr Charles Cochran of Culross presented thereto Mr William Trotter, probationer, who accepted; and the presentation and acceptance were notified to the moderator of the presbytery, 4th May 1747, and produced to the presbytery 3d June; and 1st July there was produced to them a charter of the patronage of the kirk of Culross, which had formerly belonged to Mr John Erskine of Carnock, dated 12th February 1747.

No 33.

The patron's powers with respect to vacant stipends.

No 34.

A patron found to have right to the fruits of a benefice, where a minister had been settled, though there was a suit depending concerning the right of patronage.

No 34.

Neither Mr Cochran's author nor his predecessors had presented either first or second ministers; but Colonel Erskine, the disponer's father, had, as patron, disposed of the vacant stipends.

Objection was made before the presbytery to Mr Cochran's title, by the heritors, magistrates, and town-council, and by the kirk-session; *1st*, That the patronage which belonged to the abbey was granted to the Lord Colvil, and he he did not shew any progress from him, or that he was denuded; but none of the objectors pretended any title.

*2dly*, That the charge of second minister was founded in 1648, in consequence of an agreement, and upon a voluntary contribution by the parishioners: That the patronage thereof was reserved, and vested in delegates to be chosen by the contributors; and that it appeared by the records of the session and presbytery, the first incumbent was so presented.

For these reasons the objectors alleged there was no presentation; and craved of the presbytery to moderate a call, as their custom was on the *jus devolutum*, which they granted, and 16th September 1747, approved of the call given 26th August 1747 to Mr Thomas Fairny. Mr Cochran appealed to the synod of Fife, who, 3th September, affirmed the sentence, as did the General Assembly, 20th May 1748.

Mr Fairny declining the charge, a new call was given, 6th October, to Mr James Stoddart; which the presbytery approved, and settled him minister, 24th November; notwithstanding Mr Cochran insisted on his presentation already granted, which they rejected, as the case had been determined by the General Assembly.

The settlement was made during the pendency of an appeal, either from the presbytery to the synod, or from them to the General Assembly 1749: But this appeal the committee of bills of the Assembly refused to transmit to the House; and the commission of the Assembly, to whom a complaint against the committee was referred, approved their conduct.

After the call to Mr Fairny was approved by the presbytery and synod, Mr Cochran had insisted in a declarator before the Court of Session, of his right to the patronage of this church, calling the Officers of State, and the heritors, and the town-council of Culross; but, there being a defect in the summoning the town-council, process was sisted by interlocutor 21st January 1748, till they should be called; and this being done, diligence was granted to the defenders 23d July 1748, for recovering the original contract, said to have established the fund for supporting the second minister: The contract, however, was not recovered; and Mr Cochran having referred to a charter on record 1633, of the patronage to the Earl of Kincardine, from whom Colonel Erskine derived right, the LORDS, 21st January 1749, preferred him to the Crown in the presentation of the first minister, and of consequence found he had right to the presentation of the second minister; and found the defenders had not brought sufficient evidence, that the contributors had reserved to themselves the right of presenting

him: The condescence of the old charter was not made in order of time, till after Mr Stoddart's settlement. No 34

Mr Cochran pursued the Heritors for their stipends, as having timeously presented; and a multiplepoinding was raised in their name, calling him and Mr Stoddart the minister.

*Pleaded* for the minister, he has right to the stipend being duly settled by the presbytery, who were not obliged to keep the church vacant till the pursuer made out his title to the right of patronage: He did not make it appear to them he had a right to the patronage of the first charge, producing only a recent charter without a progress; they had probable evidence by their records of the patronage of the second charge being reserved; in these circumstances they proceeded, as in the case of a dubious right of patronage; and their procedure was approved by the synod and subsequent General Assembly, Mr Cochran in the meantime insisted in a declarator before the civil court, to which the presbytery were not made parties; he was opposed by the King's Council, in behalf of the Crown, and only obtained his declarator after two years, and when Mr Stoddart was settled; the presentation not being sustained by the General Assembly, when objected to Mr Fairny's call, this was a *res judicata* to the presbytery, and they could not again take it into consideration, when objected to Mr Stoddart's.

*2dly*, The act 117th, Parl. 1592, whereby the patron has right to the benefice, if the church is settled without regard to his presentation, appoints him to present a qualified minister, which Mr Trotter was not.

*Pleaded* for the pursuer, There was no dubiety of his right; he produced a charter, and his author had possessed by disposing of the fruits of the vacant benefice. No other title appeared; and the heritors, after the alleged lapse, only craved the presbytery would proceed *jure devoluto*, in regard he had no right to the patronage of the second charge, it being reserved; but of this the presbytery record was not evidence. The presbytery affected to doubt of his right to the patronage of the church, and obliged him to raise a declarator; this is in their power to do in all cases. They did not act *bona fide*, having proceeded to settle Mr Stoddart, pending his appeal, contrary to their own rules; and if the matter had been delayed till the General Assembly, the declarator would have been obtained.

THE LORDS preferred the patron:

Reporter, *Justice-Clerk*. Act. *Lockhart*. Alt. R. *Craigie*. Clerk, *Kirkpatrick*.

*Fol. Dic. v. 4. p. 52. D. Falconer, No 213. p. 256.*