

Patron at the time, and it was no dilapidation but a necessary act of administration to which he could have been compelled upon the statute. But we repelled the defence, and reduced, *me tantum renit.* 16th June, Refused a reclaiming bill without answers, 8 to 4.

No. 3. 1748, Nov. 19. MR CHARLES COCHRAN, PATRON OF THE PARISH OF CULROSS.

MR COCHRAN presented a Minister to the parish, but the Presbytery is going to settle another, and has appointed Thursday for the ordination; and the Patron presented a bill of advocacy, praying also for an injunction to the Presbytery to stop proceeding in the ordination of the other Minister, and Kilkerran, Ordinary, reported the bill to us whether he should appoint it to be answered. But we unanimously refused the bill as not competent.

No. 4. 1751, June 26. SAME PARTIES.

MR COCHRAN in February 1747 presented Trotter a probationer to be second Minister of Culross, which became vacant in November 1746, and produced a late charter from the Crown of the patronage on his own and Mr John Erskine's resignation, but the town of Culross claim the right of electing the second Minister by delegates chosen by them, as the first person who was ordained second minister of that Church in 1648 was elected, as appeared from the Presbytery books. The Presbytery moderated a call at large, which fell on Mr Fairnie, which was carried through the several Churches and was approved by them, but Fairnie refused to accept, and thereupon a new call was moderated and Mr Stoddart chosen. In November 1747 Mr Cochran pursued declarator of his right, and was opposed both by the Crown and the town of Culross. In November 1748 Stoddart was ordained Minister of the Church, and thereafter in the process with the Crown Mr Cochran condescended on a charter in the records to his authors in 1683, and at last in January 1739 obtained a declarator of his right; and now Mr Cochran pursues the heritors for the vacant stipends; and the defenders did not oppose as to bygones before Stoddart's settlement, but as to stipends after that time said there was no vacancy. The case was reported by Lord Justice-Clerk, and I was of opinion that Mr Cochran's right not being clothed with possession, and being disputed both by the Crown and the town, the Presbytery was not obliged to wait more than two years till he cleared his right, and therefore was for sustaining the defence. But the Lords thought that the opposition to Mr Cochran's right was affected and spirited up by the Presbytery, and therefore found that the Patron had right to the benefice, and preferred him to the Minister, *me renit.* Justice-Clerk, and Leven did not vote. *Pro* were Minto, Drummore, Strichen, Kilkerran, Murkle, Shewalton, Woodhall.

No. 5. 1752, Feb. 27. URQUHART *against* OFFICERS OF STATE.

MELDRUM as purchaser at the sale before us of the estate of Cromarty belonging to Sir George M'Kenzie, son of Sir Kenneth, produced a charter from the Crown in 1598 in favour of Sir William Keith, erecting 18 or 19 kirks that had been common kirks of the

Chapter of Ross into so many parsonages, and giving the patronage of them to Sir William Keith, and a ratification in Parliament in 1592 with a connected progress of the whole to Sir Robert Innes of Innes, from him to Earl of Cromarty, from whom Sir George M'Kenzie had right to this one. On the other hand there was produced for the Crown, a contract betwixt the Treasurer for the Crown, the Bishop of Ross, and Sir Robert Innes, conveying these patronages to the Bishop, with a charter under the Great Seal in favour of the Bishop in 1637, but no sasine on it, and a presentation to the kirk in 1678 by the Bishop, and it was alleged that neither Bishops nor Chapters were abolished in 1588 nor before 1592, and therefore the grant to Sir William Keith was *ab initio* void and null; and notwithstanding ratification, the act *salvo jure* saved the Chapter's right. 2dly, That supposing the right good at the first, it was rescinded by the acts 1606 and 1617, the first restoring Bishops, and the other their Chapters, and the exception in the act 1617 granted to laic Patrons by the King with consent of titulars for the time cannot avail the pursuer, because it was without the consent of the Bishop and Chapter, who were the titulars for the time. 3dly, Sir Robert Innes was in 1636 denuded to the Bishop by a charter of resignation, and he was in possession as appears by the presentation in 1678; and patronages are *jura incorporata*, and may be transmitted without sasine. Answered, The abolishing of Popery abolished all the Chapters and thereby the common kirks became patronate, and the King disposed of the patronages, whereas a common kirk cannot possibly be patronate, because it belongs in common to all the members of the Chapter, which cannot die, though any particular prebend may be patronate, which appears from the act 1594 touching common kirks, which does not make them but supposes them then patronate, and is confirmed by Sir George M'Kenzie's authority in point in his observations on the act. 4thly, It is confirmed by the very acts 1606 and 1617 in the difference made between mensal and common kirks; and the exception in the act 1617 requiring the consent of the titulars is in consequence of the act 1693; and the titulars meant were not the Chapter because there could be no patronage of common kirks while they remained common, but the titulars meant are the Ministers serving the cure, and who had right to the benefice. 5thly, That the very contract 1636 depended on the validity of Sir William Keith's right, for if it was void he could convey no patronage to the Bishop, and the kirk would still remain common and belong to the Chapter; —and answered to the defence on the contract, that though a patronage may be created or conveyed by grant without infestment, yet when it is incorporated into a barony, as this was into the barony of Delney by the charter 1588, and all the subsequent charters, and made a feudal right having a superior and vassal, it cannot thereafter be conveyed without sasine, and may be in non-entry as other feudal rights, in the same way as heritable Bailiaries, whereof the Church-Bailiaries are a known example. Replied, It appears by the Tarbat charter in 1656 that Sir Robert Innes's warrandice was qualified in his disposition, so as not to incur double warrandice by the contract in 1636 with the Bishop of Ross. Duplied, However such personal clauses might affect Earl of Cromarty's heirs, yet it cannot affect a singular successor, who *bona fide* purchases on the faith of the records at a judicial sale in this Court. The Lords preferred the right of the pursuer. But, 28th February, a reclaiming petition was presented bringing over again all the former arguments, but concluding with one sufficient for all, viz. that they had found in the record of

sasines for Inverness-shire, Bishop of Ross's sasine in these patronages dated September 1637. 26th June, Remitted to the Ordinary to hear the objection to the disposition to the Bishop and to the sasine. Refused the petition and adhered as to the other point. (See No. 7.)

No. 6. 1753, May 9. HERITORS AND MINISTER OF LANARK *against*  
THE CROWN FACTOR.

THIS parish became vacant 4th August 1748, and Lockhart of Lee as Patron presented Mr Dick, and the town of Lanark claiming also the patronage presented Mr James Gray, Minister of Rothes, and in November 1748 the Presbytery preferred Lee's presentation as having the better right to the patronage. 20th December 1748, A presentation to Mr Gray was signed by the King, and with Mr Gray's acceptance was presented to the Presbytery in January 1749, and in March 1749 Lee raised a declarator of his right of patronage, wherein he called the Crown, the burgh, and Lockhart of Carnwath, and in April 1749 raised a declarator, wherein he called the Crown, the burgh, and Lockhart of Lee, and both declarators being conjoined, the Crown compeared by Lord Advocate to defend against both; and while that process went on in the Court of Session, many various proceedings were had in the Church judicature, which made the round twice of the Presbytery, Synod, and Assembly; and at last in October 1750, Mr Dick was by the Presbytery and Syond of Glasgow ordained Minister of Lanark. By the stops of procedure in the declarators Lee seemed at last pretty backward and dilatory, so that it was not decided till 10th July 1751, when it was found that for ought yet seen the Crown had the best right to the patronage, and was assoilzied from both declarators; and thereupon in August 1751, the Court of Exchequer gave a factory to James Carmichael to levy the vacant stipends, and in consequence thereof a multiplepinding was raised in name of the heritors, which was this day reported by Drummore. The Crown's factor claimed, because the Crown had duly presented and the Presbytery had not given obedience. The Minister claimed as being lawfully ordained, and though the Crown had presented, and is now found to have the best right for ought yet seen, yet that was not till after he was ordained, and that without any herry, the vacancy having subsisted two years and two months; that Lee had produced a charter under the Great Seal in 1647 containing *novodamus*, since which there had been no opportunity of presenting till now, and Lee has had the only possession that could be had by gifting the vacant stipends for the use of the Minister's widow in 1708, and though that charter was found insufficient, being only passed in Exchequer without any warrant from the Crown, yet the Presbytery did right finding him in possession to obey his presentation, and could not let the Church remain vacant for years till the point of right should be settled; and the rule in the Canon law is in case of such disputes in patronage, that if they are not decided in four months from the vacancy the Church must be settled. Lord Advocate replied, That the Canon law is not binding here, that the point of right would have been decided long before the settlement had it not been Lee's affected delays till the settlement was over. At advising I gave my opinion that the Church judicatures were not obliged to wait years till a controversy touching the patronage should be decided. That such was my opinion in the case of the