

1752. July 29.

Mr ROBERT DICK *against* Mr JAMES CARMICHAEL, Factor appointed by the Barons of Exchequer.

No 35.

A minister admitted upon a presentation from the patron last in possession, found entitled to the stipend during his incumbency, tho' another was afterwards found to have a preferable right to the patronage. Reversed upon appeal.

IN the 1647, Colonel Lockhart of Lee, obtained a charter under the Great Seal, granting *de novo* the estate of Lee; and also containing an original grant of the patronages of the two parishes of Lanerk and Carluke; and these patronages were contained in all the subsequent title-deeds. From this period the Crown never laid claim to any of the two patronages; the family of Lee possessed both; had presented to the parish of Carluke; and though there had been no opportunity of presenting to the parish of Lanerk, yet the vacant stipend of that parish had been disposed of by the family of Lee.

A vacance happening in this parish *anno* 1748, John Lockhart of Lee presented Mr Robert Dick, who being disagreeable to the Magistrates of Lanerk, a presentation was obtained from the Crown in favours of another, which made it necessary for Mr Lockhart to bring a declarator of his right against the Crown. The objection against his title was, That the charter 1647 being granted by the Barons of Exchequer, without a special warrant from his Majesty, was null *quoad* the two patronages, to which the family of Lee had no anterior right. And accordingly, it was at last found by the Court of Session, That the pursuer Lockhart of Lee had no right to the patronage of Lanerk, No 14. P. 9913.

But as this process was spun out for a considerable time, the church-courts did not think it their duty to wait the issue of the process in the Court of Session. They proceeded in the regular manner to settle Mr Dick, who was presented by the patron in possession, and who at the time appeared also to have the best right.

The Barons of Exchequer, after the process was determined in the Court of Session against Mr Lockhart of Lee, judging the settlement of Mr Dick to be also void, granted a factory to uplift the stipend as vacant. The factor brought a process before the Court of Session against the Heritors, who insisted in a multiple-poining, calling the Crown and Mr Dick the present incumbent.

In behalf of the Crown, the act 117, Parl. 1592, was *urged*, "Providing, that, in case the presbytery refuses to admit a qualified minister presented to them by the patron, it shall be lawful to the patron to retain the hail fruits of the benefice in his own hands." And it was subsumed, that the church-courts having refused to admit the King's presentee, the King as patron is entitled in terms of the statute to the fruits of the benefice.

*Answered* for Mr Dick; There is a wide difference betwixt the case of a single presentee and that of competing presentees. In the former case, the presbytery cannot overlook a presentation, and settle a church by a popular call, which would be a gross contempt of the laws of the land. Such a settlement is declared null by the act 1592, and justly. This was the case of the

late settlement of the parish of Culross, (*supra*) to which this Court did apply the said act 1592, finding that Mr Cochran of Ochiltree, the undoubted patron, whose presentee was rejected by the church-courts, was entitled to retain the vacant stipends. But in the case of competing presentees, these courts, who are bound to settle the parish, must judge the best way they can in the competition; and though they should err in point of judgment, such error may be redressed *rebus integris*, but cannot have effect to annul a settlement regularly made. To this case the act 1592 is not applicable.

It was answered, 2do, That there is a rule laid down in all Christian countries, and in Scotland in particular, with regard to the case of competing patronages, viz. That the presentee of the patron in possession is to be preferred, till the true patron get his right declared in a proper court. Therefore, as Lockhart of Lee was unquestionably in possession of the patronage, the ecclesiastical courts did nothing but what was incumbent upon them by the law of the land when they preferred Mr Dick.

THE LORDS preferred Mr Dick.

This question being appealed in behalf of the Crown, the decree was reversed, and his Majesty was preferred to the stipend,

*Fol. Dic. v. 4. p. 52. Sel. Dec. No 20. p. 22.*

\* \* This case is reported in the Faculty Collection :

1753. *March 2.*—THE parish of Lanerk having become vacant in the month of August 1748, Mr Lockhart of Lee, as standing infeft in the patronage, under a charter from the Crown, *anno* 1647, presented Mr Robert Dick to the vacant parish; and which presentation was duly accepted and given into the presbytery in the month of October 1748.

Some time after, and within the six months, another presentation was given into the presbytery by the Crown, as patron of the said parish, in favours of Mr James Gray. The presbytery for some time delayed giving their judgment; and at last, upon the 11th April 1750, they preferred Mr Lockhart's presentee, and appointed a moderation of a call in his favours; and which call they afterwards sustained.

The Magistrates of Lanerk having appealed to the General Assembly, which met in the month of May 1750, the Assembly affirmed the sentence of the presbytery, and appointed them to proceed to the settlement of Mr Dick.

In obedience to this judgment, the presbytery proceeded to the trial of the said presentee; but being interrupted in their procedure by a mob in the town of Lanerk, the matter was referred to the Synod; who appointed Mr Dick to be ordained at Glasgow. This was accordingly done upon the 4th October 1750; and, in consequence thereof, Mr Dick obtained possession of the church, and has served the cure as minister of the parish ever since.

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During these proceedings before the ecclesiastic courts, Mr Lockhart, in the month of March 1750, raised a declarator of his right of patronage before the Lords of Session; and, upon the 10th June 1751, the Court adjudged, "That Mr Lockhart had produced no sufficient title to the patronage in question; and that, for ought yet seen, the said patronage remains with the Crown; and decreed and declared accordingly."

Soon after this judgment, the Barons of Exchequer granted a factory to Mr James Carmichael, for his Majesty's behoof, to uplift the vacant stipend of this parish; and a multiple-poiding having been brought in name of the heritors, a competition ensued between the King's factor and Mr Dick the minister, for the stipends which had fallen due since the time of Mr Dick's admission.

*Pleaded* for the factor; That by the act 116th, Parl. 1592, "it is ordained, that all presentations to benefices be directed to the particular presbyteries in all time coming, with full power to them to give collation thereupon, providing the foresaid presbyteries be bound and astricted to receive and admit whatsoever qualified minister, presented by his Majesty or laick patrons." And by the immediate following act of the same Parliament, it is further provided, "That, in case the presbytery refuses to admit any qualified minister presented to them by the patron, it shall be lawful to the patron to retain the whole fruits of the said benefice in his own hands."

These statutes, though suspended during the subsistence of the act 1690, which abolished the right of presentation, again revived when patronages were restored; and are admitted, since that time, to be part of the law of Scotland. Without some such constitution, the right of presenting would be inept. The compulsitors of the law, which formerly took place for enforcing presentations, were not thought so well accommodated to the genius of presbytery; and therefore a more gentle remedy was devised by these statutes, viz. That the benefice should remain with the patron as vacant, till the presbytery admit his presentee; and which indeed is saying no more than what is implied in the nature of his right and *inerat de jure*, without such express provision. And accordingly, this Court has applied this remedy of the law in two former instances; in the case of the patron of Auchtermuchty, *anno* 1735, (*See APPENDIX*); and lately, in that of Charles Cochran of Culross against Stoddart, *anno* 1751, No 34. p. 9951.

And as the King, by the judgment of this Court above recited, has been found to be lawful patron of this parish; and in due time, after the death of the last incumbent, presented to the presbytery Mr James Gray, a well-qualified person, to supply the vacancy; and that the presbytery have, to this day, *refused* or deferred to admit the said presentee; therefore, in terms of the statutes above quoted, his Majesty is entitled to *retain* the whole fruits of the benefice in his own hands, until his presentee shall be admitted; and the factor appointed by the Barons of Exchequer for receiving such fruits, ought to be preferred thereto accordingly.

*Answered* for Mr Dick ; The sanction of the act 1592 can only apply to the patron in possession of the vacant benefice, at the time when he presents to the presbytery ; for a possession of the benefice cannot be *retained* till it is *attained*. Mr Lockhart and his predecessors have stood infest in this patronage since the 1647 ; it is not pretended that the Crown has exercised one act of possession since that time ; and it is proved, that, upon occasion of the last vacancy of the parish, in the year 1708, Mr Lockhart's predecessor disposed of the vacant stipend, as patron ; so that Mr Lockhart must be considered as the patron in possession. If Mr Lockhart's presentee had been rejected by the presbytery, it was indeed possible for him to have *retained* the vacant stipend of which he had the last possession ; but it impossible for the King to have the benefit of the sanction of this law, by *retaining* what he never possessed.

*2do, Et separatim.* Every person, in possession of any subject or right, by virtue of a habile title, is entitled to retain and enjoy that possession till such time as he is legally dispossessed by the true proprietor. The right of presenting is a proper fruit of patronage ; and consequently, a party in possession of a patronage, in virtue of a habile title, is entitled to present ; and his presentation will be effectual, although, before collation, his right be brought under challenge ; Lambertinus de jure patronatus, lib. 2, part. 1. quest. 3. art. 4. Jacob's law dict. Darreign presentment. Reg. mag. lib. 3. cap. 33. From these principles it follows, that Mr Lockhart's presentation having been granted before any challenge against his right, was a good presentation ; and, having had effect by the ordination of the presentee, cannot be rendered invalid by the after decret of the civil court setting aside his right.

*3tio,* The sanction of the statutes above quoted, cannot apply to the present case ; because the presbytery complied with the direction of the law ; and admitted the presentee of the only legal patron, so far as could appear to them. The law indeed requires, that the presbytery should admit the person presented by the patron ; but, as it has given the presbytery no remedy, whereby they can bring the rights of competing patrons to trial in the civil court ; it must therefore be implied, in the jurisdiction given them by law of admitting the presentee of the lawful patron, that they must have a power of trying the rights of competing patrons, to the effect of explicating that jurisdiction. And this judgment of the presbytery, upon the point of civil right, must determine the settlement of the church, and put an end to the vacancy ; and consequently, to any claim for the benefice as vacant, *pro hac vice*. It will not indeed preclude the party aggrieved from having his right afterwards tried in the civil court ; but still it must determine the right to the effect of supplying the present vacancy ; and, if it were otherwise, this absurdity would follow, that though the law has required the presbytery to settle vacant churches, upon the presentation of the lawful patrons ; yet the presbytery cannot comply with the law, wherever a competition happens about the patronage. Neither the presbytery nor the civil judges can force the parties to a decision of their right.

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and so, by this means, vacancies may be continued for ever. And as to the cases of Auchtermuchty and Culross, they are, in many respects, different from the present; and consequently the decisions therein given will not apply.

In the reply for the factor, it was *observed*, That Mr Lockhart never had been in the proper possession of this patronage. The King himself had presented the last time it could be done, in the 1643; and the pretence of Mr Lockhart's possession in 1708 is frivolous; for it appears that Lockhart of Carnwath and the town of Lanerk took upon them also to grant assignations of the vacant stipend of that year, under the assumed character of patrons; and such private grants, without the knowledge of the King's Officers, could not be sufficient to dispossess his Majesty of this patronage.

“ THE LORDS preferred Mr Robert Dick, the incumbent, to the stipend that hath fallen due, since his admission to be minister of the parish of Lanerk, and in time coming, during his incumbency; and decerned accordingly.”

Act. *Advocatus & Pringle.*Alt. *Dick, Brown, & Pringle.*Clerk, *Kirkpatrick.*

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*Fac. Col. No 70. p. 106.*

\*\*\* This case was appealed :

The House of Lords “ ORDERED, That the interlocutor of 2d March 1753 be reversed.”

1754. *March 8.*HERITORS of the PARISH of TAIN, *against* MARGARET MONRO.

No 36.

When the King becomes patron of a church in consequence of the attainder of the former patron, he is not bound to apply the vacant stipend for pious uses within the parish.

THE patronage of the church of Tain fell to the Crown by the attainder of the Earl of Cromarty. The Barons of Exchequer, in right of his Majesty, granted certain vacant stipends of this parish to Margaret Monro widow of the last incumbent:

Some of the heritors having been charged by her for payment of these stipends, presented a bill of suspension, and *pleaded*, That the gift to the charger is an illegal application of the vacant stipends, which, by law, are appropriated for “ pious uses within the parish.” The act 18th, Parl. 1685, indeed declares, that this “ is not to be extended to the vacancies of those churches whereof the King's Majesty is patron;” but this exception relates to patronages then acquired, not to such as might afterwards be acquired by the Crown. In this case, the King has, since the act 1685, come in right of the Earl of Cromarty; and every objection which would have been good against a gift obtained from the former patron, must be good against a gift obtained from the King.

*Answered* for the charger; The patron had formerly, by common law, the disposal of the vacant stipends. The act 18th Parl. 1685, ordained the vacant