

even though the judgment of the Court of Session sustaining it was afterwards altered by a superior court. No 18.

Answered for Lady Forbes; Her right of retaining the stipend is founded on the act 115th 1592, and the decisions, Moncrieff *contra* Maxton, 14th February 1745, see APPENDIX; Cochran *contra* Stoddart, 26th June 1751, *infra, h. t.*; and the Crown *contra* Dick, 2d March 1753, *infra, h. t.* The rule of the statute is general, without distinguishing whether the patron was in possession or not. The inconveniencies are the same; and therefore, there is no occasion for making such distinction. As her husband was infeft, his possession and his brother's was in law her possession; and though she could not present, so long as her right remained personal; yet, so soon as it was completed by infeftment, she was entitled to exercise every right of patronage. The authorities quoted are against the petitioner. It is a rule, that, when there is any controversy about the right of patronage, the ecclesiastical courts must stop till it is determined. The case of the authorities is, when a supposed patron presents *bona fide*, and afterwards his right is reduced; but here there was a dispute, or rather, it was clear in favour of the respondent.

"THE LORDS adhered."

For the Petitioner, *Ferguson et David Dalrymple.*

Alt. Montgomery.

Fol. Dic. v. 4. p. 48. Fac. Col. No 81. p. 178.

1762. February 26.

SIR DAVID CUNNINGHAM, Baronet, *against* WILLIAM WARDROP, MR JOHN WARDEN, JAMES WADDEL, and Others, Heritors and Inhabitants of the Parish of Whitburn.

THE parish of Livingstone, in the presbytery of Linlithgow, being anciently of considerable extent, the presbytery, in the year 1650, upon a petition from the inhabitants, declared, that the parish was a sufficient charge for two ministers; and they described the limits for a new parish, and fixed upon a place for building a church; but there was then no fund established for that purpose.

In the year 1719, a number of heritors and inhabitants of the parish made a subscription for raising a fund sufficient for endowing a church, and maintaining a minister; and, for that purpose, entered into a deed of mortification, whereby they gave, granted, and doted particular sums of money for a maintenance to a minister, for building a new church, for purchasing ground for a church-yard, for a manse, for a glebe, &c. By the same deed, they put this new endowed church, &c. under the management of the heritors and kirk-session; and they declared that the ministers should be chosen by the whole heads of families, &c. residing in the parish, qualified in manner mentioned in the deed, excluding hereby all patrons and other persons, expressly, whatsoever,

No 19.
Does a patron's right of patronage continue over the whole, where part of an old parish is erected into a new one?

No 19.

from the power of presenting or nominating any person whatever to be minister of the said parish; as also, from the disposal of the foresaid stipend, or other parts of the produce of the aforesaid mortified funds, in times of vacancies.

In 1731, an action was brought before the Court of Session, as Commissioners for plantation of kirks and valuation of teinds, at the instance of most of the heritors, against Sir James Cunningham the pursuer's brother, and George Dundas, who both pretended right to the patronage of the parish of Livingstone, in order to obtain a legal disjunction of the new parish from that of Livingstone, and a decree of erection of the said new parish.

In this cause, a consent from Sir James Cunningham, as patron of the parish of Livingstone, to the new erection, was produced, with this provision, that it should not prejudice his right to the tithes either of the parish of Livingstone, or the parish to be erected, or the management thereof, during the vacancy of either of the said parishes.

George Dundas also consented, under protestation, that his consent should not prejudice any right he might have to the patronage.

Upon the 23d June 1731, the Lords disjoined the new parish from the old, and erected the same into a separate parish, to be called the parish of Whitburn. Mr Wardrobe was elected minister of this parish in the end of 1731; and, upon his death, which happened in 1759, Mr William Porteous was chosen minister by the parishioners; and at both these elections, Sir James Cunningham at the first, and the pursuer at the second, had given in a presentation in favour of the person elected by the parish; which presentation had been each time refused.

In the 1760, Sir David Cunningham brought a process of declarator, for having himself declared to be patron of the parish, and entitled to the vacant stipends.

Pleaded for the pursuer; That his predecessors being patrons of the whole parish of Livingstone, no new erection could deprive him of any part of his right, and the new parish must be still subject to his right of patronage, as was decided in the case of the parish of Haddington, 18th Nov. 1680, No 6. p. 9901.

That the rent of the lands allocated for a stipend to the minister of Whitburn, not being above 750 merks, which is less than the *minimum* appointed by law, the minister, who had brought an action for augmentation of the stipend, must be entitled to such augmentation out of the tithes of the parish, to which the pursuer as patron had right, and he could not be obliged to pay such augmentation to any incumbent not admitted upon his presentation. That the rules laid down by the deed of endowment for calling the minister of this parish, destroyed the subordination that ought to take place in well ordered societies, tended to render settlements inextricable, and must be productive of perpetual dissension: And that, in the process 1731, for erecting the new parish of Whitburn, no notice having been taken of the deed of foundation, nor pre-

tence made of its giving a title to the patronage, the deed seemed to have been laid aside and derelinquished by the parties entitled to claim under it.

Pleaded for the defenders; That the patron's right must either arise *ex collatione fundi, ex constructione ædis, aut ex donatione ecclesiæ*; but neither the pursuers nor his predecessors contributed to any of these; the whole endowment arose by the bounty of voluntary subscribers, under whom the defenders now claim; and therefore the right of presentation by the rules of law ought to belong to them: That the original subscribers had a right to annex what qualities and conditions they thought fit to their donation; and they had expressly reserved the right of presenting the minister; and that the act 1633. c. 6. expressly enacts, 'That it shall no ways be lawful to alter, change, or invert any pious donations to any other use than that specific use whereunto they are destinate by the disponder himself.' That the pursuer's right of patronage over the church of Livingstone, which his predecessor endowed, remained entire, notwithstanding the new erection: That the case of the parish of Haddington, quoted for the pursuer, was a contribution for a second minister in an old parish church, without any reservation concerning the patronage, the presumption was strongest in favour of the patron of the church: That the minister's action against the heritors for an augmentation of the stipend, is but a device to aid the pursuer; for this minister having accepted a settlement, endowed by a private foundation, limited to the fund established by the founders, could not be entitled to an augmentation by law out of the tithes: And, even if the minister should succeed in his demand, almost the whole of the new burden would fall upon the defenders, which surely could be no reason for depriving them of the right of calling the minister, &c: That the mode of election of a minister appointed by the deed of foundation, is subject to no inconvenience, and differs very little from the method appointed by the act 1690. c. 33: And, even if the mode of election was inconvenient, the right of the patron of the old church, who is expressly excluded, could not take place; but the election would fall to be regulated pursuant to the said act 1690: That there was no foundation for the pursuer's pretence, that the founders or heritors of the parish had relinquished their claim of presenting the minister: That in the action 1731, for the erection of the parish, reference was plainly made to the funds established for the foundation, to the manner of raising that fund, and to the rules laid down for calling a minister, &c; all which are also expressly referred to by Sir James Cunningham's deed of consent to the new erection; and the election of a minister has regularly proceeded according to those rules since the erection of the parish.

THE LORDS, upon the report of Lord Minto, "found, that Sir David Cunningham had the right of patronage of the parish of Whitburn, and of presentation of a minister to the said parish; and that he had also right to the administration of the rents of the lands purchased for a stipend to the minister during a vacancy."

No 16.

But, upon a reclaiming petition and answers,

THE LORDS “ sustained the defence, and assoilzied from the declarator ; preferred the defenders to the right of administration of the rents of the lands purchased for a stipend to the minister during a vacancy ; and decerned.”

Reporter, *Lord Minto.*Act. *Advocatus.*Alt. *M^e Queen.*

J. M.

Fol. Dic. v. 4. p. 50. Fac. Col. No 83. p. 181.

*** This case was appealed.

THE HOUSE OF LORDS ORDERED, that the judgment of the Court of Session should be reversed.

1765. February 13.

WALTER LORD TORPHICHEN *against* Mr GILLON of Walhouse.

No 20.

A patron, upon the building of a new church, has a preference in the choice of his seat, though his interest in the parish be trifling, and the other heritors pay in proportion to their valuations.

THE old church of Torphichen having been taken down, and a new one erected, the area of the church, of course, came to be the subject of division. His Lordship was undoubted patron and titular of the teinds in the parish, in virtue of grants from the Crown to his family, whereby he and his ancestors were vested; as coming in the place of the preceptor, with the property of the lordship and barony of Torphichen, and all the privileges thereto belonging. He was also superior of a considerable part of the parish, of the most part of which he was formerly the proprietor, though his property at present therein was but trifling. When the heritors convened, his Lordship insisted, that he, on account of his pretensions, as above stated, was well entitled to the first choice of a seat ; and, *2dly*, That he had right to a seat of the same dimensions with the one that had been possessed by his family, from time immemorial, in the old church in Torphichen. Mr Gillon, on the other hand, and the rest of the heritors, were of opinion, that, as the new church was built by the heritors in proportion to their respective valuations, the extent of their valuations must determine the preference of choice, and likewise the *quantum* which fell to be allotted for the accommodation of each heritor ; and that, as Mr Gillon succeeded to the Earl of Hopeton, who formerly had the highest valuation, he was therefore entitled to the same preference Lord Hopeton would have had, if he had not disposed his right to him. The bone of contention between the parties was, which of them should have possession of the only aisle in the new church, opposite to the pulpit, as being not only the most respectable situation, but likewise best calculated for having a full view of, and being well viewed by, the congregation.

“ THE COURT, in respect that Lord Torphichen was patron of the parish, titular of teinds, and an heritor in the same, found him entitled to the first