

PRESBYTERY of DUNSE,	- -	<i>Appellants.</i>	1750.
JOHN HAY of Belton, Esq.	- -	<i>Respondent.</i>	<u>PRESBYTERY</u>
			OF DUNSE
			v.
			HAY.

28 March 1750.

**PATRONAGE.—PROCESS.—**A presbytery having moderated a call to present to a vacant charge *tanquam jure devoluto*; the patron raised a declarator to have it found that he was the undoubted patron, and that he had presented *debito tempore* a qualified person. The Court of Session sustained the action as competent, and decerned in the declarator. *Reversed*, on the ground that the Lord Advocate ought to have been made a party,—reserving all objections to the jurisdiction of the Court of Session in the cause.

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[Falc. Mor. 9911. Sup. V. 768.]

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THE parish of Dunse being vacant, a presentation No. 90. in favour of Mr. Adam Dickson was granted by Mr. Hay of Belton, as patron. An objection to the validity of the presentation was raised in the presbytery, on the grounds, *first*, in respect that the right of patronage of the parish was not truly and *bona fide* vested in Belton; on the contrary, that Hay of Drummelzier was in reality the patron, but being unwilling to qualify himself for the valid exercise of the right, by taking the prescribed oaths to government, he had executed a simulate and trust conveyance to Belton, for the sole purpose of evading the law: and, *secondly*, in respect that the presentee had not qualified by taking the necessary oaths, until after he had obtained his licence to preach, contrary to the express provi-

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sions of the statute (5 Geo. I.) Upon these grounds the presbytery refused to admit Mr. Dickson to the church, and appointed a moderation and a call for supplying the vacancy, *jure devoluto*. Belton appealed to the synod, whence the matter was carried by a reference before the General Assembly, who, after hearing the cause at the bar, 16 May 1748, appointed the presbytery to moderate a call to Mr. Dickson.

In the mean time, and while the matter was still before the church courts, Belton brought an action of declarator in the Court of Session against the members of the presbytery, (appellants,) calling for production of his, the pursuer's titles, and of the presentation which were in their custody; and concluding to have it found, that he was undoubted patron of the parish, and had a good right to present a qualified person; that Mr. Dickson was duly and timeously presented by him, was qualified, and did accept the presentation, &c.

In defence it was pleaded, (besides the above objections to the qualifications of the respondent and his presentee,) that the proper parties to a declarator of patronage were not called, particularly Drummelzier and the other heritors of the parish; that the effect of the process was to bring under review of a civil court the proceedings of a court ecclesiastical, in matters belonging exclusively to its cognizance, which in various points of view was irregular and incompetent. The Lord Ordinary having advised with the Court, (15 February 1749,) “repelled  
 “the objections made both to the pursuer's right,  
 “and to the person by him presented, on account  
 “of his not having taken the oaths before his first  
 “licence in respect of the answers; and found

“ that the pursuer had *in possessorio* sufficient  
 “ right to present, and that the right has not fallen  
 “ to the presbytery *tanquam jure devoluto.*” The  
 Court adhered, (25 February 1749.)

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The appeal was brought from the interlocutors  
 of the 28 and 31 January, and 15 and 25 February  
 1749.

Entered,  
 20 Dec. 1749.

*Pleaded for the Appellants:*—1. The examination  
 and admission of ministers to benefices in Scotland,  
 is vested in the church courts alone; and no courts  
 of civil jurisdiction can interfere to control their  
 determinations. Although a declarator of the right  
 of patronage, as an action for a civil right, is com-  
 petent before the Court of Session; yet the pre-  
 sent action cannot be considered as such, because  
 the manifest intent of it is to review the proceed-  
 ings of the presbytery, to declare the presentee  
 duly qualified, and to compel the church judica-  
 tory to admit him. The presbytery are alone  
 made parties, whereas in a declarator of the civil  
 right of patronage, the crown and the heritors are  
 the proper parties, and not the church judicatory,  
 which is to determine on the propriety of the ex-  
 ercise of the right, in whomsoever it is vested.

2. Neither Drummelzier, who was truly the pa-  
 tron, nor the presentee, were duly qualified.

*Pleaded for the Respondent:*—It is competent  
 to bring a declarator of right against any party who  
 contests, or threatens to contest the same. In the  
 present case the respondent’s object was to prevent  
 the appellants, or even the superior ecclesiastical  
 judicatories, from taking upon themselves, on a  
 mistaken understanding of the point of right, to  
 confer the benefice on any other person than his  
 presentee.

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Judgment,  
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The interlocutors complained of in no way deny that the examination and admission of ministers belong to the church courts. They have only declared that the civil or patrimonial right of presenting belongs to the respondent and not to the appellants; after which it may still be true that the examination and admission of his presentee will be in the judgment of the ecclesiastical judicatories in their proper order.

“ The appellants’ counsel being directed to apply themselves particularly with respect to proper parties in this cause; the counsel on both sides were heard thereupon. And due consideration being had of what was offered on either side in this cause ;

“ It is declared, &c. that his majesty’s advocate for Scotland ought to have been made a party to the action of declarator brought in this cause ; and therefore ordered and adjudged, that the several interlocutors complained of in the said petition of appeal be reversed : And it is hereby further ordered, that the respondent do make his majesty’s advocate a party defender in this process ; and also be at liberty to bring such other parties before the Court as he shall be advised ; but this order to be without prejudice to any exception or objection which may properly be taken or made to the jurisdiction of the Court of Session, touching any of the matters in question in this cause.”

For Appellants, *W. Murray, A. Hume Campbell.*

For Respondent, *And. Pringle, C. Yorke.*

This reversal is not noticed in the reports of the case.