

quent rights in the pursuer's family, shows plainly the sense that was universally entertained with regard to the validity of these rights. In a question with a subject all challenge would undoubtedly have been cut off by the negative prescription; and it does not appear that the Crown is in a different situation. The act 1600, cap. 24, declares, That the King shall not be prejudged by the negligence of his officers; which relieves the Crown from all objections founded on the forms of judicial proceedings; but does not deprive the subjects of the salutary relief of the negative prescription, as is observed by Sir George Mackenzie upon the said act, in respect it is a general remedy introduced for the quiet both of King and people; and will not be presumed to be abolished by such remote implication. And at any rate, if such challenge could be competent after so long an acquiescence, the ground of challenge ought to be made *lucē meridiana clarius*, and not to depend upon imaginary conjectures.

With regard to the objection founded on the act 1593, cap. 172 (176); in the first place, it appears from the narrative of this act, as well as from Sir George M'Kenzie's observations upon it, that it related only to new rights of patronage granted by the King; and therefore does not apply to the present case. And, *addo*, It is well known, that this act went into disuse soon after it was made, and no regard has ever been had to it; accordingly, in a very late case, the very same objection which is now made was solemnly over-ruled, January 1749, Cochran of Culross *contra* the Officers of State, No 11. p. 9909.

'THE LORDS found, that Balgowan had right to the patronage of the kirk of 'Monydie,'

Act. Craigie, Dav. Greme, Ferguson. Alt. King's Counsel. Clerk, Gibson.

W. J.

Fol. Dic. v. 4. p. 54. Fac. Col. No 87. p. 151.

1762. February. LADY DOWAGER FORBES *against* MR JAMES M'WILLIAM.

IN 1720, a contract of marriage was entered into betwixt William Lord Forbes and the Lady, by which she was provided to a total liferent of the estate of Forbes, including the patronages.

In 1731, after her husband's death, she was infeft in the estate, but not in the patronages.

There was only one son of this marriage, Lord Francis, who succeeded his father in 1730, and, dying in 1735, was succeeded by his uncle, James Lord Forbes, who took infeftment in the whole estate, patronages included. Lady Forbes, after her husband's death, executed certain deeds, first in favour of her son, Lord Francis, and thereafter in favour of her brother-in-law, Lord James, which had the appearance of renouncing any right she had by her contract of marriage to the patronages; and, for several years, Lord James, with her

VOL. XXIV.

55 G

No 17.

No 18.

A minister settled by a bar whose right to the patronage was afterwards found invalid, was found not entitled to the stipend, altho' duly settled by the presbytery.

No 18. knowledge and her consent, presented to all the vacant churches belonging to the family, and exercised every other right of patronage.

In 1752, Lady Forbes was infest in the patronages, upon the precept contained in her contract of marriage.

In 1757, the parish of Forbes became vacant; and, upon the 24th January that year, James Lord Forbes gave in to the presbytery a presentation in favour of Mr M'William, and Lady Forbes another in favour of Mr William Copland. Lord Forbes had presented two ministers to this parish since his brother's death, the one in 1742, and the other in 1745.

After some proceedings before the presbytery and synod, the General Assembly, in May 1757, appointed the presbytery to proceed to the settlement of Lord Forbes' presentee; and he was settled accordingly the August following.

In March 1757, Lady Forbes brought a process before the Court of Session, for declaring her right to the patronages; and, 2d August 1758, the LORDS found, that she had not the right of presenting ministers; but, upon an appeal, this judgment was reversed, 18th February 1760.

In 1762, Lady Forbes, being charged by Mr M'William for payment of the stipend, brought a suspension; and, upon the 14th July that year, the Lord Ordinary sustained the reasons of suspension.

*Pleaded in a reclaiming petition:*

When churches become vacant, and the right of patronage is controverted, it is the duty of the presbytery to prefer the presentee of the patron last in possession. It is impossible, in such cases, to wait till the right is determined in the courts of law; because this might keep churches vacant for years, which might be attended with the greatest inconveniencies.

That this is law, appears from the following authorities: Reg. Maj. lib. 3. cap. 33. § 1. 2. 4. 5. 6. Glanville, lib. 13. cap. 20. Decretal, lib. 3. tit. 38. cap. 19. Sir George M'Kenzie's Observations on Act 7. 1567. Lord Bankton, v. 2. p. 32.

Lord Forbes had been in the uninterrupted possession ever since his nephew's death, had presented to all the churches belonging to the family that had become vacant, and particularly, had presented the two last ministers to the parish in question, with the knowledge and consent of Lady Forbes, and she had concurred in the calls as a liferentrix.

This case is the clearer, because the Court of Session found, that Lady Forbes had not the right of patronage. It is plain therefore, in every view, that the General Assembly did right in preferring Lord Forbes' presentee. They did so *optima fide*; and, therefore, Mr M'William must retain the benefice, whatever was the event of Lady Forbes' process. Lord Forbes, when he presented, was certainly a *bona fide* possessor; and consequently *fructus precipiendo suos fecit*; and his interim exercise of the right of patronage must be good,

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?