THE LORDS found neither of the pursuers had produced sufficient titles to the patronage in question; and that for ought yet seen, the right remained in the Crown. No 14.

Reporter, *Justice-Clerk.* Act. for Carnwath, *A. Pringle*; for Lee, *R. Craigie.*
Alt. *Advocatus.* Clerk, *Kirkpatrick.*

D. Falconer, v. 2. No 219. p. 263.

1752. *June* 27.

WILLIAM URQUHART of Meldrum *against* The OFFICERS of STATE and HERITORS of Cromarty.

No 15.
A grant by the King of the patronage of a common kirk in 1588, ratified in Parliament 1592, erecting the same into a parsonage, found to be good without consent of the chapter and bishop, and to subsist notwithstanding the acts 1606 and 1617, restoring bishops and their chapters.

A patronage once united, and passing, by infeftment, along with lands, cannot be afterwards conveyed without infeftment; but a sasine bearing in general "*juris solemnitatibus consuetis debite observatis,*" was held sufficient.

This last point was affirmed upon appeal.

THE kirk of Cromarty was one of the common kirks belonging to the bishop and chapter of Ross; and in 1588, King James VI. granted to Sir William Keith a charter of the barony of Delny, and certain other lands, containing an erection of the kirk of Cromarty, and other eighteen kirks, which had belonged to the said bishop and chapter, into parsonages, and granting to Sir William the teinds and patronage of these kirks, and uniting the whole into one barony; upon which Sir William was infeft. And in June 1592 this grant was ratified in Parliament.

This right came by progress into the person of Sir Robert Innes; who, in 1636, entered into a contract with the bishop of Ross, narrating a process of reduction and improbation which the bishop had against him for setting aside his right to these patronages; and that, willing to prevent further questions, he resigns all these patronages in the King's hands in favours of the bishop, declaring, that the bishop should be at liberty to use that right, or his ancient right, as he thought most proper,

On this contract a charter was expeded in favour of the bishop in the same year 1636, and the bishop was infeft 19th September 1637. But the sasine, as appeared from the register (for the principal was lost,) contained no symbol of infeftment, and wanted the sign and subscription manual of the notary.

In July 1656, the said Sir Robert Innes disponed the said lands and patronages in favour of Sir George Mackenzie of Tarbat, afterwards Earl of Cromarty; on which Sir George expeded a charter, and was infeft.

The Earl of Cromarty disponed the estate and patronage of Cromarty in favour of his son Sir Kenneth Mackenzie; and the said estate and patronage being brought to a judicial sale by Sir Kenneth's Creditors, William Urquhart of Meldrum became purchaser.

William Urquhart brought a declarator of his right of patronage, and called as defenders the Officers of State, the Heritors of the parish, and the Presbytery as is usual.

No 15.

Pleaded for the defenders, 1*mo*, That the grant of the patronage of the kirk of Cromarty and the other kirks, by the King to Sir William Keith in 1588, was void and null; for that as they belonged to the bishop and chapter of Ross, the King had no power to dispose of them without consent of the bishop and chapter; who, notwithstanding of the Reformation, were still existing at the date of the grant; for although the ministration, in offices of religion, was carried on by those called the travelling clergy, yet they were not the clergy authorised by law till the year 1592, when presbytery was established; and it appears from the records of the Privy-Seal, that, from the Reformation to 1592, bishops continued to be elected by the chapters as formerly; three instances of which occur in 1572, viz. St Andrews, Dunkeld, and Sodor. And chapters continued in the full right of their benefices till 1594, when their common kirks were taken from them. The King, therefore, having no power to make the grant, the ratification in Parliament could not make it valid, because of the act *salvo jure*.

2*dly*, By 2d act, Parl. 1606, and 2d act, Parl. 1617, restoring bishops and their chapters to their patrimony, the whole kirks, which had belonged to the bishop or chapter of Ross, were restored to them; and though there be an exception in each of these acts, yet the case of the patronage in question does not fall under either of these exceptions; for the exception in the act 1606, of common kirks disponed by his Majesty to whatsomever persons preceding the act, does not refer to the case of a common kirk erected into a parsonage, where the patronage is disponed to a laick; for that is not a disposition of a kirk which can only be to a kirk-man; but the exception respects only cases where the King had disponed the kirk to another bishop, or settled a minister in it, who by the exception was to enjoy the benefice during his life.

Neither does the exception in act 1617, "That it shall be without prejudice to laick patrons of their patronages granted to them by the King's Majesty, with consent of the titulars for the time," aid the pursuer; in the *first* place, because it respects only the case where patronages of Kirks had been granted away, which formerly belonged to the bishops and chapters, and were held and used by them in the same way as laicks used their patronages; but could never respect the mensal or common kirks, without which the bishops and their chapters could not be supported. In the *second* place, The grant in favour of Sir William Keith was without consent of the titular, whether the bishop and chapter be considered as the titulars or the incumbent for the time, in terms of the act 172d, Parl. 1593 *.

3*dly*, Supposing the grant valid, yet the Crown, as come in place of the bishop of Ross, ought to be preferred to the pursuer; for Sir Robert Innes in 1636 disponed the patronage to the bishop, which was long prior to his disposition in favour of Sir George Mackenzie, and therefore the bishop's right was preferable to Sir George's, though no infeftment had followed on it; for a right of patronage, being *jus incorporale*, passes without infeftment, Stair Inst. b. 2. tit. 8.

* Glendook's Edition.

§ 35. And though the patronage being united to a barony will make a conveyance of the barony transmit the patronage, though not particularly mentioned, yet it does not transform the nature of the right so as to make it a corporeal one. But supposing it should have the effect to communicate to this incorporeal right, the qualities of a corporeal one, yet as soon as the union was dissolved, these qualities flew off. Now the King, who created the union, had power to dissolve it; and did so by his charter upon Sir Robert Innes's resignation in favour of the bishop in 1636. Besides, it appears from the register of sasines for the shire of Inverness, that the bishop was infeft in this right upon the 19th of September 1637. No 15.

Answered for the pursuer to the first defence, That before the date of the grant in favour of Sir William Keith, chapters were abolished, and had no right either to officiate in kirks themselves, or to present others thereto; for, from the beginning of the Reformation, the Protestant clergy, who were governed by their own superintendants, were the clergy established by law, as is declared by acts 6th and 7th, Parl. 1567; by the last of which the right of laick patrons was reserved to them; but the patronages which belonged to ecclesiastics, now become by law incapable to exercise them, did of course devolve upon the Crown; and so it has been understood by the legislature in all the statutes relative to these matters. By act 100th, Parl. 1531, it is statuted, "That every parish-kirk shall have its own pastor;" and by act 102d of the same Parliament, it is enacted, "That all beneficies of cure under prelacies shall be presented by our Sovereign Lord and the laick patrons, in favour of able and qualified ministers." In this statute the King is held to be patron of all kirks which were not of laick patronage; and so it has been always understood by our lawyers, *Craig, lib.* 2. *dieg.* 8. § 37.

And particularly with respect to common kirks, it was ordained by act 196th, Parl. 1594, "That they should be of the same nature with other parsonages and viccarages, and should be conferred by presentation of the lawful patrons." Sir George Mackenzie, in his observations on this act, says, "That the King, or such as had right from him, became patron of these kirks, as coming in place of the Popish clergy." And he also adds, "That there were not then chapters." With him agrees Lord Stair, Inst. b. 2. tit. 8. § 35. p. 309. So there can be no doubt of the King's power to make the grant in favour of Sir William Keith. It is of no importance that there were some few elections of bishops by chapters soon after the Reformation; for these were not elected with a view to have any share in the government of the church, but rather to give their assistance in disposing away the temporalities thereof to others.

Answered to the second defence, That the act 1606 does plainly confirm all grants of this nature; "for it excepts and reserves all common kirks which are disponed by his Majesty to whatsoever person preceding this present act." And this clause cannot be limited to the case of kirks disponed to kirkmen, as

No 15. appears from the following clause of the act; whereby it is provided, "That if there be any common kirks pertaining to bishopricks and their chapters of old, that now pertain and fall to them by virtue of this act, the ministers who are lawfully provided to the said common kirks shall noways be prejudged during their lifetimes." Here a plain distinction is made betwixt common kirks disponed away to laicks and those conferred by presentations to ministers; the first are excepted from the act, the others are to return to the bishops and their chapters, saving the right of the incumbents during their lives.

Neither can the act 1617 be pleaded to defeat the effect of the grant in favour of Sir William Keith; for grants of that kind are expressly excepted from the act, and that without distinguishing whether the kirks were proper patronages vested in the chapter before the Reformation, or were common kirks. By the act, these grants are saved, though not ratified in Parlament; and therefore there can be no doubt of such as are secured by so ample a ratification as the one in question is.

The consent of the titular to the grant was not necessary, as that was only required to save grants not ratified in Parliament; and though it had been necessary, yet by titulars could not be meant the Popish chapters who were not then in being; and whose advice, if they had been in being, would never have been asked. But the clause of act 1617 must refer to act 172d, Parl. 1593, which requires the consent of the beneficed person; and if so, it is incumbent on the defenders, before their objection can be sustained, to prove that there was a beneficed person alive at the date of the grant; and though they proved this, yet, *posi tantum temporis*, it must be presumed that the consent was given, as the Lords lately found in the case of the patronage of Culross, No 11. p. 9909. And though not presumed, yet as the objection operates only in favour of the Crown, it is excluded by the ratification, and is also cut off by the negative prescription.

To the third defence, *answered*, That there are proper symbols established for infefting singular successors in rights of patronage, as well as in other real rights; but whatever might have been the case with respect to a right of patronage upon which no infeftment had ever passed, to which the citation from Lord Stair refers, yet when the patronage was once united to a barony, and infeftment taken upon it, it could not be transmitted without infeftment; and therefore Sir George Mackenzie's prior infeftment (supposing the bishop not to have been infeft) must carry this right. Had Sir Robert Innes disponed the whole barony, as well as the patronage, to the bishop, and afterwards disponed the whole to Sir George, it could not have been disputed that Sir George's right would have been preferable in respect of the first infeftment; and it must be a very extraordinary paradox if an acquisition should be more effectual when the acquirer gets only a part of the subjects contained in his author's infefiment, than if he had got the whole.

With respect to the infeftment said to have been taken by the bishop, a reference to the records, in a competition of real rights, is not sufficient; the defenders must either produce the principal sasine, or prove the tenor of it.—*2dly*, The sasine, such as it appears from the records, is null, because it bears no symbol of infeftment, and wants the sign and subscription manual of the notary. No 15.

Lastly, As the pursuer acquired the right at a judicial sale, he is secured by act 6th Parl. 1695; and whatever action, under the right of the bishop, may lie against the receivers of the price, there can lie none against the purchaser.

"THE LORDS repelled the first and second defences, and remitted it to the LORD ORDINARY to hear parties on the third defence, viz. whether the bishop of Ross's right from Sir Robert Innes is preferable to the pursuer's; and also to hear parties on the act of Parliament 1695."

1753. *July* 28.—IN the case betwixt these parties, concerning the right of the patronage of the kirk of Cromarty; for which, see what is mentioned above, the Lord Ordinary reported the points remitted to him by the interlocutor of that date, viz. "Whether the Bishop of Ross's right to the patronage from Sir Robert Innes, by the contract 1636, is preferable to the pursuer's right derived from the said Sir Robert Innes, by disposition in 1656; and also, whether the pursuer's right be secured by the 6th act Parl. 1695, he having purchased the patronage, together with Sir Kenneth Mackenzie's estate; at a judicial sale."

On the first point, the pursuer *objected*, That the contract 1636, whereby Sir Robert Innes disponed the patronage to the Bishop, was null by act 80th, Parl. 1579; because, though the names of three witnesses to the subscription of Sir Robert Innes be inserted, yet these witnesses are not designed, unless the defenders will condescend who were the witnesses, and astruct the condescendence.

Answered for the defenders; That there was no necessity for designing the witnesses until the statute 1681; for the act 1579 only requires, that witnesses be designed in deeds, not subscribed by the party, but by notaries; and it appears from the records, that, betwixt the 1579 and 1681, great numbers of deeds were executed without designing the witnesses.

Replied for the pursuer; That it is evident the clause of the act 1579, requiring witnesses to be "denominate by their special dwelling-places, or some other evident tokens," refers as well to deeds subscribed by the party, as to those subscribed by notaries. Sir George Mackenzie considers it in this view, in his observations on that act; and so have the LORDS in many cases; particularly 15th July 1664, Colvill against Executors of Lord Colvil, *voce* WRIT; and, 3d February 1665, Falconer against Earl of Kinghorn, IBIDEM; where they found, that if the witnesses were not designed in the deed, the user of it behoved to condescend on them, and prove his condescendence;

No 15. and what is enacted by the 5th act Parl. 1681, is, that the deed shall not be suppliable by condescending on the witnesses, if they be not designed in the deed itself.

" The Lords sustained the objection, That the witnesses designations were not insert in the body of the contract 1636; but found, that the same might be supplied by condescending on their designations, and astructing the same." *See* Writ *.

The pursuer further *objected*, That supposing the defenders should be able to condescend on the witnesses, and astruct their condescendence, yet the pursuer's right is preferable, because derived from the Earl of Cromarty, to whom Sir Robert Innes, in 1656, disponed this patronage along with the barony of Delny, upon which the Earl expede a charter and was infeft; and therefore, though he had the posterior disposition, yet he was preferable to the Bishop of Ross, by having first completed a title by infeftment; for the infeftment said to be taken by the Bishop in 1636, is null, for several reasons to be afterwards mentioned.

Answered for the defenders; That a patronage, by its proper and original nature, is neither a feudal subject nor held by a feudal tenure, but is a personal right or privilege like nobility, and is designed by the canonists to be *jus idoneos rectores in ecclesiis instituendos episcopo offerendi; quod alicui in ecclesia acquiritur, quod eo ipse, vel ejus auctores, ecclesiam posuerint, ædificarint, vel opibus non minimum auxerint, consensu episcopi adhibito, ex quo jure, cum utilitate, honor et onus simul resultant.* Calvin. *voce Patronatus.* Agreeable to this, Lord Stair, b. 2. tit. 8. § 33. says, " That though patronages do ordinarily pass as annexed to lands by charters of boroughs, baronies, or lordships, yet they may pass without infeftment as *jura incorporalia.*" This patronage was held according to the original nature of the right, by the Bishop or chapter of Ross without any infeftment, till the year 1588, when it was annexed to the barony of Delny, and with that barony granted by King James VI. to Sir William Keith; and so soon as it was disunited from the barony, which it was by the contract 1636, it returned to be of its original nature, that is, an incorporeal right, held and transmissible without infeftment.

Replied for the pursuer: That as there are proper symbols established for the tradition of patronages, as well as of other real rights, so the general rule ought to obtain as to them, that the first infeftment completes the transmission; but whatever be the case of patronages in general, it is certain that such as have been annexed to lands, and transmitted by infeftment alongst with them, must continue to be transmitted in the same manner; and as the right to this patronage was established in the person of Sir Robert Innes by infeftment, so he could not be divested of it without infeftment taken on the contract or disposition.

* Lord Kames's report of this part of the case is *voce* Writ.

"THE LORDS found, that Sir Robert Innes could not be completely denuded of the patronage in favour of the Bishop, without sasine following in the person of the Bishop." No 15.

The defenders having produced from the record, an extract of a sasine taken by the Bishop of Ross in 1637; the pursuer *objected*, That the sasine was null, because it did not bear the delivery of symbolical possession by the bailie to the attorney, by a psalm-book, the ordinary symbol for a patronage; but only bears in general, that sasine was given, the solemnities used in like cases being observed; and as such general clauses had often by the Court been found insufficient to support the executions of legal diligence, far less could they support an instrument of sasine.

Answered for the defenders; 1*st*, That it was but a modern invention to take infeftments upon patronages, and therefore there were no established symbols for giving such infeftments: None such are mentioned by Craig or Stair; and though in some instances we find a psalm-book given as a symbol for a right of patronage, yet sasines of such rights were often given without such symbols.

2*dly*, As the instrument bears that sasine was given *juris solemnitatibus in similibus fieri consuetis debite observatis*; this was sufficient, as has often been found in similar cases; particularly 21st March 1628, Maxwell against Portrack, *voce* SALMON FISHING, when the sasine of a salmon-fishing was sustained, though it did not bear *per traditionem Cymbæ et retis*, but only that the bailie came to the ground of the land and fishing, and gave state and sasine of the same.

"THE LORDS repelled the objection, in respect that the sasine bore, that the usual solemnities in the like case were observed."

The pursuer further *objected*, That the sasine was null, because the extract produced, and the copy in the register, wanted the *signum* of the notary which ought to contain his motto and name, and is his proper subscription: That a sasine was null for want of this, the LORDS found in 1731, in the case of the Creditors of Jordanhill, though the instrument was all wrote by the notary's own hand.

Answered for the defenders; That it appears from the copy in the register, and the extract thereof produced, that the principal instrument of sasine was attested and subscribed by the notary in the usual manner; the docquet, *Ego vero Gulielmus Lauder*, &c. being wrote by the notary's own hand. It is true, the *signum* and motto of the notary are not copied into the register; but it appears from a certificate from the keeper of the records in the lower Parliament house, that in the particular register of sasines for the shire of Inverness (in which record the Bishop's sasine is registrated) from 1636 to 1643, the notary's *signum* is not insert in any copy of a sasine in the register; but it is not from thence to be presumed that such was wanting in the principal instrument.

"THE LORDS repelled the objection."

On the second point, viz. if the pursuer's right be secured by the 6th act

No 15. Parl. 1695, it was *pleaded* for the pursuer, That by the said act it is statute, "That the purchaser at a judicial sale, paying the price offered to the creditors, as they shall be ranked by the Lords of Session, shall be for ever exonered, and the lands and others purchased, disburdened of all debts and deeds of the bankrupt, or his predecessors, from whom he had right." That the pursuer purchased this patronage at the judicial sale of Sir Kenneth Mackenzie's estate, and is therefore secured by that clause of the act, from any deed done by Sir Robert Innes, from whom Sir Kenneth derived right. And to this it will be no good answer to say, that the Crown, in right of the bishop, does not claim upon any deed done by the predecessors of Sir Kenneth Mackenzie, but upon a deed done by Sir Robert Innes, whereby the bishop was preferable both to Sir Kenneth and to his predecessors; for it can make no difference whether the deed was done by one of the bankrupt's ancestors, or by one of his authors; the intention of the statute was to make the purchaser secure in all events, and so the Lords have constructed it as often as the case has occurred, particularly 21st June 1720, John Chalmers against Sir Andrew Myreton, observed *voce* Ranking and Sale; and, in 1739, Bailie Dundas having purchased a tenement, at a sale carried on by the creditors of Thomas Wyllie, Lady Rollo claimed right to the tenement, her father having adjudged it from Henry Wyllie, Thomas's younger brother, and represented that Henry's right was preferable, in respect that the right of Thomas proceeded from his father, and was under a faculty to alter, which the father exercised by disponing the tenement to Henry; yet the Lords found that Mr Dundas's right was secured by the act 1695. The claim in that case was indeed founded on a deed of the bankrupt's father, but then the bankrupt did not derive right from him as heir, but by a singular title.

Answered for the defender; That as the King was not made a party to the process of sale, the decreet of sale could not prejudge him; and it would be absurd and unjust, that the estate of a third party, who was not called, and had no opportunity to object, should be sold for payment of the bankrupt's debts; but by no statute is any such iniquity introduced. The design of the acts concerning the sale of bankrupt estates, is to transfer to the purchaser for the use of the creditors, the estate that truly was in the bankrupt; but not to create for their use any new estate or interest which never belonged to them. And the chief scope of the act 1695, is to provide in favour of the purchaser a method whereby he might pay or consign the price: And the meaning of the clause founded on by the pursuer, is that the purchaser so paying or consigning, shall have all right or title which belonged to the bankrupt or his predecessors, and that was descendible or competent to him, and which he or his creditors jointly had in their power to have made over to the purchaser by voluntary conveyances; but not that the purchaser shall be preferable to third parties, who may have derived a prior right to the lands, from a remote author of the bankrupt's predecessor, and who thereby had a preferable title to any that was

No 15.

in the bankrupt himself. That this is the sense of the act, is further evident from the words that immediately follow in the same clause, viz. " And that the bankrupt, or his heirs, or apparent heirs, or creditors without exception of minority, not compearing, or conceiving themselves to be prejudged, shall only have access to pursue the receivers of the price and their heirs." All this provision is made in respect of the persons who were intitled to claim in right of the bankrupt himself; but there is nothing in the statute importing, that the estate of one not called in the process, can be sold for another man's debts.

" THE LORDS found, that the right of the Crown was not barred by the decreet of sale."

Act. *Fergusson.* Alt. *Advocatus Boswel.* Reporter, *Kilkerran.* Clerk, *Gibson.*

B. *Fol. Dic. v.* 4. *p.* 53. *Fac. Col. No* 15. *p.* 30. *and No* 84. *p.* 124.

*** This case was appealed:

" THE House of LORDS ordered and *adjudged*, That such parts of the interlocutor 28th July 1753, as are complained of in the original appeal, (viz. those which sustain the objection, That the witnesses designations were not inserted in the body of the contract 1636), be reversed, and that the want of designation of the witnesses to the said contracts be repelled."

" Moved also, That the cross appeal be dismissed, and that such parts of the said interlocutors as are therein complained of (viz. those which repel the objections to the Bishop of Ross's sasine, and the plea founded on the act 1695) be affirmed."

*** Lord Kames reports this case:

1752. *February* 27.—URQUHART of Meldrum having purchased the estate af Cromarty, and the patronage of the kirk of Cromarty at a public roup before the Court of Session, brought a declarator to ascertain his right to the patronage, which was called in question upon occasion of the settlement of a minister presented by him: and his titles were as follow:

Charter of resignation and *novodamus anno* 1588, by King James the VI. to Sir William Keith of the barony of Delny, containing an erection of the kirk of Cromarty and 18 other kirks into patronages, which formerly belonged to the chapter of the bishopric of Ross; granting to Sir William the teinds and patronage of these kirks, and uniting the whole into one barony, called the barony of Delny, upon which Sir William was infeft. This charter was ratified in Parliament *anno* 1592, and the subjects therein contained came by progress in the person of the Earl of Cromarty, and the patronage of the kirk of Cromarty was derived from him to Sir George Mackenzie, and was purchased as said is by the pursuer with the rest of Sir George's estate.

No 15.

In behalf of the Crown, it was *objected* against this progress, That this kirk of Cromarty, with the other kirks contained in the charter 1588, did anciently belong to the chapter of Ross; that by the act 2d, p. 1606, the bishops were restored to their original rights; and the chapters to theirs by the act 2d, p. 1617, with an exception only of such patronages as had been disponed by the king with consent of the titulars for the time, *i. e.* with consent of the chapters in this case; and consequently the grant of the above patronages to Sir William Keith being without consent of the chapter of the bishopric of Ross, is annulled by the said act 1617, and these patronages restored to the chapter in whose right the king now is.

In answer to this ground of preference for the crown, it was endeavoured to be made out in the first place, That by *titular* in the said act 1617, could not be meant the chapter. For by the establishment of the Presbyterian form of government, bishops were abolished as to their spiritual powers, though not as to their seat in Parliament, which was a civil privilege. And by the same establishment, chapters behoved also to be abolished. In the next place, it is pretty evident, that teinds belonging to bishops and their chapters were annexed to the Crown by the act 1587, though not mentioned directly in any clause of that act. This is proved *1mo*, By a clause in the same act, excepting from the annexation teinds belonging to parsons and vicars; * *2do*, By the authority of the act 1606, restoring bishops, in which it is expressly said, that by the act 1587, the teinds were annexed to the Crown as well as the lands; and by the authority of the act 192. Parl. 1593, to the same purpose. And indeed it behoved to be so, for otherwise teinds belonging to monasteries, teinds of common kirks belonging to chapters, &c. would be left *in medio* without a proprietor. Therefore, by the word *temporalities* in the act 1587, must be meant the whole patrimony of the church-teinds, as well as lands. These considerations make it evident, that by *titulars* in the act 1617, chapters could not be meant who had no existence at the time of that act, and who had no right to the teinds supposing them to have an existence.

In the next place, it was insisted upon positively, that by titulars in the act 1617, was meant the beneficed person, or the minister who served the cure for the time. This clause plainly refers to the act 176, Parl. 1593, declaring that dispositions granted by his Majesty of the patronage of a benefice without consent of the beneficed person, shall be null. The objection then resolves into this plain point, Whether the charter 1588, granted by the King to Sir William Keith is null *quoad* the patronages upon the statute 1593, as wanting the consent of the person serving the cure for the time. This statute, it is true, has a retrospect; but then it can afford no objection, *1mo*, Because it takes place only with regard to benefices where the beneficed person is titular of the teinds, and not where the churches originally belonging to a chapter were at that time

* But *quæritur*, What shall we say to the clause of the statute 1587? p. 530. at the top.

in the hands of the Crown in place of the chapter; 2*do*, *Esto* the kirk in question were a parsonage, the objection is not applicable, unless it could be proved that there was an incumbent the time of the grant; 3*tio*, Supposing this fact, the consent of the incumbent must be presumed *post tantum temporis*, which by the statute, is not required to be in writing; and, *lastly*, The Crown is cut off from this objection, by the negative prescription. No 15.

"THE LORDS preferred Urquhart of Meldrum before the Crown."

IN the declarator of the right of patronage of the kirk of Cromarty, at the instance of Urquhart of Meldrum against the Crown, to support which, there was produced a connected progress from Sir William Keith, to whom the King disponed this patronage *anno* 1588, by a charter upon which infeftment followed to Sir Robert Innes, who was also infeft *anno* 1631, and from him to the pursuer; it was *objected*, that Sir Robert resigned this patronage in the hands of the Crown, for a new infeftment to be granted to the bishop of Ross; that the King accordingly granted to the bishop a charter of resignation; and though this charter was never completed by infeftment, yet a patronage being an incorporeal right, it transmitted without infeftment; and the King in place of the bishop, is preferable before the pursuer, who could take no effectual right from Sir Robert, after Sir Robert was thus denuded in favour of the bishop.

In answer to this ground of preference, it was admitted, That a patronage being an incorporeal right, is incapable of being possest like lands; and therefore that the form of introducing the purchaser into possession, which is necessary to establish the right of property in lands, and is vouched by the instrument of sasine, cannot regularly obtain in this case. And upon this account, a device was fallen upon, both in England and Scotland, to annex patronages to land, in order to bring them under an infeftment; because the influence of custom was such, that people generally did not think themselves secure in the purchase of any subject without infeftment. But in process of time, when an instrument of sasine was universally substituted in place of actual possession, incorporeal rights crept into sasines, because in symbolical possession, the absurdity did not appear so glaring as it did formerly in the act of introducing a purchaser into the actual possession. By this means, offices, patronages, and other *jura incorporalia*, creeping into sasines, it came to be established in practice, that *jura incorporalia* might pass by infeftment; and with regard to a patronage in particular, a symbol was invented, and now they universally pass by infeftment.

2*do*, Whatever may be the case of a patronage which has never passed by infeftment, if there are any such, yet if a patronage has once been established by infeftment, it becomes a feudal holding, and must partake of the common nature of all feudal holdings, that the vassal is not denuded by resignation alone, but by new infeftment. And this must hold, more especially in the present case, where the patronage is disponed by Sir Robert to the bishop as a feudal

No 15. holding, and the bishop having taken right to this patronage by resignation, behoved to submit to the rules of the feudal law, and could have no complete right without infeftment.

" THE LORDS preferred Urquhart of Meldrum before the Crown."

Sel. Dec. No 6. p. 8. and No 7. p. 10.

1755. *January* 8. DONALDSON of Kinnairdie *against* OFFICERS OF STATE.

No 16.
Patronage not comprehended under any of the annexing acts.

THE abbacy of Aberbrothock, to which belonged the patronage of the kirk of Aberarder, was erected by King James VI. in a temporal lordship in favour of the Marquis of Hamilton; and upon his resignation, was by Charles I. disponed to William Murray, afterwards Earl of Dysart, from whom Kinnairdie derived right. His right being controverted, he insisted in a declarator of the same against the Officers of the Crown. For them it was *objected*, That the abbacy of Aberbrothock having been comprehended under the general act of annexation 1587, the grant thereof by the King in favour of the Marquis of Hamilton, and the subsequent grant in favour of William Murray, were null and void. It was *answered*, That patronages were not comprehended under any acts of annexation; and, therefore, the objection is not good.

' THE LORDS, I think, unanimously preferred Kinnairdie to the patronage.'

The history of the patronage of the church after the Reformation, appears to be this. The bulk of the subjects belonging to the church, teinds as well as lands, being under patronage; and the use for which these subjects were given to the church, having ceased upon the Reformation; it was thought that these subjects ought to return to the respective patrons, as being the presumed donors. All the subjects of which the King was patron were upon this principle restored to him; and all that were of church patronage went to him as *bona vacantia*. Laick patrons at the same time took possession of the subjects under their patronage. All this happened long before the act of annexation 1587, which is evident from the act itself, excepting from the general annexation many lands belonging to monasteries, formerly gifted by the Crown, and erected in temporal lordships. And with regard to patronages in particular, all of them, in the act 102d, Parl. 1581, are understood to be either in the Crown or in the laick patron; which shows, that even before the 1587, such patronages were transferred to the Crown.

We are not then to consider the act 1587 as the title which the Crown has to church lands, and other branches of its patrimony. The sole intention of this act was to annex to the Crown certain subjects which formerly belonged to the King. No subject is conferred upon the King by that statute save bishop lands. These are not only taken from the bishops and bestowed upon the King, but also annexed to the Crown. Church patronages were certainly in