

1714. June 18.

MR ALEXANDER M'BAIN, Minister at Avoch, *against* Sir KENNETH M'KENZIE
of Scatwell, and other Heritors of that Parish.

THE Church of Avoch being vacant about 17 months, through the heritors all that while neglecting to call a Minister, 28th August 1711, Mr Alexander M'Bain was presented by the united Presbyteries of Ross, *tanquam jure devolutum*, and formally ordained and admitted, 4th June 1712; and having served the cure since that time, pursued the heritors of the parish for payment of his stipend for years bygone, and in time coming, conform to use and wont.

Answered for the defenders, *imo*, This action, concluding payment of a constant and perpetual stipend, to himself and his successors in office, in all time coming, conform to former use of payment, resolves into, and has the effects of a process of modification and locality; and, therefore, is only competent before the Commission for Plantation of Kirks and Valuation of Teinds; *2do*, The pursuer's admission is null by the statute of the 10th Anne, intituled, An act to restore Patrons, &c. which repeals the act of Parliament 1690, allowing a *jus devolutum* to the Presbytery, in case of the heritors and elders not calling a Minister, within six months after a vacancy, in these words; *In so far as the same relates to the presentation of Ministers, by the heritors and others therein mentioned*; under which last words, *and others therein mentioned*, the Presbytery's former *jus devolutum* doth fall, and restores patrons to the power of presenting to their Churches, vacant upon the 1st of May 1712, or that should happen to be vacant at any time thereafter, with a *jus devolutum* to the Presbytery, in case of the patron's neglect to present within six months after the said 1st of May, if the Church were then vacant, or from the time of its falling vacant thereafter. In so far as the pursuer was admitted by the said Presbytery within two months after the said 1st of May 1712, upon the foot of a *jus devolutum* arising to them, from the heritors and elders neglect to call a Minister for the space of six months before that day, in virtue of the first repealed act 1690; *3tio*, The pursuer hath not taken the oaths required by the statute of 10th Anne, intituled, An act to prevent disturbance of those of the Episcopal communion, which requires the oaths to be taken in the same manner, and under such penalties, as are contained in the 14th act of the 6th Anne, whereby those neglecting, or refusing to take the oaths, are disabled to enjoy any office, and their office is adjudged to be void, without mention of a previous sentence or conviction, which must be understood of being void *ipso jure*; seeing, in the case of other penalties, a sentence convicting is required.

Replied for the pursuer, *imo*, It is the nature of all possessory actions, such as this is, to ascertain the pursuer's possession in all time coming, until a better right be declared, and his title reduced. And, though this process will

No 70.

In a process at the instance of a minister against the heritors of his parish, for payment of stipend, it was found incompetent for them to object against his admission by the Presbytery, *jure devolutum*, as null; but that such objection must be proposed by way of reduction, at the patron's instance, in which the Presbytery must be called for their interest.

No 70.

make an action of modification unnecessary, it is not of that nature. For, an action of modification is sued when the incumbent is dissatisfied with the present quantity, or manner of paying his stipend; but, when he acquiesceth in both, this action sufficeth; *2do*, The defence against the legality of the pursuer's admission is neither competent nor relevant. It is not competent; because, *1mo*, The act restoring patrons is purely introduced in their favour, and is *jus tertii* to the defenders, whom it rather aggrieves, by taking away the right formerly lodged in them, as heritors; *2do*, Suppose the patron were in the field, and his right instructed, the pursuer's formal admission, to which a presentation is not essential, must support his claim, until it be reduced; in which reduction, at the patron's instance, the Presbytery, whose act of admission is quarrelled, should be cited for their interest. Now, that an admission, without a presentation, may be formal, is certain; because, the patron's right of presentation may be purchased from him, or renounced by him, or he might, *ex post facto*, homologate an admission by the Presbytery, by not presenting within the six months; as, in this case, no presentation was made by the patron within six months after 1st May 1712, which imported his acquiescence in the pursuer's call and admission. Again, although the objection against the legality of the pursuer's admission were competent and receivable in this state of the process, it is not relevant; because, the right of presentation fell to the Presbytery, *tanquam jure devoluto*, a twelvemonth before 1st May 1712, and the Presbytery had actually exercised their right, by presenting, *bona fide*, long before the date of the act, and thereby had *jus quæsitum* to the presentation, which is expressly reserved in the statute of 10th Anne. For the only drift of that act being to transfer the power that formerly was in the heritors and elders to the patrons, without prejudice to the Presbytery's *jus devolutum*, it must be concluded, that, in what case soever the heritors had forfeited their right, the patron, as succeeding in their room, can have no shadow of a claim. It is a mere quibble in the defenders to apply the words of the statute, *and others therein mentioned*, to Presbyteries, as if they were not applicable to any other persons, pretending powers to present. For, by these words are meant Elders, Magistrates, Town Councils, and Kirk Sessions, to whom the power of presentation was by our law given; *3tio*, The defence, founded upon the pursuer's not having taken the oaths, is not competent in this state of the process, in regard he was not legally convicted thereof. For, though a previous sentence be not mentioned in the very clause that infers incapacity, and declares the offices of such as refuse to take the oaths void; yet the known principles of law will extend it to that likewise. Nothing is more penal than incapacity and disability of enjoying any office; and in cases penal, law requires trial, that the alleged offender may have an opportunity to exculpate himself.

THE LORDS repelled the defence of incompetency of Court, and sustained process for the stipend the pursuer's predecessors had been in possession of for

bygone, and in time coming, until there be a constant modified stipend allocated to the pursuer, by the Commission for Valuation of Teinds; found the defence against the pursuer's admission and possession not competent in this process; and found the defence, upon his not taking the oaths, not competent, he not being legally convicted thereof.

Fol. Dic. v. 1. p. 522. Forbes, MS. p. 63.

1759. January 8.

THOMAS FRASER of Glenvacky, claimant on the estate of Lovat, *against*
HIS MAJESTY'S ADVOCATE.

UPON the 14th June 1694, Hugh Lord Fraser of Lovat granted an heritable bond or wadset-right, containing a precept of sasine, to Thomas Fraser brother of Belladram, for L. 1000 Scots; for security of which sum Lord Lovat became bound to infest him in the lands of Glenvacky, under reversion, and for payment of a surplus-duty therein mentioned.—Thomas Fraser was infest 27th October 1696, and his sasine duly recorded 2d December 1696.

Thomas Fraser entered on possession of the lands, and paid regularly the surplus-duty. About the year 1702, he made a transaction with William Fraser of Teanakyle; by which, for a valuable consideration, he disposed to Teanakyle his wadset of Glenvacky. But neither this conveyance, nor infestment upon it, were produced.—It was proved, however, that Teanakyle entered on the possession of the lands, and continued to possess them from the year 1702 to the year 1745, when he died, and made payment regularly of the surplus-duty.

Teanakyle, some time before his death, conveyed this wadset-right to Thomas Fraser his son, who was infest 19th August 1745.

The estate of Lovat having been forfeited and surveyed, an abstract of the survey was recorded in the Exchequer, which, with respect to the lands of Glenvacky, contained these words: 'Thomas Fraser of Glenvacky of surplus-rent for his lands of Glenvacky wadset to him for 1000 merks, L. 20, one custom-cow, one wedder, one lamb, and 60 loads of peats.'

Thomas Fraser entered his claim, in order to have the mistake in the abstract of the survey rectified, by which the wadset-sum was stated as 1000 merks in place of L. 1000.

It was *objected* for his Majesty's Advocate, That the claimant had not produced the conveyance from the original wadsetter to Teanakyle, the claimant's father, nor the infestment upon that conveyance; and therefore the claim must be dismissed; for that a proof, if brought, of his and his father's possession, could not constitute an heritable right; and nothing could supply the want of the intermediate conveyance to his father, but a proving of the tenor; that

No 69.

No 71.

A person claimed a wadset right affecting an estate which had been forfeited. Pleaded for the crown, that no right had been produced. Answered, this *jus tertii* to the crown; the rights had been lost, but there had been long possession. The claim was sustained, but the rights to be produced.