

No 25.

The pursuer likewise *pleaded* a right by prescription to this patronage upon his possession. But that point did not receive any express judgment; the Court being unanimously of opinion, that the titles produced were a sufficient legal conveyance of the patronage of this church to the pursuer's predecessors.

THE LORDS found, that the pursuer has an undoubted and exclusive right to the advocation, donation, and right of patronage and presentation of ministers to the said kirk and parish of Coldstream.

Act. *Iley Campbell.*Alt. *Lord Advocate, Sol. General, Sol. of Tithes.**Fol. Dic. v. 4. p. 48. Fac. Col. No 25. p. 40.*

No 26.

Found in conformity with Donaldson against Officers of State, No 16. p. 9926. that the patronages of churches came not under the general act of annexation in 1587.

1783. February 22. JAMES MURDOCH against ALEXANDER GORDON.

MR MURDOCH, preacher of the gospel, obtained from the Crown a presentation to the parish church of Crossmichael; a church, to the patronage of which Mr Gordon of Culvenan likewise laid claim. Of the Crown's right to this patronage a process of declarator was brought, in the name of Mr Murdoch alone; the counsel for his Majesty, deeming that of Mr Gordon preferable to it, having declined to concur in the action.

Mr Gordon's right was derived from a charter of King James VI. in 1593, containing, among other subjects, the patronage in question. This charter, however, being posterior to the general act of annexation, Mr Murdoch contended, that a previous dissolution in Parliament was necessary to render it an effectual grant of the patronage. The point therefore on which the fate of the competition chiefly* depended was, Whether rights of patronage were to be understood as comprehended in the property of the Crown thus annexed. The Court having appointed a hearing of the cause in presence, it was

Pleaded for the presentee of the Crown: The statute of 1587, cap. 29. is thus entitled: 'Annexation of the *temporality* of benefices to the Crown.' The term *temporality* here plainly denotes such rights as were held by virtue of the temporal law, that is, the common law of the realm; and stands in contradistinction to that of *spirituality*, by which, prior to the Reformation, the clergy denominated tithes; these being as they supposed, possessed *jure divino*, independently of any human or temporal appointment. This pretended *jus divinum*, however, having after that event been reprobated as unchristian, or absurd, the consequence was, that though all the parts of the Popish benefices, as *bona vacantia*, had equally devolved to the Crown, yet the act of Parliament above mentioned, framed for rendering them its annexed property, was confined to the temporality alone. It being unjust to comprehend in like manner their *spiritu-*

* There were other topics introduced, which proved immaterial in the cause, particularly one respecting the effect of a private act of ratification, in the event of patronages being found to have come under the annexation.

ality, the foundation of the right to which had been thus shaken, this was reserved from the annexation, still alienable, and open to future disquisition; though perhaps an exception is to be made of the teinds of prelaties and of kirk-lands, agreeably to the statute of 1593, cap. 192. But, under the denomination of *spirituality*, could not be comprehended rights of presentation, which no churchman ever imagined to belong to the church *jure divino*. Among the other temporal subjects therefore which fell under the annexation, patronages of churches are undoubtedly to be classed. Indeed the power of presenting was not the only temporal right which belonged to the patrons; they were likewise entitled to enjoy the lands, and other temporal property of benefices, during their vacancy.

The subsequent statutes accordingly refer to the annexation of patronage. Thus that of 1606, cap. 2. concerning the restitution of the estates of bishops against the general act of annexation, specially mentions patronages among the subjects annexed. In the statute likewise of 1633, cap. 9. entitled, *The King's general revocation*, and which recalled all alienations of benefices that had been annexed to the Crown, 'patronages of kirks' are expressly denominated as such; and in the act, the 12th of the same year, a similar expression is used thus: 'Patronages and benefices formerly belonging to the kirk, and since annexed to the Crown.' In a variety of instances too of acts of dissolution, framed for the purpose of erecting new benefices, patronages are found expressly dissolved; such as that in favour of the bishop of Edinburgh in 1633, and that which appeared in the lately decided case of the Crown and the Earl of Haddington relative to the parish of Lennel, (See APPENDIX.) The opinions of lawyers correspond to these proofs. Thus Lord Stair, B. 2. Tit. 8. § 35. says, 'There are patronages which by act of Parliament are annexed to the Crown, either expressly, or when baronies, lordships, or benefices, are annexed.' And the observation is repeated by Mr Erskine, B. 1. Tit. 5. § 10.

Answered, To create a permanent addition to the revenues of the Crown, which by the profusion of our princes had been greatly diminished, was undoubtedly the object of the statute of 1587, as of all the other acts of annexation; and accordingly in the preamble of that statute it is expressly so declared. But as, by the accession of mere rights of patronage, the royal treasure could never be increased, it was surely not to be expected that these would be found in the property annexed, and which too is denominated the *temporality* of benefices; an appellation confined to subjects of revenue, exclusively of patronages, and all other unproductive rights; as at the same time it likewise distinguished that revenue which arose from lands and other temporal sources, in opposition to teinds claimed by the church *jure divino*. In the minute and prolix enumeration accordingly of the subjects of annexation which the enacting part of the statute contains, not a hint concerning patronages is to be discovered; for though it descends even to trifling particulars, still they are of a nature to afford a lucrative product.

No 25.

That in fact patronages were not so annexed, is farther apparent from several posterior statutes. Thus the act of Parliament 1593, cap. 172: (176.) declares the consent of beneficed persons alone, without the aid of dissolution, sufficient to give validity to alienations by the Crown, of rights of patronage. For the same reason, the act of 1617, cap. 2. excepts from the patrimonies thereby restored to chapters of cathedral churches, those patronages which since the annexation had been alienated by his Majesty; an absurd provision surely, if they had been regarded as part of the Crown's annexed and unalienable property. Nor is the statute of revocation in 1633 inconsistent with these enactments; for it relates not to patronages in general, but a few particular instances of annexation *per expressum*, which it belongs not to the present argument to controvert; as indeed they rather fortify it, by showing the necessity of an express enactment on the subject. This doctrine is confirmed by the authority of Sir Thomas Hope, tit. *Of Kirks and Benefices*, § 4. 5.; and by that of Lord Bankton, B. 2. Tit. 8. § 90.; while the above quotation from Lord Stair is confined to those special cases, and to the annexation of baronies including patronages.

In truth, the notion itself of the annexation of patronages would perhaps have never occurred, but for the zeal of Sir George M'Kenzie in strengthening the hands of his Sovereign, against the influence of those whom he calls 'schismatic private patrons;' persons, in the disastrous times preceding the Revolution, attached to the cause of that civil and religious freedom which was established at that æra. In his observations on the general act of annexation in 1587, he mentions the case of Stewart *contra* the Laird of Waterstoun, (See APPENDIX.) in which, he says, the question was agitated, but not decided. As, however, he assigns no reason for this, it may be fairly presumed to have been no other than his own foresight of an event opposite to his wishes. From that period to the present time, except in one instance, the idea has never been revived; a case, that of Donaldson *contra* the Officers of State, January 8, 1755, which furnishes a direct precedent for the present, as it was there decided by the Court, that patronages did not fall under the acts of annexation, No 16. p. 9926.

Replied; Though the opinion of the learned reporter of the last-mentioned decision seems adverse to the annexation of patronages, yet, from inspection of the papers in that cause, it appears not to have been determined on that principle; concerning which, from the number of specialities in the case, it was unnecessary to give judgement.

The majority of the Court, upon the grounds above stated, were of opinion, that church patronages were not included under the general act of annexation; and therefore that any subsequent alienation of them by the Crown could not require dissolution in Parliament to render it effectual. So that the charter founded on by Mr Gordon was, notwithstanding the objection of there having been no previous dissolution in Parliament, sustained as a valid grant of the patronage in question.

THE LORD ORDINARY had found, ' That the defender Alexander Gordon had the preferable right to the patronage in question ;' and

No 25.

' THE COURT having heard parties procurators in their own presence, adhered to the interlocutor of the Lord Ordinary.

A reclaiming petition against this judgment, to which an additional one was joined, were, on being advised with answers, both refused.

Lord Ordinary, *Ankerville.*
Clerk, *Orme,*

Act. *Ilay Campbell, Crosbie.*

Alt. *Blair, R. Dundas.*

S.

Fol. Dic. v. 4. p. 53. Fac. Col. No 95. p. 147.

1788. February 7. HUGH GRANT *against* The DUKE of GORDON.

IN 1726, a vacancy in the united parishes of Moy and Dyke had been supplied in consequence of a presentation from the predecessor of Mr Hugh Grant.

In 1782, on the death of the incumbent, different presentees were offered, by the Duke of Gordon, as having right to the sole patronage; and by Mr Hugh Grant as patron of Moy. And the settlement having been delayed till the question of right should be determined in the civil courts, it was at length found by the Court of Session, that the patronage of Moy belonged to Hugh Grant, and that of Dyke to the Crown.

Still, however, the Duke of Gordon, whose ancestors had been in use of presenting in this parish, insisted, that the patron of Moy having exercised his right on the immediately preceding vacancy, the person named by himself should be preferred, or that at least the right of presentation should be held as devolved, for that time, to the presbytery.

Observed on the Bench: The enactment of 1617, c. 3. provides, that, in the union of two or more parishes, ' the presentation of ministers should be appointed by the commissioners of tithes, to pertain to the patrons *alternis vicibus.*' But by this it was not intended to abridge the *rights* of patrons, but merely to regulate the *possession*, in the only way which the nature of the case admitted of. When, therefore, the patron who may present on a particular vacancy does not chuse to exercise his right, that of the other, meeting with no obstruction, must be allowed its fullest influence.

' THE LORDS preferred the presentee of Mr Hugh Grant.'

Lord Ordinary, *Swinton.*
Clerk, *Sinclair.*

Act. *Blair, Jā. Grant.*

Alt. *Maclaurin, Honyman, Tait.*

G.

Fol. Dic. v. 4. p. 49. Fac. Col. No 18. p. 33.

No 26.

One of the patrons in an united parish, may present on every vacancy, if no presentation be offered by the other patron.