

1757. December 21. RIDDEL of Newhouse *against* OFFICERS OF STATE.

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Nature and  
effect of a  
*novodamus*.

THE parish of Kirkpatrick-Irongray being vacant, the right of patronage was claimed by the Crown against Walter Riddel of Newhouse, deriving right by progress from the family of Herries; and he founded upon a charter from the Crown *anno* 1510, in favour of Andrew Lord Herries of the barony of Terregles, with the patronage of the said kirk, containing a *novodamus* in ample form. It was *objected* against this title, that it was a charter of resignation only; that a *novodamus* in a charter of resignation will not infer any more but a renovation of the vassal's former right, unless expressed clearly as an original grant, which is not the present case; and, therefore, that this charter will not avail till it be made out, that the Lord Herries the resigner was *ab ante* vested in this patronage.

It was *yielded*, That in the present case the *novodamus* imported no more but a renovation of the former right; and, consequently is no good title to the patronage, supposing Lord Herries to have had no right *ab ante*. But then, the charter following upon the instrument of resignation, in which the patronage is resigned as well as the barony, is an acknowledgment by the Crown, that the patronage *ab ante* belonged to Lord Herries; and consequently is legal evidence of the fact; especially *in re tam antiqua*. Hence it follows, that this charter is a good title to the patronage, unless it be instructed for the Crown, that at that period Lord Herries had no right, and that the resignation of the patronage was an imposition upon the Crown.

'The charter was sustained as a good title, and Mr Riddel was preferred.'

*Fol. Dic. v. 4. p. 20. Sel. Dec. No 138. p. 194.*

\* \* \* This case is reported in the Faculty Collection :

1758. June 27.—IN 1756, Walter Riddel of Newhouse brought an action against the Officers of State, for having it delared, That the patronage of the parish-kirk of Irongray belonged to him.

The titles he founded upon were derived, by progress, from the ancient family of Herries, who had obtained from the Crown, at different periods, grants of the barony of Terregles, (within which the kirk of Irongray was situated,) *cum advocacionibus et donationibus ecclesiarum dict. terrarum*. Particularly, in 1510, Andrew Lord Herries obtained a charter, proceeding on his own resignation of the said lands and barony of Terregles, which contains specially the patronage of the said kirk of Irongray. The *quæ quidem* of this charter bears, that the said barony and patronage, &c. had formerly belonged to the said Andrew Lord Herries, and had been resigned by him; and there follows a special clause of *novodamus*, with respect to some particular lands; and after this a general clause of *Novodamus*, and an erection of the whole lands and patronages contained in the charter into one barony.

There did not appear evidence of any act of possession of this right of patronage by the family of Herries; and Mr James Guthrie, the last minister of this parish, who was settled upon a popular call in the year 1694, having lived down to the year 1756, no possession could have been had for sixty years past.

*Pleaded* in defence for the Crown, That as his Majesty is presumed to have right to every patronage where no other right appears, so the charter 1510 conveyed no valid or effectual right to this patronage, being only a simple charter of resignation, giving back to Andrew Lord Herries what he was pleased, in the procuratory of resignation, to allege had formerly belonged to him; and therefore could give to the resigner no better right than he formerly had; because these charters passing without inquiry, *periculo petentium*, do not it is certain bestow any right, unless the Crown had formerly granted the same; which is not proved to have been the case here.

*2do*, The clause of *novodamus* in the said charter 1510 does not extend to the patronage in question, so as to be held equal to an original grant of the patronage. The charter contains only a special *novodamus* of some particular lands; and the words *de novo damus*, thrown into the next clause, by which a new union of all the lands in the charter is made, has plainly been inserted through inaccuracy, and without intending to confer any new right, other than the new erection into a barony; as is apparent from comparing the several clauses and circumstances of the charter.

*3tio*, The right of this patronage appears to have been vested in the Archbishop of Glasgow, who did accordingly exercise his right by presenting to the benefice; as is proved by a decree obtained before the Commissary of Dumfries in the 1671, by Mr Lawson minister of the parish, against the heritors; wherein he sets forth, as the foundation of his libel, that he had been settled minister in the said parish in the 1668, upon a presentation by the Archbishop, containing collation and institution. The evidence arising from this decret must be held good *in re tam antiqua*, and is sufficient to establish at once the right of the Archbishop to this patronage, and his exercise of it; and as the Crown is now in the right of the Archbishop, the defenders are entitled to plead the positive prescription upon the Crown's right, and the negative prescription of the pursuer's pretended grant, upon which no possession appears to have ever followed.

*Answered* for the pursuer; to the *first*, It is impossible to produce the original grants of this estate, and patronage; because they run back to a period long before we had any records; but there are several charters granted to the family of Herries previous to the year 1510, which are referred to, and which contain the patronages of the kirks within the barony of Terregles; and therefore the charter 1510, by granting *nominationem* to Andrew Lord Herries, the patronage of Irongray, did truly give no more than formerly belonged to him. And the long series of charters condescended on by the pursuer, are fully sufficient to establish his right in a competition with the Crown, where no shadow of title in favour of any other person is produced.

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To the *second*, The charter 1510 contains a proper general clause of *novodamus* of the whole lands, baronies, and patronages, contained in the dispositive clause of the charter; and which clause, by its established effect and construction in law, must supply all defects in the former titles of the resigner, being equivalent to a new grant. There is nothing inconsistent in granting, in the same clause, a *novodamus* of the lands, and an union and erection of these lands into a barony; and an instance exactly similar occurs in a grant to the Lord Home, which is produced.

To the *third*, The defenders do not pretend to point out or allege any charter or other title to the patronage in question, in favour of the Archbishop of Glasgow. And the only evidence arising from the decret of the Commissary founded on, is that, in the year 1668, the Archbishop did take upon him to nominate and collate Mr Lawson to this parish. There is no mention in the decret, either of patronage or presentation; and this letter of admission and collation has probably been granted by the Bishop, not as patron, but as having right to nominate, admit, and receive *tanquam jure devoluto*. At any rate, it can never be maintained, that one single act of possession assumed by the Archbishop in 1668, is sufficient to prove, that the right was in him, contrary to the evidence of a series of charters from the Crown, by which it appears that this patronage was vested in the family of Herries. With regard to the pretended prescription, there can be no foundation for it in this case. It is a fixed rule in law, that the positive prescription cannot take place without a title; nor could the Archbishop's usurping the possession for one vice, establish his right to the patronage, although his presentee had enjoyed the benefice for any length of time, even beyond the years of prescription. And as to the negative prescription, nothing is more certain, in the law of Scotland, than that a right of property once vested in any person, cannot be lost by mere neglect of possession, unless some other person has, at the same time, acquired that property; which cannot be pretended in the present case.

'THE LORDS found, that the clause of *novodamus* in the charter 1510 contained a new grant of the patronage in question; and that the Archbishop of Glasgow's right to the said patronage was not sufficiently instructed by the decret before the Commissary of Dumfries in the 1671, nor by the possession that followed upon the presentation mentioned in the said decret; and therefore preferred the pursuer to the said patronage.'

Act. Miller, Ferguson.

Alt. Crown-Lawyers

Clerk, Kirkpatrick.

Fac. Col. No III. p. 198.

How far a *novodamus* implies a discharge of the casualties of superiority; See IMPLIED DISCHARGE AND RENUNCIATION.

See APPENDIX.