NOVODAMUS.

1680. *February* 29. SCOT *against* The ARCHBISHOP of Glasgow.

No 1.
A charter of resignation containing a *novodamus*, with an express right of patronage of a parish, was preferred to a posterior grant of the said patronage from the same author, although it was *pleaded*, that a *novodamus nihil novi juris tribuit*, and the patronage was not resigned, nor did belong to the resigner *ab ante*; in respect it was *answered*, that a *novodamus* infers a new grant as well as a renovation, and every thing expressed is understood to be habilely disponed whether there was an antecedent title in the resigner's person or not.

THE Archbishop of Glasgow having, upon the 25th instant, insisted in his reduction, which he raised with the suspension, the cause was fully debated, but upon hopes of agreement, the LORDS delayed the interlocutor till this day. The reason of reduction insisted on was, that by the King's gift and disposition, in *anno* 1608, produced, the King disponed the Archbishoprick of Glasgow, with all the privileges and emoluments thereto belonging, with a *novodamus*, repeating the same words, and adding, 'præsertim jus Patronatus Ecclesiæ de Ancrum et Stobo, &c. ad dictum Archiepiscopatum pertinens, una cum omni alio jure ad dictum Archiepiscopatum aut beneficia suprascripta respective aut ullo modo habemus aut habere poterimus,' &c.; by which the King was fully denuded, and this patronage in the person of the Archbishop and his successors, and therefore it is a prior and better right than the disposition of the same patronage by the King to the Earl of Lothian, 1625, to which Ancrum has right. It was *answered* for Ancrum, That the King's charter to the Archbishop, in *anno* 1608, can give no right to the patronage of Ancrum; 1*mo*, Because it proceeded upon the Archbishop's own resignation, and so could carry no more right than the resigner had then; for it cannot be pretended, that the then bishop had right to the patronage of Ancrum, which was never an ecclesiastick patronage, but in all taxations was lifted amongst the laick patronages in the taxation rolls; and there are produced three presentations by the King for the year 1608, and one after the year 1608, to Mr William Bennet, who was the only entrant after 1608, except Mr John Livingston, who entered when the power of presentation by patronage was abolished; but after the King's return, the King's right being revived, Mr James Scot had a presentation, both from the one party and the other; and now the question is of his successor; so that the enumerating of this patronage amongst the benefices

No 1. pertaining to the Bishoprick of Glasgow, was by unwarrantable suggestion and obreption. 2*do*, Albeit there be in the said charter a *novodamus*, it alters not the case, seeing the design and import of a *novodamus* is only to supply the defects of prior titles, resigned or confirmed; but it is not equivalent to an original right; and therefore, unless the Archbishop could show that his predecessors had some title, valid or invalid, the *novodamus* cannot give him an original right, where he had no pretence before; for it is known and ordinary, that a *novodamus*, though it bears *pro omni alio jure*, yet that is but still, and hath its limitation from custom, as to such clauses granted by the King, who is secured against the neglect of his officers; and therefore it will not exclude the King from the casualties of ward, marriage, liferent escheat, nor non-entry, as to years preceding, as was found in the case of the Lord Treasurer Depute against the Earl of Northesk, No 70. p. 6506., whose *novodamus* bore expressly ward, yet was not found to exclude the King's donatar from the marriage. 3*tio*, The conception of this *novodamus* is qualified and restricted to the benefices, *quæ ad prædictum Archiepiscopatum pertinuerunt vel pertinere poterint*, which is expressed in the dispositive clause, and repeated in the *novodamus* before the enumeration, and is repeated again after the enumeration; and therefore the subsequent clause *pro omni alio jure* can only be understood for all right the King had to the bishoprick, and all benefices which had pertained thereto, of which Ancrum was none. It was *replied* for the Archbishop, That the King's charter appeareth clearly to have proceeded of certain knowledge as to the parsonage of Ancrum, for it gives a special reason of the concession thereof, because that kirk was erected upon the lands and baronies belonging to the said archbishoprick; and it is notour, that Nether Ancrum, which is the most considerable barony in the parish, pertains to the see of Glasgow, and is holden feu thereof. And as for the presentations by the King to the kirk of Ancrum produced, the three preceding the year 1608 cannot be respected, because archbishops and bishops were then suppressed, and though they were then titular or tulchal bishops, which were then thought necessary for conveying the rights of churchmen, yet they had not the power of trial, or admission of ministers, but were ordinarly laicks, as there were then titular abbots, who were laicks, and both these and the laick bishops sat in Parliament, but the King alone had the presentation of all ecclesiastick patronages, till the year 1606, when archbishops and bishops were restored as ecclesiastick officers, and had expressly restored to them the ecclesiastick patronages; and as to the King's presentation after the year 1608, the King is presumed universal patron of all kirks, and where no other shows a right, it is ordinary to grant presentations upon that account *periculo petentis*; but it is evident that the archbishop did not collate upon the King's presentation, but Bennet's collation produced is a year after the King's presentation, but not upon it, but upon the bishop's own presentation. And as to the second allegiance of the import of a *novodamus*, it is groundless, and were destructive of the security of the whole lieges, who rest upon charters with a *novodamus* as a ground of right,

No 1.

and do not look after anterior rights; and if a *novodamus* imported not but where a prior title could be shown, the whole lieges would be surprised, and the most part ruined, all resting secure upon a *novodamus*; yea, a single precept of *clare constat* is a good title without shewing any right anterior, and is preferable to all rights posterior to the precept; and it is beyond controversy, that a precept of *clare constat*, yea a charter upon resignation disponing baronies or tenements, with an enumeration of particulars granted by subjects, was never controverted upon pretence that the particulars enumerated were not before comprehended, but adjected as parts and pertinents of before, which was never interpreted as a limitation, obliging the vassal to instruct an anterior title to any part enumerated. It is true *novodamusses* by the King, passing in Exchequer of course, have this limitation by custom, that they extend not to the King's ordinary casualties, which uses to pass by distinct gifts, such as ward, marriage, non-entry, and liferent escheat. But that was never pretended as to any interest in the King to the property of the right disponed by the *novodamus*, and so was never limited, but ever extended against not only defects in vassal's titles, but against forefaulture, recognition, disclamation, purpresture, nullity, reduction, improbation, &c. though none of these were expressed, because the property is still understood to be given by the *novodamus*, whether there was any title to it before or not, but with the burden of these ordinary casualties, except in so far as they are particularly expressed in the *novodamus*. And as to the third, the words *que pertinuerunt*, premitted or subjoined to the enumeration *præsertim* is no more a limitation than the ordinary clause, Comprehending, &c.; whereby the lands comprehended are given as part and pertinent; which is an extension and not a limitation, and yet would give as good ground to allege that that enumeration, which is ordinary in all charters even where there is no *novodamus*, were by obreption and false suggestion, unless it would be instructed by prior rights, that the lands enumerated were parts before of the barony or tenement disponed; and if this were law, the lieges were in a very brave condition of all their rights; but even in this *novodamus*, the words *quæ pertinuerunt*, *&c.* are not repeated after the clause *pro omni alio jure*, that the king had to the archbishoprick or benefices respective above written, or any part thereof, wherein the chief moment of the *novodamus* is, and wherein there is no shadow of limitation.

THE LORDS found the *novodamus* in the King's charter to the Bishop, in *anno* 1608, sufficient to give him and his successors right to the parsonage of Ancrum, and therefore reduced Ancrum's posterior right in *anno* 1625, and his decreet of declarator founded thereon. In this process, the Archbishop objected against Ancrum's right, upon the 169th act, Parl. 13. King James VI, whereby all rights of patronages of benefices granted by the King, without consent of the present incumbent, are declared *ipso jure* null without declarator; but the same being alleged against the Archbishop's right, so that both were in *pari casu*, the LORDS did intimate to the King's Advocate, and he not

No 1. having insisted, the LORDS considered the rights as they were *in campo*, and preferred the prior right as aforesaid.

Fol. Dic. v. 2. p. 8. Stair, v. 2. p. 765.

*** Fountainhall reports this case.

1680. *February* 28.—IN the declarator, Sir John Scot of Ancrum against the Archbishop of Glasgow, of his rights of patronage of the church of Ancrum, and of the tacks of their teinds they took from time to time from the parson at his entry, (which, by the act of Parl. 1606, is declared not to be simony,) " the LORDS found the *novodamus* adjected in Archbishop Spottiswood's patent *in anno* 1608, mentioning the patronage of Ancrum, carried the right thereof; without necessity of insructing, that before that gift, it was one of the patrimonial kirks of his diocese, (as it was alleged the Archbsshop ought to prove) because the words of the *novodamus* imported as much as that it had belonged to the Archbishoprick of Glasgow before; since churchmen's evidents cannot be so easily transmitted from one to another as private men's; and therefore they preferred him to Sir John Scot, whose author's right was not till 1625."

Fountainhall, v. 1. p. 91.

*** A similar decision was pronounced 14th July 1737, Heritors of Spey against Duke of Gordon. *See* APPENDIX.

1714. *November* 25.

No 2.
A charter of *novodamus* on the obtainer's resignation containing words not in the former charter, viz. *cum terris* hail sea-greens, was found to give no new right to sea-greens, nothing having been understood given but use and wont.

BRUCE of Poufoulis *against* RASHIEHILL, NEWMILN, and LADY KINNAIRD.

POUFOULIS pursues a declarator of property of certain sea-greens lying opposite to his lands and barony of Poufoulis, libelling upon a charter in the year 1612, containing a *novodamus*, and especially these words therein inserted, viz. *una cum terris vulgo* hail sea-greens, &c.; to which charter the pursuer has right by progress, and thereupon *alleges*, that sea-greens being generally, at least at every high tide, overflowed by the sea, the same fall under the description of *littus maris quatenus maximus hibernus fluctus excurrit*, and consequently can belong to no heritor, as part and pertinent of his lands and barony, but are *inter regalia* belonging to the Crown, and cannot be conveyed without a special right, such as the pursuer produces, and none of the defenders do pretend to.

It was *alleged* for the defenders, *1mo*, That the charter libelled, proceeding upon resignation, is no further to be extended than the right of the resigner, with a *novodamus* of the subject resigned from the Crown, as will appear by