

1730.

MAGISTRATES
OF PERTH
v.
THE
PRESBYTERY.

<p>The MAGISTRATES and TOWN COUN- CIL of PERTH,</p>	}	<i>Appellants ;</i>
<p>Messrs. THOMAS BLACK, WILLIAM STEWART, and WILLIAM WILSON, Ministers of Perth ; GEORGE FAUHNEY and GEORGE ROBERT- SON, Hospital Masters of Perth ; Mr. ROBERT LYON, Moderator of the Presbytery of Perth, for himself and on behalf of the said Presbytery, as overseers of the said Hospital,</p>	}	<i>Respondents.</i>

6th March, 1730.

TITLE TO PURSUE.—A presbytery may pursue in the name of a kirk-session within their bounds, upon a grant made to that kirk-session for charitable uses.

PRESCRIPTION.—ACT 1617, c. 12.—Possession during forty years without a title not sufficient, in order to plead the negative prescription.

[Fol. Dict. ii. p. 98. Mor. Dict. p. 10723.]

JAMES VI. made a grant to “the poor of Perth” of all lands, tenements, &c. which had belonged to the religious houses within that burgh, and by the charter the rents and yearly income of the same are appointed to be received by a collector, or hos-

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pital master or masters, (to be annually chosen by the kirk session of the burgh,) who are to apply the same to the pious uses mentioned in the charter, and to be accountable for intromissions to the superintendent, the said minister and elders, or to the exchequer if required. Infestment followed upon this grant, and it was subsequently ratified by two acts of Parliament.

After the lapse of some time, the purposes of the grant were neglected, and during upwards of forty years two of the subjects contained in it, (called *Friars Land* and *Charter House*,) had been possessed by the Magistrates and Town Council of Perth, and the income arising from them applied exclusively to the use of the burgh. Under these circumstances, an action of reduction, improbation, declarator, and count and reckoning, was brought by the presbytery of Perth, in their own name, and in that of the kirk-session of the burgh, against the Magistrates and Town Council, the purpose of which was to compel production of their title deeds, if they had any; and to have the same reduced; to have it declared, that the pursuers had the only undoubted right to the lands; and to make the magistrates accountable for the rents and profits unduly received by them.

The kirk-session disclaimed the suit; upon which it was pleaded by the defenders that the presbytery had no right to insist in name of the kirk-session, by whom alone the action could be competently brought. The Lord Ordinary reported this plea to the whole Lords, who, of this date found, "That
July 12, 1728. " the ministers and elders of Perth cannot disclaim

“ the process, and sustained process at the presby-
 “ tery’s instance, in order to exclude any interest
 “ the Magistrates of Perth can pretend to the hos-
 “ pital lands, and remitted to the Ordinary to pro-
 “ ceed in the said cause accordingly.” This in-
 interlocutor was reclaimed against by the minister and
 elders, and their petition refused, of this date, by an
 interlocutor finding, “ That the presbytery might
 “ carry on the process in the name of the said
 “ ministers ;” and remitting to the Lord Ordinary
 to hear parties upon the other points of the libel.

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It was next objected by the defenders, that the
 declarator was barred by their possession during
 more than forty years, the pursuers’ right to the
 lands being lost *non utendo*. It was answered by
 the pursuers, that their right could not be held
 to be prescribed, in a question with the Magis-
 trates, who never had any title whatever to the
 lands. The Lord Ordinary “ repelled the alle-
 “ geance of prescription in respect of the answer,
 “ and found that the lands and others libelled do
 “ pertain and belong to the hospital of Perth ;”
 and by another interlocutor he sustained the action
 of mails and duties, allowing a proof of the posses-
 sion and of the yearly rents, &c. These judgments
 were brought before the whole Court upon a peti-
 tion and answers, and, after a hearing in presence,
 were adhered to.

July 25.

July 26.

Nov. 21,
 Dec. 24.

Thereafter the Magistrates produced as their
 title, a charter granted to the town by Robert II.
 of “ Totum et integrum burgum de Perth, cum
 “ omnibus aliis et singulis libertatibus, asiamentis et
 “ justis pertinentiis quibuscunque, ad dictum bur-

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“ gum spectantibus, tam infra burgum quam extra.”

And it was further maintained, that the charter, &c. upon which the pursuers claimed, were voided by the act of Parliament (1592), whereby all grants by the crown of lands which had belonged to the religious houses were revoked. It was answered, *first*, That the lands in question could not be included in the charter by Rob. II. produced, seeing that they had been the property of the friars long after the date of that charter. *Secondly*, That the ratification by Parliament of the king's grant is posterior to, and contains an express exemption from the act of revocation passed the same year. The Lords “ adhered to the Lord Ordinary's interlocutor, and refused the desire of the bill.”

Feb. 5, 1729.

Entered
Feb. 24.

The appeal was brought from the interlocutors of the 12th, 23d, and 25th July, the 21st Nov. the 24th Dec. 1728, and 14th Jan. and 5th Feb. 1729.

Pleaded for the Appellants :—1. None can sue any action upon a real right, but such as are vested with the property, and by the grants founded on, the ministers and elders of the burgh of Perth are the grantees in trust, and they have disclaimed this action.

2. Supposing the presbytery to be entitled to pursue, yet the action is now barred by the act 1617, c. 12, the burgh of Perth having been in possession of the subjects for upwards of forty years without interruption.

3. Supposing the action to be still competent, the appellants have produced title-deeds prior to their possession.

4. At all events, the appellants are exonerated by

the *bona fide* nature of their possession from the action for profits for forty years past.

Pleaded for the Respondents :—1. The trustees are, by the tenour of the grant, made accountable to the superintendent; and by act of Parliament the bishop and ordinaries have the control of pious donations within their bounds. All offices in the church of Scotland superior to that of a presbytery being abolished, the presbyteries are come in place of the bishops and superintendents.

2. Actions prescribe by the act 1617, only where the possession for forty years has been upon a charter and seisin, or, in the case of an heir, upon a continued tract of seisins flowing upon retours or precepts of *clare constat*.

3. The appellants produce no title. The lands in question are not included in the charter of Rob. II. founded on, because at its date, and until the Reformation, they belonged to the Charter-house in Perth.

4. The appellants, having possessed without any title, are liable for all bygone rents and profits.

After hearing counsel, “it is ordered and adjudged, &c. that the appeal be dismissed; and that the several interlocutors therein complained of be, and the same are hereby affirmed.”

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Judgment
March 6,
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For the Appellants, *Dun. Forbes, C. Talbot, Ro. Dundas.*

For the Respondents, *P. Yorke, Ch. Areskine, Ja. Graham.*