To this last argument of prescription, it was answered by Miss Brodie, That the only act of presentation ever exercised by the Earl's predecessors since the erection, appears to have been that of Mr Alexander Dunbar in 1665, which cannot affect this question, because the presentation being alternate, the Earl of Moray, as joint patron, exercised no more than his own right when he granted this presentation; and it seems that he was allowed the first *vice*, because he was the *dignior persona*. As to the only other settlement made during the last century, 7th June 1670, there is just as much reason to presume that it had been granted by the family of Lethen as by the Earl of Moray, the Bishop's letter mentioning neither the one person nor the other. And the last settlement, in 1752, was made by the late Earl, by tolerance of Lethem, who was willing to join in the settlement, and therefore did not object to Mr Monro the presentee, but at the same time he entered a protestation in the Presbytery records, in order to save his right, which being of the same nature with an infeftment of interruption recorded in the proper register, was sufficient to bar prescription, and must prevent that instance being of avail to either party. As, therefore, the sole person presented by the Family of Moray remained in the cure for only four years, there can be no time for prescription; but there also can be no room for prescription, as the title founded on by the Earl of Moray could only give him an alternate right to the patronage, and can never be a title to acquire the sole right by any length of time. So that there was neither possession nor a title for prescription. No. 1.

The Court found, That Miss Brodie was entitled to this *vice*, and allowed partial decree to be extracted.

Lord Reporter, *Kennett.* For Miss Brodie, *Ilay Campbell.* For Earl of Moray, *David Rae.*

D. C.

1776. *August* 2.

The PRESBYTERY of Strathbogie *against* Sir WILLIAM FORBES of Craigievar, Baronet.

SIR WILLIAM FORBES was undisputed patron of the parish of Grange. Upon going abroad during the latter part of his minority, he executed a deed, constituting Lady Forbes, his mother, his *commissioner, trustee, and factrix*, "declaring, That this present commission is to endure and con- No. 2. *Jus devolutum.* See No. 42. p. 997.

No. 2. " tinue until I, with consent foresaid, (of his curators,) recall the same by " a writing under my hand, *or by attaining the age of twenty-one years com-* " *plete*, whichever of these events first shall happen."

Sir William became of age in May 1774. The parish of Grange became vacant upon 16th October following. On 10th March 1775, Lady Forbes, as commissioner for her son, granted a presentation to Mr John Bonnyman.

This presentation, with a letter of acceptance from the presentee, having been in the usual manner produced before the Presbytery, they required evidence of Lady Forbes's authority, and assigned a term for producing her commission. It was not produced on the day of meeting, 17th May 1775. The Presbytery rejected the presentation, and found, that the right of presenting had fallen into their own hands *jure devoluto*. In consequence of an appeal to the General Assembly, the Presbytery were appointed still to receive evidence of Lady Forbes's powers. Her commission before mentioned was then produced, along with another deed by Sir William, dated at Dresden, 28th June 1775, ratifying the presentation granted by his mother. The Presbytery persisted in finding, that the right of presentation had fallen into their own hands, and they raised a summons of declarator, to have it found, that the presentation by Lady Forbes could have no effect; that the ratification could not validate it, being granted long without the six months; and that therefore the right of presenting had fallen to the pursuers, *tanquam jure devoluto*.

Argument for the pursuers.

The statute 10th of Queen Anne, c. 11. distinctly limits the right of the patron to six months. Now the patron did not present within that time. The commission to Lady Forbes had expired in consequence of the majority of Sir William. It is doubtful whether a patron can delegate to another his right of presenting. But certainly, however that may be, a commission, if at all legal, must contain special authority to grant the presentation to a particular person, whereas Lady Forbes's commission is entirely general, and contains no particular power to that effect. A right of patronage implies in it a trust of considerable importance, in the exercise of which, there is a *delectus personæ*, of moment to the church, and to the public. The right of choice is entrusted to the patron personally, and cannot be delegated. A patronage is indeed an alienable subject, but then the disponee comes precisely in his author's place; but a factory or commission, which does not denude the granter, is evidently a very different thing. It will be found, that, in practice, a right of presenting is never executed in virtue of a general commission. Even the general commission, however, in the pre-

sent instance, had expired by the majority of the granter, as has already appeared from its terms. No. 2.

Lady Forbes may have continued to manage her son's affairs while he remained abroad after his majority; but in doing so, she was a *negotiorum gestor*, not a factor. Her general administration may have been a proper subject of ratification. But such a manager is vested with no active title, nor can the rights of third parties be affected by management of that kind without their consent. If a *negotiorum gestor* were to bring an action for a debt due to his absent friend, no court of law would force the debtor to pay. If a *negotiorum gestor* were to use an order of redemption of a wadset by premonition and consignation, a declarator of redemption could not be founded on that order contrary to the wadsetter's consent. The wadsetter would be entitled to object, that the order had been used by a person who had no authority for using it. Those, therefore, who voluntarily transacted with Lady Forbes, after her son's majority, might perhaps be safe, and Sir William might have been barred from challenging her transactions. But as none can present except the patron himself, or one specially authorised, Lady Forbes, taking upon her to present without any authority, could not thereby deprive the Presbytery of a right which the law had established in their favour.

If the vacancy had happened during Sir William's minority, and while he was abroad, his curator could not have granted the presentation; for curators cannot act of themselves: They can only consent to acts of the minor. Neither would the Court have interfered to authorise a factor *loco tutoris* to grant a presentation. The law has established a right in favour of presbyteries, of presenting to vacant churches, if the patron does not exercise the right within six months; and the Court will not authorise one to act in place of the absent person, to the effect of depriving the Presbytery of the right which the law has vested in them. The *jus devolutum* of the Presbytery is not a forfeiture of the patron's right. The right of the patron is not absolute but qualified, of which the *jus devolutum* is the natural result.

The deed of ratification must go for nothing. The six months were elapsed before it was signed. The presentation, as has been shewn, was granted *a non habente*. The after deed of ratification could not make it better, because the time within which Sir William could exercise his right, was previously elapsed. When the act *de quo quæritur* may be performed at any time, the rule, *Ratihabitio mandato æquiparatur*, will take place. But if the act is to be performed within a limited time, the ratification must be executed within that time; if not, the deed of ratification flows *a non habente*, as much as the deed ratified.

No. 2. The statute 1567 enacts, That "the patron present a qualified person "within six months *after it may come to his knowledge*, of the decease of "him who bruicked the benefice of before." Lord Bankton, from these expressions, says, that the six months can only commence from the patron's probable knowledge of the vacancy; but the statute 10th of Queen Anne must regulate the matter, which expressly enacts, that six months shall run "after such vacancy shall happen."

By the canon law, four months were allowed to the laity, and six to ecclesiastics. The same was the law of Scotland prior to the statute 1567, as appears from Sir George Mackenzie's observations on that statute. At that time it was of little moment whether the six months were to commence from the actual vacancy, or from the patron's probable knowledge of it, as patrons had little occasion to be at a distance from their ordinary place of residence. But the situation of Scotland had come to be very different, when patronage was restored by the statute of the 10th of Queen Anne. Commerce had become extensive. Patrons, in the course of their affairs, might be in the most distant countries, and great inconveniency and hardship might have often occurred, if the six months were to have been counted only from the time of the patron's knowledge of the vacancy. The opinion delivered by Bankton, Vol. 2. p. 23., is supported by no authority or decision, and seems to be very questionable. But even Bankton says, That "the patron's knowledge is to be presumed, after such time as "advice could have been had from the place where the incumbent died, to "the place of the patron's residence." Sir William Forbes might have been informed at Dresden, in a fortnight, of the incumbent's death. So that still the deed of ratification is far without the six months.

It has been said, that the plea of the Presbytery is unfavourable, as founded on a mere neglect in the patron. But the pursuers are only claiming a right, as distinctly given to them by the statute, as the qualified and limited one out of which theirs result, is given to the patron.

Argument for the defender.

The Presbytery seem to misapprehend the nature and purposes of the *jus devolutum* with which the law has entrusted Presbyteries, in the view of enforcing the timeous exercise of the right of patronage. It never was the intention of law to create a rigorous forfeiture of the patron's right, or to confer a substantial right upon the Presbytery. The *jus devolutum* presupposes a neglect of the patron as its basis; therefore, if there has been in fact no neglect, if there has been no undue delay, there is no *jus devolutum*. The patron is the favourite of the statute, and when he appears to have meant to exercise his right fairly and *bonâ fide*, it is the spirit of the law that it should be effectual. These observations are obviously applicable to the present case. Sir William Forbes was abroad. He entrusted his mother with the unli-

mited management of his affairs. In the course of that management a va- No. 2.
cancy in a church, undoubtedly in his gift, occurs. She immediately transmits a presentation to be signed by him, which accidentally does not reach him, so as to be returned in due time. By the powers already vested in her, she executes a presentation herself, as his commissioner, which he approves of and ratifies. Every thing, then, is done which the circumstances admit of towards exercising the right in due time. There ought, therefore, to be no *jus devolutum*.

If Lady Forbes had held no commission, and had acted merely as *negotiorum gestor*, it may be true, that she could not have insisted on completion of her presentation, contrary to her son's wish; but here, he is not disapproving, but heartily approving of her conduct. Surely, then, third parties have no title to interfere, especially while pleading the want of power, for the purpose of creating a forfeiture in their own behalf.

If the vacancy had happened during Sir William's minority, and while he was abroad, there can be no doubt, that if his curators had presented, even without his concurrence, the right would have been preserved; although such an act of management, if he had been at home, would have been invalid. In like manner, if a factor *loco tutoris* had been applied for during his absence abroad, and granted by the Court, such factor might have legally presented. The reason of both is the same,—That every lawful act, for the benefit of the person absent, will be sustained to protect against a penal forfeiture.

The express ratification by Sir William, as soon as the matter came to his knowledge, must put the matter beyond all doubt. *Ratibabitio mandato æquiparatur;* and this ratification must operate *retro* to the date of the act itself; more especially when it is not pleaded to the effect of depriving any third party of a right, but in order to bar a claim maintained by parties who had no radical or competing right in their own person, but would only have been entitled to be heard upon the presupposal of a forfeiture incurred by him.

That ratification operates *retro* to the date of the act ratified, does not seem to be denied. But it is pleaded, that the ratification itself was long after the six months, and therefore ineffectual. But it is of no consequence whether the ratification was within or without the six months. The Presbytery are only entitled to plead upon a supposed neglect in the patron. The presentation by Lady Forbes upon the presumed approbation of her son, barred any foundation for supposing such neglect. And the ratification, at whatever time it was lodged, proved equally the *reality* of that consent which Lady Forbes had presumed. The act and the consent, therefore, must, in the eye of law, be considered as both intervening before the expiry of the six months.

No. 2. The argument of the pursuers proceeds upon a mistake in point of law. The six months do not run from the day of death of the incumbent, but from the time of the probable knowledge of the patron. Such is the doctrine of the canon law. Such is the enactment of the 7th act 1567, which statutes, "That a patron shall present within six months after it may come 'to his knowledge of the decease of him who bruicked the benefice of before." Suppose the case reversed, that the patron had been at home, and the minister had died abroad, could it have been maintained, that the patron's unavoidable ignorance of the fact, should be the cause of forfeiting his right, or that the same ignorance in the Presbytery should be their *modus acquirendi jure devoluto?*

The statute of Queen Anne does not narrow the ancient right of patrons, nor enlarge the *jus devolutum.* The former are put upon the footing of the ancient laws and constitutions, whereas the latter is limited and abridged in every possible case; as, for example, in the case of a patron who grants a presentation, but refuses or neglects to take the oaths, or in the case of patrons known or suspected to be papists, and who do not purge themselves of popery, at or before signing the presentation. In all these cases, the right for that turn falls to the Crown, not the Presbytery, and a second term of six months is granted.

The *jus devolutum* introduced by the statute of Queen Anne seems to have been copied from the ideas of the law of England, where, in the case of a lapse of six months, the right goes to the ordinary or Bishop; after other six months, to the Archbishop; and after other six months, to the King. Now, in the English law books, it is a settled point of law, that if after a church is lapsed to the immediate ordinary, the patron presents before the ordinary has filled the church, the ordinary ought to receive the clerk; for lapse to the ordinary is only an opportunity *of executing a trust;* Burn's Eccl. Law, *voce* Lapse. And that the act of Queen Anne does not derogate from, but is a ratification of the act 1567, is expressly laid down by Lord Bankton, Vol. 2. p. 23.

As the *jus devolutum* is not a competing right with the right of the patron, but merely a trust; before it can be exercised, it must clearly appear that the patron has incurred a forfeiture of his right. But even supposing a forfeiture to have been here incurred, the same equity must apply to it which is applied to other forfeitures. Thus, in the case of an irritancy incurred by an heir of entail, if any plausible grounds can be condescended upon, or if the forfeiture has not been ascertained by a declarator, and matters be still entire, it is the uniform custom to allow the forfeiture to be purged. The same rule must hold in the present case, where matters are still entire, as no settlement has yet been made. This plea is much strengthened by a late instance. The act of Parliament regulating the election of

magistrates within burghs, ordains complaints to be brought within two months of the proceedings complained of. By the set of the burgh of Pittenweem, the Michaelmas election happens so early in September, that the two months were elapsed before the sitting down of the winter session; yet both this Court and the House of Lords sustained a complaint brought from that burgh, even after the expiry of the time limited by act of Parliament. No. 2.

The Court pronounced the following interlocutor: "On report of Lord "Justice-Clerk, and having advised the informations *hinc inde*, the Lords "repel the defences, and decern in the conclusions of declarator at the pur-"suer's instance, in terms of the libel."

Lord Reporter, *Justice-Clerk.* Act. *Macqueen.* Alt. *Henry Dundas.*

W. M. M.