APPENDIX.

PART I

PATRONAGE.

1777. *July.*

Miss BRODIE of Lethem *against* The Earl of MORAY, *et é Contra.*

No. 1. Alternate right to present. See No. 22. p. 9937.

MUTUAL actions of declarator were brought by the Earl of Moray and Miss Brodie of Lethem, against each other, concerning the patronage of the parish of Kinloss, vacant by the death of the last incumbent. This parish had been erected in 1661, out of parts of the two adjoining parishes of Alves and Rafford; whereof the patronage of the former belonged to the Earl of Moray, and that of the other, to the family of Lethem and Lord Spynie lternately. The Court at first, (26th February 1777,) sisted all procedure until the heirs or representatives of Lord Sypnie were called in this suit; and appearance was made, in consequence of this interlocutor, for the Duke of Gordon, who sisted himself as in the right of Lord Spynie.

It was contended by Miss Brodie, that from the very nature of the erection of this parish, the patron of Rafford was entitled to at least an equa voice with the patron of Alves; for as that erection had been made equally from these two different parishes, the patrons of both should retain their former rights, and should therefore present alternately to the new one. That this is both agreeable to the act 1621, cap. 5., and 1617, cap. 3. § 3. That, therefore, it is not only agreeable to law, but to the general practice of the country, that in such an erection the patronage should alternately belong to each of the two respective patrons of those parishes, from which the new one had been disjoined; and in this view, Miss Brodie's claim must be preferred, as it could not be denied, that the Earl of Moray had granted the last presentation to that parish in 1752.

No. 1. To this it was answered, That, even supposing Miss Brodie had the sole right to the patronage of Rafford, instead of possessing it only alternately with the person in the right of Lord Spynie, yet she could not be found to have right to any part of the patronage of Kinloss, because about two-thirds of the stipend of Kinloss is paid out of the lands in the parish of Alves, and the church itself appears to have been situate in that parish: As, therefore, the Earl of Moray, upon the erection of Kinloss, had double the interest in that parish which both the joint patrons of Rafford could pretend to, it was a just and legal consequence thereof, that, instead of the patronage of Kinloss being split into fractions, it should wholly accresce to the Earl as patron of Alves. But in short, if there could have been any room to dispute the Earl's sole right of patronage, as matters originally stood, yet his right is now firmly established by the positive prescription, and any right which the family of Lethem could have had, is cut off by the negative prescription. For the first minister in this parish was settled by a popular call in 1657, while patronage was abolished. The second incumbent was clearly presented by the Earl of Moray in 1665; when the Bishop's letter to the presbytery shows, that he had received a presentation from the Earl of Moray, naming Mr Alexander Dunbar to be minister of Kinloss. The next settlement that appears on record, is that of Mr George Innes, 7th June 1670, in virtue of a letter from the Bishop to the moderator, for transplanting Mr Innes from Bremnay to Kinloss. And it may be presumed, that this was also in consequence of a presentation from the Earl of Moray. The next vacancies in this parish were supplied while patronages stood again abolished by the act 1690; and the last incumbent was presented by the Earl in 1750, although the Laird of Lethem now for the first time protested, that his right should not be hurt by this presentation, but that he should be entitled to the next *vice*. Upon this possession, it was contended by the Earl, that he had established his right, or supplied the defect in his right, if there had originally been any, in the same way as a title to a certain tenement *per expressum* will, through possession for a requisite time, be made to comprehend what was originally part of another tenement, by rendering it *part* and *pertinent* of the tenement to which it is acquired. Now, as the Earl had a good title to the *patronages of the churches and chaplainries of the lands and earldom of Moray*, and has likewise specially a right to the *patronage of the church of Alves*, he apprehends, that either of these titles is sufficient to vest in him, through prescription, a good right to the patronage of Kinloss. And this doctrine of prescription, in the right of patronage, is confirmed by the case of Earl Home against Officers of State, decided finally in the House of Peers, the 7th of March 1759, No. 76. p. 10777.

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.