

No 41. or never taken by probationers before they were licensed; the common time for qualifying was after they had got a presentation, and were in the course of obtaining a settlement; so that as the taking the oaths before being admitted and ordained was sufficient to remove the objection of disqualification, and save the presentee from penalties, it must, *a fortiori*, be sufficient to save the patron's right from forfeiture.

THE LORDS adhered.

Lord Ordinary, *Monboddoo*.
Clerk, ———.

For the Presbytery, *Maclaurin, Crosbie*.
For D. Erskine, *Craig, Rae*.

R. H.

Fac. Col. No 42. p. 115.

1776. August 2. PRESBYTERY OF STRATHBOGIE *against* SIR WILLIAM FORBES.

No 42.

SIR WILLIAM FORBES of Craigievar being abroad while the church of Grange, of which he was patron, became vacant, his mother Lady Forbes, factrix and commissioner for her son, in virtue of a commission empowering her 'to pursue and defend all actions, civil or criminal, whenever he or his estate might be concerned, till he should attain the age of 21,' granted a presentation before the expiry of the six months, but after the period of her son's majority; though, as being abroad, he had never recalled his commission, and she had continued to exercise every act of administration relative to his affairs. The Lady, however, to obviate any objection to her title, procured from her son abroad a ratification of all she had done, and particularly of the grant of the patronage; but this did not arrive till after the expiry of the six months; and the presbytery, in the mean time, had declared the *jus devolutum*, rejected the presentation, and given another in favour of a person of their own choosing. In a declarator brought by the presbytery for supporting their presentation, it was urged for the patron, that the *jus devolutum* cannot fall but through the patron's neglect to exercise his right during the legal term; but here there had been no neglect on his part; for his mother, whose administration, even if questionable, he had ratified, had within the legal term exercised his right. THE LORDS repelled the defences, and decerned in the declarator. See APPENDIX.

Fol. Dic. v. 4. p. 49.

1795. May 15.

No 43.

The six months within which pa-

LORD DUNDAS and MR JOHN NICOLSON *against* The PRESBYTERY of Zetland, and MR ARCHIBALD GRAY.

MR JAMES BARCLAY, minister of Unst in Zetland, died on the 24th December 1793.

Lord Dundas is patron of the parish, and Mr Bolt, his factor in Zetland, wrote to Mr Innes, his Commissioner in Edinburgh, first on the 28th December 1793, and again on the 9th January 1794, informing him of the vacancy.

Mr Bolt's first letter never arrived; but his second was received by Mr Innes on the 30th of January. He forwarded it the same day to Lord Dundas at Newcastle, who got it on the 1st February.

Lord Dundas, 23d May 1794, signed a presentation in favour of Mr John Nicolson, which he immediately transmitted to Mr Innes, who, without loss of time, wrote to the presentee for his letter of acceptance, licence, &c.; and, upon receiving them, he forwarded the whole, along with the presentation, to Mr Bolt, on the 16th June, by a vessel from Leith bound for Lerwick.

The vessel, it was alleged, met with contrary winds, and did not arrive at Lerwick, till the evening of the 26th June.

On the forenoon of that day, being the second after six months from Mr Barclay's death had expired, the presbytery of Zetland met, in terms of an adjournment from the March preceding; and their moderator having received no presentation for the parish of Unst, it was proposed, that, in virtue of their *jus devolutum*, they should immediately proceed to the appointment of a minister.

Mr Bolt, who attended the meeting, upon this represented, that he had received a letter from Mr Innes, dated 5th June, mentioning, that the presentation in favour of Mr Nicolson had been signed some weeks before; that he expected its arrival every hour; and therefore he requested 'the presbytery would delay proceeding in the matter for a limited time.'

It carried, however, by the moderator's casting vote, to refuse the delay; and a petition in favour of Mr Archibald Gray, from some of the heritors and elders of the parish, having been read, they, *de plano*, appointed him to the charge, and fixed a day for his settlement.

One of the ministers present took a protest against these proceedings; and Mr Bolt having received the presentation in the evening, he waited on the moderator, and required him, under form of instrument, to receive it, and to take the necessary steps for Mr Nicolson's settlement.

The presbytery having, nevertheless, settled Mr Gray on the day appointed, Lord Dundas brought an action against them and Mr Gray, concluding, that it should be declared, 'That he had exercised his right as patron within the time required by law; and that the presentation granted by him in favour of Mr Nicolson was valid and effectual.'

In defence, it was

Pleaded; By our ancient law, a lay-patron was obliged to present within four months after the vacancy; Reg. Maj. b. i. c. 2. § 3. Afterwards, by 1567, c. 7. where a vacancy happened by the incumbent's death, six months were allowed to the patron from his knowledge of it; and by 1592, c. 117, where the vacancy arose from his deprivation, he was allowed six months from the time the extracted sentence of deposition was shown to him. But patronage was a-

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trons are bound to present, run from the date of the vacancy, and not from the period it comes to their knowledge; but if a presentation is signed and dispatched within six months from the vacancy, it will exclude the *jus devolutum* of the presbytery, although from circumstances not imputable to the patron, it should not be lodged with the moderator for a short time after the expiration.

No 43.

abolished by 1690, c. 23; and although the rights of patrons were restored by 10th Anne, c. 12, yet this was done under certain modifications. The legislature saw that it was a great hardship on parishes, when their patron was in a distant country, that they should want a minister for such a length of time as was necessary, to give him six months for filling the vacancy after its notification; it would also occur to them, that it might be often difficult to ascertain when that notification was actually received. Accordingly, by § 3. of that statute, it is declared, ' That in case the patron of any church aforesaid shall neglect or refuse to present any qualified minister to such church, that shall happen to be vacant the said 1st day of May, or shall happen to be vacant at any time thereafter, for the space of six months, after the said 1st day of May, or after such vacancy shall happen, that the right of presentation shall accrue and belong for that time to the presbytery of the bounds where such church is, who are to present a qualified person for that vacancy, *tanquam jure devoluto.*' From which it is evident, the right of patrons is limited to six months from the death of the incumbent; and such is the opinion of Forbes (Inst. Part I. p. 52.) who lived at the time the act was passed.

Answered; It is admitted, that by the statutes 1567, c. 7. and 1592, c. 117, patrons were allowed six months for presenting from the time they got notice of the vacancy. Now the declared object of the 10th Anne, was to put the right of patronage precisely on the same footing on which it stood before the act 1690; Bankton, b. 2. t. 8. § 59.; Erskine's Principles, b. 1. t. 5. § 9.; Institute, b. 1. t. 5. § 17.; 2d March 1762, Pror. for the Church against Earl of Dundonald, No 40. p. 9961.; 10th August 1770, Erskine against Presbytery of Paisley, No 41. p. 9966. It is entitled, ' an Act to Restore patrons to their ancient rights;' and even the clause founded on by the defenders, although somewhat inaccurately expressed, will not bear the construction they put on it. It only deprives the patron of his right, if he ' neglect or refuse,' to present within the six months; an expression which evidently implies, that he must be made acquainted with the vacancy before they begin to run.

Besides, were the construction put on the clause by the defenders adopted, patrons might in some cases be deprived of their right before they could hear of the vacancy; and in many, they would have much too little time for making proper inquiries respecting the qualification of candidate; hardships to which it is not to be presumed that the legislature meant to subject them.

Supposing, however, the construction contended for by the defenders were well founded, Lord Dundas has complied with it. As he subscribed the presentation within the six months, he cannot be said to have either neglected or refused to exercise his right for that period. It is true the statute 1567 required, that the patron should, within the six months, transmit the presentation ' to the superintendent of the partis quhair the benefice lyes.' But this requi-

site is wholly omitted in the 10th Anne; and if it is true, as the defenders argue, that an alteration has been made on the ancient rights of patrons by that statute, Lord Dundas is entitled to say, that under it he has, by signing the presentation within the six months, done all that is required for preserving his right.

The Lord Ordinary reported the cause.

When it came to be advised, two of the Judges thought, that the words of the 10th Anne clearly imported, that patrons were to present within six months from the vacancy. They also thought, that it was requisite that the patron should lodge the presentation within that period, and that therefore the action fell to be dismissed. One of the two even doubted, whether the presbytery could wave or renounce their *jus devolutum*.

The rest of the Judges (one excepted) also concurred in thinking, that the 10th Anne had altered the former law, and that the six months now commenced from the death of the last incumbent. But although this alteration (it was observed) is in the main beneficial, as it prevents all disputes about the period when the notification is received, the statute is not to be judaically interpreted. Lord Dundas executed the presentation a full month before the time limited; and it was owing to unforeseen accidents, in no way imputable to him, that it did not reach Zetland before it expired.

THE LORDS "repelled the defences, and found and declared in terms of the libel."

Lord Ordinary, *Esqgrove*.

Act. Dean of Faculty *Erskine, Ch. Hay*.

Alt. *George Ferguson*.

Clerk, *Menzies*.

R. D.

Fol. Dic. v. 4. p. 50. Fac. Col. No 170. p. 401.

See APPENDIX.