

it is, the patron here did present *debito tempore*, and could not present another, until the Bishop had rejected the former; so that what part of the six months was lost by the Bishop's delay, cannot be imputed to the prejudice of the patron.

THE LORDS ordained the point to be debated *in presentia*.

Harcarse, (PATRONAGE.) No 649. p. 211.

No 38.

1696. December 8.

PRESBYTERY OF FALKIRK *against* The Earl of CALLANDER and His TUTORS.

PHILIPHAUGH reported the Presbytery of Falkirk against the Earl of Callander and his Tutors, for declaring that he had lost the vice of presentation of the minister of Falkirk, (whereof he was patron,) both during this vacancy and the next, because he had neither qualified himself, nor applied it to a pious use within the parish. *Alleged*, That being the delinquency of the last Earl, it cannot prejudice his heir; because *in pœnalibus non datur actio in hæredem ex defuncti delicto*. *Answered*, The certification against misapplication of the stipend is not such a penalty as is intransmissible to the heir, but is rather *jus accrescendi* to the moderator of the presbytery, and a devolution; and if the last Earl had no right, he could not give his heir the same, and the tinsel was declared against the last Earl of Callander in his own time. THE LORDS declared against the heir in favour of the presbytery.

Fol. Dic. v. 2. p. 47. Fountainball, v. I. p. 740.

No 39.

1762. March 2.

THE PROCURATOR for the Church of Scotland, and the MODERATOR for the Presbytery of Ayr *against* THOMAS EARL OF DUNDONALD.

THE patronages of the parishes of Monkland and Prestick, within the bounds of the presbytery of Air, belonged of old to the abbacy of Paisley, and were purchased by the family of Dundonald from the Lord of erection of that abbacy.

These two parishes were afterwards united.

In 1662, the then Lord Cochran conveyed the patronage of Monkland to Blair of Adaintoun, in whose family it still remains.

In 1726, Thomas then Earl of Dundonald made a strict entail of his estate, including the patronage of Prestick; but this, notwithstanding, William the immediate predecessor of the present Earl, conveyed the patronage, for favour and affection, to Charles Dalrymple of Orangefield.

Mr William Walker, the last incumbent in these united parishes, having

No 40.

A patron having given a presentation, the person presented signified his acceptance by letter, but when he came to be settled, he declared his renunciation of the presentation, as he had since his acceptance got another. The

No 40.
 patron in
 course of
 post, gave a
 new presenta-
 tion, but
 which hap-
 pened to be
 without the
 six months
 from the va-
 cancy being
 declared.
 The presby-
 tery claimed
 the *ius devo-*
lutum. The
 Lords found,
 that by the
 first accepted
 presentation,
 the prescrip-
 tion was in-
 terrupted,
 and that the
 right of pre-
 sentation had
 not fallen
jure devoluto
 to the presby-
 tery.

been presented by Blair of Adaintoun, the right of presentation for the next *vice* belonged to the patron of Prestick.

In March 1760, a call was given by the consistory of the Scotch church at Rotterdam to the said Mr William Walker; and, upon the 26th of the month, this call was presented to the presbytery of Air.

Mr Walker declared his resolution to embrace the call, but that it would be inconvenient for him to leave this country before the middle of June; upon which the presbytery agreed to delay finishing the affair, by a formal sentence, till the last Wednesday of May.

The presbytery accordingly met upon Wednesday the 28th of May 1760, and pronounced an act, loosing Mr Walker's pastoral relation with the parish of Monkland, and translating him to the Scotch congregation at Rotterdam, 'leaving it to the consistory of Rotterdam to admit him to be minister there, on or before the 1st of August then next.' They did not however declare the vacancy otherwise than by appointing two of their number to preach until a new pastor should be appointed.

Upon the 13th of July 1760, Mr Walker was admitted minister at Rotterdam; and, upon the 4th of November thereafter, the Earl of Dundonald granted a presentation in favour of Mr Alexander Cunningham probationer; which, with the presentee's letter of acceptance, was left, under form of instrument, at the house of the moderator of the presbytery, upon the 25th of the same month.

Mr Dalrymple of Orangefield, who pretended right to the patronage of Prestick, in virtue of the disposition from the late Earl of Dundonald, granted another presentation to Mr George Laurie probationer; and this presentation, with Mr Laurie's acceptance, was lodged with the moderator upon the 19th of the said month of November.

Upon the 27th of January 1761, the presbytery appointed both presentees to preach in the parish.

In the mean time, the Earl of Dundonald insisted in a process for setting aside the disposition by his predecessor to Mr Dalrymple, as a gratuitous deed, contrary to the prohibitions of the entail under which the granter held the estate; and, upon the 31st of January 1761, he obtained a decret of reduction, by which his right to the patronage of Prestick, and his title to present *pro hac vice*, were incontestably established.

At the next meeting of the presbytery, held upon the 18th of March 1761, the Earl's procurator produced an extract of this decret of reduction, and required them to sustain the presentation to Mr Cunningham, and to take the necessary steps for his settlement. Mr Cunningham was then called upon to give his reason why he had not preached in the parish as appointed, when he declared, that the Earl of Eglinton having authorised Mr Montgomery of Lainslaw, his commissioner, to give him a presentation to the parish of Symington,

he had resolved to accept of the same, and to renounce any claim or benefit from the presentation to Monkton.

Immediately after this verbal renunciation, Lainshaw's presentation of Mr Cunningham to Symington, and the presentee's acceptance thereof, were laid before the presbytery, who, after considering the same, together with a petition from many of the heritors, elders, and heads of families of that parish, desiring them to proceed to the settlement, 'accepted Mr Cunningham's reasons for not supplying Monkton according to the presbytery's appointment, as likewise his renunciation, and appointed him to preach at Symington.'

The Earl of Dundonald's procurator being then asked, If he still persisted in his requisition with regard to Mr Cunningham's settlement in Monkton? The presbytery, upon his answering in the affirmative, came to the following resolution: 'In regard they have accepted of Mr Cunningham's judicial renunciation of any claim or benefit accruing to him from the Earl of Dundonald's presentation; also, in regard Mr Cunningham's letter of acceptance of Lord Eglington's presentation to the parish of Symington lies before them, they agree not to take any steps in his settlement at Monkton: And, with regard to Orange-field's presentation, the presbytery are of opinion, that it is now off the field.'

The Earl of Dundonald's procurator immediately protested, 'That the presbytery's accepting of Mr Cunningham's renunciation should not prejudice the Earl's right of patronage to present another qualified person in due time from that date, according to law; and that the presbytery should take no steps with respect to settling any other in the said united parishes.' And, upon the 23d of the same month of March 1761, the Earl granted a new presentation to Mr John Cunningham minister at Dalmellington, which, together with his letter of acceptance, was lodged in the hands of the moderator upon the 27th.

At the next meeting, held upon the 22d April 1761, the presbytery agreed to reject the Earl of Dundonald's presentation in favour of Mr John Cunningham; because, from their minutes, it appeared to them, that the six months allowed by law to patrons for presenting to vacant parishes were elapsed before the giving in of the said presentation; and, for the same reason, found, that the right of settlement was fallen into their own hands, *tanquam jure devoluto*.

The Earl of Dundonald having appealed to the General Assembly, they resolved to delay the consideration of the case till the point of law should be determined in the civil court, and, with that view, directed the procurator of the church to concur with the moderator of the presbytery in raising a process of declarator for having it found, that the right of presentation, *pro hac vice*, had fallen to the presbytery, *jure devoluto*.

A process of declarator being accordingly brought, it was *pleaded* for the pursuers, That from the 28th of May, when the presbytery loosed Mr Walker's pastoral relation to the parish of Monkton, and translated him to the Scotch congregation at Rotterdam, to the 27th of March 1761, when the Earl of Dundonald's second presentation in favour of Mr John Cunningham was lodged

No 40.

with the moderator, more than six months had run; and that, even supposing the presentation and letter of acceptance of Mr Alexander Cunningham, left at the moderator's house upon the 25th November 1760, to be an interruption, and that the same continued till the 18th of March 1761, when the presentee accepted of a presentation to Symington, and renounced that of Monkton; yet, as there remained only three days of the six months unexpired upon the said 25th of November, so, from the 18th of March 1761, when the first presentation was renounced, to the 27th of that month, when the second was lodged with the moderator, nine days had run; from which it was clear, that the last presentation came, at any rate, six days after the expiry of the six months allowed by law.

Answered for the Earl of Dundonald; *imo*, A patron's granting a presentation to a qualified person, which is accepted by the presentee, and is regularly laid before the presbytery within six months of the vacancy, but is afterwards rendered ineffectual by the presentee's renunciation, imports a legal interruption of the currency of the six months, so as to make that time commence *de novo* from the presbytery's acceptance of the renunciation. The right of patronage is a civil right, or right of property, and, if a patron were not, from regard to public utility, laid under certain limitations, he could not be precluded from the exercise of his right of presentation by any lapse of time, less than would be sufficient to cut down the right of patronage itself. Now, although the right of presentation be confined to six months from the vacancy, yet, as that limitation is evidently a penal restraint, it ought to be explained in the manner most favourable to the patron. When he presents a qualified person, who dies or renounces before the necessary forms are dispatched and the settlement completed, he does all that is incumbent upon him to supply the vacancy; the benefice, *quoad* his right, is thereby as effectually filled while the settlement depends before the church-courts, as if the presentee were actually settled: He cannot revoke his presentation or grant a new one till it is out of the field; he has no controul upon the presentee, nor upon the presbytery; his right, therefore, cannot in equity be hurt by the act or deed of either. Hence, it is equally consistent with reason and justice, that six months should be allowed to him from the death or renunciation of the presentee, as from the death or removal of an incumbent fully vested in the benefice.

This construction, so agreeable to reason, is confirmed by the opinion of the greatest lawyers. Lord Stair says expressly, lib. 2. tit. 8. § 35. That, if the presentee be rejected, 'the patron must present another, which must be done within six months after the vacancy may come to his knowledge, (but the six months may not run from the vacancy, but from the refusal or appeal discussed, which cannot be determined in six months,) otherwise the kirk may admit a qualified person for that time.' And surely, the same reason holds for giving the patron as much time from the acceptance of the presentee's renunciation without his consent, as from the rejection of a qualified person.

The declared opinion of the legislature likewise supports this doctrine. By the statute of the 5th of George I. cap. 29. § 8. it is provided, 'That, if any patron shall present any person to a vacant church, who shall not be qualified, &c, or who is then, or shall be, pastor or minister of any other church or parish, or any person who shall not accept or declare his willingness to accept of the presentation, such presentation shall not be accounted any interruption of the course of time allowed to the patron for presenting, but the *jus devolutum* shall take place, as if no such presentation had been offered.' When the statute thus declares, that the presenting an unqualified person, or one who does not accept, shall not be accounted an interruption, it admits, *e contrario*, that the presenting a qualified person, who does not accept, shall be an interruption of the six months, as clearly as if it had so expressly declared. The only question then is, What is the legal effect of an interruption of the time prescribed for excluding a civil right? Now, it is established by the opinions of all lawyers, and by a tract of uniform decisions, that an interruption of any kind of prescription makes the course of time to begin to run *de novo*, from the period of such interruption. An interruption made by a process has unquestionably that effect: On the other hand, any particular circumstance that is only suspensive of the currency of prescription, is not, in the language of the law-books or acts of Parliament, said to interrupt it. Thus, in the act 1617, minority is not stated as an interruption of the prescription thereby established; but it is declared, 'that, in the course of that prescription, the years of minority shall not be counted.' Again, in the statute of 19th of Geo. II. cap. 7. it is said, 'that the time and space betwixt the 16th of September 1745, and the 1st of June 1746, shall not be reckoned in any short prescription, but shall be deducted from the same.' Hence, it is evident, that the legal meaning of an interruption is very different from that of a suspension of the cause. It therefore clearly follows, from the words of the above statute of Geo. I. that the presentation and acceptance of a qualified person form an interruption of the six months, so as to make them to begin to run *de novo*.

2do, Supposing the first presentation not to interrupt, but only to suspend the currency of the six months during its dependence, the vacancy was not completed till the translation took effect by the former incumbent's admission to his new charge. The six months could therefore only begin to run from the 13th of July, instead of the 28th of May 1760; in which view, after deducting the space of time that intervened betwixt the 25th of November 1760, when the first presentation was left at the moderator's house, and the 18th of March 1761, when the presentee's renunciation was accepted by the presbytery, it will be found, that the second presentation was lodged near six weeks sooner than was necessary.

Upon this point the patron is intitled to maintain, That the presbytery's act of translation of the 28th of May 1760 was altogether irregular, as proceeding without a previous citation to the parish of Monkton to answer the reasons of

No 40.

transportation ; and therefore could not hurt his right. But, laying that circumstance out of the question, the translation and vacancy could by no means be thereby completed. An act of transportation enables the incumbent to be admitted to another charge ; but it is his actual admission only that completes the transportation, and makes the commencement of the vacancy.

3tio, At any rate, the patron's right could not be hurt by any act either of the presentee or presbytery, of which he was ignorant. As much time must therefore be allowed to him over the six months as was necessary for his getting information of a vacancy happening through such act, and granting a second presentation. It is an established rule, That *non valens agere*, is a good exception to the currency of any prescription or lapse of time whereby a right is cut off ; and it would certainly be unjust to forfeit a patron of his right for not exercising it, while the opportunity of doing it is unknown. Now, as the act of the presbytery translating Mr Walker, which passed upon the 28th of May 1760, could not be known at Edinburgh by the common course of post till the 31st of that month, the six months could not from thence elapse till the 1st of December ; so that, upon the 25th of November, when the first presentation was lodged, there were still six days to run ; and, as the patron was only informed of the presbytery's proceedings of the 18th of March 1761, when they accepted of the first presentee's renunciation, by a letter from the moderator dated the 19th, which was received by post upon the 23d, the remaining six days could only then begin to run, and, of consequence, the patron's right was exercised two days before the lapse of the six months, when computed in the strictest manner that law or reason can admit ; seeing that the second presentation, and the presentee's letter of acceptance, were lodged with the moderator upon the 27th of the same month.

' THE LORDS found, That the right of presentation *pro hac vice*, had not fallen *jure devoluto* to the presbytery ; and therefore assoilzied from the declarator.'

A&t. David Dalrymple.

Alt. David Rae.

A. W.

Fol. Dic. v. 4. p. 49. Fac. Col. No 88. p. 193.

1770. August 10.

THE PRESBYTERY of Paisley *against* DAVID ERSKINE, Esq. ; Patron of the Parish of Erskine.

No 41.

A minister of a parish having died on 2d January, and the patron being abroad, a pre-

THE minister of Erskine having died on the 2d January, the parish was declared vacant by the Presbytery of Paisley on the 15th of that month 1759. Lord Blantyre, the patron, being then in Italy, as soon as he was informed of the vacancy, granted a conveyance of his right to David Erskine, in order to his granting a presentation to Mr Walter Young. This disposition was dated