

Lords found that no action lay. They held it to be a clear smuggling contract. This seems to me to be a strong case, and deserves reconsideration.

PATRONAGE.

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

IN determining a case between the Presbytery of Strathbogie and Sir William Forbes of Craigievar, patron of the parish of Grange; the Lords were of opinion, that a general power of factory was not sufficient to entitle a factor to present in absence of his constituent,—and, that still less was such power competent to a *negotiorum gestor*, or to a factor, continuing to act as factor, after the factory was expired; and therefore, where, as in this case, Lady Forbes, in virtue of a general factory from her son, who was abroad on his travels, but which factory was truly expired, though she continued to act under it, did present to the church of Grange within the six months,—the Lords found that the *jus devolutum* took place notwithstanding; and that any ratihabition by Sir William, after the six months, did not draw back, and had no effect. Some of the Lords seemed to consider the *jus devolutum* as a forfeiture, and were desirous of laying hold of any pretext to evade it; but the majority were of a different opinion, and thought, that, if a latitude of this kind was allowed, there would be an end of the *jus devolutum* altogether.

Lord Covington gave his opinion, that the six months were strictly to be adhered to, and that no time was to be allowed for giving the patron notice of the vacancy; at the same time he was, in this case, of opinion, that the *jus devolutum* had not taken place: he considered it as a forfeiture, and that even the act and deed of a *negotiorum gestor* was sufficient to prevent the lapse of it. Lord Gardenstone and Lord Auchinleck were of the same opinion. Lord President inclined to think, that the general factory was sufficient; but his difficulty lay in this, that the factory was expired.

In a *vice* patronage, each patron is patron of the whole parish, and may present to every *vice*, provided that the other does not interfere and hinder him. It is *jus tertii* to the Presbytery and every other person. It is also to be observed, that, although the patrons present *per vices*, each patron has the disposal of the vacant teind of the parish of which he was patron before the annexation. This is Lord Braxfield's opinion. It may also be maintained, that, as each patron has his turn *per vices*, if the patron whose turn it is lie by and do

not present, but allows the other to present, and his presentee to be settled, it will not from this follow, that he has right to the next *vice*. *Sibi imputet* that he did not exercise his *vice* when it came: he must wait till it come about again.

PERSONAL AND TRANSMISSIBLE.

AN Action, before the Dean of Guild of Edinburgh, was brought at the instance of

1773. *February*. The PROCURATOR-FISCAL *against* JOHN PAXTON, Stabler;

for using false measures,—in which Paxton was fined, and ordered to prison till payment. He suspended, and before decision died. The Lords found that the action had fallen, and did not transmit against his heir; who could not be punished for his predecessor's fault.

Same 2d *December* 1768, *Peter Williamson against Merchants of Aberdeen*.

CALDER *against* M'KENZIE.

AN act of liti-contestation transmits certain penal actions against heirs, because by this a relevancy is established, and parties join issue in going to proof upon that relevancy; but, in an act allowing a proof before answer, no relevancy is established, nothing is determined at all, no obligation is created which did not before exist, and no room for arguing that the ground of action is rendered transmissible against heirs: Every defence relevant in law, may still be proponed; and, though the libel should be proved, the defender may be assolied.

So it was argued for the Relict and Children of M'Kenzie, tutor of Kilcoy. The case was a transference of an action of oppression and damages, brought by Calder against M'Kenzie, for having defamed him as guilty of an intention and attempt to assassinate him,—concluding also for a censure, and a sum *in solatium*. In this, an act before answer was pronounced and extracted, before M'Kenzie's death: after his death, a transference being brought, Lord Stonefield transferred it, that is, the whole *statu quo*, reserving all defences. And the Lords adhered.

On the above subject, see Bank., V. II, p. 608; Erskine, B. 4, *tit.* 1, § 70.