

No 22. the Earl. The last by the Earl, in 1750, was protested against by Lethem, which clearly interrupted any prescription. At any rate, there was no room for prescription in the present case; for as the Earl's title could give him only an alternate right, so that could never be a title to acquire the sole right. THE LORDS found Miss Brodie entitled to this vice of presentation. See APPENDIX.

Fol. Dic. v. 4. p. 50.

1778. *January 22.* THOMAS TAIT *against* GEORGE SKENE KEITH.

No 23.
Right of the
patron to
present by a
commission-
er.

THE late Earl Marischal having his residence in a foreign country, committed the management of his affairs in Scotland to Messrs Alexander Keith, elder and younger; and the commission under which they acted contained a special power to grant presentations to the churches whereof he was patron.

In 1776, the church of Keith-hall, in the gift of Lord Marischal, became vacant. Two presentations were granted; one on the 9th May, in favour of Skene Keith, by Lord Marischal's commissioners, who had previously received a letter from him, desiring them to present Keith. This presentation was transmitted next day by post to the presentee. The other was executed on the 10th May by Lord Marischal himself at Potsdam, in favour of Thomas Tait, and was on the same day transmitted by post to his commissioners, but without instructions to forward the presentation to Tait. The commissioners having already presented Keith, sent it back to the patron at Potsdam, from which it was afterwards transmitted to the presentee.

After some procedure in the church-courts, mutual declarators were brought at the instance of Keith and Tait, for ascertaining the preference of their respective presentations.

Pleaded for Tait; imo, The power of presenting cannot be delegated to a factor. It is a faculty personal to the patron. In no statute or law-book is mention made of presenting by a commissioner or factor.

The act 10th Anne, c. 8. obliging the patron to qualify, proceeds on this principle, that the right of presenting cannot be delegated. By that statute, § 6. and 7. the patron is strictly required to take the oaths to government; and, if suspected of popery, to subscribe the formula, before presenting, otherwise the presentation is declared to be null.

If it had been lawful to present by a factor, the act of Parliament, in order to prevent these regulations from being defeated altogether, would have required the same oaths to be taken by the factor presenting, as by the patron when he presents. But, as it was understood to be the law, that the factor could not present, this was unnecessary. Accordingly, in practice, no popish patron attempts to present by a factor; and it is always thought necessary that the patron, who does not chuse to take the oaths required by the statute, should

dispose the right of patronage itself, *pro hac vice*, to one who will comply with the law in this respect. Because the power of presenting cannot be delegated, crown-presentations must proceed on a sign-manual, though the crown-acts by its commissioners, the barons, in disposing of vacant stipends, and exercising every other right consequent on patronage.

2do, Supposing it lawful to present by commissioners having special powers, commissions of that kind are, from their nature, revocable, either expressly or tacitly. Lord Marischall, by presenting himself, virtually revoked, in that instance, the general commission to the Messrs Keiths; and the presentation by him, as it was granted before any thing had followed on that by the commissioners, must be preferred, as the true choice and nomination of the patron. The presentation by the commissioners is not to be considered as even prior to the other; for, though it is earlier in date, both must be held as delivered at the same time, both having been put into the post-office on the same day.

Pleaded for Skene Keith; *imo*, The right of patronage is a patrimonial right *in commercio*, and the power of presenting is a branch of it. It is not disputed that the patron can exercise all the other branches and pertinents of this right by a factor, such as uplifting and discharging the vacant stipends, tithes, &c. —There is no solid reason given for making an exception of the power of presenting.

There was no need to notice the case of a factor presenting in the statute 10mo An. c. 12.—As the patron, from whom the right flows, must be qualified, it is immaterial whether the commissioner is so or not. In the present instance, both patron and commissioners were qualified.—Law-books may not have laid down *totidem verbis*, that a patron can present by a factor specially empowered. But, in cases where doubts might possibly arise, the law-books are not silent. It is said the tutor may present, in name of the pupil, the husband as administrator for the wife, &c. Bank. v. 2. p. 37. § 100.—Crown-presentations require a sign-manual, because it was not judged expedient for the Crown to delegate the power of presenting to the Barons, whose offices are for life, and not from any doubt that the power of presenting might be delegated.

The usage was said to be in favour of this plea, and that it was a common practice among patrons residing abroad, to present by commissioners, having special powers.

2do, The presentation by the commissioners is the prior presentation. It is confessedly so in date. As to the delivery, the two presentations were put into different post-offices on the same day; but that of the patron was then transmitted by him only to his commissioners, and not to the presentee. It must, therefore, be held as remaining in the custody of the patron, until, upon being sent back, it was afterwards transmitted from Potsdam to the presentee. But the presentation by the commissioners was in the hands of their presentee before that time; consequently it is prior in point of delivery.—In every question with a posterior presentation by the patron, it must be considered as the pre-

No 24.

sentation of the patron himself. It is, therefore, of no moment, that Skene Keith was not *de facto* settled by the church before the presentation to Tait. The patron was *functus*, as well as the commissioners, by the first, and no effectual presentation could thereafter be granted by either.

In this case each party *alleged*, That undue means had been used in obtaining the other's presentation; and, in the action at the instance of Tait, this was made a ground of reduction. But the cause was determined by the Court solely on the ground of law.

The COURT were unanimously of opinion, that a patron may delegate his power of presenting to a factor. They found, 'That the Messrs Keiths, having full and special power by commission from G. Keith, late Earl Marischal, to grant presentations to parish-churches, whereof he is patron, in the same manner he could do himself; and having granted a presentation, as commissioner aforesaid, to Mr Skene Keith, to be minister of this parish, which was prior to a presentation to the same parish, granted by the Earl himself to the said Thomas Tait; therefore, in a competition betwixt the two presentees, found the presentation to Keith preferable.'

For Keith, *D. Rae, G. Ogilvie.*

Alt. Advocate, Crosbie.

Fol. Dic. v. 4. p. 49. Fac. Col. No 6. p. 11.

* * * This case was appealed :

THE HOUSE OF LORDS ORDERED and ADJUDGED, That the appeal be dismissed, and the interlocutors complained of be affirmed.

1778. June 30. EARL OF HADDINGTON *against* The OFFICERS OF STATE.

No 25.

Title in the Lord of Erection to the patronage of a church annexed to the benefice.

THE church of Coldstream having become vacant, two different presentations were given, one by the Crown, and the other by the Earl of Haddington. The Earl soon after brought a declarator of his right of patronage, in which he called the Officers of State.

Pleaded for the pursuer; The lands of Coldstream, and the churches therein situated, formerly belonged to a convent of Cisterians, and, upon the reformation, were annexed to the Crown.

In the year 1621, an act passed for dissolving the priory of Coldstream from the Crown, and erecting it into a barony in favour of Sir John Hamilton, third son of the Earl of Melrose; and this act was followed by a charter from the Crown to him of the subject. Sir John, thereafter, conveyed the whole grant to his father, who was the predecessor of the pursuer.