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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.'

Act. *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

the 8th June; and in consequence thereof, a presentation in favour of Mr Young was granted by Mr Erskine, dated the 30th June—offered to the moderator of the presbytery on the 2d of July—refused on account of that day being a Sunday, but received by him the day following. The acceptance by the presentee was dated on the 1st, and the presentation was then received by the Moderator of the Presbytery on the 5th July.

No 41. sentation was not offered to the moderator of the presbytery till the 2d July thereafter, which being a Sunday, it was refused. It was received however the day following, but this being one day after the lapse of the six months, the presbytery brought an action to have it declared, that the right of presentation had fallen to them *jure devoluto*. The Court were of opinion, that there was not ground for the action.

Some of the heritors having objected to the presentation, as not having been granted within the time limited by law, and that the right *jure devoluto* had accrued to the Presbytery; after some procedure in the church courts, a declaratory action was brought at the instance of the Presbytery, for having the presentation set aside, and for having it found and declared, that the right had *jure devoluto* fallen to them.

In support of this action, it was *pleaded* by the Presbytery,

1*mo*, It was absolutely necessary that the exercise of the right of patronage should be limited to a precise definite time; as otherwise churches might, and very often would, be kept vacant for ever, or for a long period. This the law disapproved of; and therefore confined the exercise of the right to a period of six months from the time the vacancy happened. According to this rule, the patron's knowledge of the vacancy neither was nor could be the term from which that period was reckoned; as thereby the matter would be thrown entirely loose, and the settlement of churches made to depend on a variety of accidental circumstances.

By the canon law and the statute 1567. c. 7. the time that the patron came to the knowledge of the vacancy was that which was regarded; but as the inconveniency of that rule was soon felt, by the subsequent statutes, no accidental prolongation of the six months was admitted of. The act 1690. c. 23. which gave the Presbytery a *jus devolutum*, made no *salvo* as to the period's running from the knowledge of the event; and the act 10th of Anne, c. 11. not only made no such exception, but fixed down a *terminus a quo*; and therefore in express words declared, that if the patron of a church neglected to present a qualified minister to such church as shall happen to be vacant, "for the space of six months after such vacancy shall happen, the right of presentation shall accrue and belong for that time to the presbytery of the bounds where such is; who are to present a qualified person to that vacancy *tanquam jure devoluto*."

The act of the 5th Geo. I. c. 28. went entirely upon the same plan, and made other regulations for enforcing it. It made the acceptance to be part of the presentation; and enacted, that both should be lodged within the said time, that is, within six months, the period fixed by the former statute. It made no exception *de verisimili notitia*, or as to the time in which the vacancy might come to the patron's knowledge; but expressly declared, that unless the presentation and acceptance were lodged within the said time, they could make no interruption. Such was undoubtedly the intention of the law; and though Lord Bankton and Mr Erskine qualified these enactments, and gave them an interpretation

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agreeable to the statute 1567, their opinion could not be set up in opposition to the express words of the legislature.

2do, As the law was unquestionable, it was only necessary to shew that the circumstances were such as were struck at by the enactment. The incumbent died on the 2d January 1769, and it was not till the 3d of July thereafter, that the presentation was lodged with the Moderator under form of instrument; so that the six months were not at any rate expired. The answer, that it had been offered to the Moderator on the 2d of the month would not avail; that day was a Sunday, and the law did not allow any *actus legitimus* to be gone about on that day, even though a hardship might arise from the prohibition. Many instances of this rule could be given, such as a summons of interruption of prescription, or the protests of bills. The offer, besides, in the present instance upon the Sunday was even too late; for as the vacancy commenced on the 2d of January, the six months, reckoning *de momento in momentum*, were completed on the 1st of July, so that if both the 2d of January and 2d of July were to be taken into computation, the result would be six months and a day.

3tio, The acceptance of the presentation was clearly without the period. By the act 5th, Geo I. c. 28. the lodging the letter of acceptance within the six months, was a co-requiste with the presentation; that too most justly; for if a period had not been fixed for the one as well as the other, the settlement of churches might still in an arbitrary manner have been delayed. Now the acceptance was not lodged till the 5th of July; and though it was said to have been signed on the 1st of that month, yet, by the word *accept*, the statute never could mean the bare subscription of the presentee; nor could the public notified acceptance be held as taking place till the letter was delivered.

Pleaded for the patron, the defender;

1mo, As it was the intention of the law, by the restriction upon the right of patronage, merely to guard against the fault or neglect of patrons, it never could be meant to limit that right, when he was guilty of neither. A patron was not in fault till such time as he was made acquainted with the vacancy; and hence the prescription against him could not begin to run but from that period. Such avowedly was the ancient law of this country. The canon law observed that rule; and by the statute 1567, c. 7. the right of *devolution* was expressly declared to have accrued only after six months from the time that the vacancy came to the patron's knowledge. The same rule did not appear to be altered by the subsequent statutes, neither during episcopacy, when the right of *devolution* fell to the Bishop, nor after it was abolished, when it fell to the presbytery; nor did it ever take place but when the patron neglected to present within six months after the death might have come to his knowledge; or in case of deprivation, within six months after the sentence.

By the statute 10th of Anne, c. 11, patronage was revived, and every thing restored to the same state as they were in before the act 1690. Though in that statute, therefore, the words, after the vacancy may have come to the patron's

knowledge, were not repeated, yet as the intention of the enactment was to restore the right of presentation entire, the mere omission could not be construed into a repeal of the former law. This doctrine was laid down by Lord Bankton, v. 2. p. 23. § 59.; by Mr Erskine, b. 2. t. 1. § 9.; and in the case 2d March 1762, Parish of Monkton, No 40. p. 9961, the claim of the presbytery to present *jure devoluto* was, in circumstances extremely similar to the present, rejected.

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2do, As the presentation in Mr Young's favour was tendered to the moderator of the presbytery on the 2d July, and as the 2d of January, the day the last minister died, could not be reckoned in the computation, the six months, even according to the strictest interpretation, were not expired. The presentation, on account of its being rendered upon a Sunday, was indeed *refused*, which was wrong; for as the execution of hornings, intimation of sales, and other judicial matters, were allowed on that day by law, there was less reason why a notification of this kind should have been rejected. In many instances, the execution of diligence, and other matters relating to civil rights, had been sustained, though done upon a Sunday. 24th February 1627, Earl of Cassillis *contra* Macmartin, *voce* SUNDAY; 26th June 1628, Lord Newark *contra* Maxwell, IBIDEM. But whatever doubt might be entertained as to the validity of acts of that nature, when done upon a Sunday, there could be none with regard to such an act as the present, which was not only an act of necessity to save a just right, but one respecting the concerns of the church. The rejection indeed made no difference; for, by the *offer*, the presentation was out of the patron's hands, so far as it depended on him; which sufficiently discharged his duty.

3tio, As to the acceptance by the presentee, the act 5th Geo. I. c. 28. by which that matter was regulated, mentioned no particular time, within which it must be made. But although that act had, in express words, prescribed that the acceptance was to be made by the presentee within six months, to be reckoned from the death of the last incumbent, the terms of the statute would in the present instance, have been strictly complied with. The acceptance was dated the 1st of July, within the six months; and though it was not received by the moderator till the 5th, yet as the words of the statute said nothing with regard to the acceptance being lodged, but required only that the presentee shall accept, or declare his willingness to accept, of the presentation within the said time, every requisite of the statute was, by the declaration of the 1st July, expressly fulfilled.

In giving judgment, the Court was chiefly swayed by the facts which occurred, viz. That the presentation was lodged with the moderator, and accepted of by the presentee, within the six months prescribed, even computing that period from the very day the vacancy happened by the death of the former incumbent; and that by the steps which, in the present instaace, had been followed, the enactments of the statutes had been sufficiently fulfilled.

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Upon advising informations, the LORDS sustained the defence, and assoilzied the defender.

The presbytery gave in a reclaiming petition; in which, besides the former, the following additional points were argued:

1mo, By the statute 10th of Anne, c. 12. § 6. it was enacted, that all patrons, at or before presenting a minister, shall take the oath appointed to be taken by persons in public trust; and in case of refusal or neglect, that such presentation shall be void, the right to devolve to her Majesty, who might accordingly present a qualified person within six months. Lord Blantyre, the patron, previouly to the presentation by Mr Erskine, had granted a presentation to Mr Young, which, on the 30th June, had been presented to the moderator of the presbytery, but immediately thereafter withdrawn. The reason was obvious; for as Lord Blantyre had not taken the necessary oaths he was apprehensive that he would thereby have lost his right of presentation; and the conveyance to Mr Erskine was then devised, in order, if possible, to save the right, and still to present to the same person. By the presentation, however, which Lord Blantyre had actually given and signed, and which had been presented to the moderator, his right, as he had neglected at the same time to take the oaths required by statute, was, *ipso facto pro hac vice*, lost, and devolved upon the Crown.

The forfeiture having been incurred, it was not in Lord Blantyre's power, either by withdrawing the presentation, to reinstate the right in his own person; or, by conveying the right of patronage to another, by that means, through the medium of Mr Erskine, radically to preserve the right, which, by the enactment of the statute, was declared to be forfeited for the neglect. The enabling a non-juring patron to present in this manner was such a device as was called by the Civilians, *fraus legi facta*, l. 29. and 30. *D. De legibus*; and it was *triti juris*, that an act of this description, in defraud of the law, was equally ineffectual with a direct breach of it. The consequence here was obvious; the right had devolved to the Crown, but having been neglected to be exercised within the six months limited, the *jus devolutum* of the presbytery fell again to take place in the same manner as if no presentation had been signed at all.

2do, By the statute 5th Geo. I. c. 29. it was declared, that all persons presenting themselves for trial to be licensed to preach, or to be ordained a minisser, shall, upon being admitted or ordained, take and subscribe the oath of abjuration, and be furnished with a certificate of their having done so; and by another clause of the same statute, it was enacted, that if any expectant of divinity shall apply to any presbytery in order to be ordained or licensed, without a certificate of his having taken the above oaths, he shall be liable to imprisonment, and shall be incapable of enjoying any benefice, by virtue of any presentation, as a minister of any parish, for the space one year. This enactment applied expressly to the present question. The presentee, neither qualified by taking the oaths required when licensed to preach, nor when, in conse-

quence of his presentation, he applied to the presbytery to be ordained minister of the parish of Erskine. The conseqeunce of these facts was equally obvious; for as the patron had presented a person not qualified, in terms of this statute, the presentation was of no avail; and the *jus devolutum* took place in the same way as if no such presentation had been given.

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Answered for Mr Erskine;

1*mo*, The pursuer's new ground of challenge proceeded entirely upon the assumed fact of Lord Blantyre's being a non-juring patron; but of this there was no proof; and it neither could nor would be presumed. But although it were founded on fact, still, by the statute in question, the sole benefit of the forfeiture was given to the Crown, not to the presbytery; and hence it was *jus tertii* to the presbytery to found on the right of the Crown, which had made no claim, nor brought any declarator to ascertain the forfeiture. But though the plea maintained had been competent in law, there were not *termini habiles* in the present instance to support it. The presentation founded on was said to have been signed by Lord Blantyre in Italy; and hence, admitting that to be the fact, it never could be the meaning of the law to impose a forfeiture of this kind on account of a patron's not qualifying at a time or place where it was impossible for him to do it. The statute could only be held to apply to a presentation which had been followed out and made the ground of judicial proceedings, in order to a settlement. A patron may alter his mind and recal his presentation; and as, in the present case, it had merely been delivered, and immediately withdrawn, without having been given in to the presbytery; nothing was done by which the forfeiture could be incurred.

The second branch of the objection, that Lord Blantyre could not evade the statute by granting a conveyance of his right to another, stood also on the assumed ground of his being a non-juring patron. Though the fact had been so, it was of no consequence. There was no law or statute which disabled a person not qualified to government from holding the right of a patronage; nor did any law exist by which a non-juror was disabled from alienating such a right to any one he might think fit. Penal laws were not to be extended; so that though the law had gone so far *in pœnam* as to restrain a non-juring patron from presenting, it had not gone still farther, and restrained him from alienating the patronage itself.

2*do*, It was an established rule, that in questions arising upon penal enactments, the most favourable construction was to be received. By the first clause of the statute founded on, it was provided, That every expectant, &c. shall, 'upon his obtaining a licence to preach, or being admitted or ordained to be a 'minister, take and subscribe the oath,' &c. As these words imported the alternative of being licensed or ordained; hence, if he got himself qualified between the one period and the other, he sufficiently satisfied the law; and as Mr Young was not yet ordained, there was no defect which could not, in terms of the statute, be removed. This was agreeable to the general understanding of the law and to the practice of the clergy of this country. The oaths were seldom

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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, *Monboddo*. For the Presbytery, *Maclaurin*, *Crosbie*.
Clerk, ——. 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 chusing. 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.