

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.

In the act 1621, the subjects dissolved from the Crown, are described to be the priory of Coldstream, and the benefice thereof, 'with all lands, kirks, teinds, &c. pertaining to the said priory, as well the temporality as the spirituality of the same; and specially, all and hail the lands, &c.; also the teinds, parsonage and vicarage, of all and sundry the kirk and parish of Coldstream, pertaining to the said priory of Coldstream, as a part of the spirituality of the same, with all other kirks and teinds pertaining to the said priory, as spirituality thereof.'

As the teinds of the parish of Coldstream were part of the spirituality of the priory, the person serving the cure in the church of Coldstream, must have been a vicar named by the prior and convent.—The right of the ecclesiastical titular, in such a case, to supply the cure of the annexed benefice, was not, in strict language, a right of patronage; the titular himself being, in effect, parson of the parish, and the vicar only a substitute. But, when the large benefices were given away to lay titulars, this right of presenting to the annexed benefice became a proper right of patronage in the lay titular, and was exercised and transmitted as such; Sir G. M'Kenzie, Obs. on a. 1594, c. 196.; St. Inst. B. 2. t. 8. § 34.; Bank. B. 2. t. 8. § 18.—Under the terms, therefore, of the grant to the priory of Coldstream, above recited, the patronage of this church was effectually conveyed to the Lord of Erection. The words, 'advocation, donation, and right of patronage,' do not occur in the grant, But those used were more proper in the circumstances of the case. The Crown's right being of the same nature with that which formerly belonged to the benefited person, the proper mode of conveying it was under the general description of the kirk, and the teinds thereof. It was by having a right to these that the Crown had the consequential privilege of naming an incumbent.

No particular words were necessary; the grant of the benefice, *per nomen universitatis*, includes all its parts and privileges, and, consequently was sufficient to carry the patronage of this church; St. Inst. B. 2. t. 8. § 34.

*Answered* for the defenders; There is no conveyance of a right of patronage in the titles produced: There is not even any grant to the kirk of Coldstream *nominatim*. But, though a grant to this kirk were to be held as included under the general conveyance of kirks, such a grant carries the teinds or spirituality of the kirk, but not the right of patronage. It may be true, that, before ministers had right to the fruits, the Lords of Erection, under the colour of this title to the kirk, may have put in vicars to serve the cure, as the ecclesiastical titulars were in use of doing; but, as soon as ministers came to have right, by statute, to a certain stipend out of the great teinds, the nomination to the office of minister was in the Crown. It required an express conveyance of the *advocatio donatio ecclesie* from the Crown, to vest the right of presentation in the Lord of Erection, and it was not carried by his grants to the benefice. This, it was said, seemed to be the opinion of Lord Stair, Inst. B. 2. T. 8. p. 320.

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The pursuer likewise *pleaded* a right by prescription to this patronage upon his possession. But that point did not receive any express judgment; the Court being unanimously of opinion, that the titles produced were a sufficient legal conveyance of the patronage of this church to the pursuer's predecessors.

THE LORDS found, that the pursuer has an undoubted and exclusive right to the advocation, donation, and right of patronage and presentation of ministers to the said kirk and parish of Coldstream.

Act. *Iley Campbell.*Alt. *Lord Advocate, Sol. General, Sol. of Tithes.**Fol. Dic. v. 4. p. 48. Fac. Col. No 25. p. 40.*

No 26.

Found in conformity with Donaldson against Officers of State, No 16. p. 9926. that the patronages of churches came not under the general act of annexation in 1587.

1783. February 22. JAMES MURDOCH against ALEXANDER GORDON.

MR MURDOCH, preacher of the gospel, obtained from the Crown a presentation to the parish church of Crossmichael; a church, to the patronage of which Mr Gordon of Culvenan likewise laid claim. Of the Crown's right to this patronage a process of declarator was brought, in the name of Mr Murdoch alone; the counsel for his Majesty, deeming that of Mr Gordon preferable to it, having declined to concur in the action.

Mr Gordon's right was derived from a charter of King James VI. in 1593, containing, among other subjects, the patronage in question. This charter, however, being posterior to the general act of annexation, Mr Murdoch contended, that a previous dissolution in Parliament was necessary to render it an effectual grant of the patronage. The point therefore on which the fate of the competition chiefly\* depended was, Whether rights of patronage were to be understood as comprehended in the property of the Crown thus annexed. The Court having appointed a hearing of the cause in presence, it was

*Pleaded* for the presentee of the Crown: The statute of 1587, cap. 29. is thus entitled: 'Annexation of the *temporality* of benefices to the Crown.' The term *temporality* here plainly denotes such rights as were held by virtue of the temporal law, that is, the common law of the realm; and stands in contradistinction to that of *spirituality*, by which, prior to the Reformation, the clergy denominated tithes; these being as they supposed, possessed *jure divino*, independently of any human or temporal appointment. This pretended *jus divinum*, however, having after that event been reprobated as unchristian, or absurd, the consequence was, that though all the parts of the Popish benefices, as *bona vacantia*, had equally devolved to the Crown, yet the act of Parliament above mentioned, framed for rendering them its annexed property, was confined to the temporality alone. It being unjust to comprehend in like manner their *spiritu-*

\* There were other topics introduced, which proved immaterial in the cause, particularly one respecting the effect of a private act of ratification, in the event of patronages being found to have come under the annexation.