

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, the same being incompetent, from the Barons of Exchequer acting ministerially as a Board of Treasury, under the special direction of an act of Parliament.

For Appellant, *Henry Dundas, Al. Wedderburn, C. Dundas.*

For Respondent, *E. Thurlow, Al. Forrester.*

NOTE.—In this case, the appellant founded on several cases in arguing for the competency of the appeal. In particular, the case of the York Buildings Company *v.* His Majesty's Advocate, acting for his Majesty's and the public interest, and the Creditors upon the Estate of George late Earl Marischall, decided 23d April 1777, (House of Lords.) There were various questions of accounting between the York Buildings Company, who were purchasers of the forfeited estates, and those having interest in the price; and certain orders and decrees of the Barons of Exchequer fixing disputed points had been pronounced, when an appeal was taken to the House of Lords from the Court of Exchequer in Scotland. But it does not appear from the printed appeal case, that His Majesty's Advocate stated any objection to the competency of the appeal, and the discussion was confined entirely to the merits.

It was ordered and adjudged that the appeal be dismissed, and that the several orders therein complained of be affirmed.

The competent course in seeking a review of the sentences of the Court of Exchequer, is by *writ of error* to Parliament.

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[M. 9938.]

Rev. Mr. THOMAS TAIT,	-	-	<i>Appellant ;</i>
Mr. GEORGE SKENE KEITH, Minister, and	}	-	<i>Respondents.</i>
Others,			

House of Lords, 30th March 1778.

PATRON—COMPETING PRESENTATIONS—MANDANT'S POWERS—IMPLIED RECAL.—Where a patron, residing in a foreign country, had appointed commissioners, with powers to present to vacant churches, the latter presented a party a day before the patron himself presented another party: Held, the presentation by the commissioners, in virtue of the powers delegated to them, was good, and to be preferred to the patron's own presentation, and that the right of patronage may be exercised by delegates so appointed.

George Keith, Earl Marischall, was patron of the parish church of Keith-hall, Aberdeenshire, and having become

1778.

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vacant by the death of the incumbent, the appellant obtained from his Lordship a presentation, duly signed by him, on the 10th May 1776.

In consequence of a power and commission granted by the Earl to Alexander Keith the elder, and Alexander Keith the younger, of Ravelston, the respondent received a presentation to the same church and parish from them, acting for the Earl, and as duly empowered in that respect, dated 9th May 1776. Both presentations were served on the same day on the presbytery. And the question came to be, which of the two was entitled to be preferred and sustained?

Jan. 22, 1778. The Court pronounced this interlocutor:—"Find that  
 " Messrs. Keiths, elder and younger of Ravelston, having  
 " full and special powers, by commission from George Keith,  
 " late Earl Marischall, to grant presentations to parish  
 " churches, whereof he is patron, in the same way and man-  
 " ner as he could do himself; and having granted a presen-  
 " tation, as commissioners, to Mr. George Skene Keith,  
 " preacher of the Gospel, to be minister of the united pa-  
 " rishes of Keith-hall and Kinkell, which was prior to the  
 " presentation to the same parish, granted by the said George  
 " Keith, late Earl Marischall himself, in favour of Mr. Tho-  
 " mas Tait, second minister of Old Aberdeen, therefore, in  
 " a competition betwixt these two presentations, find the  
 " presentation to Mr. Skene Keith preferable, and decern."

Against this interlocutor the present appeal was brought to the House of Lords.

*Pleaded for the Appellant.*—The right of presentation cannot in law be exercised by commissioners or attornies, but only by the patron vested with the right to present; the presentation, therefore, on the part of the Earl Marischall's attornies was inept. And even if valid at all, it cannot stand in competition with a presentation under the Earl Marischall's own hand. The very fact that he presented a different party, necessarily implied a recall of that commission, and a presentation by the patron himself granted only a day after the one by the attornies, ought to be preferred.

*Pleaded for the Respondent.*—It is the established law of Scotland that a patron may exercise his right of presentation by means of commissioners, empowered in the special manner Messrs. Keiths were in the present case. The commission, therefore, not having been recalled, and the commissioners having acted under special powers, and in absence of the patron, the presentation by them was, to all intents

and purposes, a good presentation, and must, moreover, be held in law to be the act of the patron; and, consequently, being prior in date to that in favour of the appellant, the respondent is entitled to be preferred.

After hearing counsel, it was

Ordered and adjudged that the interlocutor be affirmed.

For Appellant, *E. Thurlow, Henry Dundas.*

For Respondents, *Al. Wedderburn, Ar. Macdonald, Dav. Rae.*

1779.

EARL OF  
SELKIRK, and  
DUKE OF  
HAMILTON  
v.  
DOUGLAS, &c.

[M. 4358, 10962, 12350.]

EARL OF SELKIRK, - *Appellant in first Appeal;*  
DUKE OF HAMILTON, MARQUIS of } *Appellant in second Appeal;*  
DOUGLAS, EARL OF ANGUS, &c. }  
ARCHIBALD DOUGLAS, Esq. *Respondent in 1st and 2d Appeals;*  
EARL OF SELKIRK, - *Respondent in second Appeal.*

House of Lords, 8th March 1777, 14th April 1778,  
27th March 1779.\*

ENTAIL—CLAUSE OF RETURN—PROHIBITORY CLAUSE—FIAR—NEGATIVE AND POSITIVE PRESCRIPTION—SASINE—REVOCATION—CONVEYANCE—“HEIRS WHATSOEVER”—COMPETENCY OF PAROLE TO EXPLAIN THIS CLAUSE—HEIR ENTITLED TO CHALLENGE ON DEATHBED.—The ancient investiture 1630 restricted the destination of the family estates of Douglas to the heirs-male of Archibald Lord Douglas’ body; “whom failing, to return to the Earl of Angus his father, and his heirs-male and of tailzie,” with prohibition to alienate or to contract debt; but no prohibition against altering the order of succession. Several deeds were executed by Marquis James Douglas, one of 9th March 1699, which confined the succession to heirs-male, and favoured the succession of the Earl of Selkirk as such. A subsequent deed, 11th March 1699, introduced heirs-female, together with one executed on 28th October 1699, and others of 1716, 1718, and 1726. He afterwards revoked these by deed 16th October 1744, and declared that his estates and honours should descend to the heirs of ancient investitures. The Duke of Douglas (the Marquis’ son) afterwards executed a deed or contract of marriage, 1759, which called, after heirs-male of his own body, “his own nearest heirs and assignees whatsoever.” On deathbed he executed a deed (1761) calling the heirs whatsoever of his father, which included Lady Jane

\* There are two separate appeals here:—the first, between Mr. Douglas and the Earl of Selkirk, in which the latter was appellant, and disposed of 8th March 1777; the second, between the Duke of Hamilton and Mr. Douglas and Earl of Selkirk. They are placed together, as they involve the same narrative of fact and law.