

* * * This case is also reported by Dirleton.

A PRESENTATION being granted by a Bishop to a prebendary, in favour of a person during his lifetime, and, after his decease, to his son; the LORDS found, in a multiplepointing, and competition betwixt the persons substituted in the said presentation, and another Prebend provided by the succeeding Bishop, by the decease of the first Prebend; That the substitution, contained in the presentation foresaid, did expire by the decease of the father, and that the substitution was void, in respect the Bishop could not, in prejudice of his successor, grant a presentation in the terms foresaid, bearing a tailzie and substitution.

Reporter, *Castlehill.*

Clerk, *Mr John Hay.*

Dirleton, No. 440. p. 215.

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1680. November 18.

The TOWN of HADDINGTON *against* The EARL of HADDINGTON.

In a competition betwixt the Town and Heritors of Haddington and the Earl of Haddington, for the patronage of the second minister of Haddington, it was *alleged* for the Town and Heritors, That the stipend of the said minister was but a voluntary contribution, whereby the Town gives L. 400, and the Heritors 4 chalders of victual, not out of the teind, but by a cast according to their valued rent of stock and teind; and therefore the right and patronage consisting mainly in the power of presenting ministers, and the enjoyment of the stipend during vacancy, there is no ground for the Earl, as patron of the kirk of Haddington, to pretend to either of these, but only to the presentation of the first minister, and his benefice during the vacancy, but no way to have any interest in this voluntary contribution; for patronage being introduced to encourage mortifications of pious donations to the church, and therefore the builder of the edifice, the mortifier of the benefice, or of the ground, are thereby acknowledged patrons, whose interest it was to defend that church, and therefore did present a qualified person for the cure; and if the patron become indigent, he was to be alimanted out of the fruits, and by our custom they had the same during the vacancy; so that the Earl being acknowledged patron of the church, he hath all its priviliges as he had them before the erection of the second minister, by whom he hath no detriment, and should claim no advantage; and this is cleared by the common custom of the nation; for, the most part of the towns of Scotland had only at first one minister, to whom they were not patrons; but now, most of the considerable burghs have dotted stipends to their ministers by their voluntary contributions, whereof the patron of the first minister did never claim any interest; and if the contrary should be found; it would discourage and hinder all such erections in time coming, and

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The town of Haddington having established a second minister, and provided him in a stipend by voluntary contribution, the patron was found to have right to present both ministers.

[No 6. draw these already made in question ; for none would contribute a stipend, if they had not power to call the minister, but that the patron might force one upon them, which might breed disquiet and dissatisfaction among them. It was *answered* for the Earl, That he being undoubted patron of the kirk of Haddington, he behoved to have inspection and protection of that kirk, and to provide qualified ministers therefor ; so that any dotation to this kirk was *accessorie*, and he behoved to be patron thereof ; for it cannot be pretended that the Town or Heritors could have introduced a minister in the kirk where he is patron, without his consent, nor can it be presumed that he would have consented to a second minister to preach in that kirk, but with submission to him as patron ; but if the Town of Haddington growing populous, one minister could not serve the whole congregation, their competent way was to have divided the parish, and erected a new kirk, in which case if the teinds had been affected, he would still have been patron, much more when there is no distinct parish, but a second minister helping ~~the first in the~~ same kirk ; nor can it be questioned, that a patronage once founded, if it were but by the building of the kirk, any mortification to the benefice could found a new patronage, or give the mortifier any interest with the patron. It was *replied* for the Town, That the patron's consent was clearly inferred by his patience in suffering a second minister to be erected and officiate in the kirk ; nor is there any reservation that he should be patron of that erection ; nor can it be instructed that ever he did present, but, on the contrary, there is produced an act of the Town Council of Haddington, bearing, the Earl of Haddington, then secretary, to have supplicated the Town, that Mr Trent his chaplain might be second minister, who was accordingly minister, and died but of late ; and the case here is not of an accessory mortification to the same kirk, but in effect the kirk becomes collegiate, the two ministers becoming colleagues, and may have two patrons, as is evident by the common law, that in collegiate kirks there might be more patrons dotting more benefices, and so likewise in new united kirks, though the one was suppress, and the minister were only to officiate with the other, that patron doth not become patron of the whole, but they did present *alternis vicibus*, albeit in dismembrations and annexations of parts of parishes to one entire parish, the patron of that parish was patron of the whole as accessory ; so that the patron admitting of the second minister, without reservation or protestation, the presumption is far stronger on the other part, that the contributors did not mean to put their minister in the power of another. It was *duplicated* for the Earl, That the presumption was much stronger for him who had no opportunity of reservation, and protestations in that case are not kept after so long a time, but being so probable, are to be presumed ; whereas the contributors had a clear opportunity in their consent to the stipend of the second minister, to have reserved to themselves a right of patronage, in which case the patron allowing him to officiate, behoved to be understood according to the election ; neither will there be any inconveniency in preferring this patron for

the future, seeing the Lords' decision will clear that where contributors reserve the patronage, they will have right thereto, so that whenever they make such erections, it will ever be with that reservation, which if the patron refuse, the Commissioners for plantation of kirks will be Judges, and will not sustain the patron's wilful refusal when he can have no detriment. "THE LORDS, before answer, having allowed either party to adduce what evidences or adminicles they could, to clear how this second minister was erected, and when, and who did present at first and thereafter;" whereupon there was produced an act of presbytery in *anno* 1636, the Bishop being present, whereby the Town consented to L. 400, and the Heritors to 4 chalders of victual for a second minister; but there is no mention of the patronage, or any reservation or protestation, and immediately thereafter Mr Trent was put on his trials, who died but lately; and there is nothing instructed by either party who did present; the Town did also produce their act of Council, but the Earl *answered*, That the petition in the Town's act could not prove against him, unless the petition were produced, mentioned in the act, they having an evident interest for pretending to the presentation, to make such acts in their own books:

THE LORDS found, that in this case there being neither election nor reservation, nor protestation concerning the patronage, that the presumption was strongest for the Earl as patron, and that his allowing of the second minister was as being patron of both, and therefore preferred the Earl.

Fol. Dic. v. 2. p. 47. Stair, v. 2. p. 799.

* * * Fountainhall reports this case :

1680. *July 31.*—IN the declarator pursued by the Town of Haddington and Heritors of the landward parish against the Earl of Haddington, anent the presentation of the second minister of Haddington, the Earl having presented one as second minister, the Lords upon a bill given in by the Town (in regard they could not get the cause advised this Session,) stopped the planting of the church, and any further procedure thereon, till the 1st of November next, as being vitious, done *pendente lite*, during which *nihil est innovandum*.

1680. *November 18.*—THE patronage of the second minister of Haddington (31st July 1680) was this day decided, and determined in favour of the Earl of Haddington against the Town and Heritors, albeit they paid the stipend. For it seems the Lords thought *dottatio* alone not enough to give a patronage, and that because there was no erection presentation, nor foundation proven; nor any reservation of the patronage made in the acts of the Town Council giving the said stipend, though they alleged it to be voluntary; yet it is not easy to revoke what is once given to the church; likeas he had got a decret thereon before the commission for planting of churches. Yet *Mascardus de*

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probat. Verb. jus patronatus affirms, that reservation of patronage is not necessary. The Lords also went upon this ground to prefer the Earl that he was patron of the whole church, and of the parson and first minister, and it being *ecclesia patronata*, he was founded *in jure communi* also as to the presenting the second minister, who is only in the case of an *ecclesia succursalis* or *auxiliatrix* to help the *ecclesia matrix*, as the canon law expresseth it, and so follows as accession of the first patronage.—Yet patronage was bestowed on founders both in gratitude and remuneration, and to be an encouragement and invitation for others to mortify; and the *patronus egenus* was alimeted *per ecclesiam*: And we know Mr Robert Reid left a legacy for a salary to the Bibliothecar at Aberdeen College, and the LORDS found the presentation belonged to his heirs, and not to the E. of Marishall who was patron and founder of the university, though it was only an accessory to the College; and by the canon law altarages, chapels, and oratories were allowed to be erected within patronate churches; and yet the patronage belonged to their founders. See Abbas, Consul. 105; Viviani rationale jur. canon. ad c. 25. Extra, de jure patronatus; Duaren. de beneficiis lib. 1. c. 4. where they give instances of altarages founded *in ecclesiis patronatis* which did not accresce, but the founders were patrons; as also they prove that patronage in such foundations needs not be expressly reserved, nor protested for. It was thought my Lord Hatton broke the neck of this cause, having the parallel case against the Town of Dundee, (*See infra.*); only, Dundee can instruct that they have presented, and their stipend is altogether uncertain and alterable.

Fountainball, v. 1. p. 112. and 116.

1683. January 10.

The TOWN of DUNDEE against The EARL of LAUDERDALE.

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Contrary to the above, the town having had possession of the right, and formerly exercised it.

THE town of Dundee having pursued a declarator against the Earl of Lauderdale, of their right of patronage of their second minister, upon this ground, that the town had been constantly in use to pay the stipend, and to call and present the second minister, which they proved by writs produced; and it being *alleged* for the Earl, That he and his authors, constables of Dundee, being infeft in the patronage of the kirk of Dundee, if the town did adjoin another minister for their convenience, and doted a stipend for his maintainance, that could not prejudice the Earl; but it being an accessory donation, he ought to have the patronage thereof; and it was so found expressly betwixt the Earl of Haddington and the Town of Haddington, (*supra.*) where, in the competition anent the patronage of the second minister, the Earl of Haddington, who was patron, was preferred to the town, albeit the stipend for the most part was paid by the town; it was *replied* for the Town of Dundee, That the doting of