

No 6.

*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.

No 7.

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

the stipend was one of the ways of acquisition of the patronage by the common law, and that the practise betwixt the Earl of Haddington and Town of Haddington did not quadrate in this case; for the possession was dubious and controverted betwixt the Earl and the Town of Haddington; but here the town of Dundee had not only doted the stipend, but have been in constant possession, by presenting and calling of ministers from time to time, and that the Earl of Dundee, and his predecessors, who were my Lord Lauderdale's authors, did never question or controvert the same.—THE LORDS, in respect that the second minister's stipend was paid by the town, and that they had been in possession by calling and presenting the minister without any question made by the constables of Dundee, my Lord Lauderdale's authors, declared in favour of the town.

*Fol. Dic. v. 2. p. 47. P. Falconer, No 62. p. 22.*

\* \* \* Sir P. Home reports this case :

THE town of Dundee having raised a declarator against the Earl of Lauderdale, for declaring they had right to the presentation of a second minister, and had always been in use to present when this place vaiked, as appears by several acts of the Town Council; and that Mr Robert Rate, whom they had now presented to be second minister, was lawfully presented, and ought to be admitted; albeit *alleged* for the defender, that he being undoubted patron of the church of Dundee, and the right of patronage being indivisible, he had right thereby to present the second minister as well as the first; and, if there had been a distinct church erected within that benefice, the defender as patron, *ipso facto*, would have had right to present the same; much more where there is not a distinct church erected, but a second minister only, to be an assister and helper to the first, and so is only accessory, and *accessorum sequitur naturam principalis*, and does not alter the case in law, from whom the provision of the stipend does flow; for a patron of a church does oft times pay no proportion of the stipend; and if once benefices be founded, and a patronage acquired, a posterior donation to that same benefice, though far more considerable than the first erection, yet the posterior donatar will have no right to the presentation; and the right of patronage being introduced by law, not only as a remuneration and acknowledgment of the benefactors and founders of the benefice; but likewise upon the account that he should be overseer and guardian to the church; and it is the person who shall have the choice and nomination of the incumbents, who shall serve the cure, and without whose advice the titulars or present incumbents cannot dispose of the benefice; and this case was expressly decided upon a full debate betwixt the Earl of Haddington and the town of Haddington, (*supra*). in the same terms where the town and landed heritors had provided a second minister, without any assistance from the Earl of Haddington, patron of the church; and therefore craved that they may be allowed to pre-

No 7.

sent the second minister, that is presented to themselves; the LORDS found, That the presentation belonged to the Earl of Haddington, who was patron of the church, albeit he contribute nothing to the the stipend; and as to the town's possession, it was only the time of the late troubles, when there were great invasions made upon the rights of the church and patrons; and the acts of the Town Council cannot make faith in behalf of themselves, or against a third party; and albeit the town has been in immemorial possession of presenting the second minister, yet possession cannot prescribe a right without the title.—*Replied*, That albeit the defender be patron of the church, and that *jus patronatus sit indivisibile*; yet that can only be understood as to that benefice, but cannot be extended to any voluntary contribution, settled by the town for a second minister, whereunto they were not obliged in law, but was done only out of their own good will, of the good of the inhabitants: And it is clear by that title of the common law, *de jure patronatus*, that whoever dotes or founds a benefice should have the right of patronage thereof; and which is clear from the many chaplainries that have been founded in Scotland, which, albeit they are founded within another benefice, yet the patron of the benefice did never pretend right thereto, but the sole right of presentation did belong to the founders and dotters of the chaplainrie: And albeit if any person should make a donation in favour of a benefice, the right of presentation will still belong to the patron, because in that case the donation becomes accessory to the benefice; but if any person make a distinct foundation, separate from the benefice, the right of presentation will belong to the founder, and will not accresce to the patron of the other benefice: And this is clear in the general, far much more in this particular case, they having been in immemorial possession of presenting the second minister, which appears not only from the acts of the Town Council, which being extracts of the public register of the town, ought to make faith even against third parties; but also by contracts betwixt the town and the second minister, many years before the late troubles; and it is clear by that title in the common law, *de jure patronatus*, and the lawyers thereupon, that a right of patronage may be prescribed without a title; and the Earl of Lauderdale and his predecessors were never in use to present second ministers; and the practick betwixt the Earl of Haddington and the Town of Haddington does not meet this case, because in that case it was dubious whether the Earl of Haddington be patron, or the town and landward heritors had been in possession to present a second minister, and *in casu dubio*, the presumption being always for the patron, therefore the LORDS preferred the Earl of Haddington to the right of presentation; whereas there is no doubtfulness in this case, seeing it is evident the town has always been in the use to present second ministers: But it is not only the case of the town of Dundee, but of many burghs of Scotland, who, out of their own liberality and good will, have given large provisions to second ministers, and upon that ground are always in use to present them; which right of presentation, if it were taken from them, would dis-

courage all such pious donations.—THE LORDS declared in favour of the Town of Dundee, in respect the second minister's stipend was paid by the town, and that they had been in possession of calling and presenting the second minister, without any question made by the Constables of Dundee, the Earl of Lauderdale's authors.

No 7.

*Sir P. Home, MS. v. i. No 368.*

\* \* \* This case is reported by Harcarse :

THE Town of Dundee having made a foundation of a stipend for a second minister there, the Earl of Lauderdale, Constable of Dundee, claimed the presentation as patron of the church; because, though: *in ecclesia non patronata dos, fundus, or constructio aedificii*, founds a right of patronage; yet *in ecclesia patronata*, the old patron is to be patron of the new erection, unless there be a right of patronage reserved in the mortification; especially seeing there is but one church for both the first and second minister.

*Alleged* for the Town; That they, as founders of the second minister's maintenance, are founded in law in the right of presentation, unless they had dispensed with it. And by the canon law there might be within a *matrix ecclesia* other *succursales*, or *auxiliatrices ecclesiae* having distinct patrons from the mother church; and if it were otherwise, the mortifying of stipends to second ministers would be discouraged: Besides, it appears from several presentations 60 years ago, that the town of Dundee were in use to present the second minister; and it did not appear, that any was ever appointed by the Constable.

THE LORDS declared the sole right of calling the second minister to belong to the Magistrates of the town of Dundee.

*Harcarse, (PATRONAGE.) No 750. p. 212.*

\* \* \* This case is also reported by Fountainhall :

1683. *January 11.*—THE debate betwixt the Town of Dundee and my Lord Halton, now Lauderdale, anent the patronage and presentation of the second minister there, being reported, 'THE LORDS preferred the Town's right upon their dotation, former presentations and possession;'—notwithstanding he was patron of the parson; and the contrary seemed to be decided on the 18th of November 1680, for the Earl of Haddington against the Town of Haddington, *supra*: But they differenced the cases; for the Town of Haddington's possession was not so pregnant and clear.

*Fountainhall, v. i. p. 206.*