

1765. February 15. MRS ANN MACDONALD *against* CHARLES MACKINNON.

No 35.

A jointure provided by the actual heir in possession, good against the estate.

JOHN MACKINNON, tacksman of Mishinish, married Ann Macdonald, daughter of Donald Macdonald of Benbecula, and, by postnuptial contract, provided her, in the event of her survivance, in a life-annuity of 200 merks.

During the marriage, Mishinish acquired the possession of the estate of Mackinnon, in the manner explained in the preceding decision. And, upon the narrative, that a small additional tocher had been paid him; he provided her in the locality of certain lands, part of the estate of Mackinnon.

After the death of Mishinish, an action was brought by his widow against Charles Mackinnon, now of Mackinnon, for the mails and duties of her locality lands.

Sundry objections were pleaded to the titles produced by the pursuer; but what the defender relied on, was the general argument of the defect of power in Mishinish to burden the estate.

“THE LORDS repelled the defences.”

Act. Montgomery, Wight.

Alt. Burnet.

G. F.

Fac. Col. No. 2. p. 198.

1771. February 25.

* * * This and the preceding case having been appealed, the House of Lords ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors therein complained of be, and the same are, hereby affirmed.

1774. June 28.

CAPTAIN JOSEPH CAVE *against* The GOVERNORS of the Merchant Maiden Hospital of Edinburgh.

No 36.

The heir apparent of a person originally vested with a right of presentation to an hospital, by the deed of a third party, was found entitled without a service to present upon a vacancy.

ONE of the patrons, having right of presentation to the Trinity and Merchant Maiden Hospitals in Edinburgh, was the deceased Joseph Cave, engraver to his Majesty's mint in Scotland, in consequence of a donation of the sum of L. 2000 Scots, made by Robert Murray merchant in Edinburgh, to each of the said hospitals, and particularly destined 'for alimending and maintaining, according to the rules and constitutions thereof, a young girl, to be presented by Mr Cave and his heirs to the Merchant Maiden Hospital, and a person to be by him and his heirs presented to the Trinity Hospital.'

The said Mr Joseph Cave (whose presentations, while he lived, were regularly admitted), having died in bad circumstances, none of his children inclined to represent him. His eldest son, Dr James Cave, however, (it was said), granted a presentation, upon a vacancy happening in the Trinity Hospital, in

favour of a person, who was readily admitted by the Governors of that hospital.

No 36.

A vacancy having taken place in the Merchant Maiden Hospital, about two years ago, Captain Cave, the immediate younger brother of Dr Cave, (now deceased) granted a presentation in favour of a young girl; but when this presentation was laid before a general meeting of the Governors, they refused to sustain it, upon this ground, that he ought to have produced a service, as heir general to his father, in order to instruct his title.

Captain Cave, upon this refusal, brought an action against the Governors, to sustain his presentation, and to admit the presentee, and to make payment of damages, &c.

Pleaded for the defenders; The statutes of the hospital provide, in the case of presentations, That the donor and his heirs shall have the right of presenting. And the question here is, if an apparent heir, without making up any titles, can exercise this right?

It is clear, that the person having right to this presentation must be heir to Joseph Cave, either 'designative or active;' and, though the defenders admit, that an heir may be called or described designative, without actual representation, (see Dirleton, tit. *De feodo pecunie*, quæst. 12. &c. Bankton, b. 3. tit. 5. § 54.), they doubt very much if this is one of the cases to which the distinction can apply; for that, by the express terms of Robert Murray's donation, the right of presentation was given to Joseph Cave himself, and, failing him, to his heirs; so that his heirs must take the right out of him; and no room is left for the distinction above mentioned, in case the Court were of opinion that this is a patrimonial right.

Upon this point, the defenders know well, that titles of honour and offices of dignity transmit, *jure sanguinis*, without any service; but they never understood that a patronage, or a right of presentation, was of that nature. It is neither an office nor a dignity, but a patrimonial right or interest, making a part of the person's estate who has it, and which must be transmissible, in the same way with any other part of his estate. It never was doubted, that the patronage of a church required service to carry it to the heir. A right of presenting to a college, to a bursary, to an hospital, or to any other endowment from which profit arises, must be upon the same footing. A patronage and a peerage never were considered to have the smallest resemblance to one another. In the case of the burgh of Wick, reported by D. Falconer, No 8. p. 1850, the Court found Lord Caithness's privilege, of approving of the leets, to be transmissible, and transmitted with the estate, and not to be of the same nature with his dignity. Neither does it occur that there would be any expediency in allowing this right to be carried without a service, which is the legal and proper mode of evidence; and, upon production of the retour to the Governors, this at once instructs the title of the claimant.

No 36.

Answered ; Were the pursuer insisting, in the right of his father, for the enjoyment of an heritable subject that had belonged to him, it might be maintained, that, before he could vindicate any such subject, it behoved him to connect himself with his father by a service ; but that is by no means the case. His father had no interest in the mortified sum, further than that, during his life, he had the personal privilege, conferred upon him, of presenting a young girl to be maintained and educated in the hospital ; and that the hospital, simply by the mortification, were bound to admit such girls as should be presented by him upon a vacancy ; and, although the same privilege devolved upon his death to his eldest son, and upon his failure to the pursuer, yet neither the one nor the other could be said to enjoy it in the right of their father, but only in consequence of the deed of mortification granted by Mr Murray, which conferred that privilege upon Mr Joseph Cave's heirs and successors, after his death. The pursuer, by using his privilege, takes up no part of his father's succession, nor does he intermeddle with any thing that properly belonged to him. He only renders effectual the ends and purposes for which the mortification was made, and is therefore under no necessity of making up any sort of title. He must indeed show, to the satisfaction of the Hospital, that he is the person who was authorised, by the deed of mortification, to name the young girl for whose education and maintainance the charity was bestowed ; but that he does sufficiently, when he proves that he is the lineal representative, or, in other words, the apparent heir of his father.

A right of patronage is very different from that which the pursuer claims ; it is an heritable subject, in the most proper sense of the word, and is generally annexed to baronies and other tenements, when it passes by infestment. It also gives right to emoluments, besides the power of presentation, especially to the tithes, (where there is no other titular), which are often very valuable ; but the pursuer can reap no emolument, nor can he draw any profit from the privilege he now claims.

THE COURT found ' that the pursuer, being heir apparent to Joseph Cave, is entitled to present in terms of Mr Murray's mortification, without any service, and therefore decern in the declarator.'

Reporter, *Gardenston*. Act. *Wight*. Alt. *Ilay Campbell*. Clerk, *Kirkpatrick*.
Fol. Dic. v. 3. p. 259. Fac. Col. No 118. p. 318.

No 37.

Though the ancestor die in the most distant parts, no addition

1783. November 14. DAVID HENDERSON against ROBERT CAMPBELL.

ROBERT CAMPBELL, residing in Ayrshire, was the heir of James Campbell, who died in the East Indies. Upwards of a year after his death, but several months less than one from the time when the news of it were received in this