

against Buccleugh, for denuding him of the right of the patronage; and as Francis could not present, so he could not consent as patron to tacks. Upon these considerations, diverse of the Lords were of the contrary opinion.

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Dirleton, No 25. p. 11.

* * * A similar decision was pronounced, 5th July 1632, Sheriff of Forrest against Town of Selkirk, No 4. p. 6886. *voce* INFERTMENT.

1677. *January 24.*

The LAIRD OF INNERNYTIE *against* Mr WILLIAM NAIRN, Minister of Capoch.

In a double poinding, raised at the instance of the Tenants of Russil, who were pursued for their duties by the said parties, it was *alleged* for Mr William Nairn, That he ought to be preferred; because, after the death of Sir William Stewart, who was Prebend, presented *in anno* 1664, he had a right from the Bishop of Dunkeld to the said prebendary, and rents thereof. It was *answered* and *alleged* for Innernytie, That, notwithstanding, he ought to be preferred; because, the gift and presentation, granted *in anno* 1664, which was long prior to the Minister's right, was not only made to his father, but, failing of him by decease, to his son, who now pursues; and, by virtue thereof, his father did possess, during his lifetime, and the Innernyties since his decease, and so had the benefit of a possessory judgment; but, albeit they were contending upon right, yet they ought to have preference; because the Bishop, who granted their right, being undoubted patron of the prebendary, which was not a benefice of cure, being neither a collegiate kirk, nor liable to any ecclesiastical service, the Bishop, as he might have granted a joint right to the father and son, and longest liver of them two, so he might lawfully grant a right to the father during his life, and, failing of him by decease, to his son, as is ordinary to all Bishops to grant a right of the Clerk's office of Commissaries to father and sons; likewise, the King, as patron of the Chapel Royal, doth grant such right to laick persons, neither can this be called a dilapidation of the benefice, in prejudice of the Bishop's successors, seeing they have only *nudum jus presentandi*, and do not thereby take away any of the rents of the benefice. It was *replied* for the Minister, That, notwithstanding, he ought to be preferred; because, after the death of Sir William Stewart, the benefice was then vacant, and his son, having only possessed by the space of three years since, cannot crave the benefit of a possessory judgment, as if his father had been only liferenter, and he fiar, and so might make use of his possession, to defend as in a possessory judgment, seeing his father had a full right, by his presentation, to the whole benefice, and the son had no pretence of right but by sub

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A patron granted a presentation to a man, and, after his death, to his son. Found, that the presentation was ineffectual *quoad* the son's right, after the patron's death.

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stitution, which can never defend him, seeing that were undoubtedly to dilapidate the benefice, in prejudice of the Bishop's successor, who, upon decease, or vacancy by demission, hath a full right to grant a new presentation; and the act of Parliament, against dilapidation of benefices, hath no such exception; and, if it were otherwise, a present Bishop might substitute twenty persons to one another, and might prejudge all his successors; and for the rights granted to Commissary Clerks, it cannot be obtruded; because, that is only an office of Court, and profits arising from personal service; neither can presentations granted by the King to prebendaries of the Chapel Royal to laick persons.—THE LORDS did consider this presentation, and finding that Innernytie's right was only by a substitution, failing of his father by decease, which the law doth not allow, seeing thereby all succeeding Bishops might be prejudged of the benefit of presentation, which is a part of the right of a bishoprick, albeit it was not a benefice of cure; they did prefer the Minister; and likewise found, that Innernytie could not make use of his father's possession, and thereby crave the benefit of a possessory judgment, it not being of the nature of liferent right and fee, granted to a father and a son.

Fol. Dic. v. 2. p. 47. Gosford, MS. No 945. p. 622.

* * * Stair reports this case.

THE Bishop of Dunkeld being patron of a prebendary, gave presentation thereof to Sir William Stewart of Innernytie, and thereafter to John his son. Sir William possessed it during his life, and his son some years after, who paid the Minister's modification out of the Prebend's benefice to Mr William Nairn, Minister, who discharged him as Prebend. Thereafter the Minister takes a presentation to the prebendary; and in a competition betwixt them, the Minister *alleged*, That Innernytie's presentation, in so far as it contains a substitution to John after his father's death, was null, disposing of a benefice not vacant, and an unwarrantable dilapidation of the Bishop's benefice; for if he might substitute one person to the present incumbent, he might substitute an hundred, and so exclude all his successors. It was *answered*, That a conjunction of two was ordinary and warrantable to endure to the longest liver; and this was the same in effect, and that the Minister had homologated and acknowledged Innernytie's right. It was *replied*, That the Minister's discharge was of his local stipend, and before he was Prebend himself.

THE LORDS found the substitution null, and preferred the second presentation.

Stair, v. 2. p. 498.

* * * 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.