

S E C T. III.

Erection of Kirk lands into Temporal lands.

A. against B.

No 41.

FOUND that pensions disposed out of benefices before the assumption of the thirds, are subject to pay a third feual as the rest of the benefice.

Item, That a stipend assigned to a minister serving at a kirk, furth of the fruits of the said kirk, if thereafter that kirk, the L. L. of Plat might assign the stipend to a minister serving at another kirk, as an unplaced minister's stipend.

Kerse, MS. fol. 34.

1612. December. EARL OF HOME against LORD BUCCLEUGH.

No 42.

IN an action betwixt the Earl of Home and the Lord Buccleugh, it was found, that the entailing of the kirk of Colliston, in the rental, was sufficient to make the kirk of the patrimony of Jedburgh; and thereafter it being *alleged*, That the Abbot of Jedburgh had granted presentation of the vicarage, the LORDS found it no ways relevant, except it were alleged that, conform to the presentation, the parson presented was admitted, or in possession in a matter moved betwixt the Earl of Home and the Lo. Buccleugh, concerning certain lands in Liddisdale, acclaimed to pertain to the abbey of Jedburgh. THE LORDS found, that, after 30 years possession in ecclesiastics, should be a sufficient title, in place of the old custom which required ten years, before the reformation.

Kerse, MS. fol. 40.

1666. February 24. SIR ROBERT SINCLAIR against LAIRD OF WEDDERBURN.

No 43.
In erections
of benefices
into tempora-
lities, the
titular de-
mitted in the
King's hands,
upon which

JOHN STEWART son to the Earl of Bothwell, being abbot and commendator of Coldinghame, the Earl being forefaulted in Parliament, his son was dishabilitate to brook any lands, or goods in Scotland, whereby John fell from the right of provision of the abbacy; thereafter the King annexed the abbacy of Coldinghame, which was excepted from the general annexation 1587, to the Crown, excepting the teinds, and gave right of reversion, both of lands and teinds.

to the Earl of Home, who gave a tack of the teinds of Kello and Cumerjame to the Laird of Wederburn. Thereafter John Stewart was, by act of Parliament restored, and the former act of dishabilitation rescinded, whereupon John Stewart demitted his temporal provision in the King's hands, and got it erected in an heritable right; he thereupon infest Douglas of Ivleck for relief of sums. Sir Robert Sinclair's Lady, as heir to him, pursues for the teinds of Kello, and Cumerjame, upon the infestment of relief. He had before obtained sentence for the years preceding John Stewart's death, during which his temporal provision stood, and as to which there was little controversy by the act of rehabilitation; but now the pursuer insisted for the years after John Stewart's death. It was *alleged* for the defender, *first*, that he has right by his tack unexpired, from the Earl of Home, who had the only right of fee, to the whole abbacy, by his infestment granted to him by the King, long before the infestment granted to John Stewart. It was *answered*, That the Earl's infestment, proceeding upon John Stewart's dishabilitation, that being rescinded, and he rehabilitated, the Earl's infestment fell *in consequentiam*, and John Stewart's right, on his own demission is the only right. It was *answered* for the defender, That the Earl of Home's right did not to proceed solely upon John Stewart's dishabilitation, but on the act of annexation following thereon, *anno* 1612, and John's rehabilitation could put him in no better condition than before the dishabilitation, and so could extend no further, but to the personal provision he then had. It was *answered*, that in that special act of annexation 1612, the spirituality or teind was excepted, as it was in the general act of annexation, and so no right granted by the King, till the teinds were demitted in his hand by the titular, could be respected, as being *a non habente potestatem*, at least not proceeding *legitimo modo*. It was *answered*, that the teinds, though not annexed, yet by the suppression of the Popish clergy, they returned to the Crown; for the general act of annexation, doth not give the King a right, but acknowledged his right by the ceasing of the ends for which these benefices were granted; but the annexation makes them indissolvable from the Crown, and indisposable by the King, and so the teinds being annexed, they cease not to belong to the King, but they are at his disposal, and he having disposed of them to the Earl of Home, before he disposed of them to John Stewart, the Earl's right is preferable, and so the defender's as his tacksman. It was *answered*, That all the erections of benefices in temporalities, were only upon demissions of the titulars; for though the Popish clergy was supprest, yet the King presented persons to the benefices, who had the titles of abbots, and commendators, and sat in Parliament, but had not the office, and in so far they were not supprest; and so the King could not dispose of the benefice, till it were demitted by the titular in his hands. It was *answered*, That the King could not dispose in prejudice of the titular incumbent; but that the titular, who was a naked liferenter, his demission should reach the fee, it was against reason; and John Stewart being

No 43.
the erection
followed.
A posterior
erection, after
demission,
was preferred
to a prior
without it.

No 43.

dishabilitated, when the King granted the Earl of Home's right, so that there could be no demission, the King being in the commendator's place, and could not demit to himself, the dishabilitation at least was equivalent to a demission, though it had been necessary, as it was not; for albeit *de facto*, the King erected upon demissions, yet that he could not, after the abbot's death, have erected it, or provided another, or even during his life, reserving his temporal provision, there could be no doubt, else the demission of a liferenter or administrator could never give the King right of fee, which the resigner had, and here, the King had the right of fee, but not the resigner.

Yet the LORDS found, that seeing all erections by custom proceeded on demissions, that the Earl of Home's not proceeding so, and John Stewart's proceeding upon his demission, was preferable, and therefore repelled the defence.

It was further *alleged*, That John Stewart had ratified the defender's tack. It was *answered*, That was but personal, and could not be relevant against the defender, being a singular successor. It was *answered*, That the pursuer's interest being but for relief, the defender could satisfy, and pay the interest, upon assignation, and so his singular title not being absolute, might be so purged.

Which the LORDS found relevant.

Fol. Dic. v. I. p. 530. Stair, v. I. p. 366.

1680. June 10.

The EARL of PANMURE and FORBES of Monymusk *against* MENZIES of Pitfoddels.

No 44.

THE LORDS found the feuers of Abbacies were only liable for the feu-duties contained in the ancient feu-charters granted by the abbots to them, but not to relieve the Lord of erection of any part of the blench-duty payable by him to the King, unless they have expressly burdened themselves with the said relief in their late charters; because the Lord of erection is liable for the blench-duty, merely upon account of the erection granted in his own favour, which cannot prejudice the anterior vassals.

Fol. Dic. v. I. p. 530. Fountainball, MS.

1699. February 8. EARL of ABERDEEN *against* FORBES of Auchorties.

No 45.
Although
Lords of
Erection after
1633 were no
more superi-
ors, and had
only right to

IN the competition between the Earl of Aberdeen and Forbes of Auchorties, the case was, the feu-duties of these lands belonged anciently to the Abbacy of Arbroath. That being erected in favours of the Marquis of Hamilton, he conveyed them to Urquhart of Meldrum, who, by a simple disposition, first transmits them to Forbes of Auchorties, and afterwards by resignation to the