

## SECT. II.

## Vacant Stipend.

No 27.

Patronage found to carry right to vacant stipends, after seven years application to universities by act of Parliament, notwithstanding an act of Council prorogating that act to seven years more.

1681. February 23. SIR ROBERT HEPBURN *against* —.

IN a competition for a vacant stipend, between Sir Robert Hepburn, as patron of the kirk of —, and — as having a gift from the Council;—it was *alleged* for the patron, That the stipend in question being due for years after the seven years applied to Universities by act of Parliament, doth belong to the patron, who *de jure communi*, and by our unquestionable consuetude, before the patronages were taken away by the rescinded Parliament 1649, and after the right of patronages were restored by the act of Parliament 1661, the patron had the unquestionable right to the vacant benefice or stipend, except only the seven years applied to Universities by the 20th act of Parliament 1672, which ended *anno* 1678.—It was *answered*, That by an act of Secret Council there is a prorogation of that act for other seven years.—It was *replied* for the patron, That nothing but an act of Parliament could take away, in whole, or in part, the private right of patrons.

THE LORDS preferred the patron.

*Stair, v. 2. p. 866.*

1694. February 20. DONALDSON *against* BROWN.

No 28.

THE patron's gift of the vacant stipend to the last minister's widow and children found a pious use, in terms of the act of Parliament, provided they dwelt within the parish at the time.

*Fol. Dic. v. 2. p. 48. Fountainhall.*

\*.\* This case is No 14. p. 471. *voce* ANNAT.

1695. December 6. LORD WILLIAM DOUGLAS *against* HERITORS of Mannour.

No 29.

IN a double pointing about a vacant stipend, where the patron had destined the same for building a bridge in the parish; and on the other hand, the heritors and presbytery had allocated it for repairing the church and manse, it was found, That since the patron was never interpellated by the heritors and presbytery to apply, but that he had made the first application himself, and that to an

uncontroverted pious use within the parish, therefore his destination must be preferred.

No 29.

*Fol. Dic. v. 2. p. 48. Fountainball.*

\* \* \* This case is No 12. p. 8501. *voce* MANSE.

1699. *January 17.*

CAIRNMONT and MAXWELL *against* The HERITORS of Kirkbane.

I REPORTED Mr John Cairnmont, and Maxwell of Kirkhouse, his cedent, who pursued the Heritors of the parish of Kirkbane, for payment of the vacant stipend of that church, cropt 1698, to him, as patron. And having obtained a decret for the same before the Steward of Kircudbright, they suspended on this reason, that they were also distressed by Adam Craik of Arbigland, who had a gift of the same year's vacant stipend from the Privy Council, on the recommendation of the presbytery of Dumfries, on this narrative, that Kirkhouse, the patron, was a reputed papist, and so by the 23d act of Parliament 1690, had lost the patronage, and the same devolved to the presbytery: And Craik being admitted for his interest, contended, the decret charged on was null; *imo*, Because this active title instructing him to be patron, was not produced; and though it be now given in, yet that should have been done *in initio litis*; and farther, offered to prove he was denuded of the patronage by expired adjudications, and voluntary dispositions; which the LORDS found relevant, being proponed by some of his creditors adjudgers; *2do*, By the foresaid act of Parliament, a patron misapplying the vacant stipend loses both that and the next vice; but so it is, Kirkhouse assigned it to Mr John Cairnmont, which is not in the terms of law, requiring, that they be employed on pious uses within the parish, which this is not. *Answered*, His assignation is but in trust, and his name only borrowed for the patron's behoof, and he is willing to declare his assignation is only of the nature of a factory to uplift it for the patron, that he may apply it to pious uses. THE LORDS remembered they had refused to sustain this to the Earl of Balcarras, and so found the assigning it was a misapplication, by which he lost the management and administration of it for this vacancy; and therefore sustained and preferred Arbigland's gift from the Privy Council; and the declaring now, *ex post facto*, that it was only a trust, is not sufficient to reintegrate and validate the same. Thus there was no necessity of determining the presumptions adduced to prove the patron was commonly holden and repute a papist, though he came now and then to the protestant church, with his testificates that he renounced all popish principles, and ready to subscribe the Westminster Confession of Faith without any mental reservation, equivocation, or dispensation whatsoever; but being deter-

No 30.

A patron who had assigned the vacant stipend in trust, for his own behoof, was found to have forfeited his right to the administration of the vacant stipend for pious uses, and a donatory of the Privy Council was preferred.