

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 reputed 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.

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mined upon the former grounds, the LORDS did not dip upon this. By the canon law, if a patron fall poor, he is to be alimeted out of the benefice which he or his predecessor founded or enriched, on this presumption, that the donation was with that implied quality.

Fol. Dic. v. 2. p. 48. Fountainhall, v. 2. p. 35.

1700. June 20. LORD SALTON against LADY PITSLIGO.

No 31.

The stipend must be applied to pious uses within the parish.

THE Lord Salton, being patron of the kirk of Tyrie, procures an act of Privy Council, allotting 1000 merks of the vacant stipends thereof, for repairing the adjacent harbour of Frazerburgh; and the Lady Pitsligo, both for her own liferent, and as curator to her son, being debtor in 500 merks of it, she makes a discharge of the stipend, and grants bond for that sum to George Cheyne shore-master there; but being afterwards charged on her bond, the Lady suspends, that she was likewise distressed at the instance of the Moderator of the presbytery, who craved the said stipend might be applied to sundry pious uses within the parish, which they condecended on, as the repairing the church and manse that were ruinous, the building a bridge, and the maintaining the poor, conform to the destination of the act of Parliament 1685. *Answered*, Whatever might be pleaded if the thing were intire, yet here the nature of the debt was wholly innovate by making a discharge of the stipend and granting a bond for it; so it was extinct as to the nature and quality of a stipend, and on the faith of it that sum, and more, was actually expended on the harbour, which, though not within the parish, was adjacent thereto, and very beneficial to them; so it being *bona fide* employed before quarrelling, *res non est amplius integra*, but the Lady must pay. *Replied*, It was not denied but the bond was given for the stipend, and so being surrogate *in ejus locum sapit naturam surrogati*, and must be liable to its burdens; and *esto* the sum equivalent had been expended on the harbour, yet *non refert*, seeing the bond is yet unuplifted, and so, as extant, may be affected by the presbytery, and claimed for the pious uses within the parish, which neither the patron nor any act of Privy Council can invert to any other use without the parish, though never so necessary; seeing this were to dispense with the act of Parliament's specifical destination; and the being employed or not does not alter the case; and has been oft so found by the LORDS, as in the competition for the vacant stipend of the kirk of Foveran, betwixt the heritors of the College of Aberdeen, who had the Privy Council's gift; and the like was determined as to the stipend of Falkirk. Some of the LORDS thought this a material specialty here, that, on the faith of this bond, they had expended the sum; but the plurality preferred the presbytery and parish to the harbour, and found it behoved to be applied to pious uses within the parish in the first place.

Fol. Dic. v. 2. p. 48. Fountainhall, v. 2. p. 97.