

1666. February 10.

The COLLECTOR of the VACANT STIPENDS, *against* PARISHIONERS of MAYBOLL and GIRVANE.

THE Collector of the vacant stipend, having charged the heritors of Mayboll and Girvane, for the stipend due by them the year 1663; they suspend, and produce the minister's discharges who served these years, and alleged they made payment *bona fide* before this charge.—It was *answered*, They were in *mala fide* by the act of the last session of Parliament, declaring the places of ministers, entered since 1649, to be vacant, if they had not obtained presentation and collation conform to the act.—It was *answered*, That the fore-said act was not simple, but conditional, if they had not obtained presentation and collation; and there was nothing obliging the parishioners to inquire, whether they had done that, which, by the law, they were obliged to do; but seeing there was no charge against them by the collector of the vacant stipends, and that the patron, or ordinary, did not present another, but suffered the then incumbents to preach all that year, they were in *bona fide*, to think that they might pay them for the time they served.—It was *answered*, There was a decret produced against the same ministers, for the year 1662, and therefore they could have no right to the year 1663.

THE LORDS found the reason of suspension relevant and proven, notwithstanding of the answer; because the decret was not against the heritors, and was but obtained in 1664, after they had made payment of the year 1663.

*Fol. Dic. v. 1. p. 112. Stair, v. 1. p. 353.*

1676. July 25.

JAMES THOMSON *against* JOHN MOUBRAY.

ALEXANDER FRANK being heritor of several tenements of land in Edinburgh, which were at first comprised by James Porteous, who, long thereafter, got a wadset of the said lands, for the sum of 2100 merks, and for his relief of a cautionry of 1000 merks for the said Frank: The said Alexander Frank did thereafter obtain a decret against Porteous, his heir, finding, after count and reckoning, that he was satisfied; but James Thomson having gotten a gift of bastardy, and *ultimus hæres*, of the said James Porteous, the compriser and wadsetter, and declarator thereupon, did obtain a decret of removing before the Bailies of Edinburgh, against John Moubray, as tenant and possessor of one of the tenements; who having given in a bill of suspension of the said decret, it was ordained by the Lords, that both parties should be heard upon the said bill; the reason of suspension was, that the donatar could be in no better case than Porteous himself, whose right was only a comprising and wadset; both which were satisfied and extinguished by a decret of count and reckoning against

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Payment to ministers who had fallen from their right, not having obtained presentation and collation, was sustained, because, notwithstanding, they were allowed to preach, and the heritors were not interpellated by the collector of the vacant stipend.

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Found in conformity with No 16. p. 1786.

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Porteous's heir. It being *answered*, That the service of John Porteous's heir being reduced, no such decret could militate against the donatar, unless he had been called, or the Lords of Exchequer, Porteous having died bastard, and his estate belonging to the King and his donatar: Whereupon the Lords, before answer, did ordain Thomson, the donatar, to be heard, and to propone what he might have alleged, if he had been compearing in that decret of count and reckoning. It was then *alleged* for Thomson, That the decret was null, and could never have been pronounced if he had been compearing: *1mo*, Because Porteous being a bastard, no payment could have been made to any as his apparent heir, seeing his estate belonged to the King as *ultimus hæres*: *2do*, Porteous having not only a right of wadset, but likewise an expired comprising before that decret, albeit the wadset had been satisfied by intromission or payment, yet it being only granted in farther corroboration of the sums contained in the comprising, the legal reversion whereof was expired before full payment, his right became irredeemable, and no payment thereafter could redeem the same. It was *answered* for Moubray, That he having married the daughter of Alexander Frank, and, by contract, having gotten a right to the whole reversion competent to him against Porteous, that the first allegiance ought to be repelled, because the decret being given against Porteous's eldest son, who was heir, served and retoured, any payment made to him was made *bona fide*, his service not being reduced until long thereafter, and the reduction of his service was by collusion. It was *answered* to the second, That the contract of wadset was disposed, which did clearly extinguish the comprising, notwithstanding that it did bear in corroboration, seeing these words were only put in *ex stylo*, and that it was clearly by the reversion of the new wadset, that the whole rights were redeemable, by payment of the sums contained in the new wadset.—THE LORDS did seriously consider this case, and found as to the first allegiance, that payment being *bona fide* made to the heir of Porteous, whose service was standing unreduced or quarrelled, Alexander Frank, who had the right of reversion, did pay the same *bona fide*; and so the donatar could only pursue the apparent heir, whose service was reduced; and, as to the right of comprising which was alleged to be expired, they found, that the compriser having accepted of a new wadset, with a reversion, upon payment of the sums therein contained, it was a clear innovation of his right, and did extinguish the comprising as to the legal reversion; so that the sums in the wadset being satisfied, he could not recur to the right of comprising, there being no such thing reserved to him in the new right of wadset.

1676. November 27. This case being again debated upon a bill of suspension of a decret for mails and duties, the LORDS, upon that same ground, did refuse the bill, and found, that the new wadset being conceived with a reversion, as said is, did extinguish the legal reversion of the comprising.

*Fol. Dic. v. 1. p. 113. Gosford, MS. p. 571. Nos 890. 891.*