1677. *July* 7. MISTRESS JEAN GRAY *contra* SIR ARCHIBALD PRIMROISE.

THE Register's last lady puts 2000 merks in Ker of Moriston's hand, and takes bond in David Boyd's name to her own behoof; thereafter takes a blank assignation from Boyd; and a little before she died, by a paper under her hand, declares she wills that her son Archibald's name be filled up in the assignation. After her death, the Grays coming by the assignation, they fill up Mistress Jean's name in it.

The Register, in 1670, intents process against her, founded on his lady's destination and nomination, and that it was presumed to be his money. Mistress Jean on that, comes and gives him back both the assignation and bond, and he uplifts the money. Now, since his advancement, or rather degradation, Mistress Jean raises a summons against him, of declarator, that the bond was extorted by concussion, through his power that he then had; and she, through his boasts and threats, knowing his bloody, malicious, and vindictive humour, was forced to give it up. Much debate was upon the qualifications of the concussion, as irrelevant within the town of Edinburgh, the seat of justice, where she needed not be frighted. It might have been credible if it had been done in the Highlands. Yet *minor metus* is required towards the forcing a woman than a man, as to whom it must be *talis que cadere potest in constantem virum;* See Dury, 1632, *Cassie* and *Fleeming*.

They were to have the Lords' answer on the relevancy. But Sir Archibald, considering it would but blaze his name where he was not loved, therefore quietly found the libel relevant of consent, being assured he had not used such indirect methods.

This process was managed by Sir Jo. Dalr. with much bitterness. But he and his father would do well to consider, if concussion be once sustained, how their friends, who have got decreets in their time, have reason to fear the same measure on a change: *nec lex est justior ulla, quam necis artifices arte perire sua; Quod quisque juris in alterum statuerit, ut ipse eodem utatur.* See *alibi* more of this just retribution. See M'Keinzie's Pleadings, page 183, and Seneca there. They will do well not to lay preparatives and foundations against themselves, but use their power moderately. *Vide Tit. D. de Concussione,* and the lawyers on it; *vide infra, 1st August* 1677, *Master of Cathcart, numero* 634.

Advocates' MS. No. 592, folio 291.

1676, and 1677. The PARSON of PRESTONHAUCH *against* RAMSAY, &c. his PARISHIONERS.

1676. *November 28th.*—MR GEORGE SHEILL, Parson of Prestonhauch, pursues Sir A. Ramsay of Waughton, and his other parishioners, for the parsonage and vicarage teinds.

The defence as to the parsonage was upon standing tacks, &c. which see in the informations beside me. As to the vicarage, it was ALLEGED absolvitor, because they have never, at least not these forty years past, been in use of payment of any other small teinds, but only for wool and lamb.

ANSWERED, though use and wont regulates the possession of teinds, being various and local, yet he offered him to prove he or his predecessors had possessed all the several species of small teinds, from one or other of the heritors or tenants in the parish; which must be sufficient to import an obligement upon the other heritors, being *obligatio individua.* See the reply to this fully in the information.

This went to the Lords' answer; who found the defence of immunity by the space of forty years relevant, and that the incumbent's possession could only tie the payers, and not the other heritors; and sustained the use of payment of such quantities as were paid preceding the citation in this cause, to import the continuance of the payment of the same in time coming; and admitted the minister likewise to prove possession. See more of this *infra*, No. 593, in July 1677.

This restricting of the payment of vicarage only to the payers, Sir George Lockhart called a great strain of law, and incongruous to the principles of it.

Advocates' MS. No. 510, folio 267.

1677. *July 7.*—In the action pursued by the minister of Prestonhauch, against Sir A. Ramsay, and other his parishioners, mentioned *supra*, in November 1676, No. 510; in obedience to the interlocutors, having produced tacks of the parsonage teinds, for sundry 19 years yet to run; and for proving the use and wont of the vicarage, probation having been led by both parties, this day the tacks and depositions came to be advised.

It was OBJECTED by the minister's advocates against our tacks, that they were null by the 200th act, Parliament 1594, and the 4th act, in 1617, declaring all tacks set by beneficed persons without consent of the patron longer than for their lifetimes and three years thereafter, null. And this was such, being set in 1609, without the consent of Buccleuch then patron. *2do*, It contained a conversion of victual into money, viz. setting a price at a merk the boll; which is a species of delapidation, and prohibited by the 11th act, in 1585.*

Whereunto, it was ANSWERED that, *esto* these were nullities, (which is denied,) yet the tack could not be now quarrelled thereupon, because they were prescribed, never being questioned as null within the space of forty years, it being now sixty-seven years since their date.

REPLIED,—The 12th act in 1617 anent prescription of rights, seems only to speak of real rights of lands, and not of tacks of teinds.† *2do*, It cannot extend to any but such as are proprietors: not to incumbents and administrators, whereof one for personal respects, may suffer the great prescription to run, as particularly in this case. Mr John Dalzeel was 50 years altogether minister at this kirk, and he not quarrelling it, it is nowise just that his silence or connivance should prejudge the place or his successors, who were not *valentes agere*, and so prescription could not run against them.

DUPLIED,—The act of Parliament was opponed, which was general, *et ubi lex non distinguit nec nos;* that it was the great fence and bulwark to all our properties;

* See the epitome of Sir D. Carnegie of Pittarrow's decreet for abstraction of mill multures, elsewhere.

† *Vide* act 21, Parliament 1649, where nothing doted to pious uses can prescribe; and by the Roman law, *centenaria præscriptio* was requisite, *contra Ecclesiam Romanam*; *Novella nona.* Dury, *7th December*, 1633, *Church of Abersheldor and Gowrie. Infra, July*, 1677, *No.* 631. *Vide Novellam* 111, *et* 131. See *20th of March*, 1683, *Bishop of the Isles.*

that to scan it nicely, or loose a pin, were as dangerous as to reverse acts of indemnity.

The Lords, after some demur, sustained the answer of prescription, and found the tack could not be now quarrelled after 40 years, for lack of the patron's consent.

The minister offered to prove interruption within the 40 years, to take off our prescription. It was craved he might condescend. The Lords found his reply of interruption relevant, and assigned him a day for proving thereof.

Then we entered to debate, that, *esto* he should prevail in proving interruption, yet we behoved to be assoilyied from the pretended nullity of the tack, for want of the patron's consent; because the foresaid acts of Parliament prohibiting such tacks, *non procedunt annullando actum, sed adjiciendo aliam pœnam.* See Vinnius, *Quæstionum Selectarum Illustrium, lib.* 1, *Quæst.*1; see Dury, 9*th November*, 1624, *Mr Thomas Hope* and *his Minister*, and the lawyers cited there; see our information. *Vide* Bartolum, *ad L.*20, *act Prætor. D. de Novi Operis Nuntiatione, Num.* 3. But the President stopped it, because being a point *in jure*, after they saw what was the event of the minister's probation of interruption, they could hear it any time: and it was most rational to reserve it, and lay it over till that time; because if the minister prove not legal interruptions, there will be no need of debating these points.

As to the probation anent the vicarage-teinds, the Lords, at much leisure, having read the long depositions of the witnesses taken for both parties, found the Mains of Waughton liable for 24 shillings, as the price of each teind-lamb, preceding the term of , at which time this action was intented; as also, find Waughton, Houston, Fantasy, Myreside, Smeiton, and Prestonkirk, liable in payment of teind-wool, teind-lamb, teind-greises, and cheese, or 18 shillings for the price of ilk teind-lamb, and 8 pennies of ilk fleece of wool; and that Martle is liable for teind-wool, lamb, and greises; and that Linton, Eistforton, &c. and all the lands within that parish, are liable in teind-wool, lamb, and greises, except Overhaills and Patrick Temple's lands, which have hitherto only been in use to pay teind-wool and lamb, and excepting any other lands that are possessed *cum decimis inclusis*, or are Temple-lands or Cistercian, or otherwise privileged, and so simply free; and decern each of them to pay the respective species foresaid of small teinds, *ipsa corpora*, since the entering of the summons, and in all time coming; as also, to pay to the minister the tack-duties respective contained in their standing tacks of the parsonage-teinds produced. *Vide supra*, No. 586, *Minister of Nig*, [*June*, 1677.]

What are accounted vicarage? See Hadington, 19*th January* 1611, *Bailie of Monkland.* *Advocates' MS. No.* 593, *folio* 291.

1677. *July* 7. GAIRDNER *against* TENNENT.

ONE called Tennent, being charged by Gairdner on a bond, suspends on this reason, that the bond was elicited from him, by taking him in, and drinking him drunk.

REPLIED,—*Non relevat*, since *ebrius* is *duplici pœna afficiendus, secundum Pittacum; et sibi imputet*; and it was not so profound as to rob him of all use of his rea-