

*sede vacante*, to the stipend since the expiring of the Act of Parliament 1672, given them for seven years to the Universities; and preferred Sir Robert as patron to the College; notwithstanding of the Act of Privy Council prorogating the Act of Parliament and giving them the vacant stipends. Which was to make an interfering of jurisdictions, and cause the Session annul summarily Acts of Privy Council. Only some of the Lords of Session are patrons of churches, and they looked on the Act of Privy Council as *parte non citatâ nec auditâ*, and null, unless the several patrons had given their assent thereto. And the 115th Act Parliament 1592, and first Act 1612, give the patron the fruits, if he present a qualified person, and he be refused; and though the Parliament may prejudge patrons (where their consent is also tacitly implied,) yet the Privy council cannot. By the canon law, the patron had the fruits *sede vacante*, but not for his own private use, except he fell poor; but he behoved to apply them to a public or pious use. Craig says, *Fructus, vacante sede, hodie apud nos ad principem aliumve patronum pertinent, quorum rationem reddere non tenentur*.

By the old canons, the vacant fruits were divided into three, *viz.* to the next entrant succeeding; the fabric of the church; and the poor. The Pope after this assumed the disposal of them; in whose place our king succeeds by the Act of Annexation 1587, though teinds be not there annexed.

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1681. *February 23.* The LADY ABERLADY and HUGH KENNEDY her Husband against FLETCHER of ABERLADY.

THE Lady Aberlady and Hugh Kennedy late of Ardmillan her husband against Fletcher now of Aberlady.—The debate, if her annuity of 2500 merks ought to bear a proportional part of the public burdens, being reported, the Lords found the minor's father Sir Andrew Fletcher having been in possession and use of payment of said annuity without burdens, the chargers must be free for bygones; which likewise they declare shall free the tutors and curators. And sustain the allegiance that Aberlady, this minor's father, retained a stock of which he paid no annualrent, nor is to pay till the decease of the Lady, to liberate her from the burdens in time coming; and find the answer relevant, that the stock foresaid was affected with debts due by Mr John Hay of Aberlady, the disponer, and the charger's first husband. See Nov. 1673, [page 33,] where the annuity was granted with absolute warrandice; but this alone was repelled as not sufficient to free her against public burdens, seeing she was infest on it.

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1681. *February 23.* LADY IDINGTON against WILLIAM KIRKWOOD.

LADY Idington having charged William Kirkwood in Dumbar, on his tack, for payment of the tack-duty; and he suspending on this reason, That he had paid it to Doctor Stevenson and Mr Robert Ker, who had infeftments forth of the lands set to him in tack;—the Lords, on report, found that the tenant ought

to have retention of what he paid to persons who had poindings of the ground whereof he was tenant. So that a naked infestment of annualrent, without a decreet of poinding, was no sufficient warrant to him at his own hand to dispose upon the master's rent, who was able to pay his own debt. *Vide Haddington, 4th June 1611, Hamilton.* *Vol. I. Page 132.*

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1681. *February 25.* WILLIAM EWING, Vintner, *against* GRISSEL MALLOCH his Servant.

THE probation between William Ewing, messenger and vintner, and Grissel Malloch, once his servant taverner, being advised; the Lords found, by the oaths of the witnesses, that the said Grissel's reason of suspension and reduction was not proven, *viz.*:—That the bond charged upon was extorted by unjust or illegal force or fear.

Yet it was proven, that Ewing's wife, her mistress, did hold her in within the house, and threatened to send for an officer to put her in the tolbooth, if she would not subscribe the said bond; only, they had counted and reckoned before, and the Lords thought this a *metus licitus* to get a bond for the balance ere she deserted the service; likeas the threats were only *verba jactantia*, and were not put in execution. Yet less dread will serve to a woman than to a man, and to a minor than to one who is come to age.

But the Lords found the other reason proven, *viz.* that the suspender, at the time of granting the bond, was minor, and therefore sustained the bond only in so far as the account for which it was granted can be instructed.—This is very hard; because the servant who takes in all the money as the price of the wines is minor, therefore she shall be reponed without instructing lesion; only it may be said, vintners should not commit this trust to minors, as being a consequential breach of the *Senatus-Consultum Macedonianum*, intrusting your persons with money which they may prodigally waste. But they should count weekly with their servants.

Then ALLEGED, for William Ewing,—Though the suspender, as minor, could not be liable by the bond, yet the same was valid and obligatory against the cautioner, who, in law, had not the benefit of the principal's minority.

The Lords found the cautioner in the bond charged on liable, albeit the minor be not obliged thereby; and find the letters orderly proceeded against the cautioner; reserving action against the minor, on the account and grounds of debt whereupon the bond charged for is founded, as accords of the law.

*Nota.*—The cautioner is only in her bond of lawty and fidelity, but not in the bond for the liquid sum charged on. See Dury, *28th Nov. 1623, Shaw.*

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1681. *February 25.* DEBATES before the COMMISSION for PLANTATION of KIRKS.

At the Commission for Plantation of Kirks, it was debated, *1mo*, If they could grant protection to witnesses under caption to come and depone, seeing,