loss to his master, he told him he should pay but 800 merks. The tenant has ever since possessed it these three years; and being charged for 1000 merks for the years subsequent to 1673, he says he bruiks *per tacitam relocationem;* and there was a novation of the old tack-duty, and he can pay no more but 800 merks yearly.

Prestongrange ANSWERS,—The tack being verbal, and only lasting for a year, there can be no tacit relocation, but where the tack is perfected in writ, which was not here. *2do,* The abatement must be presumed to have been singly for that one year, and not for the subsequent, wherein there was no ground to seek it; and the law is clear for this *in terminis terminantibus,* l. 15. § 4. *D. Locati,* where Papinian says, *Si uno anno remissionem quis colono dederit ob sterilitatem, deinde sequentibus annis contigerit ubertas, nihil obest domino remissio, sed et integra pensio illius anni quo remisit exigi potest;* which is yet stronger, because the one year compenses the other.

REPLIED,—Wherever there is a location, a relocation may take place. *2do,* If he had a mind, the old duty of 1000 merks should return to be paid for the subsequent years, then he should have interrupted by a warning, or some other declaration of his mind; for relocation is nothing but a presumption that both parties continue in the same mind, will, and inclination; till which be taken off by some contrary act, (*et qualis qualis insinuatio voluntatis* will serve, though it will not be sufficient to remove on, unless the warning be legal in all points,) the relocation stands. *Vide supra, June* 1674, *George Young* against *Cockburne,* No. 447.

Advocates' MS. No. 649, *folio* 304.

1677. *November* 8. MORAY of Skirling *against* ——

IN a case of Moray of Skirling's that was reported to the Lords, they found use of payment made to a minister of a greater duty than was contained in his tack or decreet of locality, (which might be for personal respects to him, but it seems protestation must be made thereon,) obliged the heritor, or payer, to continue the same quantity to his successor. It seems the Church quits nothing they once get. *Vide 22d March,* 1626, *Lennox of Branshogle.*

Advocates' MS. No. 650, § 1, *folio* 304.

ANENT SERVICES AS HEIRS.

1677. *November* 8.—This case was proposed. A man dies, leaving a land estate and two sons. The eldest goes off the country, and stays away seven or eight years, and no word of him whether dead or alive. Creditors, and others having little or no right, intrude themselves in the possession, and are more than twice paid of all their pretences. The younger brother has no title whereon either to debar them, or call them to count and reckon; *quid juris,* what shall he do? Some thought he might serve heir to the father. This was objected against; that *non constabat* whether his elder brother was dead or alive, and so no inquest could retour him nearest lawful heir, since there might be a nearer in life; (see David Melvill's case, who the Lords found could not be served heir to the estate of Leven, *supra,* No. 548, *20th February,* 1677;) and the *fama* there was an elder brother was enough, since *præsumitur vivere usque ad* 100 *annos, nisi probetur mortuus,* albeit

none appeared for him before the inquest. Yet services have been reduced in Scotland, on that reason, that there was a nearer on life; *ergo*, inquests have not scrupled in such cases to retour. But the most rational way, in such a case, were to give in a bill to the Lords of Session, representing the matter of fact, and craving a factory or other warrant from them, as *curator bonis*, to intromit and call others to account *ne res medio tempore pereunt;* upon caution to restore if the brother shall compear and claim his right. *Advocates' MS. No.* 650, § 2, *folio* 305.

Anent Consolidating Superiority and Property.

1677, *November* 8.—Where a vassal holds of a subject, and buys the superiority, to the effect he may hold of the King, or succeeds as heir of line to his vassal, *quæritur*, How the superiority shall be mingled and united with the property, it being the more noble and sovereign right. For consolidating the property with the superiority the way is easy and known, by a resignation *ad perpetuam remanentiam* in the superior's hands; but how the superiority shall descend to be confounded with the property, is not so easy. Sir John Nisbet advised, that the vassal should dispone the property to a confident person; and, being so denuded of the property, that then he who was his superior in these lands should dispone to him the superiority; (but *nudum jus superioritatis* cannot be conveyed alone, being *jus incorporeum, quod nequit per se subsistere*, without the lands be also disponed *cui inhæret;* as was advised by Sir Robert Sinclar in Smeton Hepburne's superiority, who took a disposition of it directly from Sir A. Ramsay, as having right to all the apprisings on the estate of Waughton;) which being done, then the trusted person to retrocess him again to the property, by which the property became an accession only of the superiority. But I see no absurdity in the making the superiority to come to the property, and there were too many *ambages et obliqui cuniculi* in this conveyance. Why may not the superior resign the superiority *ad remanentiam* in the Exchequer's hands, or *in favorem* of the vassal; to the effect it may be extinct, and he may have none interposed betwixt him and the King, but he may immediately hold of his Majesty?

If he be heir to his vassal, *quæritur*, If a special service will consolidate the property, without any more. For, in other cases, if one die specially served without a seasine, the next heir enters not to him, but to him who died last infeft.

Advocates' MS. No. 650, § 3, *folio* 305.

1677. *November* 8. The Commissaries of Edinburgh *against* The Executors of Robert Hamilton.

The executors or nearest of kin of Robert Hamilton in Newbottle having been charged by the Commissaries of Edinburgh to confirm his testament, they gave in a bill of suspension, on this reason, that he had *inter vivos* made an assignation and disposition of all his moveable goods in favours of ————; and so not being *in bonis defuncti*, but he denuded, they ought not to be confirmed. The Lords repelled, in November, 1677, the reason: both in regard the assignation was not intimated in the lifetime of the cedent, and that it bore a clause empowering the disponer to alter it at his pleasure; and so it was reputed to be but done in defraud of the confirmation, since it was not absolute.

Advocates' MS. No. 650, § 5, *folio* 305.