other tenement, (which was also bound by the first original infeftment of annualrent,) to relieve him of the half of the said annualrent.

EXCEPTED,—He can never be made liable for the half of the said annualrent, because he has brooked and possessed his tenement these forty years and more, free of the said annualrent, and so has prescribed *liberum tenementum.*

ANSWERED,—He cannot be heard, because in all law and reason, the creditor's possession by uplifting his annualrent out of the other tenement, must be interpreted to retain to him his possession of this also, and so interrupt the running of prescription.

REPLIED,—*Esto* it were granted that prescription will not run against the creditor, so as to impede him, though after an hundred or two hundred years, to come back upon that tenement, though all the while he should have lifted nothing furth thereof; yet the case must not be reputed the same with a conjunct debtor, and to give him the power, after forty years that I and my tenement have been free of him and of any others, and so prescribed *immunitus*, to seek his relief of me; *vide supra, No.* 136, [21*st February* 1671.]

The Lords not the less found that he was liable in relief, though he had been able to say free for an hundred years together; and that he could lay no claim to prescription, because the use of payment out of the other tenement, as being a part, interrupted the prescription *quoad* the whole. This was thought a very hard interlocutor, and dangerous, *nec transit quidem mihi absque difficultate; see* 20*th July*, 1658, *Nicholsone* contra *the Laird of Philorth. Item servitus* is a *res meræ facultatis quæ numquam præscribuntur.*

The Lords found that tenement which was all the while free, would be bound to relieve the other tenement, for a proportional part conform to the value of that tenement, being compared with the tenement that bore the burden. See a parallel case, 6*th November* 1678, *Hay and Milne.*

Advocates' MS. No. 178, *folio* 99.

1671. *June* 22. Anent DISCUSSION.

A CAUTIONER in a testament being convened to make the confirmed goods forthcoming; it was excepted, that our law allowed no other action against such a cautioner, but only *in subsidium*, the executor being first discussed. *Infra No.* 432, [*December* 1673,] and 191, [30*th June* 1671.] ANSWERED, he confessed it was so, and therefore he had discussed him by obtaining a decreet *cognitionis causa* against the principal, in regard, he having been charged to enter heir, he had renounced. REPLIED, This is not a sufficient discussion, seeing he must not only be discussed in his lands and heritages, but also in his moveables, by poinding, arrestment, and otherways *usque ad peram et sacculum.* And it was remembered, that the Lords had found in a debate in the Inner House, an heir of line was not sufficiently discussed, (the defence was proponed by the heir of tailyie,) because they had done no diligence for reaching his heirship moveables: and though it was alleged, that moveables in respect of their uncertainty, and that they might be darned and carried from hole to hole, needed not to be discussed;

yet my Lord Castlehill inclined to refuse action against the cautioner, unless they should discuss both the moveable and real estate of the principal debtor.

Advocates' MS. No. 181, *folio* 100.

Anent Jus Relictæ.

1671. *June* 22, and 24. ——— *against* ———.

June 22.—A WIFE pursuing for the third of the moveables, It was ALLEGED,—They behoved to have compensation, in so far as they offered them to prove, that in her husband's time she intromitted at her own hand *inscio marito* with such and such goods and gear, and disposed on them, and made use of the price which was never *in rem mariti versum;* and therefore these goods must be imputed to exhaust her third *pro tanto,* especially considering that this defence is founded on that same individual reason, that *actio rerum amotarum* is in the civil law. ANSWERED, that whatever intromission she had with her husband's goods in his lifetime, can never be ascribed in satisfaction of third, or any thing else she can claim to by decease of her husband; because, being in the eye of her husband, it must be presumed to have been with his consent; and they might as well make her liable, and fix a passive title on her for intromitting in her husband's time as do this: both which are such novelties as I believe neither of them were ever heard at this bar before.

They were to have the Lords answer thereupon, *infra No.* 182.

Advocates' MS. No. 180, *folio* 100.

1671. *June* 24.—IN the foresaid cause at the 22d of June, No. 180, taken to interlocutor, the Lords found intromission by the wife *stante matrimonio* not relevant, unless they would say she was thereby *locupletior facta;* that she conveyed her husband's means, and took bonds therefore in her own name, and applied them to her own use, and so benefited herself to her husband's prejudice.

Advocates' MS. No. 182, *folio* 100.

1671. *June* 29. Anent Extracting Decrees of Inferior Courts.

WHERE a decreet of an inferior court, as the commissary's, sheriff's, &c. is suspended, the charger needs not extract his decreet, but only produce the said inferior judge's precept for instructing his charge, if the sum contained in the decreet be within L.40; but if it be above that sum, then he must produce the decreet itself, and the precept will not instruct the charge.

Advocates' MS. No. 183, *folio* 100.

* See Petrus Peckius *de testamentis conjugum, Libro* 2, *Cap.* 6. *Per legem* 51 *D. de donationibus inter virum et uxorem,* the law honestly presumes all the wife's acquisitions to be *ex re mariti ad evitandam turpis quæstus suspicionem.*