with, and partly by what was owing to herself as creditrix by the contract matrimonial, or otherwise. This answer Craigie sustained, and would not receive our new libel *hoc loco.*

Then I offered to find caution for her liferent of the sum in the bond, (which was all her interest in it, for the fee of the sum was uncontrovertedly elided and taken away by the discharge; for the husband could dispose upon the fee of the sum at his pleasure, and his heirs cannot reclaim, but might not evacuate his wife's liferent in it,) upon her delivering up of the bond, reserving repetition *per condictionem indebiti*, as accords of the law. This the Lord Justice-Clerk granted.

Advocates' MS. No. 647, § 4, *folio* 302.

1677. *November* 8. BARBARA GRANT *against* JANET CUTHBERT.

THERE was also another suspension, depending betwixt this Barbara Grant and Janet Cuthbert, determined at the same time, whereof the cause was this. Barbara Grant gets a liferent tack of a house in Inverness from her husband, at least so long as she does not remarry. Janet Cuthbert is pursued by her before the Bailies there, for the maill and duty of it, as she who possessed it from 1670, and is decerned in L.20 yearly. Janet having suspended this decreet, Craigie turned it to a libel, in regard, 1*mo*, The mandate of the procurator compearing for her was not mentioned in the decreet; yet that this is not relevant *separatim*, *vide supra*, *June*, 1677, *M'Mine* against *Newlands*, No. 576. *Vide* 12*th December*, 1676, *Christian Holmes* and *Marshall*, No. 518. 2*do*, That she was decerned for years wherein her husband was living, viz. from 1670 till 1674, promiscuously and confusedly, without distinguishing what years she possessed herself, and what years clad with a husband; and the libel was wrong drawn, craving her to be decerned *nomine proprio* for all, whereas she ought to have been convened for these years *nomine executorio*, which was not done; and though we offered to adminiculate the decreet, by condescending how long her husband possessed, and how long herself since; but it was refused. 3*tio*, That the term was not circumduced. Whereupon a commission was granted for proving the rent and her possession; who alleged, she behoved to have allowance for reparations.

ANSWERED,—She having right by a liferent tack, was not liable in reparations, but only the fiar.

This was repelled; only necessary reparations, and no other, were sustained.

Advocates' MS. No. 648, *folio* 304.

1677. *November* 8. MORISON of Prestongrange *against* His Tenant.

MORISON of Prestongrange sets a verbal tack of a muirland-grass roum he had to a tenant, for 1000 merks by year. In the winter 1673, the storm was so great and long that much cattle in Scotland died, and the labourers of such roums near lost all their stocking. Amongst the rest, Prestongrange's tenant representing his

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