other; and the charger was minor. The Lords found the reason was *jus tertii* to the debtor, and the charger had right to uplift, notwithstanding the said substitution, seeing she was now married. *Vol. I. Page* 644.

1694. *November* 23. MR GEORGE HALIBURTON of INCHCAIRNY *against* DARG and LEVISTON in Dirleton.

THEIR defences were founded on a tack, bearing the receipt of 350 merks, and allowing them to retain the rent of the acre and an half, set in satisfaction of the annualrent. It being OBJECTED the tack was null, as wanting both a definite ish and specific tack-duty, without which no tack could subsist, these being *de essentia*;—it was ANSWERED, The redemption was the termination, and the annualrent was the tack-duty.

The Lords found it null against the pursuer, who was an appriser, and so a singular successor, whatever it might operate against the granter's heirs. Which was conform to Craig, *tit. de Locationibus;* and Durie, 31*st January* 1627, *Ross;* 28*th November* 1635, *Morison;* and Stair, 15*th June* 1664, *Thomson;* and 5*th February* 1680, *Rae.* *Vol. I. Page* 645.

1694. *November* 23. JOHN HAMILTON *against* MILLERS, and ALEXANDER HAMILTON of KINKELL.

THE Lords would not restrict the paternal power, if the defenders could assign any rational cause why he passed by his only son of the marriage, and gave him but 2000 merks, whereas he gave one of his daughters 4000 merks; in so far as, in her contract-matrimonial, he gave 2000 merks; and, having settled 1700 merks on another daughter, with a power to alter on her death, he bestowed that 1700 merks also on the other daughter.

The Lords not thinking fit to narrow the father's power too much, they divided the 1700 merks between them, and gave the son the half of it; remembering that, both in Andrew Bruce's case, and Bailie Thomas Wylie's, they had found the father fiar, and stood to the division he had made amongst his children; and that parents, notwithstanding of provisions and destinations in their first contract of marriage, were not thereby impeded to provide a second wife and children to a moderate provision; and, though he was heir, yet, being but heir of provision, he was also a creditor. See Stair, 13*th February* 1677, *Fraser.* *Vol. I. Page* 645.

1694. *November* 23. JANET HAMILTON, *against* RAPLOCH, her Brother.

JANET Hamilton, relict of Samuel Winram, pursues Raploch, her brother, for 400 merks, due by her father, conform to bond, whereto she had an assignation. He offers to prove, by her oath, that this debt was paid by her father, and an

assignation taken blank, (which extinguished the debt,) and her name afterwards filled up in it; and she acknowledging that she got both the assignation and bond from her father, the question occurred to the Lords, Whether the debt was so extinct by confusion, as that he could not make it reconvalesce, by filling up his daughter's name in the assignation; which was as great an indication of his mind to continue debtor, as if he had given her a bond of provision: only, it was objected, this was not the habile way.

The Lords ordained her to be reëxamined, if she saw the assignation blank, and if it was so at the first; or if her name was originally filled up in it: Though this imports little to take off the principle, *quod confusione tollitur obligatio.*

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1694. *November* 27. ALEXANDER BRAND, late Bailie in Edinburgh, *against* HUGH WALLACE of INGLESTON.

THE Lords considered the two points whereon he was sought to be made liable; and thought the first *medium*, founded on his declaration of the receipt of the papers, narrow, unless they could subsume that he had effects at that time in his hands, of Edward Ruthven's, or that he had taken course with other debts of his, posterior, at least no more privileged than Bailie Brand's; for his obligement and trust at least imported this much, that he should have presented the account and precept to the heirs of Edward Ruthven, and craved to have it allowed; and that they should have refused it upon some ground of law.

But the Lords laid hold on the second; and, before answer, allowed Bailie Brand to prove, *scripto vel juramento*, that Hugh Wallace had made a transaction for what he intromitted with of Edward Ruthven's means; for, if he had taken a discharge of the whole count and reckoning, without discussing this article of Bailie Brand's debt, they thought it reasonable he should be liable for it.

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1694. *November* 29. MR RORY M'KENZIE, Minister at Avach, *against* GEORGE M'KENZIE of ROSEHAUGH.

MR Rory M'Kenzie, minister at Avach, against George M'Kenzie of Rosehaugh, for paying the expense of building a manse, which the defender, as principal heritor, was liable in. The defence was, This being a claim of reparations, it was prescribed, not being pursued within five years; conform to the act 1669, whereby all bargains anent moveables prescribe in that time.

ANSWERED,—This case does not fall under the quinquennial prescription introduced by that act. *2do.* Though it did, the visitation made by the presbytery, by the bishop's order, being a document in writ, interrupted the prescription.

The Lords repelled the defence, and found it probable *prout de jure;* and allowed him to prove he built it, and what he expended thereon.

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