Wightman being likewise a creditor, he arrests Bonhard's share in the African company, and pursues a forthcoming against the Commissioners; in which the donatar's assignee compears, and craves to be preferred, the gift of his escheat being prior to his arrestment; but he contended, That the capital stock in the African company, being mortified and heritable, could not fall under escheat; especially now, when eventually, by the treaty of Union, it bears annualrent, and so is no more escheatable than a bond or security bearing annualrent: and, by this rule, a wife might seek the third of it *jure relictæ*; which were very odd.

ANSWERED,—The stock in the African company, being moveable, must certainly fall under escheat; for the Lords have found it both arrestable and confirmable; and, if so, why not escheatable? And the Act 1695, erecting this African company, finds the profits of it affectable by creditors' diligence: Yea, sundry rights, reputed heritable, are notwithstanding escheatable, as rentals, tacks, clauses of relief, though they have profits arising from them: and that the African subscriptions came to bear annualrent, was not by its original constitution, but *ex post facto*, by an article of the Union.

REPLIED,—The stock here, being a dead sum, mortified to perpetuity, can never fall under escheat, seeing it was not of its own nature upliftable, till the company, by paction, was dissolved, and an equivalent given by England for it.

The Lords fell upon a distinction, That, as the profits of that company were moveable, and so escheatable, the annualrents of the stock given by the Union, in place of the profits, must be likewise moveable, and fall under escheat; and, therefore, preferred the donatars of the escheat to the annualrents of Bonhard's capital stock, viz. from 1695 to May 1707; and found Wightman, the arrester, had [not] right to the stock, which did not fall under escheat, but only the annualrents that came in place of the profits by the treaty of Union: and so in a manner divided the controverted subject between them, though not in two precise equal halfs, the annualrent being but for twelve years: so that the stock and principal sum was somewhat better. *Vol. II. Page* 480.

1709. *January* 26. MUIRHEAD and JAMES HILL *against* GEORGE MUIRHEAD.

SIR Robert Grierson of Lagg grants a bond to umquhile George Muirhead, for 7,500 merks, payable to himself, while on life; and, failing him, to Robert, Samuel, and George Muirheads, his sons; and, failing one of them, to the two survivors, equally betwixt them; and, failing of two, to the third surviving; and to Isobel, Jean, and Agnes Muirheads, his daughters, equally amongst them.

Two of the sons die before the father, and then he dies. One of the daughters being married to Mr James Hill, they pursue Lagg for a fourth part of the sum. George Muirhead compeared, and ALLEGED, That, his two brethren being dead, their half of the sum accresces and belongs to him by the substitution: so that there seems to be no more to divide betwixt him and his three sisters, but the other half; which he is content they have their share of. And to interpret the clause, That the whole sum of the bond divides among them, is most incongruous, and inconsistent with the rest of the members of the tailyie, by the conception whereof, he had the third, though both his brethren had lived;

and in case of any of their decease, he fell the half: whereas, by this distorted interpretation, he is put in a much worse case, and gets only a fourth. And who can convincingly believe that his father, who, in the first branch, gives him a third, and in the second a half, will, in the third rank, reduce to a fourth?

ANSWERED,—The clause is as plain as the sun, that, if two of the brothers die, the third that survives is called to no more but a third share with his three sisters, who are *conjuncti tam re quam verbis:* and we are not to ask the reason, as if we were to frame it anew, but only to see if *ita scriptum sit* that the surviving brother and his three sisters shall come in equally. And the father being master of the sum, he had the free disposal of the same, though it happens eventually to restrict and curtail his son's former right.

REPLIED,—That he being called *primo loco*, the *ordo charitatis* prefers him before those called in a posterior rank: and, when substitutes are put by themselves, and others conjoined and brought in by a separate sentence, those so conjoined get but one share, *sec.* 6, *Institut. de Hæred. Instituend.* as for example, *Titius hæres esto, Seius et Mævius hæredes sunto. Titius semissem feret*; and the other two get but the remanent half. And, by his two brothers' death, there was a *jus quæsitum* to him of their half; which the sisters could lay no just claim to, but he must carry that *jure præcipui*, and come in with his sisters for a fourth part of the other half.

The Lords found it was acknowledged, on both sides, that the two sons died before the father; and so their substitution never taking place in their person, it could not transmit to George, the survivor; and it comes to be all one as if the other two had never been named: and so found the whole behoved to be divided betwixt the surviving brother and his three sisters; and he could only crave a fourth share of the whole: whereas, if his brothers had survived the father, by which he got a *jus quæsitum* to their parts, it might have been otherwise. *Vol. II. Page* 484.

1709. *January* 28. JAMES COLVIL *against* IRVINE of DRUM.

ALEXANDER Irvine of Drum grants a bond at London, in 1667, to Robert Irvine, for £1000 Scots, in this manner, That he shall pay heritably £80 Scots yearly, to the said creditor, who shall have no action to crave or demand the principal sum; but it shall stand perpetually sunk and extinct *quoad* the creditor's *jus exigendi;* but it shall be in the debtor's power to redeem it, and disburden his lands of the same, by payment of the £1000.

This being assigned to Bailie Chancellor, he transfers it to Mr James Colvil, advocate, who pursues this Drum, on the passive titles, for payment of the bygone annualrent for many years past, having no power to call for the principal sum.

ALLEGED,—1*mo*, This bond is usurious, being an annualrent relating to L.1000 Scots of stock, in 1667, when annualrents were at 6 per cent.; and this is at 8.

ANSWERED,—No usury, which only holds in borrowed money, *et mutuo*: whereas, this bond being granted by Drum, a papist, they, by their canon law, condemn annualrent of money: but, in place thereof, allow ground-annuals