

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 sunt. 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 discharge 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 by-gone annualrent for many years past, having no power to call for the principal sum.

ALLEGED,—*1mo*, 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

and perpetual annuities out of lands. And, seeing the principal sum is here for ever sunk and passed from, it was but reasonable that some acknowledgment should be paid beyond the ordinary fixed annualrent, in compensation for the loss of my principal sum : and, if the debtor think it heavy, he can redeem this burden when he pleases, by paying back the principal sum.

Some of the Lords thought the bond usurious, but that the penalty is discharged and remitted by the several acts of indemnity passed since the year 1667, when it was granted, unless it had been exacted since 1703 ; which is the last indemnity we have, pardoning all preceding usuries ; and, therefore, they were for restricting the bond to the current annualrent.

The pursuer offered to restrict to the current annualrent, to take off the usury objected.

Others argued, that an annuity payable for the lifetime of one or more, has never been condemned, though far above 6 per cent. As, for instance, I give one L.1000 sterling, providing he pay me 2000 merks yearly, during my lifetime, and, after my death, the principal sum is to be his own : no law reprobates this bargain, because it is a hazard depending on my life ; which may be long or short, though it is near the double of the ordinary annualrent ; and, by the same rule, a perpetual annuity must be as lawful.

Some thought this allowance would open a great door to extortion of indigent debtors and usury.

The *second* defence was,—This bond is not only usurious, but superstitious, in so far as it is offered to be proven that this sum was truly mortified for the use of the capuchin monks at Paris ; and the creditor's name inserted was no more but a trust, to cover and palliate the fraud : and, for this, they produced some letters from the provincial of the order to astruct this presumption ; and the very creditor's name filled up in the bond was a monk, and so by their rules incapable of any gift, but it, *ipso momento*, accresces to the society of that monastery.

ANSWERED,—They opponed the bond bearing no such story ; and further, *esto* it were a mortification to the Scotch capuchins abroad, it is before the Act of Parliament, in 1700, declaring all such donatives null to these *cætus damnati* ; even as legacies left to the *collegia illicita* were repudiated by the Roman law.

REPLIED,—It is a great mistake to think these donations to popish colleges were valid before the Act in 1700 : for, by the act of annexation of kirk-lands to the crown, in 1587, all these mortifications turn *caduca*, and fall to the King ; and, therefore, her Majesty's advocate should be heard for her interest.

The Lords, on this, forbore the decision at this time. *Vol. II. Page 485.*

1709. *February 4.* VINCENT TANQUI and HARY HENDERSON'S EXECUTORS
against ABRAHAM BAGGOT and GILBERT STEWART.

VINCENT Tanqui and the Executors of Mr Hary Henderson against Abraham Baggat, merchant in Amsterdam, and Gilbert Stewart his factor. Baggot freights a ship of Marseilles, called the Happy Amadié, with goods to Amsterdam ; but the ship, being driven into Inverness by storm, is there disabled from