overseer;—the Lords, in a competition between [the] overseer's creditors and the master of the salt-pans, preferred the master, and presumed the salt came out of the master's pans, unless the contrary were proven.

Page 39, No. 181.

1682. *December.* The LAIRD of AIRTH *against* the LAIRDS of QUARREL.

THE Laird of Quarrel elder, being debtor to my Lord Elphingston, in the sum of 2000 merks, not bearing annual-rent, and my Lord Elphingston being debtor to my Lord Torphichen in the like sum bearing annual-rent,—young Quarrel was assigned thereto, and pursued my Lord Elphingston; who craved compensation, in respect young Quarrel being *in familia*, it is presumed he acquired the debt pursued for by his father's means; and that the course of annual-rent ought to sist from the date of his right. The Lords,—in respect old Quarrel was cautioner with Bonhard for the like sum to my Lord Torphichen, and the bond contained an obligement to infeft in old Quarrel's land;—found, that Torphichen's bond was acquired by the father's means; and so sustained the compensation, although the son was only bound in the clause of relief to Bonhard and the father.

Page 60, No. 254.

1682. *December.* CHRISTY *against* CHRISTY.

MR James Christy having left Jean Christy, his daughter and only child, executor and universal legator, and David Christy, failing her by decease; Jean did execute the testament, and obtain sentences for the defunct's moveables, and died shortly after she had been confirmed executrix and had executed the testament by obtaining sentences for the defunct's moveables; and Mr James's relict brought forth a posthume about nine months after his father's decease, called James, who was served executor to Jean his sister, and pursued by David Christy as substitute to her in the office of executry and universal legacy, to make payment of all Mr James's goods and gear. Alleged for the defender, That, as the father had preferred the defender's sister to David the substitute, it is presumed that he would *multo magis* have preferred the defender his son; for, by the civil law, *ex supernascentia liberorum testamentum rumpitur*, and, *in substitutione fidei commissaria*, the children of the party institute were always preferred to the last substitute, a stranger, or in a remoter degree, and donations were revokable *agnatione liberorum*. Answered for David Christy, This is a great novelty in our law, where the effects and solemnities of testaments are quite different from what they are by the civil law, in consideration of *hæredes sui*, and other subtilties, which have no foundation in our custom; and, seeing the father hath not declared his mind as to the supposeable and possible case of a posthume, *casus omissus habetur pro omisso*. 2. As an infeftment of tailyie to Jean the daughter, and, failing of her, to David, could not have been quarrelled by the posthume brother, though it carried away some part of the heritage, far

less can the substitution to the universal legacy be impugned, which only affects the dead's part, the sister's legitime being transmitted to the defender her brother, as her nearest of kin. Here parties are not in the case of the civil law, and the *fide* commissary institutions; for the sister institute had no children; and the *magna pars bonorum* was disponed; and *transmissio jure sanguinis* is only competent to descendants. The Lords, having considered this debate, demurred to determine the cause; but resolved they would hear parties upon this point, if the testament, being confirmed by the sister and decreets taken against the debtors payable to her, did establish the right of the sums in her person, so as they did no longer remain *in bonis defuncti*, although they were neither paid to her, nor innovated by her? Alleged for the brother, That with us the legitime transmits even before confirmation, which is but *modus acquirendi;* and though, by the ancient civil law, *hæreditas inaudita non transmittitur*, yet the *jus novum* allowed the exceptions of *jus suitatis*, to which our legitime answers, *jus sanguinis, et jus deliberandi;* and the nearest of kin having right with us *jure sanguinis*, it ought to transmit *jure sanguinis* without confirmation, as was decided, *anno* 1663, in the case of Bell and Wilkie. Answered for David Christy, That, by the current of our practice, the interest of nearest of kin doth not transmit without confirmation; and executors recovering decreets doth execute testament, so as the office cannot transmit; yet the right of the sums are not established in the person of the executor or legator, unless they be received, or the securities innovated. The parties settled before interlocutor. *Vide* No. 222, [Cameron, February 1688;] and No. 454, [Henderson against Saughtonhall, March 1683.]

Page 122, No. 446.

1682. *December.* ANDERSON and OSWALD *against* MORTIMER.

FOUND that a child alive at the dissolution of the marriage, though it die before confirmation, makes a tripartite division. 2. That, seeing bonds bearing annual-rent are heritable *quoad relictum*, and only moveable in favour of bairns, they always come under a bipartite division. 3. That a wife's provision to goods and gear did not comprehend *nomina debitorum* bearing annual-rent.

Page 123, No. 449.

1682. *December.* PRINGLE *against* FULLERTON of CRAIGHALL.

ONE imprisoned in France, at a creditor's instance, having granted a bond to another person for another cause, and raised reduction thereof *ex capite metus;* —it was alleged for the creditor in the bond, That the imprisonment being lawful, it was not *justus metus*, though the bond had been to him that did imprison the granter; *multo minus* can it be obtruded to a third party that had no accession to the imprisonment; and all the pursuer could crave, was, that the bond might not cut him off from any defences against the debt. Answered for the pursuer, That he being under no obligation before the granting of the con-