N.2. ye where a man after begetting children with a woman marries another and hath children by her the natural children will be Legitimated by his marrying their mother after dissolution of the former marriage by his wifes death so as the first born natural child will be intitled to the Right of primogeniture and succeed to his Fathers Estate before the Eldest child of the first Marriage, Gudelin de Jure Feudi part 3 cap. 5 Neg. Jo. Bost Command Tit. de concubinis N. 11. Mackenzie of precedency chapt. 9 quest. 19. Bornius Legitimation which purgeth any Blemish of the natural Childs Birth is by a fiction of Law drawn back to the Time thereof, as if the Father had been then married to the mother. which Legal Remedy is contrived in favour of Marriage & to induce men to make Reparation thereby for the wrong they have done. Nor do the children of the first marriage suffer any Injury in this matter. Seeing the Right and priviledge of primogeniture and succession began only to take effect at the Fathers death, at which Time the natural child, who was always the Eldest, was capable of succession & of Enjoying the Right of primogeniture and hindered from it before only by the Imperfection of his Birth then removed by the Legitimation, which quite covers off all original Stain and Disability as if the his parents had been married when they first carnally conversed together. we have an Illustrious Instance of this Nature in King Robert the Second of Scotland who after he had begot sons upon Elizabeth Mure Married Euphem Daughter to Hugh Earl of Ross by whom he had the Earls of Strathern and Athole, and after the Queens death joined himself in Marriage to the said Elizabeth Mure, whose eldest son born out of Lawful wedlock was upon the Account of the subsequent Marriage of his Mother preferred by the parliament to the Kings son of the first marriage.

N.1. Therefore where one was Debtor by Bond bearing @ Interest for the price of a parcel of Black Cattel, and also Debtor for the price of another parcel of Such cattel without Bond had paid a Sum to the creditor upon his Indefinite Receipt in part payment of cattel bought from him: The Sum contained in that Receipt was applyed to the payment of Black cattel bought by the Debtor within three years of the date thereof 28 June 1707 Nathaniel Duke of Leathe contra Maxwell of Cuil. Albeit the Bond was the Debtor for quod the Debtor [illegible] Law gives the Debtor first and then the creditor the Application in order after other Debts with this Speciall caution Dummodo in ea constituta in quod ipse & Debitor ejus forsitan Lord de solution which plainly points that in the Application of the general Rules of Law what was most Equal for both parties is to be considered, now it is not supposable that any prudent man would have received payment of a Debt secured by Bond and allowed another Equally onerous to stand out without any Security upon it, and thereby liable to persecute quoad Medium probandi in three years. 2d Since the common Interest is determined by the Law as a just Equivalent for the use of Money, it is unequal for a Debtor to pay a Sum bearing Interest while he retains in his Hand another Sum that affords none. So that hinc inde in Debito & Damno bitando on the creditors part, and the Debtor certat de lucro captando. The Reason why the Application was restricted to the payment of Cattel bought within three years of the Indefinite Receipts is because the price of those bought before that Time is prescribed quoad Medium probandi. And Debts so prescribed cannot be founded on either by way of Action or Exception 5 July 1681 Dickson contra Mc aulay. 18 January 1712 Harris contra Maxwell of Orchardton.

A Factor upon the Estates belonging to his Lord person, who found Creditum for his management of the Rents and not of the other having intromitted with the Rents of both at the same Time, and made Partial payments from Time to Time to his constituent upon getting Discharges and Receipts, and at Stating Accounts with the was bankrupt, as the whole payments being specified to his Intromissions with that Estate you which he had given no Security, and thereby a great Ballance stood due by the Factor for his Intromissions with the other Estate for which the Factors Cautioner was charged: He pretended upon this reason, that the Indefinite Receipts of payment ought to be applyed in stating the Accounts proportionably to the Factors Intromissions with the two Estates, and he being Bankrupt could not in any other method of stating secure this Cautioner who could the properly made only for a proportion of the Ballance according to the Factors Intromissions with the Estate for which he was surety.

Answered for the Charger 1st That the Application of Indefinite payments reaches all Debts: And since both Debtor and creditor concurred in this Application so that by this fall Account the preceeding State of the Estate for which the Debtor had no Security being Discharged his obligation to account for those allready exemplified and the Debtor could claim the Ballance only upon the Account of his Intromission with the other Estate. If a Bankrupt cannot apply indefinite payment to an obligation with Cautioners to the prejudice of his creditor to whom he owes a Sum without Caution 13 February 1685 Mc Keith contra Campbell, much more when he has actually applyed the Indefinite Receipts to the obligation meaning surely, most such Application be sustained. 2d If during there had been no Application or failed, the Judge should make the Application so as the parties would probably have made it, that is equally for the creditors and Debtor, and least to the Detriment of either: It appears to be plain, that neither the Debtor nor creditor the separately the Application of payments, but jointly: For as Debts are contracted by the mutual consent of parties, so they must be the same way dissolved, the offer of payment by the Debtor dissolves not the obligation, without the Creditors acceptance in solutum. Therefore where parties differ about the Application, that Rule ought to be followed which is most Equal for both Debtor and creditor, and least to the Hurt of either, and in this case it is more to be considered quia certat de damno vitando quam qui certat de lucro captando. No Reason can be had to the Cautioners Interest who has no Vote in the Application of payment by the principal Debtor. Nor was the maxim Debitor est Debitoris Debitor designed for an universal Rule, tho' it hold in many cases as in those where there is Durior sors and the creditor to be hindered from getting an Odious or unequal Advantage, so that in the present case the Indefinite payments should be applyed to the Debt without a Caution: Giveing all a matter to the Debtor taking off those two Debts be extinguished, and a great Loss to the creditor to apply them otherwise. It's true in the Roman Laws a Bond with a Cautioner is rather a Durior sors which would upon that account seem to give the Election to the Debtor But there is no apparent Reason for judging a Debt with Security to be Durior sors upon the principal Debtor, than his single Bond without a Cautioner, tho' it doth highly concern the creditor, that the Latter be first discharged.

Replyed for the Charger 2d There the payments being drawn out of the common Stock consisting of the Rents of both Estates they must be imputed proportionably to extinguish the distinct obligations the Factor lay under to account for those Rents: just as if the Receipts had been in part payment of the Rents of both. Nay, supposing the Factor not to have been Bankrupt, by his several partial payments out of the two Estates the Rents of the Estate which alone should have been applyed to the Cautioners debt, and both principal and Security pro tanto exonered of their obligations in prejudice of his Cautioner, than he could effectually relieve an express Receipt of the Rents of the former Estate, and take in lieu thereof a new Receipt of the Rents of the latter. 2d It may be indifferent to the Debtor, whether he apply his Indefinite payment to Satisfy the one Debtor the other in so far as relates to him and the creditor alone but not where a third party is concerned, viz. the Cautioner who is creditor for his Relief and has as good Interest to lose to his Security as the principal creditor has to whom he is bound as Cautioner In which competition about application of the Indefinite payments between these two creditors equally entitled De damno vitando and in pari casu neither can be preferred in the Application but the same must be made proper tionally. And as in the case of Mc Keith contra Campbell the Bankrupts Application of his Indefinite payment to the prejudice of his creditor was justly set aside. So the Bankrupt Factors Application here in favour of his principal creditor to the prejudice of his Cautioner who is also creditor for his Relief of

A Debt to be extinct by paying the creditor his own debt to another.
The Lords found the Indefinite Receipts of payment ought to be applyed proportionably to the Factors Intromissions with both Estates.
February 1725 Duke of Buccleugh contra Dow.