1696. *July* 9. GREIG, JAMES WILLIAMSON, and DICKSON, *against* JOSEPH KNOX.

THE Lords advised the debate betwixt Greig, Mr James Williamson, and Dickson, against Joseph Knox, in Coupar. The case dipped on a very subtile question, Whether a substitute in a tailyied sum can assign the *spes successionis* before the devolution and existence of their right? It was thought, if it afterwards happened actually to exist, there was some ground to plead the validity of the prior assignation while it was but *in spe*; for, though *viventis nulla est hæreditas*, yet *pactum de hæreditate viventis valet* in our law, as one may assign his interest as a bairn of the house, though the same depends on the future event of his father's death. See *July 6th* 1630, *Aikenhead* against *Bothwell.* But here the mother, Janet Kinloch, was substitute, failing of her children by death, to succeed to such a part of their portions: *Ita est*, That did not exist in her time; but she deceased before them, and then they died; so it could never be said to be *in bonis* of the wife, nor to have fallen under her escheat; and the *L.* 42, *D. de Acquir. Rer. Domin.* says expressly, *Substitutio quæ nondum competit extra nostra bona est:* See Craig, *Feud. p.* 219 *et* 239:---And so it was urged the assignation she made to Williamson, her husband, could convey no right, seeing she deceased before the devolution of it in her person. Then it was argued, That they could only be heirs to the wife, she being a member of the tailyie, and so could not quarrel the assignation, which was her deed.

The Lords found, They were not obliged to be heirs or executors to her in that right *representativè* so as to fulfil all her deeds, but only *designativè*, as the persons who might be heirs: and so preferred Greig to Williamson, the assignee. *Vol. I. Page* 727.

1695 *and* 1696. JAMES RENTON *against* JAMES WILSON and DAVID PLENDERLEITH.

1695. *February* 1.—MERSINGTON reported James Renton against James Wilson and David Plenderleith. Edward Dodds having provided the half of his conquest, moveable or immoveable, to his wife, failing children of the marriage, she dispones her right to Wilson, her nephew, with consent of her husband; and this being questioned by Renton, nearest heir to Edward, as not subscribed by her, but only by two notaries, whereas she could subscribe herself, and that such deeds are declared null unless it express the impediment which disabled them to write at the time; as was found, 12*th July* 1626, *Wallace;* and 24*th June* 1630, *Fairholm; 2do.* The style of moveables and immoveables could not comprehend lands:——The Lords thought it would in this case, because, by a posterior writ, the husband had explained it. 3*tio.* That the wife was the principal disponee, and the husband, only consenter, could not transmit the fee. But Craig asserts it will. 4*to.* That Wilson, coming in like an heir of provision to the half of the land, he must also be burdened with the half of the

husband's debts; as was found, *20th February* 1667, *Cranston;* and *12th July* 1691, *Gray*. Then the question arose, If Renton, who was to serve heir, ought not to have up the writs before he ratified Wilson's right.

The Lords found, *ante omnia*, he ought to have his papers.

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1696. *July* 14.---Arbruchel reported the cause Renton against Wilson, mentioned 1st February 1695, being a pursuit to denude of the half of Edward Dod's estate, both personal and real, and to implement his deeds.

The Lords thought the assignation carried heritage as well as moveables; and that the husband's consent to the wife's deed carried the right sufficiently, and therefore decerned him to denude; and found the intromission he had could not stop the same; but he implementing, the other behoved to count and reckon with him. *Vol. I. Page* 727.

1696. *July* 14. The COUNTESS of WEYMSS and her BARON-BAILIE *against* The BAILIES of the BURGH of WESTER-WEYMSS.

ARBRUCHEL reported the Countess of Weymss, and her Baron-bailie, against the Bailies of the Burgh of Wester-Weymss, who had suspended a stent imposed on them for repairing a bridge. They contended, By their erection they were not answerable to her courts, but had privileges within themselves derived from the Earl of Weymss.

The Lords, finding the stent was *in re minima*, and imposed of consent, decerned, without dipping or encroaching upon their privileges, or determining whether it was *a non suo judice* or not; or if the Earls of Weymss, granters of their charter, retained a cumulative jurisdiction, or gave it away *privativè*.

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1696. *July* 28. MURRAYS *against* DAVID SCOT of SCOTSTARBET.

HALCRAIG reported the pursuit, at the instance of the brethren and sisters of Sir James Murray of Philiphaugh, as executors to Jean Murray, their sister, against David Scot of Scotstarbet; being a declarator, that the transaction made by the Lady Philiphaugh, their step-mother, as to the 17,000 merks of portion due to her daughter, their sister, could not prejudge them who were nearest of kin; and, she being an infant, her mother could not, by substituting herself in case of her decease, prejudge their natural succession; and the sum transacted for coming in place of the portion, *capit naturam ejus in cujus locum surrogatur*, and consequently belongs to thir pursuers; and the defender Scotstarbet, who got a voluntary right of it from Lady Philiphaugh, his aunt, must be debtor to them and refund it.

ALLEGED,—The debt by the transaction became innovated, and there is no surrogation in the case; likeas this portion was not the sole ground, but the Lady renounced also her jointure of 1800 merks per annum; and if they quarrel it *quoad* one, they must repone Scotstarbet, as the Lady's assignee, *quoad*