of the Lords; and sent him to prison till he paid it, and likewise craved both the bench and the parties' pardon for his offence. *Vol. II. Page* 191.

1703. *November* 24. CURRIE, EWART, and INGLIS, *against* MUIR and GORDON.

GEORGE Callander having a wadset-right for 4000 merks on the lands of Torrs, and Marion Glendining, his wife, having the liferent of it, having married Commissary Inglis for her second husband, they transact the foresaid sum for 3000 merks with Lidderdale of St Mary Isle, and give him up the wadset, and take a bond from him, narrating that the money was originally George Callander's, but that John Inglis had some rights and securities on these lands then settled in his person; therefore, he obliged himself to pay 1800 merks of the said sum to John Callander, son to the said George, and the remanent 1200 merks to Margaret Callander, his sister; and in case they should die without heirs of their body, or unmarried, then the said sums should fall, appertain, and belong to the said John Inglis his children procreated betwixt him and the said Marion Glendining, mother to the said John and Margaret Callanders. John was married to Janet Muir, and had children, but they died before him: Margaret died unmarried. Janet Muir being remarried to James Gordon of Cambeltoun, he acquires sundry debts owing by John Callander, his wife's first husband, and thereon confirms her and himself executors-creditors to the said umquhile John, and pursues Lidderdale for payment of the 3000 merks to them. Commissary Inglis having two daughters by Marion Glendining, the said John Callander's mother, who were married to David Currie and John Ewart, they, and their husbands, pursue a declarator against Lidderdale, that they, as substitutes to John and Margaret Callanders in the three thousand merks bond, by virtue of that substitution, had right to the foresaid bond, and therefore he should be decerned to pay them. Compearance is made for Janet Muir and Gordon her husband; who craved preference: 1*mo.* For the 1800 merks payable to John; because the condition upon which the substitution was made, never existed *quoad* him, seeing he was married, and had children, though they died before him.

The Lords reduced the substitution as to the sum provided to him, and preferred his relict as executrix-creditrix in the said sum. The only question and difficulty was as to Margaret's share, viz. the 1200 merks, she never being married; and, therefore, it was contended by Commissary Inglis's daughters and their husbands, that their declarator was clearly founded in law,—Margaret never being married, and they being her substitutes in that event, and their father having an interest in the wadset-lands, as the narrative of the bond acknowledges.

ANSWERED,—It is plain the wadset-right originally belonged to Callander, her last husband's father, and the bond was granted in contemplation and satisfaction of that right; and, therefore, it was both undutiful and unjust in Callander's relict and her second husband, Inglis, to substitute her children by Inglis, (who had no relation to Callander's nearest of kin,) to the prejudice of Callander's other heirs, who ought not to be debarred by any such substitution, contrived by their stepfather to his own children, and to their seclusion. 2*do.* Inglis was so conscious of the injustice of this step, that, to rectify this *faux pas*, he

consents to John Callander his stepson's contract of marriage with the said Janet Muir, and renounces and recals the said substitution made in favour of his own children, and obliges himself never to quarrel or challenge it, nor to seek after it any manner of way.

REPLIED to the *first*,—That the bond with the foresaid substitution was granted in the year 1674, near thirty years ago, and was never quarrelled by John Callander nor his sister in their lifetime, but only now by his relict, who has patched up a title to it; and there was just cause and reason for substituting Inglis's bairns, seeing the bond narrates Inglis had a right on the subject, and, *intuitu* of that, the substitution has been inserted. And, as to the second, there being once a *jus quæsitum* constituted to his children, no renunciation nor deed of his could take it away, nor deprive them of it without their own consent; *id quod nostrum est sine facto meo, ad alium transferri non potest, l.* 11. *D. de Reg. Jur.* The right was never stated in his person, and so he could not renounce it; neither do they represent him, either *activè* or *passivè*, any manner of way, and so are not tied to implement his obligement.

The Lords did think he could not give away his children's right; but found, by the bond produced, conjoined with the contract of marriage, and his declaration therein, that the sum of the wadset did originally belong to Callander, and that Inglis could not warrantably invert the succession by passing by Callander's heirs and substituting his own; and, therefore, preferred Muir and Gordon, the executors-creditors, to the 1200 merks, and reduced the substitution, unless the children of Commissary Inglis would condescend and instruct, that their father, conform to the narrative of the bond, had rights and securities settled in his person, affecting the lands or wadset; for the Lords thought, if that were proven, it would support the substitution.

This case is coincident with that famous question now agitated in Europe, about the validity of the renunciation given by Lewis, the French King, at the Pyrenean treaty in 1659, of his children their succession to the crown of Spain; in which case the learned Grotius distinguishes *utrum liberi* be *jam nati* or only *nascituri*. Craig, *de Feudis, p.* 239, states a parallel case betwixt *Sir Patrick Hepburn of Waughton* and *the Lady Pitferren*, his sister, who, being an heir of a marriage, and provided to the lands of Brotherton, the father and friends on both sides entered into a new contract, giving her a sum of money in lieu of that provision; but she reclaimed, that they could do nothing to her prejudice in her minority. But the affair ended in a transaction.

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1700, 1701, 1702, 1703. SIR WILLIAM HOPE of KIRKLISTON *against* WILLIAM GORDON of BALCOMY.

1700. *February* 1.—SIR William Hope, having acquired the tacksmen of Balcony their right, pursues a removing against Mr William Gordon. He repeats, by way of defence, a reduction of the back-bond given to him by these tacksmen, as circumvened; seeing he had communicated to them all his rights, and particularly Douny and Morton's apprisings, and they were to have all the ex-