No 50.

ing when the substitution was made; because they were understood to be purposely omitted, if not expressly substituted. Now, in the present case, the defender was born long before the grandfather's decease; and, as he could not but have the substitution in his eye every time he looked into the bond, it is to be presumed, that if he had inclined to extend the same to his grandchild, it would have been done by some express deed after the defender was born. In the *next* place, This question cannot be governed by any of the principles of the civil law, as James, the substitute, died before his father David; whereby the defender, upon these principles, could have no claim to any part of his grandfather's succession. *Lastly*, The pursuer's predecessors were *in bona fide* to pay the debt to the surviving substitute, when no other party appeared to interpel them. Neither did they know whether the predeceasing substitutes had left any children or not; seeing none of them appeared to make any claim upon the bond for 14 years.

THE LORDS found, that James's share did descend to his children, notwithstanding the substitution, &c.

C. Home, No 103. *p.* 164.

1758. *December* 20. BETHIA YULE *against* JOSEPH YULE.

No 51.

Conditio, si sine liberis decesserit, does not take place, where the father has known of his children without making any alteration.

JOSEPH YULE, when unmarried, and near eighty years of age, lent out two sums of 1000 merks each, upon two bonds. Both bonds bore the money to be borrowed from him, and they were taken payable to him; and failing him by decease, to his brother Joseph. These sums were equal to about one-fourth of his fortune.

Afterwards he married, and had children; he lived three years after the date of the bonds, and two years after the birth of his first child, but never made any alteration in the tenor of the bonds.

Joseph had been in use to impress money into John's hands, to lend out for him; and John, before his death, had been heard to say, that he had taken care of his brother. But whether such sums or conversations had any reference to the bonds in question, did not clearly appear.

Upon John's death, his daughter Bethia claimed these bonds, on this ground, that the substitution to Joseph must be understood to have been under an implied condition, *si sine liberis decesserit*, and fell to the ground as soon as that condition failed by the existence of children; and supported her plea on the authority of the civil law, contained in the response of Papinian, in l. 102. *D. De conditionibus et demonstrationibus*; and l. 30. *Cod. De fideicommiss.* extending the limits of that response; and l. 40. par. 3. *D. De pact.*

Answered for Joseph Yule, The response of Papinian, which introduced the implied condition, *si sine liberis decesserit*, does not apply to the case in hand.

No 51.

For, 1*mo*, It supposes the case of an universal *fideicommiss.* to restore the whole succession settled by the granter to a collateral relation, in case of the decease of the heir, or other person *honoratus*. There the condition, *si sine liberis decesserit*, has been implied, because it was thought the testator would not have tied him to give up the whole succession, if he had foreseen the event of his having issue of his own body. Whatever reason there may be for this presumption in an universal succession, it would be taking too much liberty with the express wills of defuncts, to imply such condition in every special legacy, and thereby to interpolate substitutes whom the testator has not called.

2*do*, It is agreed upon, in the construction of this law, that the implication only takes place when the event was unforeseen by the testator. For instance, if there were children existing at the time, they will not be understood to be *in conditione positi*, if they were not named; for the law will not interpolate, in a settlement, heirs whom the testator had in his eye, and did not think fit to give a place to in it; Vot. Tit. *D. Ad senatusconsult. Trebellian.* § 18. And, for the same reason, where the children are afterwards born during the testator's life, and he makes no alteration of the substitution in their favour, the presumption is, that he meant the destination to subsist in the terms it was expressed; Bankton, v. 1. p. 227.

THE LORDS found, that Joseph had a right to the bonds.

Act. *J. Dalrymple, Lockhart.* Alt. *Montgomery, Miller, Ferguson.*

J. D. *Fol. Dic. v. 3. p.* 300. *Fac. Col. No* 150. *p.* 267.

1760. *July* 30. Next in Kin of ISOBEL WATT *against* ISOBEL JERVIE.

No 52.
A settlement by a man, of his whole effects, on his wife, is not voided by the unexpected birth of a child, who lives but a few months.

IN the contract of marriage betwixt William Watt and Isobel Jervie, she was provided to an annuity of 200 merks, and the children to 6000 merks. William Watt, some years after his marriage, having no children, made a settlement of the whole effects, heritable and moveable, which should belong to him the time of his death, upon his wife Isobel, but reserving a power to alter. At the death of William Watt, which happened about seven months after, his wife was near her time. She produced a female child, who lived but a very few months. The next in kin of the infant, believing that the settlement in favour of the relict was *ipso facto* voided by the existence of the child, brought a process against Isobel Jervie to account to them for her husband's moveables. Isobel Jervie was assoilzied upon the following ground, The settlement in her favour is effectual at common law. It was even effectual at common law against the posthumous child; and that child had no relief against it but in a court of equity. But a court of equity never declares void what is good by the common law. It only gives relief against such a deed as far as necessary to fulfil the rules of justice. Applying this principle to the present case, it is in the *first*