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.

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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*

all; in which case he would get much more than by standing to the transaction. *2do.* As it was a profitable bargain to Philiphaugh, so thir pursuers, as executors to their sister, can have no more right than she could have claimed herself: But *ita est*, she eventually had none; for her provision was conditional, in case she attained to the age of 16; but *ita est*, she died at 11; and it is plain, that, both by the common law and ours, *dies incertus pro conditione habetur;* and in children's portions a sum due at a certain age, if they die before that, their representatives can claim nothing. *L.* 49. *sec.* 2.; *Legat.* 1. *L.* 22.; *D. Quando dies legat. ced.* See Stair, *tit.* Of Obligations; as also, 17*th January* 1665, *Edgar;* and 17*th January* 1677, *Belches.*

ANSWERED,—They were not here approving the contract *pro parte*, and reprobating it *pro reliqua;* but only craving, that the substitution of the mother to the daughter might be interpreted *in terminis juris* for a surrogation; seeing the tutors of minors, in taking security for their money, cannot change, alter, nor invert the natural channel of succession from the nearest heirs who would otherwise have succeeded; and there be several instances where the institution subsists, and yet one is permitted to impugn the substitution. Neither can her jointure enter into consideration, because, Philiphaugh's family being then low, the heir would have got an aliment from the liferenter. And though the payment of the daughter's portion was suspended till sixteen, yet the obligation began at her father's death; *tum cessit dies obligationis:* so the mentioning her age of sixteen was only the *terminus solutionis;* and, by the Roman law, such legacies are not conditional, but presently due,—*L.* 25. *C. Quando Dies Legat. et l.* 46. *D. ad S. C. Trebel.*

The Lords did not decide this subtile case, but recommended to some of their number to endeavour to settle the parties. But several of the Lords inclined to think, that albeit the minor's friends could, by a tailyie and substitution, divert the natural succession, and give it to a remoter, in prejudice of the nearest of kin; yet that, if they quarrelled any part of the transaction, the other party ought to be free to pass from the whole, and crave to be in their own place, as if the said bargain had never been made. *Vol. I. Page* 730.

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1696. *July* 29. DR CHRISTOPHER IRVIN *against* ELIZABETH KER and THOMAS SKEENE.

[See the prior and subsequent parts of the Report of this Case, Dictionary, pages 331 and 332.]

THE mutual bills and complaints between Doctor Christopher Irvin and Elizabeth Ker, his father's relict, (mentioned 19th Feb. 1696,) anent the summary dispossessing her family out of her house in Edinburgh, were reported. The Doctor ALLEGED, That she had fled on the raising the criminal process of adultery and poisoning against her; and that her daughter-in-law and servants had voluntarily deserted the house; and so, there being *vacua possessio*, he, as heir and standing infeft, might summarily enter.

ANSWERED,—Though, *in acquirenda possessione*, some corporeal act of detention be requisite, yet, where it is only *in retinenda*, that can be done *solo animo:*