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-

cresce of the price of the victual to themselves, and if they were losers he was to refund them; which unequal conditions he then yielded to, that he might bar Sir Robert Anstruther and Sir George Nicolson from the bargain:

And now ALLEGED, 1*mo*, It was *societas seu pactum leoninum*, where he might have loss, but in no event any profit; 2*do*, It was an usurious bargain; they having the victual for £6 the boll, and got more than double; 3*tio*, It was a trust, only given them for their relief; 4*to*, It was *causa data causa non secuta*, in so far as he procured that tack to secure his own possession against ill neighbours; and now the tacksmen had transferred their right *in potentiorem*, to Sir William Hope, against the end and design of the tack; and subjects him to more hardship than he was in before.

ANSWERED to the *first*,—There can be no society here, which is a commutative contract, whereby the parties communicate to each other some stock, work, or profit, that the gain and loss may be common; but there is no such stock collated here. And, as to the leonine paction, there was plain hazard and loss by sea risk, breaking of merchants, and their pains, which alone is not sufficient; for in those unlawful societies they must always bestow their industry and pains, but they are free of all risk; and even some bargains of that kind are not prohibited; as appears, *per l.* 29, *D. pro Socio*. To the *second*, of the usury, That takes only place *in mutuo*, as is clear from the 226th Act 1594; and was found betwixt *Sir Patrick Home and the Earl of Home:* and here there was no loan of money: and every inequality of a bargain does not make it usurious, else an exorbitant salary to a factor, or the like, might be punished as usury. The granter is not reputed a provident man, yet it falls not under the notion of usury against the receiver; yea, which is more, enorm lesion *in re* (unless there be also *in consilio*,) does not rescind contracts with us, though, by the Roman law, restitution was allowed where it was *ultra dimidium*. 3*tio*, As to the pretence that it is *causa data*, ANSWERED,—Nothing appears, either from the tack or back-bond, that it was to protect him from ill neighbours.

The Lords neither regarded much the grounds urged from a society or usury, but laid some hold upon this last reason, That, if I procured you a tack, to secure my own possession and exclude others, if you have transferred it, without my consent, to one who disturbs me, whether he might not claim the excresce benefit of the tack, during the years it had yet to run; and ordained the parties to be heard thereupon. *Vol. II. Page 85.*

February 23.—The Lords advised that point in the removing, Sir William Hope of Kirkliston against Mr William Gordon, mentioned 1st current, Whether the tack and securities given to the cautioners were *causa data ob causam non secutam*; that Mr Gordon had given and conveyed these rights, to keep himself undisturbed in possession, and yet they had disponed them to Sir William Hope, who was *potentior adversarius*.

It was ALLEGED,—Nothing of this appears from the writs; and, whatever might be Mr William's motive, the same was quite different from the cause of the transaction, which must be mutually and equally known to both parties, else it cannot be *causa data*.

ANSWERED,—This was clear from the *tractus et natura negotii*: No man would have divested himself of his weapons, to be employed and retorted against himself.

It was moved by some, That the distinction between a motive and a cause was too metaphysical; for *causa impulsiva* is as much a cause as *causa finalis*, and yet it is nothing but a motive; and therefore proposed that the communers might be examined, what was treated betwixt Mr William Gordon and the cautioners, when he made over the comprisings to them.

Two difficulties occurred here, 1*mo*, That trusts now, by the late Act of Parliament, could not be proven by witnesses, but *only scripto vel juramento; 2do*, That, under the pretence of communers, any might be adduced who might swear themselves to have been communers, which might destroy writ; for preventing whereof, the Lords had fallen upon a good expedient in *Sir Thomas Murray of Glendoick's case* against *Auchinleck of Balmanno*, that you must first prove them to be communers, by the oath or writ of the party against whom you adduce them, and, if they acknowledge it, then ye may examine them on the terms and conditions of the communing. As to the *first*, The Lords did not determine it, but thought this was not precisely a trust; and, for the *second*, allowed them, before answer, to condescend who were the communers, and to prove it *scripto vel juramento;* and if it were confessed, then appointed these persons, so acknowledged to be communers, to depone anent the terms, what they were.

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June 7.---Mr William Gordon of Balcolmy gives in a petition to the Lords, craving they may grant him an act and warrant for citing his creditors to this present Parliament, in order to his obtaining a personal protection, seeing, by the Act in 1698, no protection can pass now, without citation and hearing of creditors; and also another petition, containing a complaint against Sir William Hope, deputy-governor of the Castle of Edinburgh, of sundry riots and abuses in attempting to dispossess him *manu militari*; and craving a warrant to cite him thereon.

The Lords considered the second Act of Parliament 1695, where, as to protests for remeid of law, any officer of state is allowed to pass a bill for tabling these before the Parliament; but, as to other matters, warrants for citations before the Parliament are only to be granted by deliverance of Parliament when it is sitting, or by the Lords of Session in the recesses and intervals of Parliament: and thought this adjournment, from the 30th of May till the 20th of June, could not be esteemed such a recess as is meant by the Act; else, wherever the Parliament adjourns for a week, the Lords might, in that interval, issue out warrants; which certainly only is proper for the Parliament to do, seeing this 8th session of Parliament is yet current, and not closed by any act *salvo jure*, or by an act of adjournment: Likeas, it seems unreasonable to trouble the Parliament (who are mainly convened for the great and public concerns and for making laws,) with every riot and abuse, which may be as conveniently pursued before the Privy Council and other Judges Ordinary. And, therefore, the Lords refused to grant any warrant for summary citations in this case, and left them to apply to the Parliament itself, when it should meet; especially where it was craving, *in re parum favorabili*, a protection against creditors' lawful diligence. And the Lords thought, if thir warrants had been sought from them in February last, before the Parliament sat down, that was clearly during the recess and interval of Parliament, in the terms of the law, and might have been granted then; but, the Par-

liament being actually met, a longer or shorter adjournment did not vary the case, unless the session of Parliament were closed. *Vol. II. Page* 95.

1701. *June* 27.—[*See Fountainhall's Report of this date, Dictionary* 16,704.]

1702. *February* 28.—Mr William Gordon of Balcomie being in prison, at Sir William Hope's instance, he applies, by bill, that, not being able to maintain himself, he might be liberated, if Sir William would not enact to aliment him: and the Lords having modified twelve pence *per diem*, Sir William reclaimed; because he offered to prove that Mr William had effects of his own, which he condescended on. And it being ANSWERED,—That these were debts which could afford no present payment nor relief; Sir William then required that he might assign these funds to him for the reimbursement of what he should give out on his aliment. This was much objected against, as a novelty; seeing none ever got repayment of what they gave in pity and commiseration to prisoners whom they detained for debt. But the Lords considered that aliments were decerned only to those who swore they could not maintain themselves; and therefore, when the creditor instructed the contrary, the least was to ordain the debtor to give him an assignation; and the plurality of the Lords determined so in this case.

Balcomie having likewise complained against Sir William Hope for wrongous ejecting him out of the house and lands of Balcomie; it occurred to the Lords to consider whether an ejection could be warrantably executed in the night-time; this being alleged to have been done before sun-rising.

It was plain, by our law and practice, that poindings must be betwixt sun and sun; see 1*st February*, 1628, *L. Halkerton;* but captions can be put in execution *quocumque tempore;* and, by letters for open doors, one may be taken out of his bed. But the custom as to the time and manner of ejections was not so clear; and therefore the Lords delayed the determination of it till June next. *Vol. II. Page* 153.

November 27.—Sir William Hope, deputy-governor of the Castle of Edinburgh, gave in a complaint, That there was a scurrilous, infamous, and malicious libel handed about, under the title of "The process betwixt Mr William Gordon of Balcomy, Advocate, and Sir William Hope; clearly and impartially stated:" and dispersed not only here, but at London, and dedicated to Queen Anne. That the base calumnies and reflections on himself and family, did not so much trouble him, as that the two sovereign courts, of Privy Council and Session, were arraigned, and their justice attacked, either directly, or by innuendos and suggestions; some passages whereof he cited. And that, particularly, he had violated the claim of right, in desiring the Queen to recommend to the Lords of Session, to take to their serious consideration the matters depending betwixt them; whereas, the claim of right has declared the sending letters to the courts of justice, that they may proceed in causes depending before them, is contrary to law. Therefore, Sir William craved the Lords may put some mark of their displeasure upon it, (as to burn it by the hand of the hangman;) and to acquaint the secretaries, that such false and calumnious prints be not offered at court.

The question arose among the Lords, What they should do with it: for, to

notice it, and not effectually to some purpose, it were better to slight it wholly, and let it fall. Parties cannot be hindered to publish their process; *viz.* the summons, defences, debate, and interlocutors: but, if they mingle any reflections, remarks, or observations thereon, they may be censured for the same; for the justest judicatory in Europe may be defamed that way. And, as to the article of the claim of right, it is not *novi juris introductiva*, but was our ancient law before; as not only appears from the statutes of Kings David, Alexander, William, and Robert, in the *Regiam Majestatem*, but by the 92d act 1579, and the 47th act 1587; whereby the Lords of Session are expressly discharged to regard any private letters or writing from the King or his council, in relation to causes depending; and which is founded on the common law, *l.* 7. *C. de precibus Imperatori offerendis; et l. ult. C. contra jus vel utilitat. publicam, &c.* where the Emperors worthily enact, *Rescripta contra jus elicita ab omnibus judicibus refutari præcipimus*, being oft deceived and circumvened *inverecunda petentium inhiatione*. And Antiochus III. that powerful king of Syria, is much commended for this injunction given to his judges, That they should not respect any letters he might be induced to send, but determine according to law, without any regard thereto.

Some of the Lords were for condemning the pamphlet; others said, *Opprobria spreta exolescunt*; and the expressions fixed on were such as were capable of another sense. But, in regard some of the Lords had not seen the pasquil, they were allowed to peruse it in the mean time. By the 68th act of the parliament 1537, at the institution and erection of the College of Justice, and many subsequent acts, the Lords are secured against murmuring at their sentences as unjust: for parties, tyning the cause, and hearing their lawyers plead probable grounds for them, are very ready to think they have got wrong, and openly to cry out of injustice done them; in which case the Lords are empowered to imprison, amerciate, put them to crave pardon on their knees, or otherwise punish them as they see cause. But it is much better to redress them if they have just cause of complaint, as sometimes they may have. As to the condemning infamous libels to be publicly burnt, the Parliament, in November 1700, did so with Harris's pamphlet against the Scots right to Darien; and the Privy Council, in July last, imposed the same censure on Sir Alexander Bruce of Broomhall's speech. *Vol. II. Page* 161.

1703. *November* 10.—The Lords advised the ejection pursued by Mr William Gordon, Advocate, against Sir William Hope, for ejecting him, his family, and plenishing, out of the house of Balcomy, as mentioned 28th February, 1702. The precise question was, If an ejection may be executed in the night-time, at least before sun-rising; or if it must be done with up-sun. Our practice and decisions had cleared that captions might be executed at any time, either by day or night; and there was one practick cited, *viz.* 19*th November*, 1679, *Arnold and Paton* against *Turner*, where a seasine was sustained, though taken in the night-time; but it was alleged there was neither law, statute, nor precedent determining when ejections should be used. And here it was proven to have begun betwixt six and seven in the morning, on the 9th of October; and though the sun was not actually risen, yet we know there is a *diluculum* preceding it, that, for an hour before it, irradiates and gilds the sky, while coming from the antipodes to our hemisphere; and that *sol nondum ortus illuminat*

horizontem, and they could see to read. And the parties ejected have this advantage when it begins in the morning: They have the whole day before them to convey away their goods; and they can be in no hazard of being stolen and embezzled, as they might be if the ejection were deferred till the afternoon and the *crepusculum*. On the other hand, the ejection was argued to be illegal, being clearly begun before sun-rising, there being no other legal period to fix on: for, if you may do it an hour before sun, why not at midnight? which might create many inconveniencies and disturbance of the public peace, and give pretence to robbers and enemies to enter men's houses in the night-time. And the general rule is, *Ne quid de nocte fiat, ne occasio detur majoris tumultus;* and, accordingly, poindings cannot be executed but betwixt sun and sun. And the 3d Act of Parliament, 1546, ordains tenants to be ejected and removed in quiet and peaceable manner, without convocations.

The Lords agreed, that ejections could not be warrantably made in the night-time; but some thought, that, in this circumstantiate case, it being begun with day-light, within an hour and less of the sun's rising, it could not be called illegal, there being neither law nor decision condemning that practice; and, if the Lords thought that dangerous or inconvenient, they might discharge and regulate it by an Act of Sederunt *pro futuro;* but it was hard, where there was no law, to find a transgression. Yet the plurality found the ejection illegal, being before sun-rising; and therefore ordained Mr William Gordon to be repossessed. Which decision was the first that had occurred on this point. And, in regard Sir William had made great reparations, therefore the Lords ordained Mr Gordon to find caution, before his reëntry, not to spoil nor deface any of the reparations, or other policy or planting: for Sir William may use a more legal ejection hereafter, and so recover his possession.

Then Mr Gordon insisted in his conclusion for damages he had sustained by the breaking and losing of his plenishing, and otherwise. The Lords remitted him to the Ordinary in the cause, to consider his condescendance on his damages, and hear what Sir William had to say against the same.

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December 3.—I reported Mr William Gordon against Sir William Hope. On the 10th of November 1703, the Lords having found the ejection illegal, they ordained Mr Gordon to be heard upon his damages sustained thereby; whereof a condescendence being given in, amounting to a great sum, it was ALLEGED for Sir William,---He could be liable in no damages; because, if any happened, they were occasioned by Mr Gordon himself his opposition and resistance to the execution of law: he was *primus in reatu;* and law says,---*Damnum quod quis ex sua culpa sentit, sentire non videtur, l.* 203. *D. de Reg. Jur.*; for he had fortified and barricaded his house before the ejection, and threw stones out at the windows, and threatened to shoot guns; whereas, if he had given obedience to the laws, there had been no loss in removing his plenishing. *2do*, If any skaith was done, the sheriff and his officers must be answerable for it, who, by the Acts of Parliament, are intrusted with the execution of ejections; and so, if any malverse was committed, he must be countable, and not Sir William, who was not present. *3tio*, The ejection was found unwarrantable, on a very nice and abstract point of being done before sun-rising, wherein eminent lawyers differed; and the decision being new, it is hard to make it the foundation of a claim of extravagant damages against Sir William.

ANSWERED to the *first*,---That he denied any deeds of violent resistance were used; but if he was illegally attacked, he might defend his house; for *ubi vis illicita infertur, ei impune resistere licet;* but he used only legal remedies, by applying for a suspension, and obtaining a sist of execution; and the very next morning after it run out he was assaulted ere he could get it renewed. To the *second*, All employers are liable; and if messengers exceed, not only they, but their employer may be convened; and it were absurd to make either the Sheriff or Lyon accountable for the malversations of their mairs or messengers; but here the sheriff-officers were only brought *pro more;* for all was done by Sir William's own servants, who came alongst with him. To the *third*, It was no more than a natural consequence of the illegality of the ejection, to find damages due; otherwise delinquencies went unpunished, and *lucraretur ex sua culpa*; and he ought to have his oath *in litem*, seeing he could not prove every particular chair or other household plenishing he then had.

The Lords found he ought to have reparation of his true damages, as he should instruct the same; and repelled Sir William's defences.

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1712. *February* 29.---Mr William Gordon of Balcomy gave in an appeal and protest for remeid of law against Sir William Hope, for declaring my Lord Balcomy bankrupt forty years after his death; and for sustaining Mr Mark Lermont's right; though it was offered to be proven, that Mr Robert Lermont his author was paid by his intromissions. *Vol. II. Page* 734. § 9.

July 30.---Mr William Gordon of Balcomy, and George his son, gave in an appeal and protest for remeid of law, against Sir William Hope, because he is not duly ranked on the said estate as a creditor. *Vol. II. Page* 763. § 8.

1703. *January* 29 *and December* 7. The EARL of NORTHESK *against* LADY KINFAUNS and her SON.

January 29.---THE Earl of Northesk having taken forth a diligence in his process against the Lady Kinfauns and her Son, for proving her husband's being his procurator *et negotiorum gestor*; and having cited the Lady Muckarsie, for exhibiting discharges and other writs, for proving thereof; and she having compeared, and deponed *negativè* to the whole, and craving expenses, the Lord Crocerig, then Ordinary on the witnesses, modified to her £32, conform to the days she had attended, and ordained Mr Patrick Couper, the Earl's agent, to pay her: who reclaims by a bill, 1*mo*, That in exhibitions of this nature no expenses can be given at all, seeing every one is free to expiscate, where he can find his probation; 2*do*, Agents can never be decerned in payment of expenses, who oft times are out of purse for their clients, but only their constituents.

ANSWERED to the *first*,—There may be as much calumny and malice in wrongous citing people on diligences as in pursuing them; and she is upon the matter a witness, and every witness ought to get payment of their expenses. To the *second*, Parties are seldom present, but only their agents and writers, who