

14848 SUBSTITUTE AND CONDITIONAL INSTITUTE.

No. 5. but it was found, that the once existence of a bairn, although she had never been confirmed executor, took away the benefit of that clause of the contract of marriage from any other, either heir or executor to the defunct.

For the Charger, *Dunlop.*

Clerk, *Gibson.*

Fol. Dic. v. 2. p. 395. Durie, p. 890.

1666. July 3. FLEMING *against* FLEMING.

No. 6.

A bond being conceived, payable to two persons, and, failing the one by decease, to the other, it was urged, That this was not properly a substitution, but a conditional institution, and therefore such clauses make not the survivor to represent the defunct, or to be liable for his debts. The Lords found, That, by this clause, the person substituted was heir of provision.

Fol. Dic. v. 2. p. 397. Stair.

* * This case is No. 6. p. 13999. *voce* REPRESENTATION.

1679. January 16. LD. of LAMERTON *against* LADY PLENDERGAIST.

No. 7.

A fiar, failing heirs-male, “ obliged his heirs of line to resign his lands in favours of a brother-in law and his heirs.” This was found not to be a substitution to make the party liable *passivè*, but a conditional obligation.

Fol. Dic. v. 2. p. 397. Stair.

This case is No. 15. p. 10173. *voce* PERSONAL AND REAL.

1679. January 25. MR. JOHN DAES *against* His Brother MR. JAMES DAES.

No. 8.

In the charge at Mr. John Daes’s instance against his brother, it being called and debated in the Inner-House, “ the Lords assigned to Mr. James, the suspender, the 20th of February next to prove what moveables his father had at the time of the contract in 1669, and to give in a condescence thereof betwixt and that day eight days; and to prove his condescence betwixt and the said 20th of February; and assigned the same day to the charger to prove that the same goods were delivered to, or intromitted with by, the suspender himself; and ordained the charger to re-employ the half of the sums charged for, conform to the destination and substitution of the bond of provision charged upon, viz. in case of Mr. John’s decease, without children, that then 3000 merks, being the half, shall