

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

return to his eldest brother, Mr. James, who is debtor in the bond; and found, that the goods so acquired by the defunct father, after the said contract 1669, might lawfully, by virtue of the power therein, be disposed of to his son Mr. John, as well as to any other, at his pleasure." *Quer.* If this would hinder him to assign, or consume it on his aliment?

No. 8.

Fountainhall, v. 1. p. 38.

1681. July 13. CHRISTY against CHRISTY.

No. 9.

A defunct, in his testament, named his daughter his executrix and universal legatrix, and, failing of her by decease, David Christy. The daughter having died, after being confirmed, and obtaining sentences for the defunct's moveables; in a competition betwixt her nearest of kin and the said David Christy, the question occurred, Whether he was a proper substitute, or only a conditional institute, having right only in case the daughter died before making up titles? The Lords found, That the settlement imported a tailzied succession and proper substitution, and preferred David Christy. (See Campbell against Campbell, No. 18. p. 14855.)

Fol. Dic. v. 2. p. 395. Stair.

* * This case is No. 30. p. 8197. *vocce* LEGITIM.

1685. February 19. & March 4.

JOHN GORDON against The LAIRD of DRUM and AUCHLOSSIN.

No. 10.

A man being obliged, in his contract of marriage, to employ 1000 merks in wadset, &c. and to take the securities to himself and her in conjunct fee and life-rent, and to the heirs of the marriage in fee; which failing, 600 merks to return to her nearest heirs, and the rest to his heirs whatsoever;

The Lords found, That the husband was fiar; and that there being an heir of the marriage, who outlived the dissolution thereof, though he died before his mother, the condition of the return of the 600 merks failed, and was not purified; albeit the heir was not served, and that the pursuer contended a service was necessary to exclude the mother's heirs.

Thereafter it was alleged, That a conditional return of the tocher to the wife was not intended by the clause, but an absolute substitution to her heirs, as heirs of provision to the husband, so as *quandocunque heredes ex matrimonio defecerint*, there was place for the wife's heirs, as the last substitute.

Which allegiance the Lords found relevant, and decerned accordingly in favours of the wife's next heir, who was not only cognosced as next to the wife, but also served heir of provision to the husband.

Fol. Dic. v. 2. p. 395. Harcarse, No. 370. p. 95.