

and receiving the annual-rent of the sum, and thereafter dying, never making any alteration by testament, or any otherwise, concerning that sum, to give or provide the right thereof otherwise to any other; after whose death the son substituted charges the debtor to pay the sum; who suspending, that seeing the principal creditor lived divers years after the term of payment, therefore the clause of substitution, whereby payment was obliged to be made to the son, in case of the father's decease, had not taken effect, and consequently the sum pertained to the defunct's heirs or executors, and ought to be confirmed in testament, and the son could not charge therefor; this reason was not sustained, specially seeing the same was proponed by the debtor, and there was neither any heir or executor of the defunct's, or any of the defunct's creditors, who compeared to claim that sum, and propone the same; so that it was not competent to the debtor to excuse him from payment; and seeing the defunct, albeit he lived after the term, never changed his will, therefore the substituted person was found to have right, as said is.

No. 4.

Clerk, *Hay.*

Fal. Dic. v. 2. p. 395. Durie, p. 721.

1642. February 4. LUTFIT against JOHNSTON.

By contract of marriage, James Johnston is obliged to employ upon land, annual-rent, or merchant-trading, to himself, and Margaret Wauchop, his spouse, and to the longest liver of them two, and to the bairns to be gotten betwixt them, 1600 merks, and failing of bairns betwixt them, 400 merks to the heirs, executors, legatars, and assignees of the said umquhile Margaret; and Marion Wauchop, only sister and heir served to the said umquhile Margaret and John Lutfit, her spouse, having obtained decret against the said James, for the employment of the said sum, conform to the said contract, for the use of the said Marion, (there being no bairn in life gotten of the said marriage), and thereupon charging the said Johnston; the Lords suspended the charges, in respect there was a daughter, who survived the mother, and who was executrix confirmed to her mother, albeit that bairn died within four or five weeks after her mother, seeing, by the existence once of the daughter, albeit shortly thereafter dying, the condition of the contract was purged; for it is sufficient once *habuisse liberos, quamvis statim decesserint*; and the confirming of the bairn executrix to her mother, to whom the benefit of that clause was alleged to pertain, being conceived in favours of the executors, was not much respected, seeing the bairn who was executrix died, this debt not being executed before her decease; so that if that debt fell to the executors, and not the heirs, yet the same would belong to those who would be executors again *de novo* to the relict, who was dead; and this charger was the same, who was served heir, and only would be executor in law;

No. 5.

Anobligation in a contract of marriage, binding the husband to employ a sum to himself, wife, and children, whom failing, to the wife's executors, becomes void, if the children survive the dissolution of the marriage.

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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