No 15.

1710. *December* 14. SMITH *against* SMITH.

A FATHER made a bond of provision in favour of his children, payable at the first term after his death; and it was provided, that if any of the children should die without heirs of their body, their share should accresce to the survivers. Found, that the settlement was a conditional institution in favour of the survivers, and consequently took place, though the children who predeceased had never any right, having not only died before their father, but before the bond of provision became effectual by death or delivery.

Fol. Dic. v. 1. *p.* 425. *Fountainhall. Forbes.*

*** See this case, No 50. p. 3512. and No 22. p. 4332.

No 16.
Found in conformity with the above.

1726. *January.* WALTER DENHOLM *against* DENHOLM of Cranshaws.

THE deceased David Denholm of Cranshaws, by a deed under his hand, bound himself to pay to his children therein mentioned, the sums following, viz. To David Denholm 2500 merks, to Walter Denholm 2500 merks, to Margaret Denholm 2500 merks, and to Jean Denholm 2000 merks, extending in all to 9500 merks; and that at the terms following, viz. one half at the first term of Whitsunday or Martinmas after his decease, and the other half at their respective majorities and ages of 21 years: But with this proviso, 'That in 'case of the decease of any of the children, before they attain to majority, and 'the age of 21 years, without being married and having children, the portion 'of the child deceasing should accresce to the surviving children, and be divided equally amongst them, the eldest son drawing a share with them.' Jean Denholm the youngest child, having predeceased her father, without attaining to the age of 21 years, Walter Denholm brought an action against his eldest brother the heir, for a share of his sister's portion, in virtue of the provision in the bond.

It was *pleaded* for the heir, That Jean having died before her father, as in the case of all legacies, her portion was never due, and consequently could not transmit to heirs and substitutes. Bonds of provision to children, payable at a certain term after the father's decease, or at the children's attaining a certain age, have always been looked upon as conditional, 'providing they survive the 'period condescended on;' so that if the condition do not exist by the survivance, the provision and institution is entirely void: But where the *institution* takes not place, neither can the *substitution;* because a *substitution* has no subsistence without an *institution.*

On the other hand, it was *contended,* That Jean's provision, though she predeceased her father, ought to accresce to the surviving children, even supposing

it a legacy, much more when it is a bond of provision and a conditional debt. No 16.
To make out which, the defender insisted, that though in the common case of legacies left to any person *nominatim*, if the *legatee* die before the testator, he cannot transmit to his heirs the *hope* of legacy, which is all he has at his death; yet, that the person who *devises* the legacy, cannot substitute one to him, so as though the institute fail before the testator, the substitute shall take the legacy, is, he believed, founded in no law. And here the intention of the father is most enix; the words are absolute, 'In case of the decease of any of the children 'before their majority:' And no doubt, this *case* or *condition* is purified, the children dying before their father as well as after; and the other children come in by force of the clause, whatever time that event happen before majority. Indeed, in this case it is not properly by way of *substitution*, that the children draw their share of the defunct's portion, but as *conditional institutes*; which condition is now purified. They have no claim as *successors* to the defunct; they need no service to her; nor when they get her share, will they be liable for her debts. In all the clause, there is not a word that looks like a substitution or succession; the provision is, that one child deceasing, his or her share shall *accresce and be divided*. Had the father designed a *substitution*, he would not have forgot the words, *descend*, *succeeded by*, and such like; which are rather more common, and which appear to have been shunned of design. That there was here no substitution intended, will further appear from this circumstance, that the share of the person dying before majority was to go to the rest, which could only be as conditional institutes; for by way of substitution they could draw nothing; seeing by the children's dying before majority, the condition could never be purified with respect to the institute, who never having had a right, none can be derived from him. The same reasoning will apply with rather more force in obligations than in legacies; and these provisions were truly conditional debts, not at all legacies.

'THE LORDS found, That the provision of the predeceasing child, in this case, accresced to the surviving children.'

Fol. Dic. v. 1. *p.* 425. *Rem. Dec. v.* 1. *No* 77. *p.* 153.

1748. *December* 7. LECKIE *against* RENNY.

No 17.
A legacy being left to one whom the testator named tutor to his heir, it was held an implied condition he should accept the office.

JAMES RENNY, portioner of St Ninians, disponed his whole estate heritable and moveable, to James Renny his nephew in liferent, and David the son of James in fee; burdened with his debts and donations, particularly one of 1000 merks Scots to Andrew Lecky writer, payable with interest from a year and day after his death; excluding James Renny from the administration, which he provided should be in the hands and power of certain persons, amongst whom were the said Andrew Lecky, David Walker, and William Danskin, whom he