

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 survivors. Found, that the settlement was a conditional institution in favour of the survivors, 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. Fountainball. 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