

ed, yet it has ever that inherent with it, that *suo ordine* ilk heir should be sought, and discust in his own room, by a priority and posteriority, as use is, which was repelled.

No 4.

Act. _____

Alt. *Nairn.**Fol. Dic. v. 1. p. 246. Durie, p. 862.*

1662. February. FLOYD against The DUKE of LENOX.

IN an action pursued by one Floyd against the Duke of Lenox, as heir male to his predecessor, the LORDS found no necessity to call and discuss the heir of line, unless it could be made appear that the heir of line had any thing in Scotland to discuss.

No 5.

Fol. Dic. v. 1. p. 246. Gilmour, No 35. p. 26.

1700. February 10. WALLS against MAXWEL.

AGNES WALLS and her Husband pursue Frederick Maxwel to pay a debt owing by Captain Edward Maxwel his father, on this ground, that the Earl of Nithsdale resting the said Edward L. 1000 Scots, he did take the bond to himself being on life, and to the said Frederick his son, failzieing of himself by decease; and she contended this made him liable *passive*, at least heir of provision in that sum, and so bound to pay his debt *quoad valorem*, in so far as the L. 1000 would extend. *Answered*, Such conceptions and substitutions in bonds are generally interpreted to make the father liferenter and the son fiar; but here there could be no representation, neither *in universum jus* nor *quoad* the value, for he was not *alioqui successurus*, but only the second son, and the father left both heirs and executors, and they must be first discussed; and, an heir of provision in a special sum can never be convened but only *in suo gradu et ordine*, after all the nearer heirs are discussed; and whereas, they crave he may denude of this sum in favours of his father's creditors, he is only liable *subsidiarie*, neither have they legally affected it, either by adjudication, if heritable, or confirmation, if moveable, as executors-creditors. I find Dirleton, in his Doubts and Questions, *cap. de feoda pecuniæ et nominum*, thinks the substitute in such a case liable as an heir of provision; but there, he is both the eldest son, and likewise the father reserves an express power to dispoise, which being a plain effect of dominion, shews he continues fiar. THE LORDS assoilzied Frederick Maxwel and found him not liable.

No 6.

A father took a bond to himself, and failing him by decease, to his second son. In an action against the son for payment of a debt due by his father, he was assoilzied, the defunct having both heirs and executors.

Fol. Dic. v. 1. p. 245. Fountainball, v. 2. p. 87.