1727. *July.* COMPETITION CREDITORS of JOHNSTON of Graitney.

No. 17.

William Johnston of Graitney disponed his estate "in favours of William Johnston his eldest son in liferent, and for his liferent use allenarly, and to the heirs-male to be procreated of his body in fee, which failing, to James Johnston his second son, and the heirs-male of his body in fee, reserving the disponer's liferent." Upon this disposition, containing procuratory and precept, sasine was taken to William Johnston, the eldest son in liferent, and to the heirs-male to be procreated of his body in fee, which failing, to James Johnston the second son. There never having existed heirs-male of William Johnston's body, the question arose, Whether this was a valid infeftment in James Johnston's person, or, if it was null, and he obliged yet to connect his title by a service. It was argued, That James Johnston, being no more but an heir-substitute by his father's disposition, the infeftment taken in his name was void and null, and he could no otherwise establish a title, either to the disposition or precept, than by a service as heir. It was allowed on the other side, That in case there had existed heirs-male of William Johnston's body, James Johnston could come in no other way than as a substitute, in which event his infeftment must have vanished; but it was contended, since he was also called upon in the event that these heirs-male should never exist, in that case it could not be as a substitute, but as an institute. The Lords found the infeftment null. See APPENDIX.

Fol. Dic. v. 2. p. 396.

1740. *June 12. and November.*

CAMPBELL *against* MARGARET CAMPBELL and ALEXANDER M'MILLAN.

No. 18.
Substitution in a legacy.

Daniel Campbell, second son to John Campbell, late Provost of Edinburgh, executed a testament, whereby he bequeathed all his goods, money, and effects whatsoever, to his father John Campbell, and in case of his decease, to his sister Margaret.

After the death of John Campbell, the father and institute, who survived the testator, a question arose between Captain William Campbell, eldest son to the said John, and his sister, in which the Captain alleged, that substitutions in testaments and legacies are understood to be vulgar substitutions, *si hæres non erit;* and as upon the death of the testator the legacy is *eo ipso*, without any formality of acceptance, vested in the institute, so after the institute's death, it transmits to his nearest in kin. The sister, on the other hand, alleged, that the vulgar substitutions of the Roman law, which were founded on this subtilty, that though a man could name an heir to himself, and substitute as many as he pleased, yet he could not name an heir to his heir, are unknown in the law of Scotland, by which it is no less lawful for one to substitute to his heir than to name an heir to himself;

No. 18. and as a man may tailzie his moveables as well as his lands, at least to the effect of appointing a series of successors, so the rule with us is, that any express substitution excludes the legal succession.

The Lords, upon the 12th of June, " Found, that the substitution in favour of Margaret, in her brother Daniel's testament, does subsist notwithstanding the institute John did survive the said testator;" and upon a bill and answers, and hearing in presence in November 1740, " adhered;" several of the Lords dissenting, upon this ground, that though in lands and in bonds, which a substitute carries by service, the substitution excludes the heir of blood, yet, in legacies, it is otherwise; for it did not appear what title the substitute could make up after the legacy was once vested in the institute; that a service was improper was plain, and a confirmation of an executor *qua* substitute was never heard of.

The answer suggested by some to this was, that there seemed no incongruity in the substitute's confirming executor *qua* legatary to the first defunct; for though the legacy transmits to the institute by his bare surviving the testator, yet the right of action is not established in him without confirmation; and in this case, the institute not having confirmed, the right of action remained in him to be taken up by the substitute, by confirming executor legatary to the first defunct: By others, that where there was no other transmission to the institute, but by the bare survivance, why should not the right upon his death transmit to the substitute without confirmation, as in the case of a *nominatim* substitute in a bond, who, after the institute's death, takes up the right without service?

On this incident question, the Court did not properly come to a resolution. But this much was said, that where the right of the thing lay, it could never be lost for want of a method of making up the title. Had the testator in so many words said, that it was his intention, that should his father the institute die before he disposed of the effects bequeathed to him, the right should devolve on his sister Margaret, the same objection would lie with regard to the difficulty of making up titles.

N. B.—The decision, July 13, 1681, Christie against Christie, No. 30. p. 8197. *voce* LEGITIM, which carried the matter so much farther than was done by the judgment given in this case, as even to prefer the substitute to the heir of blood of the institute, though the institute had made up title by confirmation, was by all thought to go too far. See No. 9. p. 14849.

Fol. Dic. v. 4. *p.* 302. *Kilkerran, No.* 1. *p.* 521.

*** Lord Kames reports this case:

June 13, 1740.—John Campbell, Provost of Edinburgh, in July 1734, executed a general disposition of the whole effects that should belong to him the time of his death, to William his eldest son, with the burden of provisions to his other children, Matthew, Daniel, and Margaret. Daniel, one of the younger sons, being at sea, in a voyage from the East-Indies, made his will, May 1739, in which " he gives and bequeaths all his goods, money, and effects, to John Campbell his

father; and, in case of John's decease, to his beloved sister Margaret Campbell." The testator died at sea, in the same month of May; and, in June following, John Campbell, the father, also died, without hearing of Daniel's death, or of the will made by him. William, the eldest, brought an action against his sister Margaret and her husband, concluding that it should be found and declared, that the substitution in favour of Margaret, contained in Daniel's testament, was in effect but a conditional institution, and therefore, that she had no claim; because, by the father's survivance, Daniel's effects were vested in him, and consequently were regulated by the father's deed of settlement. No. 18.

To support this conclusion, the authority of the Roman law was urged, and the rule there laid down, that *in dubio* the *substitutio vulgaris* is understood, which takes not place if the institute survive the testator.

On the other hand, it was pleaded for the defenders, That our law differs widely from that of the Romans in the case of substitutions. The idea of property was anciently more limited than at present; a man could dispose of his effects by a deed *inter vivos*, and also by a testament, but it was not supposed that property, however absolute, could empower one to make a settlement for his heir, to take place, even after that heir is vested in the full property, and indeed it is a wide stretch to admit such an extensive privilege. Thus it was a maxim in the Roman law, that no man can name an heir to his heir; which is, in other words, that no man can make a proper substitution. Such a settlement was indeed sustained, if the heir died under age, before he had capacity to make a testament for himself, which was called the pupillar substitution. So standing the law of the Romans, every settlement of the present nature, must by them be understood a vulgar substitution, which is, in other words, a conditional institution; for an extreme good reason, that it could have no further effect. But the case is widely different with us. By the law of Scotland, it is understood to be a power inherent in every proprietor, not only to name his own heir, but to name heirs to his heir, without end, in a tailzie or proper substitution. In the Roman law, there was no room for a *quæstio voluntatis;* a proper substitution, had such a thing been intended, would have been void for want of power. With us there is no defect of power, and so the matter resolves into a *quæstio voluntatis*, whether was it Daniel's intention, in case of the survivance of his father the institute, to prefer his beloved sister Margaret before his brother William. With regard to which there can be no difficulty, because the same reason that led him to prefer his sister, in case of his father's predecease, must have led him to prefer her in case of his father's survivance.

"Found, that the substitution in favour of the defender Margaret, in her brother Daniel's will, does subsist; notwithstanding the institute John Campbell did survive the testator."

*** Follows another view of the case also by Lord Kames:

John Campbell, Provost of Edinburgh, in July, 1734, executed a general disposition of the whole effects that should belong to him the time of his death, to

No. 18.

William his eldest son, with the burden of provisions to his other children Matthew, Daniel, and Margaret. Daniel, one of the younger sons, being at sea in a voyage from the East-Indies, made his will, May 1739, in which he " gives and bequeaths all his goods, money, and effects, to John Campbell his father; and, in case of John's decease, to his beloved sister Margaret Campbell." The testator died at sea in the same month of May, and, in June following, John Campbell the father also died, without hearing of Daniel's death, or of the will made by him. William, the eldest, brought an action against his sister Margaret and her husband, containing, amongst other conclusions, that, by his father's survivance, Daniel's effects were vested in the father, and descended to him the pursuer, by the father's disposition in his favours; by which the substitution in favour of Margaret, contained in Daniel's will, was altered, supposing it to be a proper substitution.

To support this conclusion, the father's settlement was appealed to, disponing to the pursuer, in express terms, all the effects that should belong to him the time of his decease; which included, among other subjects, the effects that formerly belonged to Daniel, and which vested in the father by his survivance.

It was answered, That nothing more was intended by the Provost than to settle upon his eldest son his proper effects, which, but for that deed of settlement, would have descended to his heirs *ab intestato;* that there is nothing in the tenor of the deed of settlement, or in the circumstances of the parties, upon which to presume that the father intended to void the substitution, had he even known of it at the time; but his ignorance of the substitution removes all suspicion of his having any will about the matter, secret or revealed; consequently, that the case resolves into the following question, Whether Daniel's effects must be carried by the mere force of the words in the father's settlement? which must be answered in the negative, because, though the words are general and sufficiently ample, yet words alone, without intention, have no operation in law; and, with respect to the father's intention, it certainly goes no farther than to provide to his eldest son what would otherwise have fallen to his heir *ab intestato.*

" Found, that the general disposition in 1734, granted by John Campbell to his son the pursuer, several years before Daniel's will had a being, does not evacuate the substitution in the said will, but that the same does still subsist.

Rem. Dec. v. 2. *No.* 13. *and* 14. *p.* 25.

1744. *December* 7.

The NEAREST in KIN of MARY and JANET WALKERS *against* The NEAREST in KIN of WILLIAM WALKER.

No. 19.

If the substitute die before the institute.

Robert Walker, tenant in Bedlormy, settled all his effects, being moveable, upon William his brother, and the heirs of his body, with a provision, that if William should die without heirs of his body, the sum of 1500 merks, at which