SECTION VI.

Legitim how far subject to the Father's disposal.

1681. *July* 13. CHRISTIE *against* CHRISTIE.

No 30.
Pupillaris Substitutio hath no place in the Scotch Law.

THE deceased Mr James Christie, by his testament, did nominate Jean Christie, his daughter, his executrix and universal legatrix; and, failing of her by decease, David Christie, to whom he left also a legacy of 3000 merks; and dying shortly after the testament, the said Jean being an infant, was confirmed executrix, and did obtain sentences for the defunct's moveables, and shortly after died in her infancy. Mr James Christie's relict brought forth a son about nine months after his death, who was served executor to Jean Christie his sister. The said David Christie pursues James to make payment to him of all the executry of Mr James Christie, as being substitute to Jean Christie in the office of executry and universal legacy, in case of her decease. The defender *alleged*, 1*mo*, That Jean being institute heir *in mobilibus*, and having entered by confirmation, the substitution to David evanished, seeing Jean failed not to be heir. It was *answered*, That the clause of substitution bearing, failing Jean by decease, imports a tailzied succession *in mobilibus*, whereby Jean was constituted fiar, and David heir substitute; so that Jean might have disposed thereof at her pleasure; and if she or her tutor had taken bonds for the defunct's executry, to herself and her heirs whatsomever, it would have excluded David the substitute; but that not being done, but only decreets obtained, decerning the debtors to pay the sum to Jean, as executrix, James her brother doth not succeed to her therein, but David the substitute by her father. "THE LORDS found, that the substitution imported a tailzied succession, which not being altered, David was preferable to James, nearest of kin to Jean." The defender further *alleged*, That, albeit the substitution in the universal legacy did prefer David, yet that could extend no further than the dead's part of the testator's moveables, being the half; for Jean being the only bairn, and the relict excluded by her contract of marriage, the one-half of Mr James his executry did belong to Jean, as the only bairn, which no deed of her father on death-bed, or by testament, could prejudge. It was *answered*, That the testator having appointed Jean his universal legatar, and only intromitter with his goods and gear, she could not accept

No 30.

the universal legacy upon other terms than it was granted, which did import the communication of her own bairns part; and this is in effect *substitutio pupillaris*, whereby the father hath substituted to his daughter, not only in his own dead's part, but in her bairns part, which is a just power attributed to fathers by the Roman law, to substitute heirs to their children, not only in their heritage, flowing from the father, but into all their other rights. "THE LORDS found, the substitution could only reach to the dead's part, and that the bairns part belonged to James, as nearest of kin, and executor to Jean, and that pupilar substitution hath no place with us, neither did the father make the universal legacy with express condition, that the substitute should have both dead's part and Jean's bairns part." The defender further *alleged*, That this substitution of David Christie to Jean Christie, who was the testator's only child at that time, being a donation of mere gratuity to a stranger of no relation, is excluded by the superveniency of James, whom the testator knew not to have been conceived, which if he had known, he would never have given a stranger the substitution of his whole moveables, which is *universum jus in mobilibus*; and, therefore, as all donations are revoked by ingratitude, or superveniency of children, when the donation is universal, so this donation must be revoked by the superveniency of James, who was not a month conceived when his father died.

This point being new, the LORDS appointed to hear it in their own presence.—*See* SUBSTITUTE and CONDITIONAL INSTITUTE.

Fol. Dic. v. 1. *p.* 546. *Stair, v.* 2. *p.* 889.

1697. *January* 12. JOHNSTON *against* JOHNSTON.

No 31.
A disposition by a father to a younger son, in its nature a *donatio mortis causa*, was, notwithstanding, sustained, because the father was considered to be the best judge of the distribution of his effects.

MERSINGTON reported Johnston in Haddington, against Johnston his brother, for reduction of a disposition made by their father to the younger son of all his moveables, on this reason, that it was truly of a testamentary nature, though done in *liege poustie*, and so could not prejudge him of his legitim and portion-natural; and bore not only a power to alter, but an obligement upon the son to consent to any deeds or rights his father should make thereof, which plainly brought it to the case of a *donatio mortis causa*. *Answered*, The disposition was an act *inter vivos*, and rational in the father to do it, seeing he had bound his eldest son to a silk-weaver, and had given him his patrimony. THE LORDS considered the father was best judge of the distribution of his means, (as they had formerly found in the case of Thomas Wylie's Children*;) and, therefore, sustained the disposition, and assoilzied from the reduction. Some were for trying how much the eldest son had got, that he might collate, and

* See General List of Names.