

# APPENDIX.

## PART I.

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### SUBSTITUTE AND CONDITIONAL INSTITUTE.

1801. *May 27.*

JAMES SMITH, and his ADMINISTRATOR-IN-LAW, *against* THOMAS GRIEVE.

No. 1.

JAMES SMITH, merchant in Peebles, disposed to 'Helen Smith his natural daughter, and the heirs whatsoever to be procreated of her body; whom failing, to James Smith, second son of Robert Smith, flesher in Peebles, and the heirs whatsoever of his body; whom failing, to James Smith, son to Robert Smith, skinner in Dalkeith, and the heirs whatsoever of his body; whom all failing, to his own nearest heirs and assignees whatsoever; all and sundry lands, tenements of land, debts, heritable and moveable goods, gear and sums of money, and all other subjects and effects of whatever nature, then pertaining and belonging, or which might pertain and belong to him at the time of his death.'

A person having executed a general disposition in favour of his natural daughter, and the heirs whatsoever of her body; whom failing, in favour of certain substitutes; whom failing, in favour of his own heirs and assignees; and the daughter dying after her father, without children, and without making up titles; her husband was found entitled to one-half of the household furniture and bills due to the deceased,

Helen Smith, who lived in family with her father, afterward married Thomas Grieve, who likewise lived with him.

Helen Smith died a few days after her father, and before his repositories were opened.

His property consisted partly of heritage, and partly of his household-furniture, and three bills found in his desk; one of which was indorsed by the deceased to Thomas Grieve; and the other two had the deceased's subscription indistinctly written on the back of them.

James Smith, the first substitute, having got himself decerned executor *qua* general disponee, and served heir general of provision, he and his father, as his administrator-in-law, presented a petition to the Sheriff, craving that Grieve should be ordained to cede possession of the house of the deceased, and its contents.

## 2 SUBSTITUTE & CONDITIONAL INSTITUTION. [APPENDIX, PART I.]

No. 1.  
and the first  
substitute, to  
the other half  
of them.

The Sheriff found, ' That Helen Smith had, by her father's disposition, a personal right to the subjects thereby conveyed, which she could have assigned or disposed away at pleasure, and thereby evacuated the destination in the disposition : Found, That there was, by her marriage with the defender, a legal assignation, not only of what personal estate she then had, but might afterward acquire, which by law is subject to the *jus mariti* : Found, That the *ipsa corpora* of moveables and bills, and lying money, are all subject to the *jus mariti* ; and that such moveables, bills and money disposed in general to her by her father, became, immediately after his death, the property of her husband, and formed part of the goods, in communion between them : Found, therefore, That on her death without children, one half of these belonged to her said husband the defender, and the other half (she having been a natural child) to the Crown, whereby the pursuers have no right nor interest in any of the moveables, or bills, or money, and of course, assoilzied the defender to that extent, and decerned ; but found, that the pursuers have right to the heritable estate, consisting of lands, houses, heritable bonds and personal bonds, bearing interest, (if any there be), souns of grass, leases, &c. &c. consequently to obtain possession of them, with all writings and documents regarding them ; and decerned and ordained them to be delivered to the pursuers.'

A bill of advocation for the pursuers having been passed, the defender, besides urging the topics suggested by the Sheriff's interlocutor, (in which he acquiesced), stated, that the furniture was the property of his wife, having been partly acquired by her own industry, and partly gifted to her by her father on her marriage : That he (the defender) had received the three bills as a donation from his father-in-law on the day before his death, and that his wife had put them into the desk where they were found, of which she had previously received the key from her father. But of these averments there was no evidence.

The Lord Ordinary ordered informations.

The pursuer

Pleaded : The competency of creating a series of substitution in moveables of every description is now completely ascertained ; Stair, B. 3. T. 5. § 17 ; Bankt. Vol. 2. p. 388. § 44 ; Vol. 1. p. 588. § 151 ; Ersk. B. 3. Tit. 8. § 44 ; 15th Jan. 1630, Thomson, No. 11. p. 5774 ; 13th July 1681, Chrystie, No. 30. p. 8197 ; 13th June 1740, Campbell, No. 18. p. 14855 ; and it comes to be a question of intention, whether a proper substitution, or a conditional institution only, is to be inferred in each particular case. That the former was meant in the present case, is evident, both from the words employed, and circumstances of the parties. The disponent meant his heritable and moveable estate to descend to the same person. The number of substitutions, and that in favour of his own heirs and assignees, shew, that the disponent had not in view merely the accident of the disponent dying before him ; and, as she was

a natural child, a proper substitution was necessary to exclude the right of the Crown. No. 1.

There could be no intention to favour the defender in the present case; and the subjects having become heritable *destinatione*, his *jus mariti* with regard to them is excluded; Ersk. B. 1. Tit. 6. § 12; B. 2. Tit. 2. § 14.

Answered: The expressions here used do not necessarily import a proper substitution; on the contrary, they are those usually employed where a conditional institution is intended.

Although moveables may be completely entailed, they are not the proper objects of an entail, and an intention to create one with regard to them is never presumed; 2d June 1792, Brown against Coventry, No. 23. p. 14863.

Although the pursuer were to be held as a proper substitute, he would have no right to the personal estate. Helen Smith might have defeated the substitute, by a gratuitous assignation executed *inter vivos*, or *mortis causá*, and her marriage implied a legal assignation to the defender.

Observed on the Bench: The general disposition gave a *jus ad rem*, making the personal estate descendible to executors without confirmation. The donee might have assigned it expressly, and the marriage implied an assignation in favour of her husband.

The question remains, whether this put an end to the substitution entirely, so as to make way for the Crown. This is to be decided by intention, and on that ground, the substitute is entitled to the half not taken by the husband.

Other Judges doubted the effect ascribed to the general disposition; and it was likewise observed, that the substitute was entitled to the moveables upon the same principles that he had right to the heritable succession.

The Lords “found, that the defender has right to the contents of the bill “by Robert Smith, specially indorsed to him, and that he has also right *jure mariti* to the one-half of the remaining moveables, and that the pursuer has “right to the other half thereof.”

Lord Ordinary, *Glenlee*.

Act. *Forbes*.

Alt. *Montgomery*.

Clerk, *Pringle*.

*D. D.*

*Fac. Coll. No. 230. p. 521.*