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.

bring in the same into the equal division of the goods between the two brothers, in case the disposition were reduced *quoad* an half; but it carried *ut supra*. No 31.

Fol. Dic. v. 1. *p.* 545. *Fountainhall, v.* 1. *p.* 753.

1721. *January* 18. LADY BALMAIN *against* GRAHAM.

No 32.

A DISPOSITION by a husband to his wife of the stocking that should be upon his mains the time of his decease, being quarrelled by his children, as in prejudice of their legitim, being of a testamentary nature, revocable, as not having been a delivered evident; it was *answered*, That the form of the disposition is *per modum actus inter vivos*, whereby a present right is conveyed, though suspended till the granter's death, and being done *in liege poustie*, it cannot be reached by the law of death-bed, and there lies no other bar to the father's power of alienation; 2*do*, This is a rational deed, an additional provision to a wife, and not of that nature as to admit of a construction that it was intended to disappoint the children of their legitim. THE LORDS found the goods disponed belonged to the Lady *tanquam præcipuum*. *See* APPENDIX.

Fol. Dic. v. 1. *p.* 545.

1728. *February*.

MARION HENDERSON, and HUGH CAMPBELL, her Husband, for his Interest, *against* DAVID HENDERSON.

No 33.
A father, by any deed to take effect only after his death, (tho' not on death-bed,) cannot disappoint his children's legitim.

CLAUD HENDERSON, merchant in Glasgow, having a son and three daughters, made a disposition of his whole heritable and moveable estate to his son; wherein, 'for the love and favour he had to him, he, the said Claud Hender-'son, in case it should happen him to depart this life before his said son, 'gives, grants, and dispones to him, his heirs, executors, &c. all and what-'soever debts, goods, gear, lands, heritages, &c. belonging or competent to 'him, or what he should thereafter purchase or acquire.' Then follows a clause, empowering the said son 'to procure himself served heir of line in spe-'cial and in general to his father, and to obtain himself executor decerned 'and confirmed to him;' and he thereby nominates his said son 'his sole exe-'cutor and universal legatar, and intromitter with his goods and gear what-'soever.' Of the same date, he grants bonds of provision to his daughters, which he declares, 'should be in full satisfaction of all they could anyway 'claim by his decease.' The other daughters resting satisfied with their provisions, Marion, the youngest, rejecting her bond, intented a process against