No 33. very one of the children equally; and the law of the legitim considers not the children of one marriage, in opposition to the children of another marriage; or the whole children conjunctly, in opposition to strangers; but each child separately for an equal share.

'The Lords found the pursuer entitled to her legitim.'

Fol. Dic. v. 3. *p.* 545. *Rem. Dec. v.* 1. *No* 107. *p.* 207.

1742. *June* 2. William Robertson *against* Mrs Jean Ker.

No 34.
Though a father leave his whole moveable estate to an only child, with a substitution to another, yet the child's heir *in mobilibus* is preferable to the substitute *quoad* the legitim.

Major Robertson, whose estate was all in moveables, made a testamentary settlement, in which he nominated to be his executor and universal legatee, William Robertson his only child, and the heirs of his body; whom failing, Jean Ker his spouse. After the Major's death, tutorial inventories were made up of his estate, which was managed, during the son's life, without any confirmation. And the son having died, about the age of fifteen, unmarried, the relict took up the succession by virtue of the substitution contained in the testament.

William Robertson, brother to the Major, *insisted* in a process against the relict, claiming the legitim belonging to his nephew the minor out of the Major's effects, to which he the pursuer had now right as next of kin to his nephew. The defence was, that the testament in favour of the son, whereby he got the universal succession, was full satisfaction of the claim of legitim.

Answered, The substitution in favour of the relict in case of the son's death without issue, imports a prohibition upon him to alter the settlement, at least during his minority; therefore this testament was not full satisfaction of the legitim, since, instead of an absolute, it bestowed only upon the son a limited right. And as there is no evidence the son ever acknowleged this testament by acceptance or otherwise, his claim of legitim did subsist, and must transmit to his next of kin, precisely as if the Major had died *intestate*.

Replied, The Major's settlement is a simple destination; it contains no clause prohibiting an alteration of succession; nor can any such clause be implied; and, though it were implied, and even expressed, the settlement would notwithstanding be effectual, as there is no law to bar a substitution with regard to the legitim.

'Found, that notwithstanding the testament, the pursuer, as heir *in mobilibus* to his nephew the testator's son, has right to the legitim that belonged to his nephew.'

The point strongly laboured for the pursuer was, that the legitim is a right in the moveables which the children have in common with their father and mother, of which common property the father is administrator during his life; but that, after his death, the same divides in three equal parts, one part to the wife, another to the children, and the third, called dead's part; which last is

No 34.

the only part the father has power to test upon. The Judges were generally of opinion, that the legitim is but a right of succession; evident from this, that the children, who do not survive their father, have no claim. It was also thought by most of the Judges, that it would be going too far to say, that the father, in no case, could make a substitution with regard to the legitim; for, what if a child should die in infancy, before being capable of making a testament? But then it was the opinion of the plurality, that in the present case, the testament implied a prohibition to alter in prejudice of the substitute, which was *ultra vires*; and therefore, that the substitution was void.

Several things not stated, or not sufficiently cleared, may justly occasion a doubt about this judgment. 1*mo*, There is no limitation expressed in the testament; and if the Major had no power to limit his son's fee, why will we presume that he intended so idle a thing as to transgress his powers; especially when he must have known, as the law is supposed to be universally known, that such prohibition must defeat his settlement with respect to his wife?

In the *next* place, let us suppose an express prohibition to alter the subsitution; it seems not to follow that this must defeat the substitution. There is no foundation in law or in reason for holding, that in every case a deed partly *ultra vires*, is void *in toto*. It is true, that where the several parts of a deed are mutual causes one of the other, or have any other such intimate connection, the whole must stand or fall together; but, in the present case, the prohibition is separable from the substitution, and the latter may subsist after the former is taken away. Now, it is the genius of law to support deeds, as far as they can be supported, *ut actus valeat*; and yet the present judgment voids that part of the will which is lawful and just, as a punishment upon the testator for endeavouring to fetter his son the legatee, which he had no power to do.

3*tio*, This supposed prohibition is, at worst, a very harmless matter; it is agreed to be void in law, so as perhaps not even to need the form of a reduction. Had the minor made a testament in favour of the pursuer, or in favour of his mother, the will in either case would have been effectual. Here then is a singular operation of law; a clause in a deed having no effect to answer the purpose intended, and yet having an effect quite opposite to what was intended.

And *lastly*, it is no improbable supposition, that it was the minor's inclination to prefer his mother to his uncle. Upon that supposition, the son's will is defeated by this judgment, as well as that of the father.

Fol. Dic. v. 3. *p.* 381. *Rem. Dec. v.* 2. *No* 28. *p.* 44.

*** Kilkerran reports this case:

1742. *Feb.* 4. & *Nov.* 3.—Major Robertson, whose estate was all in moveables, by a testamentary settlement nominated to be his executor and universal legatary William Robertson his only child, an infant, and the heirs of his bo-

No 34. dy; which failing, Jean Ker his spouse, whom he also appointed tutrix and curatrix to her son. After the Major's death, she made up tutorial inventories, and managed for her son during his life; and upon his death, about the age fifteen, she continued the possession upon the substitution.

But William Robertson, the Major's brother, and nearest of kin, being then advised to quarrel the Major's settlement, which had not been approbated by any deed of his son, brought a reduction thereof on some general grounds, which have been taken notice of elsewhere under their proper heads; and not succeeding in these, he recurred to this particular ground, that in so far as concerned the legitim, which was due to his nephew out of his father the Major's estate, it was not in the Major's power to make any substitution to him therein, and that it therefore belonged now to the pursuer, as nearest of kin to his nephew.

The point of law his procurators chiefly *insisted* on was, That the legitim is not properly a right of succession, but rather a right of division, which belongs to children on their father's death, in like manner as the third belongs to the relict, and over which the father has no power. And they *separatim argued*, That *esto*, it were in a father's power to substitute to his children in the legitim, the substitution in the present case was void, as it implied a prohibition to alter, which undoubtedly was not in the father's power.

On the *first* point, the LORDS were generally of opinion, That the legitim is a right of succession; and justly, otherways the children would have right to it upon their existence, though they predeceased their father, as the relict has her part, though she predecease her husband; but then they were not at one upon the father's power over it; some thought, that although it was but a right of succession, it was a right of a mixed nature, which, by the law of Scotland, the father could not impair by testament, and that consequently he could not, by a substitution, exclude the child's heir. Others were not for carrying the matter so far, that in no case the father could make a substitution with regard to the legitim; but were of opinion, that in this case the substitution of the wife, on failure of the son and the heirs of his body, implied a prohibition on the son to alter, at least, during his minority; and that as this was *ultra vires*, the substitution was therefore void; and it must be owned, that the more general opinion pointed this way. At the same time, it was not equally obvious to all, either that such prohibition was implied, or even if it had been expressed, that it should have the effect to void the substitution, which this part of the argument supposes it in the father's power to make, although the prohibition itself should be ineffectual.

But all having agreed, that the substitution was void, it was, upon February 4th 1742, found, that 'notwithstanding the testament, the pursuer as heir *in* 'mobilibus to his nephew the testator's son, has right to the legitim that belonged to his nephew;' and upon the 3d November, the LORDS 'adhered.'

Though the LORDS were unanimous in this judgment, yet, as it proceeded on

such different grounds, in which they did not agree, it cannot be said to be any other than a judgment on the particular case; yet, may it not be thought, that it might have justly been given on the general ground? For if the father cannot by testament impair the child's right to the legitim, may it not be thought a consequence, that he cannot substitute a stranger, especially to an infant child, who cannot alter a substitution; as one's right is always understood to be impaired and he prejudised, when his right heirs are excluded? No 34.

Kilkerran, (LEGITIM.) *No* 3. *p.* 333.

*** This case is also reported by C. Home:

1742. *February* 4.—WILLIAM ROBERTSON brought a reduction of his brother Major Robertson's testament, upon this, amongst other grounds, that the end of the last page did not mention how many pages are therein contained, as is required by the above act.

Answered, The testament is wrote upon one sheet, and the four pages are numbered, and signed by the testator, and the last page by the witnesses; and that, as this writ does not fall under the words of the statute, so it is not comprehended under the meaning of the act. It consists but of one sheet; and therefore, there could not be any addition or subtraction, which can only take place where a writ consists of more sheets joined together. The directions of the law are observed; every page is marked by the numbers, first, second, third, and the last page bears number fourth; but the act does not prescribe any particular form how the number of the pages shall be mentioned, as the act 1686 does with respect to sasines. It is true the number of pages is usually mentioned in the testing clause; but it is without any special direction from this statute. Neither has it said, that the omission of any of the matters therein required, shall infer a nullity.

THE LORDS repelled this reason of reduction.

1742. *June* 4.—Amongst several other points which occurred betwixt these parties, was the following one. The deceased Major Robertson, by his testament, nominated William Robertson his only son, then an infant, and the heirs of his body, which failing, the said Mrs Jean Ker his spouse, his executor and universal legatar, subject to certain legacies. Some of the legacies were to be payable by the son, and some additional ones by the relict, in the event of the son's dying before his marriage or majority; *proviso*, in case the son should survive his majority, or till he should have issue of his body, the additional legacies should become void. And, amongst the rest of the additional legacies, there was L. 3000 left to the pursuer and his family. Major Robertson having died soon after making his will, the tutors named to the son made up the tutorial inventories of the estate which descended to their pupil, but never expede any confirmation of the testament; and the son having died when about 15

No 34. years of age, the succession devolved upon the relict, in virtue of the substitution contained in the testament, which she confirmed. Of this testament the pursuer (brother to the Major) brought a reduction upon various topics; and, *inter alia*, claimed the legitim or bairns part of gear which belonged to his nephew (the Major's son) which he the pursuer had right to as nearest of kin to him.

The arguments offered in defence were, That a father was indeed under an obligation to leave a certain share of his moveables to his children; but that it sounded oddly to say, that when a parent had left the whole estate to his only child, that he had not implemented the obligation, and that he still remained debtor to him in the legitim or bairns part. That, in this case, the obligation was implemented in the most beneficial manner, when the property of the whole descended to the son, and the heirs of his body, without any restriction or limitation, and the defender is substituted simply to the son and the heirs of his body; so that upon their failure *quandocumque*, the substitution in her favours was to take place, unless they otherwise disposed of the defunct's estate. By the civil law, from which we probably derive the legitim, if an only child was instituted heir *ex asse*, the right of legitim was quite extinct; consequently, it could neither subsist in him, or transmit to his representatives; agreeable to this, it has always been held to be the law of Scotland, that whatever a child receives from his father, so far extinguishes the legitim; therefore, if he takes the whole, it is undoubtedly extinguished. By the Roman law, as the child's claim of legitim was properly a claim of succession to the parent, so the parent could substitute to the child the same way in the legitim, as he could in the rest of the estate, that is, he could substitute *si hæres non erit*; so that whether the child predeceased the father, or survived, and declined the succession, the substitute took the whole, without distinction betwixt the legitim and the rest of the estate. The child had no *querela inofficiosi*, when he was called to the whole, and much less was such claim competent to the heirs of the child. It is true, that substitution *si hæres erit*, was allowed only amongst the Romans in some cases? yet, by our modern customs, any testator may substitute to his heir *si hæres erit*, as to all the estate that descends from him to the heir. In short, children with us take the legitim as a right of succession, much upon the same plan they claim a provision in their favours in a contract of marriage; consequently they cannot be prejudged by gratuitous deeds that are to take place after the father's death, but still they take it as a right of succession, and therefore it is liable to a substitution, in the same manner as the father's other moveable estate; and, upon the same rule, when a father dies leaving an only child who has right to the executry, it was never heard of that the child confirmed only the dead's part, and took up the legitim without confirmation; but it has always been understood to be necessary to confirm the whole, in order to entitle him to proceed to diligence. Nor is it any objection to this doctrine, viz. that children take their legitim as a right of succession, that the legitim vest in them

immediately upon the father's death, which the dead's part does not, but requires a confirmation; for this is not peculiar to the legitim; it holds likewise in every legacy which vests in the legatar, and transmits to his heirs; and yet it will not be maintained that this excludes a substitution in the legacy. See § 6. *Inst. Inofficios. Testam. l.* 12. *C. eod.*; Book of Majesty, *lib.* 2. *cap.* 37. § 2.; 14th act 1617, anent Executors; Instructions to the Commissaries in the 1666. No 34.

Answered for the pursuer; That the legitim, though derived from the father, is no right of succession in the person of the child; that it belongs to the child *proprio jure*, and, upon the principles of our law, is more properly a share in the division of that moveable estate which was in communion during the father's lifetime, the administration of which was committed to the father himself, and vests in the child the moment that the father dies. And more particularly, that neither by the Civil, English, or Scottish law, is it competent to the father, by any deed of a testamentary nature, to defeat, impair, or burden the child's right of legitim, as is evident from l. 30. and 32. *proem. C. Inofficios test.* and Voet. § 44. *eod. tit.* and all the Doctors consider, that a substitution to the child in this claim of legitim, whereby any other person than the child's own heir should be appointed to succeed, is a *gravamen impositum legitimæ*, which the father had no power to impose. And with respect to the law of England, though this right of legitim is no part of the general law of that country, yet there are particular counties where it takes place, upon the same footing as it is established in Scotland, as appears from Swinburn's treatise on Testaments, part 3. § 16. See likewise chap. 37. lib. 2. *Reg. Majest.* Stair, lib. 3. tit. 4. § 24. Dirleton, *De legit. liber.* and Christie, No 30. p. 8197. In a word, the defender's plea proceeds upon this fundamental mistake, in supposing that the testament conveyed to her all the defunct's moveable estate, under a general substitution; whereas it neither did or could convey any more to her than the dead's part, since no more belonged to the testator subject to his power of disponing. The legitim belonged to, and vested in the child *ipso jure*, the moment the Major died, when the testament only became effectual, and the universal legacy could never be meant to convey more than belonged to the Major, with the burden of debts. And in such a case as this, where the child is not only entitled to the legitim, but is also nominated executor and universal legatar, *sustinet duplicem personam*, he is entitled to the legitim *proprio jure*, and takes the residue, with the burden of debts *qua* universal legatar. *Qua* executor, the child is no doubt liable to his father's whole debts, onerous or gratuitous; but, as entitled to his legitim, he would prevail against any gratuitous deed, whereby his right of legitim would be impaired or prejudged.

THE LORDS found, that, notwithstanding of the testament, the pursuer, as heir *in mobilibus* to his nephew the testator's son, has right to the legitim that belonged to his nephew. See SUCCESSION.

C. Home, No 190. *p.* 317.