

1743.

CAMPBELL
v.
CAMPBELL
AND HUSBAND.

WILLIAM CAMPBELL, - - - *Appellant* ;
MARGARET CAMPBELL and HUSBAND, *Respondents*.

17th February, 1743.

SUBSTITUTE AND CONDITIONAL INSTITUTE. — CLAUSE. —

A destination of personal property to A ; and in *case of his decease* to B, found to be a proper substitution, which subsisted although the institute survived the testator.

Found that this substitution, although alterable by the institute, was not affected by a *previous* general disposition of all that might belong to him at his death.

[Kames, Rem. Dec. pp. 25, 26. Kilk. p. 521.—Elchies, No. 7, *voce* Legacy. Fol. Dict. iv. 302. Mor. Dict. 14855.]

JOHN Campbell executed a general disposition of No. 67. the whole effects, debts, sums of money, &c. which might belong to him at the time of his death, in favour of William, his eldest son, with the burden of provisions to his other children, Matthew, Daniel, and Margaret. Daniel made his will at sea, on a voyage from the East Indies, in May 1739, bequeathing all his money and effects to “ John Campbell, his father ; and, in case of John’s decease, to Margaret, his beloved sister.” Daniel died at sea the same month, and in June following John the father died also, without having heard of Daniel’s death, or of the will which had been made by him.

A competition then arose as to Daniel’s suc-

1743.

CAMPBELL

v.

CAMPBELL

AND HUS-

BAND.

cession between William and his sister Margaret. William brought an action against her and her husband, concluding to have it found that the substitution in favour of Margaret was, in effect, but a conditional institution. It was argued that substitutions, with regard to moveable effects, were considered merely as the vulgar substitutions of the Roman law, *si heres non erit*, according to which the substitution did not take effect if the institute survived the testator; and, as in the present case, John survived his son the testator, the substitution in favour of Margaret became void; and 2dly, That Daniel's effects being vested in John by his survivance, were carried by his previous general settlement in favour of the pursuer.

Even supposing the settlement executed by Daniel to have contained a proper substitution, it was at all events merely a simple destination, which, even in the case of lands, and still more in the case of personal property, was alterable by John the institute; and it was effectually altered by the settlement previously executed by him, by which he conveyed, in express terms, in favour of the pursuer, all the effects that should belong to him at the time of his death.

It was answered, 1, That this subtlety of the Roman law upon the doctrine of conditional institution and substitution was founded upon the supposed impossibility of a man naming an heir to his heir, or, in other words, of making a proper substitution. But the doctrines of our law upon this subject are very different, and the rule is, that any express substitution excludes the legal succession; 2dly, All that it can be supposed that John intended to convey by his general disposition, were his

proper effects, which, but for that settlement, would have descended to his heirs *ab intestato*. There is nothing in that deed or in the circumstances of the parties, from which it can be presumed that the father intended to void the substitution in Daniel's will, which indeed was not in existence at the time; and it cannot be maintained that Daniel's effects must *ex necessitate* be carried by the mere force of the words in the father's settlement.

The Lords, upon the report of the Lord Ordinary, (13th June 1740,) found ' That the substitution in favour of the defender Margaret in her brother Daniel's will does subsist, notwithstanding the institute John Campbell his father did survive the said testator; and, found, That the general disposition in the year 1734 granted by the said John Campbell to the pursuer several years before the said will, does not evacuate the said substitution; but that the same does still subsist.'

The Court, upon advising a petition and answers, and, after a hearing in presence, adhered, (12th November 1740.)

The appeal was brought from these interlocutors of the 13th June and 12th November 1740.

After hearing counsel, " it is ordered and adjudged, &c. that the petition and appeal be, and are hereby dismissed; and that the interlocutors complained of be affirmed."

For Appellant, *William Noel, A. Hume Campbell.*

For Respondents, *R. Craigie, W. Murray.*

1748.

CAMPBELL
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Entered
Nov. 30,
1742.

Judgment,
February 17,
1743.