

No 11. half unless the defender would allege, that that either the testament was formed with a three-fold division, or that the bairns were yet on life; notwithstanding whereof, the LORDS found the exception relevant.

Fol. Dic. v. 1. p. 544. Haddington, MS. No 1328.

1623. July 19. SIBBALD *against* The PROCURATOR-FISCAL of St Andrews.

No 12.

IN an action of suspension, Sibbald *contra* the Procurator-Fiscal of the Commissariat of St Andrews, the LORDS found, that where a man dies, leaving behind his wife with child, who bears a bairn, albeit the bairn should live but one day, that the father's testament-dative being desired to be given up and confirmed upon charges of the Procurator-Fiscal, as use is, and, where there is no testament testamentary, although the said testament-dative should not be confirmed many years after the death of that bairn, who once lived, it should thole and have a threefold division, and that the deceased bairn should not be prejudged in his own third part, nor of no other part of the defunct's third, which might fall to him by the law.

Act. Aiton.

Alt. Absent.

Clerk, Gibson.

Fol. Dic. v. 1. p. 544. Durie, p. 75.

No 13.

1681. November. JANET GOODALE *against* WILLIAM LIVINGSTON.

FOUND, that a child unforisfiliate might, without the title of executor, pursue reduction of a testament or deed on death-bed, whereby the pursuer was prejudged of her legitim; because the pursuer was *haeres mobilium* as to the legitim, which passes to heirs, executors or assignees, without confirmation.

Fol. Dic. v. 1. p. 544. Harcarse, (LECTUS ÆGRITUDINIS.) No 647, p. 178.

No 14.

1686. March 12. YEAMAN *against* YEAMAN.

CHILDREN surviving their father, transmit their legitim to their nearest of kin, though they die without confirmation.

Fol. Dic. v. 1. p. 544. Fount. Harc. Sir P. Home.

. This case is No 54. p. 5484., *voce* HERITABLE AND MOVEABLE.