

No 8.

with other curators *ad hanc litem*; and further, he *alleged*, That the defunct died a bastard, not legitimate, and so had no power to make a testament; like as Robert Kincaid has obtained from the King a tutory dative. Both these allegations were repelled, and the pursuit sustained, at the pupil's instance authorized with one, without necessity of authorizing by any other concurrence, or new giving of curators; and it was found, albeit the defunct was a bastard, and not legitimate, he might leave tutors to his bairns, gotten by him in lawful marriage, and who were to succeed to his means, and whom he might nominate executors; notwithstanding that the defender alleged, that a bastard not legitimate, albeit having bairns gotten by him in lawful marriage, had not *testamenti factionem*; and that if he nominated his bairns executors to him, yet their succession, and coming to his means, would not be *ratione testamenti*, but *ratione sanguinis*, which was repelled; for if the bastard had more bairns gotten in marriage than one, and if he should make one of them his executor, that bairn, nominate executor, would have right only to that which behoved to come to him, *jure et ratione testamenti, et non jure sanguinis*; for *hoc jure sanguinis*, they would all succeed alike, and not he alone, who was nominate executor.

But here it is to be also remembered, that there was no declarator upon the defunct's bastardy. See SOLIDUM *et* PRO RATA. See TUTOR and PUPIL.

Act. ———

Act. Nisb.

Clerk, Hay.

Fol. Dic. v. 1. p. 92. Durie, p. 356.

1629. July 7.

WALLACE against MUIR.

No 9.
If a bastard obtain from the King, power of testing, the legatary will be preferable to the donatary of bastardy.

In a special declarator of bastardy, it was found; That the relict of the bastard had good right to the equal half of the bastard's goods, desired to be declared; and that the donatar had not right to the whole goods, but only to the other half thereof: Also the bastard having *testamenti factionem*, by grant from the King, and having made a testament in writ, and having thereafter left a legacy of 200 merks to his wife, whereby she claimed right to that part, at least to 100 pound thereof, whereunto she retrenched the said legacy: It was found, That the leaving of this legacy, after he had made testament, might be proven by witnesses, albeit the legacy was of a greater quantity, seeing it was restricted to 100 pounds by the legatar. See No 5. p. 1347.

July 9. 1629. In this action, mentioned 7th July 1629, it was found, that an heritable bond bearing annualrent, made by the debtor to the bastard, came under the general gift of the said bastard's gift of bastardy, gifted to the donatar; and that there was no necessity that the bond, or such others of the like nature, should be gifted by any particular gift of the same in special; likeas another donatar who had a special gift of that heritable bond, whereupon that declarator was fought by this general donatar, after general declarator obtained and decerned, upon the said gift of before, compearing and alleging, that he only should be preferred to that heritable bond by virtue of his gift thereof; this allegiance

was repealed, and this heritable bond, and such others (whereupon no fine followed) was found might be gifted by such general gifts, without necessity to express the same specially therein; and so by this decision, it would seem that an heritable bond should likewise fall under simple escheat by homing, as it is found here by bastardy. See GIFT OF BASTARDY.

Clerk, Gibson.

Fol. Dic. v. 1. p. 93. Durie, p. 457. & 459.

No 9.

1678. June 18.

The COMMISSIONERS for the Shire of Berwick, against CRAW.

UMQUHLE THOMAS BRUNTFIELD being a bastard, and having no near relations, did nominate John Craw his executor, and left several legacies to public uses, and specially for building a stone bridge over the water of Blacader, the sum of 4000 merks; and says, That Blacader was owing him 5000 merks, which he appointed to pay George Gordon, and to build the bridge; and he appointed the Earl of Hume and others to see the same performed; and after several other legacies, by the last words in the testament, he leaves what could be spared after the expences of his funerals, to his executor; who built the bridge without advice of the overseers; whereupon the justices of Peace in that shire, appointed some of their number to pursue the executor for payment of the superplus of the 4000 merks, over and above what was waired on the bridge, which was but 4000 merks, to be employed for the like end, viz. for the building of another bridge. — The defender *alleged* absolvitor, he having fulfilled the defunct's will in building the bridge; and what could be spared of the estate, was left to himself; neither was 4000 merks left generally to pious uses, but to build this bridge; which being done, no party had interest to pursue for any further, the defunct's intention being only the bridge; and no part of his estate could be interverted or applied without his will, more than Herriot's mortification for an hospital of so many poor boys might have been interverted to a better use, or restricted to their necessity; and there is nothing more religiously observed than the wills of defuncts, by all civil nations; the intervention or stretching whereof, would discourage all such good works; and therefore, though the pursuit be favourable, there is no law for it, nor have the pursuers any interest in it. *2do*, The defender is not only executor, but is donatar to the bastardy of the defunct, who having no children, could neither test nor legate. — The pursuer *answered*, That this legacy being for a public use, was *actio popularis*, most proper for the Justices of Peace, who have the charge of bridges; and as to the legacy itself, it is clear, not to be simply for the building of a bridge, but 4000 merks for building of it, which ought to have been all employed on the bridge, to have made it fair; but the defender, without any advice of the overseers, hath made it slight; and it

No 10.

A bastard having no lawful issue, has no power of testing; and can neither nominate executors, nor leave legacies, unless he obtain legitimation from the King.