## SECT. II.

### Testament made by a Bastard.—Nuncupative Wills.

1611. *February* 1. PURVES *against* CHISHOLM.

No 46.

A SCOTSMAN, born bastard, dying in England, his goods will fall under escheat to the King, and his donatar will have right thereto, notwithstanding any testament alleged made by the bastard, and confirmed in England, and that though bastards be alleged to have *testamenti factionem* there; specially if it be offered to be proven, that the bastard has rents, resort and traffick in this country, as a Scotman, and not as an Englishman naturalized, or made denizen.

*Fol. Dic. v. 1. p.* 320. *Haddington, MS. No* 2140.

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1665. *January* 19. SHAW *against* LEWIS.

No 47.
A nuncupative will, made in England, though good by the *lex loci*, was not sustained to carry moveables in Scotland.

WILLIAM SHAW, being a factor at London, and dying there, and having means both in England and Scotland, there falls a competition betwixt his executors nuncupative in England, and his nearest of kin, executors in Scotland. Anna Lewis, executrix confirmed in England, produces a sentence of the Court of Probates of Wills in England, bearing, 'That upon the examination of witnesses, that Court found, that William Shaw did nominate Anna Lewis his 'executrix, and universal legatrix.' And that being asked by her, what he would leave to his friends in Scotland? He declared he would leave her all, and them nothing, because they had dealt unnaturally with him.—It was *alleged* for the defunct's cousins, executors confirmed in Scotland, That they ought to be preferred, because, as to the defunct's means and moveables in Scotland, the same must be regulated according to the law in Scotland, where a nuncupative testament hath no use at all; and albeit a legacy may be left by word, yet it cannot exceed L. 100 Scots.—It was *answered*, That as to the succession, the law of Scotland must regulate; so that what is heritable cannot be left by testament, though made out of Scotland; as was found in the case of the successors of Col. Henderson dying in Holland, No 40. p. 4481.; and Melvil *contra* Drummond, No 41. p. 4483.; yet as to the solemnity of acts to the law, and custom of the place, where such acts are done, takes place, as where an act is done in Scotland, albeit it be only probable, by writ or oath of parties; yet being done in England, it is probable by witnesses, though it were of the greatest moment; and though the law of Scotland, in writs of importance, requires the subscrip-

tion of the party before witnesses, or of two notaries and four witnesses; yet writs made in France and Holland, by the instrument of one notary, are valid; so here there being no difference from the law of Scotland, which always prefers executors nominate before nearest of kin, and the difference only as to the solemnities and manner of probation, that there it may be proven by witnesses, there was a nomination, and here only by writ. No 47.

THE LORDS having considered the reasons and former decisions, preferred the executors confirmed in Scotland; for they found, that the question was not here of the manner of probation of a nomination, in which case they would have followed the law of the place; but it was upon the constitution of the essentials of a right, viz. a nomination, which, albeit it were certainly known to have been by word; yea, if it were offered to be proven by the nearest of kin, that they were witnesses thereto, yet the solemnity of writ not being interposed, the nomination is in itself defective, and null *in substantialibus*.

*Fol. Dic. v.* 1. *p.* 320. *Stair, v.* 1. *p.* 252.

*** Newbyth reports the same case:

UMQUHILE WILLIAM SHAW, residenter at London, having, by a nuncupative testament, made at London in March 1665, nominated Anna Lewis his sole executrix; the said will was proven in the Court of Probates at London, and likewise, that the defunct was *sanæ mentis*, and did expressly exheredate his nearest of kin, as persons who never deserved kindness from him. Adam and William Shaws having obtained themselves confirmed executors dative to the said defunct William Shaw, before the Commissaries of Edinburgh, intent action of exhibition and deliverance of all papers belonging to the defunct, and also for payment of the debts against the debtors. In this pursuit compearance is made for the said Anna Lewis, who *alleged*, in regard of her nuncupative testament under the seal of the Court of Probates of Writs in England, she ought to be preferred to the executors dative.—To this it was *answered*, That the defunct being a Scotsman, and his executry consisting in moveables and debts in Scotland, they cannot belong to the said Anna Lewis by virtue of the nuncupative testament, which is null by the law of Scotland, *ipso jure*.——THE LORDS found there could be no process sustained upon the nuncupative testament made in England for affecting the debts and goods in Scotland, but preferred the executors confirmed in Scotland to the nuncupative executors in England, *nemine contradicente*, notwithstanding there was a decreet recovered at the nuncupative executrix, her instance, against the executors confirmed in Edinburgh, before the Court of Appeals in England.

*Newbyth, MS. p.* 20.

No 47.

*** This case is also reported by Gilmour:

The deceased William Shaw, factor at London, having left a considerable estate behind him in moveables, most part in England, and a part in Scotland; William Shaw merchant in Edinburgh being his cousin-german and nearest of kin, obtains himself confirmed executor dative to him before the Commissaries of Edinburgh, and pursues for the debts owing to the defunct in Scotland. Compears Anna Lewis an English woman, and *alleges*, That she ought to be preferred, because she was nominate executrix and universal intromissatrix by the defunct, by a verbal nuncupative testament, which testament and will was proven in the Court of Probates of Wills at London, and that the defunct was *sanæ mentis*, and did expressly exhereditate the nearest of kin, as persons not deserving at his hands.—To which it was *answered*, That we have no such thing as nuncupative testaments in Scotland, it being necessary that all testaments be subscribed by the defunct, or by a notary or minister *de mandato*; and though a nuncupative testament be valid in England, as to any estate in England, yet it cannot be of force to take away an estate in Scotland, from the subjects in Scotland, who, and the estates in Scotland, ought to be ruled by the laws of Scotland.—*Replied*, That albeit lands and heritages must be conveyed according to the laws of the place where they lie, yet moveables, which consist most part *in nominibus debitorum*, *sequuntur personam*, and must be ruled according to the law of the place where the creditor lives and dies; likeas in the Court of Appeals in England, the said Anna is preferred to this pursuer compearing.—*Answered*, That whatever has been found in England as to a nuncupative testament and goods in England, it cannot be the foundation of any decision in Scotland, and therefore, if in Scotland a nuncupative testament will be found no testament at all, it can be no title to carry the moveables in Scotland from the nearest of kin and subjects in Scotland. Neither is there any difference in Scotland in this case betwixt a moveable or a personal estate, and real or heritable estate; seeing in the succession to either, there must be legal title in the person of the successor, according to the law of Scotland. Now a verbal testament in Scotland is of no force as to the nomination of an executor, or an universal legacy, nor to any particular legacy above L. 100 Scots; whereas this defunct's moveables were of great value, and the least part of them in Scotland.

The Lords repelled the allegeance and reply, and found that the nuncupative testament would not be sustained as to the moveables in Scotland.

*Gilmour, No 135. p. 98.*