

No 10.

cannot be controverted, but the whole 4000 merks might have been wared out upon a bridge there, of a fine structure; and therefore the executor should not *lucrari ex sua culpa*, but the superplus ought to be disposed for another like pious use. And as to the defence of the gift of bastardy, it ought to be repelled, in respect of the *legitimation* produced, whereby the King gave *tesamenti factionem* to the defunct, though a bastard.

THE LORDS sustained the process at the pursuers instance, and found, That the executor had no fulfilled the defunct's will, and that the superplus ought to be employed to another pious use; and therefore the LORDS ordained the rest to be bestowed upon the other bridge, designed by the Justices of Peace; and ordained the name and arms of the defunct to be put on the bridges; and repelled the defence of bastardy, in respect of the *legitimation*.

Fol. Dic. v. 1. p. 92. Stair, v. 2. p. 621.

1739. July 20.

ANABEL EWING, Relict of PATRICK GLEN, against JOHN SEMPLE.

No 11.

A bastard may convey his effects, by a general disposition, if it is not of a testamentary nature.

ANABEL EWING, as having right to a bond due to her deceased husband, by virtue of a general disposition from him, brought an action upon the passive titles against John Semple for payment. The defences were, *1mo*, That Patrick Glen, the creditor in the bond, being a bastard, the pursuer had no sufficient title in her person to insist for payment, she having no particular right thereto, but only a general disposition, which could avail no more than a testament would have done. *2do*, That the bond was null, in regard the writer was not designed before inserting of the witnesses, as law requires; and although it were not necessary for the writer of a paper to be designed before inserting of the witnesses, yet it is at least necessary that he should be some way or other certainly described, which he is not in the present case, the bond only bearing in the end of it to be subscribed before these witnesses, John Buchanan maltman in Dumbarton, and Adam Colquhoun servitor to James Duncanson at Garshake, writer hereof; which leaves it ambiguous whether Adam Colquhoun or James Duncanson was writer thereof.

Answered for the pursuer: That her title not being revocable, was not of a testamentary nature, but was to be considered as a deed *inter vivos*; that the act of Parliament requiring the designing of the writer, before inserting of the witnesses, was in disuetude; and that it is plain from the bond, Adam Colquhoun, one of the subscribing witnesses, is the writer thereof.

Replied: A bastard by law has no *tesamenti factio*; neither can an executor be confirmed to him upon any other title than *qua* creditor; whence it follows, that, as the pursuer's title is in effect a testament, requiring confirmation in order to its establishing a complete right in the person of the disponent, who cannot be

said to be a creditor to the defunct; that therefore there is here no habile transmission of the right, as appears from Stair, p. 427. (446.); and the decision 28th November 1691, Stewart;* where it was found, That a bastard's wife having a general disposition from her husband, could claim no right in virtue thereof, but had only that share of her husband's effects that she would have been entitled to by the law, had no disposition been granted. *3do*, By the express words of the statute 179. James VI. the bond in question ought to be found null, since the writer is not at all designed before the inserting of the witnesses, as that law requires: And the defender is at a loss to understand how it can be said to be in disuetude; as he believes, from the date thereof, to this day, very few writs of consequence, written by men of knowledge, have omitted the formality there required. But, supposing it might be dispensed with, still the writer should be designed with certainty; whereas here it is quite ambiguous, whether Adam Colquhoun or James Duncanson wrote it, the words, *writer hereof*, being immediately subjoined to his name and designation. Nor will the 5th act, 3d Parl. Charles II. allow this defect to be supplied by a condescence.

THE LORDS repelled the defences, in respect of the answers. See WRIT. *G. Home, No 228. p. 213.*

 S E C T. VI.

In what Cases a Bastard's Effects fall to the Lord of Regality.

1601. June.

BUCHANAN against CAMPBELL.

MR. JOHN DALZELL, and SUSANNA BUCHANAN, his spouse, havand be gift of our Sovereane Lord, the escheit of all guddis and dettis, whilk pertenit to umquhile _____ Campbell, dochter to the said Susanna and umquhile Colene Campbell, bastard son to Archibald Erle of Argyll, procreat betwixt the said Susanna and the said Colene, as *ultimus heres* to the said dochter deceis, and without ony lawful airs, pursuit the Laird of Caddell, as aire be provision to the said umquhile Colene, for the soume of ane thousand pundis, whilk the said Colene, be contract, had obligit him, his heirs and successors in his lands; to pay to the air's femell to be gottin betwixt him and the said Susanna, the soume of ane thousand pundis.—It was *alleged*, That his donator could have na action upone his Majestie's gift, becaus the lands to the whilk Caddell succedit, lay in the Regalitie of Argyll, and the persons dwelt thairin; and sua the gift appertenit to the Erle of Argyll be verteu of his regalitie.—It was *answerd*, That the gift of thingis falland be deceis of persons havand na lawful aires of thair awn blude as *ultimus heres*, could not pertene to the Lord of Regalitie be the general privilege of regalitie, unles he wer infest in that privilege *per expressum*, the sam being

No 12.

Lands or goods of a bastard, or person deceasing without heirs, pertain not to the Lord of Regality, unless specially expressed in his infestment.

* *Voc* HUSBAND and WIFE.