

was repealed, and this heritable bond, and such others (whereupon no fine followed) was found might be gifted by such general gifts, without necessity to express the same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.

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 9.

No 10.

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

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