

LEGITIM.

SECT. I.

Nature of Legitim.

1606. December 18. HOME against CHRISTIE.

No 1.

IN an action betwixt Francis Home and Christies, the bairns of his defunct wife, the LORDS found, that a widow deceasing having bairns, the gear in her testament receives no division, because the bairns fall no natural portion by their mother; and if the wife decease, leaving her husband and bairns in life, albeit by the order of the Commissaries, the testament will divide in three parts, yet the bairns get no part of the gear, unless their mother leave them her third in hail or in part, and the other two parts of the gear designed to be the husband's part and bairn's part, befalls together to the husband, so that the decease of the wife makes not the bairns to fall any bairn's part, notwithstanding the stile of the testament, unless she die intestate, in the which case they will fall executors to her part.

Fol. Dic.v. 1. p. 543. Haddington, MS. No 1167.

1622. January 30.

PATERSON, and his Spouse, against HOPE and DOUGAL, and their Spouses.

JOHN PATERSON, burgess of Edinburgh, and his spouse, Galbraith, being executors decerned to umquhile ———, mother to the said Galbraith, who died intestate, pursue Henry Hope and John Dougal, and their spouses, who were executors confirmed to umquhile Thomas Galbraith, which Thomas was

No 2.
Legitim is only of the father's means, not of the mothers,

No 2.
and therefore
a woman's
children have
only right to
her move-
ables, *qua*
nearest of
kin, whence
it is that they
transmit no-
thing before
confirmation.

brother to the said Paterson's wife, and son to the said ———, their mother, for payment and deliverance to them as executors to the said ———, her mother, of the particular goods libelled, pertaining to her the time of her decease, and which were intromitted with by the said Thomas her son after her decease, and therefore that his executors should be decerned to restore the same to them as being executors decerned to her, as said is. The defenders *alleged*, That the said goods pertained to Thomas, and consequently to them his executors, seeing the mother in her own lifetime made assignation to the said Thomas her son, of her whole goods, with provision that the said Thomas should pay her debts; according thereto, Thomas having intromitted in his own lifetime, and having satisfied her creditors, the said assignation as it would have defended Thomas himself, if he had been pursued in his own lifetime, far more must it defend these excipients his executors. No action being moved against him, whereby that assignation was quarrelled while he lived, he surviving diverse years thereafter. THE LORDS found this exception relevant to elide this pursuit, albeit it was *replied* by the pursuer, that the assignation, which was the ground of the defender's exception and right, could not be found valid to have defended the assignee, far less his executors, seeing it was an assignation made by the woman *in articulo mortis*, she having deceased within two days after the making thereof, and whereby *libera testandi facultas tollebatur et erat assignatio omnium bonorum*; which being sustained, would tend to a dangerous preparative, both to defraud creditors, and to defraud the bairns of their portions, and to prejudge their executors, and also the quot, and that there needed never any testament to be made thereafter; and if the Lords should incline to sustain that assignation, in respect of that clause insert therein, ordaining her debtors to be paid, and that it might appear thereby that none were prejudged, seeing there was no bairns unforisfamilitate the time of the woman's decease, and albeit there had been any, yet the bairns by their mother would fall no portion natural; it was *answered*, That the like provisions might be insert in all assignations hereafter, if such writs should be sustained as lawful, and the most that the assignation could be found good for, behoved only to be for so much of the defunct's means, as might correspond to satisfy the debts owing by her, and which were satisfied by the assignee; but for the oveplus thereof, the same behoved of all reason to pertain to the executors of the woman, who could never have prejudged her executors by that deed; and albeit the bairns could have no legitim by her, yet they were her executors of the law, whom she could not hurt by that assignation, made at that time of her death, and in manner fore-said; notwithstanding of all which answers, the LORDS sustained the assignation, and exception founded thereupon, for the whole goods of the defunct, albeit the same exceeded the whole debts owing by her, in respect also the defender offered to prove that the assignee had paid in his lifetime a part of the tocher owing by the woman's cedent to the same pursuers, whereby it was in-

ferred that it was a tacit ratification of the assignation done by the pursuer's mother.

No 2.

Act. *Peebles, Henderson and Dalry.*Alt. *Hope.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 543. Durie, p. 12.*

** See a similar case, 17th February 1663, Forsyth against Paton, No 6. p. 2941, *voce* CONDITION.

SECT. II.

Who entitled to Legitim.

1622. July 15. JAMES KENNEDY against His FATHER'S RELICT.

No 3.

JAMES KENNEDY executor dative to Robert, his father, pursues his relict for the goods and gear confirmed. She excepts she has retention of the half, because the defunct had no bairns extant the time of his decease, but this pursuer, who is heir, and cannot be both heir and have a bairn's part, and be counted a bairn, to make the testament divide in three, in prejudice of the relict. *Simile*, if there were more bairns nor the heir, and all forisfamiliate but he, the testament would divide in two only. *Ergo*, the like where there is no bairns at all by the heir. *Replied*, the heir is excluded by another, but when there is no other, he is a bairn *et facit partem in testamento*. THE LORDS repell the allegiance, in respect of the libel and reply.

Reporter, *Reidhouse.* Act. *Ayton & Fletcher.* Alt. *Nicolsons, sen. & jun.* Clerk, *Hay.**Fol. Dic. v. 1. p. 543. Nicolson, MS. No 41. p. 22.*

** See a similar case, 12th January 1681, Trotter against Rocheid, No 12. p. 2375., *voce* COLLATION.

1631. June 17. CHAPMAN against GIBSON and FINGASK, her Spouse.

No 4.

THE deceased Thomas Gibson having begotten a daughter, the only bairn of his first marriage, after whose decease, he having married Marjory Murray, his second wife, who dying also before her husband; Chapman, her executor, pursues the bairn of the said first marriage and her spouse, to make payment of the equal half of the goods, which the said umquhile Thomas Gibson had

The husband's children of a former marriage come in with the wife's executors to make a tripartite division.