

No 11. half unless the defender would allege, that that either the testament was formed with a three-fold division, or that the bairns were yet on life; notwithstanding whereof, the LORDS found the exception relevant.

Fol. Dic. v. 1. p. 544. Haddington, MS. No 1328.

1623. July 19. SIBBALD *against* The PROCURATOR-FISCAL of St Andrews.

No 12.

IN an action of suspension, Sibbald *contra* the Procurator-Fiscal of the Commissariat of St Andrews, the LORDS found, that where a man dies, leaving behind his wife with child, who bears a bairn, albeit the bairn should live but one day, that the father's testament-dative being desired to be given up and confirmed upon charges of the Procurator-Fiscal, as use is, and, where there is no testament testamentary, although the said testament-dative should not be confirmed many years after the death of that bairn, who once lived, it should thole and have a threefold division, and that the deceased bairn should not be prejudged in his own third part, nor of no other part of the defunct's third, which might fall to him by the law.

Act. Aiton.

Alt. Absent.

Clerk, Gibson.

Fol. Dic. v. 1. p. 544. Durie, p. 75.

No 13.

1681. November. JANET GOODALE *against* WILLIAM LIVINGSTON.

FOUND, that a child unforisfamiliar might, without the title of executor, pursue reduction of a testament or deed on death-bed, whereby the pursuer was prejudged of her legitim; because the pursuer was *haeres mobilium* as to the legitim, which passes to heirs, executors or assignees, without confirmation.

Fol. Dic. v. 1. p. 544. Harcarse, (LECTUS ÆGRITUDINIS.) No 647, p. 178.

No 14.

1686. March 12. YEAMAN *against* YEAMAN.

CHILDREN surviving their father, transmit their legitim to their nearest of kin, though they die without confirmation.

Fol. Dic. v. 1. p. 544. Fount. Harc. Sir P. Home.

. This case is No 54. p. 5484., *voce* HERITABLE AND MOVEABLE.

* * * Harcarse reports this case :

FOUND that a legitim transmits without confirmation, (which is *aditio hereditatis* in moveables) as the consequence of *jus suitatis* ; but that the interest of nearest of kin requires to be transmitted by confirmation.

Harcarse, (EXECUTRY.) No 470. p. 128.

No 14.

1687. December 8. RUSSEL against JOHN BROWN of Scotstoun.

FOUND that a right of legitim transmits without confirmation. *2do*, That forisfiliation of a daughter by marriage, doth not prejudice her portion-natural, unless discharged by her, albeit she got a tocher, which only obliged her to collate.

Fol. Dic. v. I. p. 544. Harcarse, (EXECUTRY.) No 475. p. 129.

No 15.
Found in
conformity
with the
above.

* * * Sir P. Home reports this case :

1687. November.—MR WILLIAM RUSSEL and his children having pursued George Brown of Scotstoun, the children's uncle by the mother, as executor to his father, for payment of a proportional part of his moveables as their mother's legitim, *alleged* for the defender, That he being executor confirmed, as nearest of kin to the defunct, and the pursuer's mother not being confirmed in her own lifetime, the defender, as being the nearest of kin, did exclude the pursuers, the oyes, seeing there is no representation *in mobilibus* ; as also, that the pursuer's mother was married before the defunct her father's decease, and had gotten a portion, and so had no right to any legitim. *Answered*, That the right of legitim is transmitted without a confirmation ; and, children's receiving of portions from the father, does not prejudice them of their legitim, unless it be expressly renounced and discharged. THE LORDS repelled the defence, and found that the legitim must transmit, albeit the mother died before the confirmation of the father's testament ; and found, that notwithstanding the daughter was married, she has right to the legitim, except she had renounced the same when she received her portion ; and decerned for the proportion of the whole goods contained in the inventory.

Sir Pat. Home, MS. v. 3.