

n. ii. McKenzie of Precedency chap. 9. quest. 19. Because Legitimacy  
 on which purgeth any blemish of the natural Child's Birth is by a Fiction  
 of Law drawn back to the Time thereof; as if the Father had been then mar-  
 ried to its Mother: Which legal Remedy is contrived in Favour of Marriage  
 and to induce Men to make Reparation thereby for the Wrong they have  
 done. Nor doth the Children of the first Marriage suffer any Injury in  
 this Matter, seeing the Right and Privilege of Primogeniture and Succession  
 begin only to take Effect at the Father's Death, at which Time the natural Child  
 who is always the eldest, was capable of Succession and of enjoying the Right of  
 Primogeniture, and hindered from it only by the Imperfection of his Birth,  
 then removed by the Legitimation, which quite wipes off all original Humane  
 Disability, as if his Parents had been married when they first carnally con-  
 versed together. We have an illustrious Instance of this Nature in R. Robert 1<sup>st</sup>  
 Second of Scotland, who after he had begot Sons upon Elizabeth Muir, married  
 Eupham Daughter to Hugh Earl of Ross, by whom he had the Earls of  
 Strathorn and Athole, and after the Queen's Death joined himself in Mar-  
 riage to the said Elizabeth Muir, whose eldest Son born out of lawful Wed-  
 lock was, upon the Account of the subsequent Marriage of his Mother,  
 preferred by the Parliament to the King's Son of the first Marriage.  
 The Effect of Legitimation of Bastards by the King's Letters, is limited to the  
 removing the Obstacles and Incapacities under which Bastards lie by Reason  
 of the Defect in their Birth, which excludes them from certain Honours &  
 certain Offices, and the Power of making a Testament, of which they are  
 made capable by the Benefit of this Legitimation, and do not extend to the giv-  
 ing them the Right of Succession. For such an Use of Legitimation would be  
 repugnant to Equity and good Manners; and it would be unjust and indecent  
 that a Bastard legitimated by the Letters of the Prince, should be admitted to  
 share with Children begotten in lawful Wedlock the Succession of their Fa-  
 ther or Mother, and that he should claim a Right to the Succession of the  
 Children and Relations of his Father or Mother. For all these Successions are  
 appropriated, by Nature and by the Laws, to those to whom a lawful Birth  
 gives the Title of Children and Relations; and the Vice of an unlawful Birth  
 cannot be so defaced, as to put the Bastard into the natural Condition of a son  
 or lawful Relation, to the Prejudice of those who are really such, Le Droit  
 publique Liv. 1. Tit. 2. Sect. 2. n. 10. Craig feud. lib. 2. Tit. 18. §. 8. McKenzie  
 ibid.

## Sect. 2.

## Of unlawful Parents and Children.

Unlawful Children are those begotten by a Man, to whom the Mother is not  
 married at all, or unlawfully married, thro' their being within the forbidden Degree  
 or either Party's having a lawful Spouse living. Stair lib. 3. Tit. 3. §. 42.  
 For

For that only is understood unlawful Marriage in this Case, which ma-  
 terially is unjust and inconsistent, or cannot subsist tho' ord only performed;  
 and not that which is clandestine or irregular, because celebrated with-  
 out Proclamation of Banns, or by a Person disabled to do it by the ecclesi-  
 astical Canons, or civil Law of the Country. Nay albeit Marriage betwixt  
 Parents after Dissolution of the former Marriage, be null as to the Children's  
 Succession of their Parents Act. 20. Par. 15. J. 6. It is not in the Opinion  
 of my Lord Stair (ibid) render them illegitimate. These unlawful Children  
 are termed Bastards, and their State or Condition and Defect in their Birth  
 Bastardy. Gabriel Daleottus De nothis spirijsque filiis cap. 18. dominus  
 the Name of Bastard from *Bastaris* a Whore or common Woman. Spel-  
 man alleges it comes from the Norman *bas vile*, mean,  
 and the Saxon *starr* risen; a Bastard being a Person meanly risen, or  
 base born, of a base and vile. Extract. Our learned Countryman Shene-  
 (de verb. signif. verb. *bastardus*) reckons it a barbarous Word whereof no  
 Reason can be given. Nor doth Bastard seem to have been always a Name  
 of Reproach, seeing we find William the Conqueror of England, begin  
 his Letter to Allan Earl of Britaign in this Manner, ego *Willelmus*  
*cognomento bastardus*.

Lawyers make four Sorts of Bastards 1<sup>o</sup> Those who are born of a Con-  
 cubine in Fornication between single Persons without any subsequent  
 Marriage, and those called *filij naturales*, or simply natural Children, who  
 only by Law, and not by Nature differ from lawful Children, 2<sup>o</sup> *Nothus*,  
 he who is begotten of a married Woman in Adultery, *quasi notus*, because  
 the Marriage shews who he is. But *notus* and *naturalis* are taken by  
 Justinian for one and the same Nov 89. cap. ult. pr. Whence it would seem  
 that *notus* is nothing but the Greek *νόθος* non legitimus. 3<sup>o</sup> *Spirios*,  
 a Bastard whose Father never intended to keep the Mother as a Concu-  
 bine, but to leave her to others that might afterwards pick her up.  
 And therefore such a ones Father cannot be known but by Confession  
 of the Mother. He is so called either *παπα τινος* *παπα* L. 23. ff. de statu  
 hom. from sowing of Seeds or *quasi oropadus* promiscuously here and there,  
 or from *spurius*, or from *se* i. e. sine et *purus* because sprung from impure  
 Copulation; or a *spurio* membris whereby Women are distinguished from Men  
*quod Sabini* *Spuron* appellavit, or from that Part of a Woman's Petticoat  
 under the Belt which is open, commonly called the Spare Shene de verb. sig-  
 nif. v. *bastardus*. 4<sup>o</sup> *Manfer*, a Bastard born of a common Strumpet which  
 as *Conianus* (comm. jur. civ. lib. 2. cap. 16. n. 2.) tells us, is a barbarous  
 Word known only to those whose Language it is borrowed from. Which  
 four Names of Bastards are comprehended by Abbas in these Verses

*Manferibus* *Scortum*, *mecha* *notus* *deit* *ortum*,  
*Ut* *seges* *a* *spica*, *sic* *spurius* *est* *ab* *amica*.  
*Dant* *naturales* *que* *nobis* *sunt* *speciales*.