

No 1. habebat filiam unam ex legitimo matrimonio natam; et ubi bastardus natu habet heredem legitimam de corpore suo, cessat eschæta, et de bonis suis potest libere disponere; prout dicit Moffat ut supra fecit; et sic Regina eschætam pretendere non poterat. Et replicavit Dundas, quod defunctus hæredem non potuit habere, quia terras non habebat; et sic non baro, neq; burgenfis, nec sacerdos; præter quos de jure Scotiæ hæredem potest nullus habere.—Triplicavit Major, quod filia erat legitima hæres patri, et habilis ad succedendum ei, etsi possedisset immobilia; et quod sic cesserat eschæta, interlocuti sunt Domini quod legitima et naturali prole existente bastardo de corpore suo procreata, et quæ posset ei hæres esse, si immobilia haberet hereditaria bastardus, cessat eschæta prius ratione bastardiæ.—Eandem DOMINI concilii assignaverunt terminum ad probandum plene legitimam existitisse defuncto, tempore sui decessus.

Sinclair, MS. p. 109.

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S.E.C.T. II.

Strangers may succeed to a Bastard as Heirs of Provision.

No 2.

Lands being disposed to a man in life-tenant, and his bastard in fee, and failing of heirs-male of the bastard, to a third party; the Lords reduced a gift of bastardy made by the King to another; and found that the law, *Quod bastardus nota potest habere hæredem, nisi de corpore suo legitime procreatum*, is to be understood only of the legal heir, not of heirs of provision.

1584. March. INNES against HAY, Clerk-Register, and the King's Advocate.

THE Earl of Errol disposed a piece of land to one Innes, in life-tenant, and to Robert Innes, his natural son, in fee; and failing of heirs-male of Robert's body, to Alexander Innes of Coxtou: Robert having deceased without lawful issue of his body, the King presented Alexander Hay, Clerk-Register, to be tenant of these lands to the Earl, as vaking in his hands by reason of Robert's bastardy. Alexander Innes, who was substitute in the charter after Robert, pursued the Clerk-Register and the King's Advocate, to hear and see the same presentation reduced, as having the undoubted right to these lands, by virtue of his substitution.—*Alleged*, That the King's interest and commodity falling to him by the common law, whereby the whole goods, moveable and immoveable, pertaining to a bastard, who had died without lawful succession of his own body, pertain to the King, could not be prejudged by any private deed whatsoever; and this was *factum privatum, substitutio facta inter privatas personas, quæ nullo modo potuit derogare juri publico, cum fortior sit dispositio legis provisione hominis*.—*Replied*, That the King had no interest in respect of the substitution, because it being voluntary to the Earl to dispose of these lands, and being *dominus et moderator rei suæ*, as he could not be hindered to give it to a bastard, so he might substitute any other to him. And the law *quod Bastardus, non potest habere hæredem nisi de corpore suo legitime procreatum*, is to be understood, *in linea descendente et collateralis*;

which excluded not a substitute to a bastard, at the will and pleasure of the donor. — THE LORDS found the reason of reduction relevant, notwithstanding of the said presentation. *Hyde Craig, lib. 2, ch. 18.*

*Spottiswood, (BASTARDY), p. 28.*

\* \* Colvill reports the same case :

THE Master of Arroll and the Earl of Arroll, the Master being fiar, and the Earl inherenter, disposed a piece of land in feu-farm and heritage, to one James Innes, inherenter, and to Robert Innes, his natural son, in fee; and failing of the said Robert, and the heirs male gotten of his body, to Alexander Innes of Coxtou; the said Robert that was the natural son fiar, being deceased without any lawful succession of his body, our Sovereign Lord presented Alexander Hay, Clerk of Register, to be tenant of the said lands to the Earl of Arroll, as if the lands had vaked in his Majesty's hands by reason the said Robert being a bastard, and having no lawful succession of his own body, by the ancient laws of the realm, the King's Majesty fell heir to him, *quia bastardus non potest habere heredem nisi de corpore suo legitime procreatum*: Alexander Innes of Coxtou, who was immediate substitute into the charter, after the decease of the said Robert, pursued the Clerk of Register and King's Advocate, to hear and see the said presentation, to be reduced, as being obtained *tacite et suppressa hereditate*, making mention that the lands, by decease of the said Robert Innes, heritable fiar, vaked in the hands of our Sovereign Lord; or, at the least, he had good right to present a tenant to the Earl of Arroll, being overlord and *dominus directus*; albeit it was of truth, that the said Alexander Innes, being next and immediate substitute in the said charter, had the only undoubted right; and, by his substitution, the King's Majesty and his Advocate, were absolutely excluded, notwithstanding of the said Robert's bastardy. — It was *reasoned* partly at the bar, and partly among the Lords-selves, against the reasons of the summons, That the said Alexander Innes, albeit he was next and immediate substitute into the said charter of feu-farm, could no manner of way prejudice the King's Majesty's interest, *quia fuit factum privatum quod nullo modo juri publico derogari potuit*; and also the King's Majesty's profit and commodity that appertained unto him by reason of the common law, and the bastard dying without lawful succession of his body, his whole gear appertains, both moveable and immoveable, to the King's Majesty, could not be prejudged *privata lege et substitutione facta inter privatas personas*: And so the King's interest and his profit that fell to him by the law, anent the decease of a bastard without lawful succession of his body; likeas if the lands had been first disposed to the bastard, and succession had failed in him, the King's Majesty would have been his heir; so in all manner, the substitution could not prejudice the King's Majesty's interest and right, *quia quod una via prohibetur alia via non admittitur*. — It was *replied* and *reasoned* upon the other part, That the exception ought to be repelled, and that the King had no interest into this case, in respect of the said substitution, because *ab initio fuit factum voluntarium* to the

No 2.

faid maister and Earl to dispone their lands as they pleased ; and if they had full liberty of the disposition of their own, they might make substitution of bastards, as well as they might give it to a bastard ; and as to the law, *quod bastardus non habet hæredem nisi ex suo corpore legitime procreatum, hoc intelligendum fuit in linea descendente, et linea collateralis* ; but the law secludet not but a bastard might be substitute, and be an heir by way of provision and tailzie ; and failing of his lawful succession, others to be substitute to succeed immediately to him, at the will and pleasure of the disponent, *quia unusquisque est Dominus et moderator rei sue* ; for a person may dispone his lands, and take them to his heirs-male, any of his surname, *præteritis filiabus et legitimis hæredibus* ; and yet the same is not agreeable to the common law.—THE LORDS, after long reasoning, pronounced *definitive*, That the reason of the summons was relevant, and so reduced the said presentation.

*Colvil, MS. p. 399. \**

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### S E C T. III.

A Bastard's Relict has right to a share of his effects.

1502. February 18.

MURRAY against KING'S ADVOCATE.

No 3.

A bastard leaving a wife, but no children, the King's donatary has right to the whole heritage and heirship moveables ; also to the half of the other moveables, under burden of the bastard's debts, funeral expences, &c. The relict has right to the remainder of the moveables.

GIF ony man beand bastard deceiffis, leivand behind him an lauchful wife, without ony succession, or bairnis, lauchfullie gottin of his bodie, the King, or his donatour, gif he ony makis and constitutis heir-ament, aucht and sould have the haill movabill airschip of the said bastard be itself ; and als wa all and haill the unmovabill airschip, gif ony be ; togidder with the ane half of the movabill gudis, quhilks pertinit to the said bastard at the time of his deceis, he findand sufficient caution to content and pay the debtis that wer awand by the said bastard, as accordis of the law, and as is efter specifyit ; and als allowand the haill debtis and expensis maid and payit for the kirk richt, and at the burial of the said bastard, according to his faculty.

*Balfour, (BASTARD) p. 237.*

\* \* Spottiswood reports a similar case without names, dated 29th July 1566.

A BASTARD deceasing, leaving behind him a wife, the King, or his donatar, will have the whole moveable heirship-goods of the bastard by itself, with the

\* This is taken from an old copy of Colvil's Decisions, which the Editor only lately discovered in the Library. See Note under page 329.