

SECT. IX.

Legitimation of a Bastard.

1758. *January 4.*

JOHN RAMSAY of Auchtertyre, *against* The Reverend Mr JOHN GOWDIE.

MR JOHN GOWDIE having obtained from the Crown a gift of *ultimus hæres* to the lands of *Maison-Dieu*, the property of the deceased Margaret Morison, who, he *alleged*, had died without heirs; John Ramsay brought a declarator to exclude this gift, in respect that Margaret Morison had not died without heirs, and that he was next heir to her.

He connected his relation by shewing, that Margaret Morison was descended from, and heir to James Morison, who was her great-grand-father; and that he himself was descended from, and heir to Marjory Morison, the only sister of this James.

Gowdie's *defence* was, That James Morison was a bastard; and, consequently, that Ramsay could not succeed either to him or to any of his descendants; because, by the law of Scotland, a bastard can have no heirs except those of his own body.

To obviate this, John Ramsay produced letters of legitimation in favour of James Morison, of date 30th June 1625. These letters are in the common style; and in them King Charles I. gives and grants to James Morison in the following words, '*plenariam potestatem, liberam facultatem, et licentiam specialem, ut ipse libere et licite disponere valeat, quovis tempore vitæ suæ, sive æger fuerit, sive sanus, sive in tempore mortis suæ, de omnibus et singulis terris suis, tenementis, annuis redditibus, assedationibus, prædiis et possessionibus, ubicunque, infra dictum regnum nostrum, sive extra idem, existent; ac de omnibus et singulis bonis suis, mobilibus et immobilibus, quasitis seu quærendis, cuicunque personæ, vel quibuscunque personis, prout ipsi magis videbitur expediens, conveniens, et opportunum, non obstante bastardia, in qua genitus et natus est, et privilegio juris nobis super bastardorum eschætis concessi; ac etiam ipsum Jacobum Morison ad omnimodos actus legitimos, in judicio, et extra judicium, exercendi, dignitatus, hereditatibus, terris, privilegiis, honoribus, officiis, et possessionibus gaudendi, in omnibus, et per omnia, sicuti de legitimo thoro procreatus fuisset, legitimum fecimus, et nostræ Regiæ Majestatis plenitudine, legitimamus.—Et si contigerit, dictum Jacobum Morison, sine legitimis hæredibus de corpore suo præcreatis, vel sine dispositione, per ipsum, de terris suis et bonis antedictis, facta, in fata decedere; nos, ex nostra regia potestate, et autoritate regali, volumus et concedimus, et, pro nobis et successoribus nostris decernimus et ordinamus, quod propinquior agnatus vel cognatus suus, ex parte patris vel matris, erit ipsius hæres, etque, in omnibus suis, terris redditibus, possessionibus, et bonis hæreditariis, mobilibus et immobilibus, habitis et habendis, succedet, et ad eadem, per breviam capellæ nostræ regiæ, introibit, simili modo, et adeo legitime, vigore hujus nostræ*

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A person obtained gift of *ultimus hæres*, of one said to have died without heirs. Alleged by a claimant, in exclusion of the gift, that the deceased's great-grand-father had a sister, from whom this claimant was lineally descended. Answered, the great-grand-father was a bastard. Replied, he had obtained letters of legitimation. Duplied, still agnates not entitled to succeed. Found, that by letters of legitimation, agnates are entitled to succeed. It afterwards appeared the lands in question were not the estate of the bastard; and the donatory was preferred.

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‘ *legitimationis, ac si prædictus Jacobus Morison de legitimo thoro procreatus fuisset,*
‘ *vel hæredes de corpore suo legitimo procreatos habuisset, aut super dictis terris*
‘ *et bonis suis in vita sua disposuisset, sine aliquo obstaculo, revocatione, impedi-*
‘ *mento, clameo, quæstione, vel contradictione nostri, vel suecessorum nostrorum,*
‘ *præfato Jacobo Morison, aut personæ vel personis cui vel quibus ipsi, de præfatis*
‘ *terris suis, tenementis, annuis redditibus, possessionibus, vel bonis, disponere*
‘ *contigerit, sive propinquiore agnato vel cognato suo, ex parte patris vel matris ;*
‘ *quibus deficientibus, legitimis hæredibus de corpore suo ; vel dispositione, per*
‘ *ipsum, in vita sua, ut præmittitur, minime facta, in terris, hæreditatibus, et*
‘ *bonis suis, antedictis, succedet, quovis modo inde fieri in futurum, non obstan-*
‘ *juris privilegio nobis super eschætis bastardorum, ut præmittitur, concess. aliisque*
‘ *juribus canonicis, civilibus, et municipalibus, consuetudinibus, parliamentorum*
‘ *actis, consuetudinibus, vel statutis, in contrarium quibuscunque, renunciando*
‘ *eisdem, pro nobis et suecessoribus nostris, in perpetuum. Præterea, damus et*
‘ *concedimus, et pro nobis et suecessoribus nostris, nunc prout tunc et, e converso,*
‘ *quitlamamus et transferamus, in et ad prædictum Jacobum Morison, et per-*
‘ *sonam vel personas cui vel quibus ipsum de terris, hæreditatibus, et bonis suis,*
‘ *antedictis, disponere contigerit ; nec non in et ad propinquiorem agnatum et*
‘ *cognatum ; quibus deficientibus, legitimis hæredibus de corpore suo, ei succedere*
‘ *contigerit in eisdem, totum jus et clameum, juris titulum, placitum et questionem,*
‘ *que et quas nos, vel successores nostri, habemus, vel quovis modo habere vel clamare*
‘ *poterimus, sine aliquo obstaculo.*”

From these letters of legitimation, Ramsay contended, That he, as the next agnate to James Morison, had a right to succeed to him. He pleaded, That the *macula natalium*, or stain of bastardy, with all its consequences, was removed by the letters of legitimation, which are intended to mitigate the hardships and incapacities whereto bastards are subject by the common law. That the law of Scotland, with respect to legitimation, was the same as the Roman law, and the laws of France and Holland ; the royal prerogative being always understood to extend to giving the bastard all rights of a free citizen, except that of inheriting to his father, or collateral relations. That the words of letters of legitimation, whereof great numbers appear in the records for two hundred years past, are almost uniformly the same with the present ones ; and give to their agnates on the father's side, and their cognates on the mother's side, a right to inherit from the bastard in default of issue of his own body. It signifies little whether the sovereign power could restore the blood so entirely as to create relations on the father's side to a bastard ; it is enough, that he can do an equivalent act, by giving to the supposed agnates of the bastard a right of inheriting from him. By bestowing this right the sovereign hurts no third party, as he disposes only of an estate, to which himself would otherwise be in law entitled, in the same manner as if it had actually escheated through bastardy or *ultimus heres*. That a gift of this nature was equally effectual, although the benefit of it did not take place, in favour of the grantee and his heirs, but at a distant period. That the sove-

reign could by law make an effectual grant of the casualties of superiority not annexed to the Crown, as well those arising in his own; as in future time; and could, in the same manner, dispose of the escheat of bastardy, and *ultimus haeres*, which are not part of the annexed property, to take place at a distant period.

Answered for Gowdie, That the form of the letters of legitimation had been borrowed from the form used in France; but that form could not receive effect in the law of Scotland. Thus, for example; they give right to the cognates, or relations upon the mother's side, to succeed to the bastard; yet by the law of Scotland there is no succession on the mother's side; and with this law the sovereign cannot dispense. In the same manner, they empower the bastard to dispose of his real estate even on death-bed; yet by the law of Scotland he cannot do so; and with this law the sovereign cannot dispense. The extent to given to these letters is to be found, not in their form, but in the law books: Craig, lib. 2. dieg. 18. paragr. 10. and 13. gives his opinion in point against the effect of the letters contended for; and Skene, *voce* BASTARDOS, and Lord Stair, lib. 3. tit. 3. § 44. suppose the only effect of those letters is, to give the bastard a power to test. That from a vast variety of instances in the records, it appears, that notwithstanding letters of legitimation as extensive as the present; yet, on the death of such legitimated bastards without issue, or without settlement of their estates, the sovereign had uniformly seized, or granted them, as fallen to him, *ratione bastardie aut ultimi haeredis*, as by the law of Scotland bastards could have no agnates inheritable to them. Nor could any precedent be shown of such a service to a bastard by his supposed agnates, nor any retour of such service upon record; which two things afford the strongest evidence, that such agnates had no claim, either from the general law of legitimation, or the particular words of the grant. That both by the common law, and by several statutes, the sovereign was restrained from disposing, by anticipation, of estates, which, in a distant event, might be forfeited or escheated; nor could he grant away future and contingent casualties of the Crown, in prejudice of his successor.

THE LORDS found, That by letters of legitimation, the agnates of James Morison, the bastard, were entitled to succeed to James Morison's estate, heritable and moveable.

John Gowdie afterwards set forth to the Court, That he had discovered, that the lands of *Maison-Dieu* were never the estate of James Morison, but had been the estate of his son Samuel Morison; and from thence he contended, That as the present letters of legitimation only provided, that the agnates shall succeed to James Morison, *in terris suis et tenementis quæsitis seu querendis*, the agnates cannot take *terras* or *tenementa* that were never in his person, but only in that of his son; and that grants of this nature ought to be strictly interpreted.

Answered for Ramsay, The letters of legitimation are in most ample form, and specially provide, that if the bastard shall die without heirs, his father's nearest agnate shall succeed, as if he, the bastard, had been born in lawful wedlock; and the King thereby renounces, for himself and his successors, all right that can

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accrue to them by James Morison's having been a bastard: That grants of this nature, which do not hurt any third party, and where nothing is given away but what would accrue to the Crown, ought to be liberally interpreted: That though the estate in question had not been established in the person of James Morison; yet as James Morison was legitimated, so far as that his agnates could succeed to him, they were also entitled to take any estate which belonged to his successors. Further, That by a particular clause in the grant of legitimation, James Morison was made capable *ad omnimodos actus legitimos, in judicio et extra judicium, exercendi, dignitatibus, hereditatibus, terris, &c. gaudendi, sicuti de legitimo thoro procreatus fuisset, legitimum fecimus, &c.* That by this clause he was entitled to succeed and take, and to be succeeded to by his descendents; and John Ramsay, his collateral heir, must, of consequence, be entitled to succeed, and take, as heir to Margaret Morison, the lawful descendent of James.

THE LORDS found, ' That the lands of *Maison-Dieu* were not the estate of James Morison, but the estate of his descendents; and the agnates of the bastard were not, by the letters of legitimation, entitled to succeed thereto; and therefore preferred Mr Gowdie, the King's donatar.'

Act. P. Murray, W. Stewart, Miller, Lockhart. Alt. D. Dalrymple, Advocatus, Ferguson.

Fol. Dic. v. 3. p. 69. Fac. Col. No 79. p. 139.

J. Dalrymple.

* * * This case was appealed :

June 1. 1758.—The House of Lords ORDERED and ADJUDGED, that the several interlocutors complained of be affirmed.

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Letters of legitimation do not entitle agnates to succeed to a bastard, without a special provision in their favour.

1784. February 10. ADAM HUNTER against ALEXANDER HUNTER.

ROBERT HUNTER disposed the lands of Polmood to his natural son George, for whom he had obtained letters of legitimation.

The descendents of George terminated in his grand-son Thomas Hunter, who conveyed these lands to Mr Alexander Hunter.

This conveyance Adam Hunter, the descendent of a brother of Robert Hunter, brought under challenge, as executed on death-bed, and on other grounds; when it was *objected* by the defender, That there was no room for agnates in the succession of persons legitimated by the Sovereign, without a special clause to that effect; and of consequence, that the pursuer had in this instance no title to insist in the action, agreeably to the decision in the case of Ramsay *contra* Gowdie, (*supra*), which was affirmed on appeal.

THE LORDS found, ' That the pursuer had not sufficient title to carry on the present process, and absolved.'

Lord Ordinary, Elliock. Act. Crosbie, Honyman. Alt. Lord Advocate Campbell.
Clerk, Menzies.

Craigie.

Fol. Dic. v. 3. p. 69. Fac. Col. No 145. p. 226.