

was answered. That the debt being constituted against her by a sentence, and she having intromitted and possessed, as donatar, to the bastardy, she could not, by a subsequent title, *ex post facto* acquired; and after sentence was recovered against her, prejudice the creditors, who had *ius acquiritum*, seeing she, as donatar of bastardy, was liable to pay all her husband's debts, *quoad vires hereditatis*.
 THE LORDS found, That the debt being constituted against her, as donatar to the bastardy, she could not, by a subsequent title of escheat, prejudice the charger: And therefore the LORDS ordained her to depone upon the quantity and species of her intromission; and allowed her retention, as to the privileged debts, such as house-mails, servant's fees, expences of both gifts of bastardy and escheat.

Fol. Dic. v. 1. p. 93. Pres. Falconer, No. 193. p. 72.

No 14.

1747. June 29.

REID against The OFFICERS of STATE.

REID being creditor to a bastard, who deceased without heirs of his body, raised a summons against the Officers of State, concluding for a decret of cognition for constituting his debt, and adjudication of the estate of the bastard.

No appearance was made for the Officers of State; but the Lords doubted how far this method was competent, thinking the proper way to affect the estate of a bastard, was to apply for a gift.

Pleaded, That this method was laid down by Stair, B. 3. tit. 3. § 46. who cited Craig, l. 2. D. 17. as of the same opinion, and a case where it was so found, No 3. p. 1346.

Observed, That Craig in the cited place did not come up to the opinion delivered by Stair, he only saying that the bastard's estate went to the King burdened with his debts; which was also the whole of the decision; but as adjudication was the only diligence by which the effects of bastardy could be affected, it ought to be granted.

THE LORDS found the bastardy proven, and the verity of the debt, and remitted to the Lord Ordinary to proceed accordingly.

Act. Williamson.

Act. Abent.

Clerk, Forbes.

Fol. Dic. v. 1. p. 90. D. Falconer, v. 1. No. 190. p. 256.

No 15.

A creditor of a bankrupt may take a decree of constitution against the Officers of State, and proceed to adjudge the estate of a bastard.

1789. July 29.

JAMES FALCONER against ALEXANDER HAY.

JAMES FALCONER having let out part of his lands to a person born out of wedlock, 'excluding his assignees and subtenants;' the question occurred, after the death of the lessee without children, Whether the tack could be assigned by the King to a donatar?

No 16.

A tack granted to a bastard, excluding his assignees and subtenants, does not pass to the Crown's donatar.

No 16.

For trying this question, James Falconer brought an action of removing against Alexander Hay, who had been appointed by the Barons of Exchequer to manage the affairs of the deceased till a donatar should be named. The pursuer

Pleaded: A tack granted without mention of assignees or subtenants, must cease on the death of the tacksmen, if he leave no heirs. A lease, therefore, granted to one born out of wedlock, on his dying without children, must be at an end; the right of the Crown in the effects of such a person being of the nature of an *escheat*, and not arising from any title of *succession*. Indeed, even although the King were in this case to be considered as an *heir*, the same consequence would follow, as he cannot, in his own person, fulfil the obligations exigible by the landlord; while, from the exclusive nature of leases, which, in the present instance, is fortified by an express stipulation, it is equally out of his power to assign his right to another; l. 1. 4. *C. De bon Caduc.*; Craig, *lib. 1. dieg.* 16. § 30.; Skene, *De verb signif. voce* BASTARD; Balfour, *voce* BASTARD, § 2.; Sir James Stewart, *ibid*; Stair, b. 3. tit. 3. § 44. 47.; book 4. tit. 13. § 1.; Bankt. b. 3. tit. 3. § 99.; Dict. *voce* PERSONAL and TRANSMISSIBLE; 25th January 1788. Alifon *contra* Proudfoot and Litster, Fac. Col. No 17. p. 29. *voce* TACK.

Answered: Where effects are without an owner, either because they have never been appropriated by any person, or because the former proprietor has relinquished them, they are said to belong to the Crown, as *bona vacantia* or *caduca*. But where this happens in consequence of the demise of the owner without lawful heirs, the King is properly said to take the effects as *ultimus hæres*, his royal prerogative, as the *pater patriæ*, rendering him the rightful successor to such of his subjects as have no other. All this, however, seems to be of little importance. Whatever is capable of transmission to heirs, is understood, in circumstances such as here occur, to be transmitted to the Crown; and the restrictions which formerly precluded the free power of disposal, are no longer of any avail; it being an established rule, as the King cannot act in a subordinate capacity, that, when in consequence of forfeiture, escheat, or otherwise, he comes into the right of an estate holding of one of his subjects, he may transfer it to a donatary, although the former owner had no such power. Thus, before the late statute abolished wardholding, the King could transfer a ward fee holding of a subject, without any danger of recognition; and at present his donatary is authorized to demand a renewal of the investiture, without any obligation to pay a year's rent to the superior, which every other singular successor must do.

The Court seemed to be of opinion, that even where no mention has been made of assignees and subtenants, the King coming in the place of the tacksmen *ob defectum hæredis*, could not transfer the right to a donatar; and, therefore, after advising memorials for the parties,

'THE LORDS decerned in the removing.'

Lord Reporter, *Rockville.*

A. A. *Elphinston.*

Alt. *Wight.*

Clerk, *Gordon.*

Fol. Dic. v. 3. p. 69. Fac. Col. No 84. p. 151.

Craigie.