

No 5.

1629. July 16.

*** Spottiswood reports the same case :

ROBERT WALLACE, donatar to the gift of bastardy of John Wallace, having obtained general declarator, pursued a special of the bastard's whole goods, and, in particular, of a bond of 1000 merks, addebted to the bastard.—*Alleged* for N. Muir, another donatar; *imo*, No process, but only for the half of the bastard's goods, because he had a wife unto whom belonged the half of the moveables by our law.—*Replied*, The whole appertained to the donatar, sickenlike as if he were donatar to a rebel's escheat.—THE LORDS found this allegiance relevant, for the cases were very unlike, as they thought.—*2do*, *Alleged*, The bond of 1000 merks could not fall under the general gift of bastardy, because it was heritable, and contained a provision of annualrent, as well infest as not infest; and so should have been gifted by presentation, as in other heritages, or else by a feveral gift which the defender had obtained *per expressum*.—*Replied*, This bond behoved to fall under the general gift, because there are only these two ways of disposing of a bastard's goods; by gift and presentation. As to the last, the King could not present this bond, because there had no infestment followed thereupon; and therefore it behoved to be included in the general gift of all the bastard's goods and gear.—THE LORDS found, That the bond, although heritable, by payment of annualrent, fell under the general gift, in respect there had no saine followed thereupon.

Spottiswood, (BASTARDY.) p. 28.

No 6.

If the lawful issue of the bastard at any time fail, their goods become caducuary, and return to the King as *ultimus heres*, with respect to such subjects as were established in their persons; and by the right of bastardy, with respect to subjects in which they died in the state of apparent heirs to the bastard.

S E C T. IV.

Consequences of the Failure of a Bastard's Issue.

1626. July 13.

L. HALERO against SOMERVEL.

A BASTARD marrying, and in marriage begetting a bairn, that bairn dying intestate and unmarried, and having neither lawful brother nor sister, nor children begotten by that bairn in lawful marriage; after the decease of that bairn, the king will have right to the goods and gear of the father of that bairn so deceased without succession, by virtue of the father's bastardy; but, under that bastardy will not be comprehended so much of the bastard's goods as might befall to that deceased bairn procreate in lawful marriage by the bastard, as said is; neither will the donatory of the bastardy of the father extend to that legitim, which pertains to the bairn, but only to the rest of the defunct bastard's goods; and not the less the king will have right also to the legitim, and whole goods and lands also pertaining to that lawful bairn, as *ultimus heres* to that bairn; but not

by reason of the bastardy of the father only : So that in such cases of the King's succession, there must two things concur, viz. That the stock was a bastard, and that the whole posterity and issue proceeding of that stock, albeit begotten in lawful marriage, be deceased ; for, as long as any lives begotten by the bastard in a lawful marriage, the King cannot be *ultimus hæres* ; and where the lawful descent fails, there is no other collateral or ascendant succession of the bastard ; and so the right pertains to the King.

Fol. Dic. v. 1. p. 92. Durie, p. 215.

No 6.

S E C T. V.

In what Situations a Bastard enjoys the Power of Testing.

1628. February 27. HAY against BISHOP OF DUNKELD.

No 7.

ANDREW HAY, executor nominate to umquhile William Hay of Strollie, and having licence to pursue, convenes the Bishop of Dunkell, as debtor to the said defunct. It was excepted by the said Bishop, that the defunct was bastard, and had no power to make a testament, except he had been legitimate. To the which it was answered, That the defender had no interest to allege the same, seeing the defunct was not declared bastard, nor nae gift taken of his bastardy ; and it were a dangerous practice, if this should be objected against every defunct and their executors.—THE LORDS repelled the exception.

Auchinleck, MS. p. 19.

1628. March 8. MUIR and THOMSON against KINCAID.

No 8.

MUIR, and Thomson, her tutor, *contra* Kincaid, Muir the pupil, and her said tutor Adam Thomson, who was left tutor testamentar, conjunctly, by the pupil's father, with Robert Kincaid and Alexander Heriot, whom the defunct nominated conjunct-tutors to the pursuer his daughter ; the said pupil and Adam, one of the tutors foresaid, pursue the other two, either to accept of the office, to the effect the minor's goods may be administered, and pursuits moved against her debtors by them, or then to renounce the office ; and Alexander Heriot, one of the tutors, compearing, and renouncing the office, the other, viz. Robert Kincaid, compearing and contesting, that the minor was not lawfully authorised to pursue this action, being only assisted with one of the three tutors conjunctly given, who ought all to concur ; and this pursuit by the minor against her own tutors, ought not to be sustained *durante tutela* ; at least she should be authorised

Found, that a bastard, though not legitimate, may leave tutors to his children, who are to succeed to his effects, and that he may nominate either of them executors.