

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.

No 6.

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

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.

No 8.

with other curators *ad hanc litem*; and further, he *alleged*, That the defunct died a bastard, not legitimate, and so had no power to make a testament; like as Robert Kincaid has obtained from the King a tutory dative. Both these allegations were repelled, and the pursuit sustained, at the pupil's instance authorized with one, without necessity of authorizing by any other concurrence, or new giving of curators; and it was found, albeit the defunct was a bastard, and not legitimate, he might leave tutors to his bairns, gotten by him in lawful marriage, and who were to succeed to his means, and whom he might nominate executors; notwithstanding that the defender alleged, that a bastard not legitimate, albeit having bairns gotten by him in lawful marriage, had not *testamenti factionem*; and that if he nominated his bairns executors to him, yet their succession, and coming to his means, would not be *ratione testamenti*, but *ratione sanguinis*, which was repelled; for if the bastard had more bairns gotten in marriage than one, and if he should make one of them his executor, that bairn, nominate executor, would have right only to that which behoved to come to him, *jure et ratione testamenti, et non jure sanguinis*; for *hoc jure sanguinis*, they would all succeed alike, and not he alone, who was nominate executor.

But here it is to be also remembered, that there was no declarator upon the defunct's bastardy. See SOLIDUM *et* PRO RATA. See TUTOR and PUPIL.

Act. ———

Akt. Nibel.

Clerk, Hay.

Fol. Dic. v. 1. p. 92. Durie, p. 356.

1629. July 7.

WALLACE against MUIR.

No 9.
If a bastard obtain from the King, power of testing, the legatary will be preferable to the donatary of bastardy.

In a special declarator of bastardy, it was found; That the relict of the bastard had good right to the equal half of the bastard's goods, desired to be declared; and that the donatar had not right to the whole goods, but only to the other half thereof: Also the bastard having *testamenti factionem*, by grant from the King, and having made a testament in writ, and having thereafter left a legacy of 200 merks to his wife, whereby she claimed right to that part, at least to 100 pound thereof, whereunto she retrenched the said legacy: It was found, That the leaving of this legacy, after he had made testament, might be proven by witnesses, albeit the legacy was of a greater quantity, seeing it was restricted to 100 pounds by the legatar. See No 5. p. 1347.

July 9. 1629. In this action, mentioned 7th July 1629, it was found, that an heritable bond bearing annualrent, made by the debtor to the bastard, came under the general gift of the said bastard's gift of bastardy, gifted to the donatar; and that there was no necessity that the bond, or such others of the like nature, should be gifted by any particular gift of the same in special; likeas another donatar who had a special gift of that heritable bond, whereupon that declarator was fought by this general donatar, after general declarator obtained and decerned, upon the said gift of before, compearing and alleging, that he only should be preferred to that heritable bond by virtue of his gift thereof; this allegiance