

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.*

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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.