

must hold, especially where the pursuit is not capital, but, as in adultery, to annul the marriage only, or restore the jointure.

No 546.

Fol. Dic. v. 2. p. 262. Stair.

*** This case is No 215. p. 12101. *voce* PROCESS.

1669. February 19. KING'S ADVOCATE *against* CRAW.

No 541.

IN a declaration of bastardy, though the pursuer cannot be bound to instruct that the father and mother of the alleged bastard were not married, it is incumbent on him to go as far as he can to a proof of this negative, that the defunct was holden and reputed bastard at the time of his death.

Legitimation accepted by the defunct from the King, is a sufficient evidence of bastardy.

Fol. Dic. v. 2. p. 263. Stair.

*** This case is No 87. p. 2748. *voce* COMPETENT.

1670. January 13. CUNNINGHAM *against* MONTGOMERY.

No 542.

IN a declarator pursued at Cunningham's instance, as donatar to a gift of bastardy of Montgomery's moveable estate, it being libelled, that he was the son of one Montgomery in Air, who was never lawfully married, it was *alleged* for the defender, That the donatar's right to the goods could not be declared until first the bastardy were proved. THE LORDS considering that this was of a general concernment, and that many years after the death of any person such gifts might be purchased, and it might be hard to prove a lawful marriage, they ordained, that the donatar should condescend on the mother's name of the alleged bastard, and that he was *tentus* and *reputatus* to be the son of such a person who was never lawfully married; which being done, they would sustain the declarator, unless the defender would offer to prove, that they were lawfully married, because the condescence being made, and they not being married, being a negative, did prove itself, unless it were taken away by offering to prove the affirmative, that they were lawfully married.

A donatar to a gift of bastardy was found obliged to condescend upon the mother's name, and to prove, that the defunct was habit and repute a bastard; *quo casu* they found, that the son must prove lawfully married, seeing negatives prove themselves.

Fol. Dic. v. 2. p. 263. Gosford, MS. p. 91.

1676. January 15. SWINTON *against* KAILLS.

MR ROBERT SWINTON, as donatar to the bastardy of Andrew Lamb, pursues a declarator of the bastardy; Marion Kails having a gift of *ultimus hæres* of the same Andrew pursues also declarator thereupon. THE LORDS, that they might prefer neither party in the probation, did, before answer, grant warrant

No 543.
What affords evidence of bastardy?

No 543. to examine witnesses *hinc inde*, whether Lamb, who died 39 years ago, was held and reputed bastard, or lawfully begotten; whether his father or mother were married, and were held and reputed married, or did cohabit as man and wife: And six witnesses being examined for either party, several of Swinton's witnesses deponed that Lamb was reputed bastard, and one deponed that his mother made public repentance as furnicatrix with his father; but the other witnesses deponed, that they were in the father's house, and saw his father and mother cohabit together as man and wife.

THE LORDS found that he was no bastard, and assoilzied from the declarator of bastardy, in respect of the cohabitation as man and wife; and as to the declarator of *ultimus heres*, compearance being made for an apparent heir, they were ordained to condescend upon the propinquity of blood.

Fol. Dic. v. 2. p. 262. Stair, v. 2. p. 400.

No 544.

Found in conformity to King's Advocate against Crow, No 541. p. 12637.

1680. January 6.

SOMMERVILLE against STAINS.

JAMES SOMMERVILLE as having a gift of bastardy of Janet Stains, upon which there is a debate marked December last, No 43. p. 2197; it was now further *alleged* for the defender, That the declarator is not relevantly libelled, that the defunct was held and reputed bastard in her life. It was *answered*, That being bastard results from this, that the father and mother were not married, which is a negative, and proves itself, unless the defender offered to prove that they were married. The defender *replied*, That the common stile of all declarators of bastardy is, that the defunct was reputed bastard in his life, which must have a positive probation. It is true, that if this were offered to be proved, and the defender did offer to prove lawful marriage, and to have cohabited as man and wife, the defence would be preferable; but there is no necessity to propone it, unless the pursuer offer to prove that the defunct was reputed bastard in her life, otherways upon the gift of bastardy the whole lieges might be put to prove the real or reputed marriage of any, or all of their predecessors, which were a great inconvenience; for, in all these cases, if a negative proving itself were sufficient to infer bastardy, it might reach not only to father, but grandfather and predecessors.

THE LORDS found, That the pursuer was obliged to prove that the defunct was held and reputed bastard in her life.

Fol. Dic. v. 2. p. 262. Stair, v. 2. p. 731.

* * * Fountainhall reports this case :

JAMES SOMMERVILLE, Usher to the Exchequer, raises a declarator of bastardy of Isobel Stains. It was debated, *imo*, if it was necessary to call the nearest of kin to this process. He *alleged* they needed not; for *ex parte patris* she had none, and on the mother's side cognition is not reckoned. Yet the LORDS or-