

teress were prohibited from marrying together; which salutary law would be eluded, if, without naming the guilty person, a divorce could be obtained.

No 545.

The present demand was not only founded on law and reason, but agreeable to the practice both of the Commissaries and the supreme Court; no instance having occurred where an articulate condescence, so far as it was in the power of the party to give it, had not been required. In the case, 1st and 2d January 1684, Earl of Monteith *contra* the Countess, *voce* WITNESS, the pursuer was obliged to condescend upon the Christian name of Ross of Auchelossen, the gallant. In the case, 8th July 1691, Kerr *contra* Scott, and 27th February 1692, Colonel Lauder *contra* Vangent, the supposed guilty person was both named and designed in the libel. In the case, 7th December 1708, Earl of Wigton, a blank having been left in the libel for the name, the pursuer, upon an objection, was obliged to fill it up. In the cases of Locquhard and Macarthur in 1733, Macleod of Raasa in 1735, Rolland of Kinnaird in 1737, and Alexander Stewart in 1738, the persons guilty were specially condescended on. In the case of Carruthers of Dormount in 1742, the Court gave an instruction to the Commissaries to ordain the pursuer to condescend specially upon the persons with whom the adultery was committed, if known to the witnesses; and some marks, distinguishing them, if unknown to them. A similar judgment was given in the case of Cunningham in 1763; and as to the case of Martin *contra* Michie, it was no precedent upon the general point, as the husband, having been out of the country, could not have access to know the guilty persons, and had besides condescended in other respects, and, upon the whole, as specially as was in his power.*

The Court was very clear in this case; and it was observed, that if a summons or condescence in general terms was allowed, the act 1600, c. 20. would be evaded. The Commissaries' judgment was accordingly approved of, and the bill of advocacy refused.

Lord Ordinary, *Monbaddo.*For Nicolson Stewart, *MacLaurin, et alii.*For Mrs Nicolson, *Ilay Campbell.*

R. H.

Fac. Col. No. 26. p. 62.

1796. February 25.

ALEXANDER GEDDES and ALLAN CLARK *against* JEAN BULL.

ALEXANDER GEDDES and Sarah Fry were said to be married, and had an only son, Alexander Geddes junior. Before Sarah Fry's death, however, her alleged husband deserted her, and connected himself with Jean Bull, with whom he settled in Wales, called her his wife, and executed settlements in her favour, conveying to her some lands in Scotland, and his whole moveable property.

No 546.

If a title, by adjudication upon a trust-bond, be objected to upon the ground of bastardy, the pursuer must prove his legitimacy.

* None of those cases are reported, except that of E. Monteith, *voce* WITNESS.—See APPENDIX.

No 546.

Alexander Geddes, after his father's death, being advised to challenge these deeds, as granted *adulterii causa*, executed a trust-bond in favour of Allan Clark; who, after deducing an adjudication on it, brought a reduction of the settlement.

In defence, it was stated by Jean Bull, That Geddes was a natural son, and consequently had no title to pursue.

Mr Geddes averred, That his father and mother had been received as husband and wife by their friends in Scotland; and produced, in evidence of the celebration of their marriage, a notorial extract of its entry from the register of marriages kept by the person who performed the ceremony, an Episcopal clergyman in Haddington, who is since dead.

THE LORD ORDINARY, "in respect the pursuer alleges, that he is the lawful son and heir of his father, and that the defender contests his legitimacy, finds the pursuer, before further procedure, must instruct his legitimacy."

In a reclaiming petition, the pursuers

Pleaded; Mr Geddes has produced *prima facie* evidence of his legitimacy, which was more than he was bound to do; for as bastardy is not presumed, Stair, b. 3. tit. 3. § 43.; 19th February 1669, King's Advocate against *Craw*, No 541. p. 12367.; 6th January 1680, *Sommerville*, No 544. p. 12638.; the defender, before she is entitled to insist in her present defence, must establish it in a regular process of declarator. The *onus probandi* lies upon her, nor can she be relieved of it merely by making a vague allegation in this action, that the pursuer is not legitimate.

Observed on the Bench; The evidence of the marriage of the pursuer's parents, hithero produced, is not complete; and an adjudication upon a trust-bond being obtained, without any evidence of propinquity, the pursuer must support his title by proof.

The COURT refused the petition.

Lord Ordinary, *Dregborn*. For the Petitioners, *Rolland*. Clerk, *Sinclair*.
R. D. *Fac. Col. No 205. p. 488.*

S E C T. II.

Death.

No 547.

1613. June 17.

A. against B.

A WOMAN, being charged by the Commissary of Dumfries to confirm her husband's testament, sought advocation, *alleging*, That her husband was not