

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.

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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-

denied them to be called, they being condescended on. *2do*, It was debated if he was obliged to prove that she was *tanta, habita et reputata* a bastard. Some thought not; for this allegiance that her father and mother were never married was a negative, and so needed not probation. Others contended, That the presumption stood for marriage and legitimacy; and, that one was lawfully begotten was more charitably presumed, than that he was a bastard; and that the burden of probation was in law devolved over, and incumbent on the donator to the bastardy who asserted it, and not on them who proponed and founded upon the legality and hability of the person; for *quod inesse debet inesse præsumitur*; see 25th February 1642, Crawford, No 539. p. 12636.

Fountainhall, v. 1. p. 67.

* * A similar decision was pronounced, 15th June 1670, Livingstone against Burns, No 22. p. 11972, *voce* PROCESS.

1770. February 21. HOUSTON STEWART NICOLSON *against* Mrs NICOLSON.

MR NICOLSON having brought a process of divorce against his wife for adultery, stated, *imo*, in his summons generally, That the defender had been in the practice of committing adultery with men different from her husband; *2do*, In more particular terms, "with a young man then in Sir William Maxwell of Springkell's family, of a rank and station much inferior to her." The summons, as to time and place, was sufficiently particular; but the defender objected to it on this account, and insisted, that before going to proof, the pursuer should be ordained to condescend pointedly upon the person by name, surname, and designation.

The Commissaries, on the 23d January, ordained "the pursuer to condescend upon the name and designation of the particular person pointed out in the libel as guilty of the crime of adultery with the defender in or about the house of Springkell."

The pursuer, in a bill of advocation, *pleaded*;

Adultery being a crime practised in private, and concealed from the eyes of the world, it was by the testimony of accomplices that in most cases it could be detected; and as, on the one hand, it would be hard to oblige accomplices to accuse themselves, or even third parties by name, whereby the peace of families might be disturbed; so, on the other, it would be of most fatal consequences, if the testimony of such persons were on that account to be altogether rejected.

In the proof of the adultery, it was in no degree material whether it was with one man or another, that the crime was committed. The only question was, Whether it was another person than the husband? If that fact was esta-

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The pursuer of a divorce for adultery must condescend specially upon the person with whom the crime is supposed to have been committed.