

No 19.

seeing, in the decret of Parliament, my Lord Argyle's right and possession were quarrelled as wrong, and therefore were acknowledged to have been, and seeing Macdougals produces no other right, and the King's Advocate concurs; and if need be, my Lord Argyle offers to prove the lands in question are parts and pertinents of the lordship of Lorn, expressed in his sasine; and albeit this be pretended to be a decret of Parliament, yet by sentence of Parliament since, it is remitted to the LORDS, and is in itself visibly null, as having been intended against my Lord Argyle, and pronounced after his death and forfeiture, without calling the King's officers.

THE LORDS repelled these defences in respect of the replies.

Stair, v. 1. p. 296.

1665. July 22. THOMAS REW *against* Viscount of STORMONT.

No 20.
Summons not sustained, it not having been executed within year and day from its date.

THOMAS REW pursues a reduction of a decret obtained by the Viscount of Stormont, who *alleged* no process, because the citation was not within year and day of the summons, the warrant whereof, which bears, to cite the defenders to compear the day of next to come.

THE LORDS found the defence relevant.

Fol. Dic. v. 2 p. 178. Stair, v. 2. p. 301.

1665. November 28. BRUCE *against* Earl of MORTOUN.

No 21.
Continuation necessary in a summons of furthcoming.

IN an action for making arrested sums forthcoming, between Bruce and the Earl of Mortoun,

THE LORDS found that the summons behoved to be continued, seeing they were not passed by a special privilege of the LORDS, to be without continuation, albeit they were accessory to the LORDS' anterior decret, against the principal debtor, which they found to be a ground to have granted the privilege of not continuation, if it had been desired by a bill, at the raising of the summons, but not being demanded, they found *quod non inerat de jure*.

Fol. Dic. v. 2. p. 178. Stair, v. 1. p. 315.

No 22.
Continuation not necessary in a summons of declarator of bastardy; but on a single summons it may be proved, that the defunct was a reputed bastard.

1670. June 15. LIVINGSTON *against* BURNS.

MARGARET LIVINGSTON, as donatrix to the bastardy of a mason in Falkirk, pursues a declarator of the bastardy, and restitution of the goods against Burns, who *alleged*, No process, because the libel, condescending upon the bastard's father and mother's names, and that the defunct was bastard, the same must be proved by witnesses, and so the summons must be continued, it being a known maxim, that all summonses, not instantly verified, either by presumption, or probation

by writ, but which must be proved by witnesses, or oath, must be continued. The pursuer *answered*, That albeit *ex abundante*, she had condescended on the bastard's father and mother, yet whoever were father and mother, that they were not married together is a negative, and proves itself, and needs no further probation, but is presumed, and puts the burden of probation upon the defender, that they were really married, at least, so held and reputed. *2dly*, Albeit probation were necessary, that the defunct was either bastard, or so commonly reputed, the probation may proceed upon the first summons, *in favorem fisci*, and is so accustomed in declarators of bastardy, and in declarators of non-entry, wherein though the death of the vassal be libelled, yet the summons is not continued.

THE LORDS found, That the summons behoved to be proved, that the defunct was at least held and reputed bastard, and that bastardy was not presumed; but they sustained the declarator without continuation, and that the declarator might proceed upon the first summons. See PROOF.

Fol. Dic. v. 2. p. 178. Stair, v. 1. p. 689.

* * * Gosford reports this case :

IN a declarator of bastardy of James Livingston, son to Henry Livingston of Castlecarry, it was *alleged* by Patrick Burn, son of the relict of the said James, who was called as a defender, No process, because the gift of bastardy did not condescend upon the woman's name who was mother to the said James, but only, that he was born a bastard; and the summons condescending upon the mother's name, did require probation that she was his mother, and was never married, and therefore, ought to have been continued conform to the daily pratique and form of process, requiring continuation of all summons where probation is necessary. It was *replied*, That declarators of bastardy were never in use to be continued, and the reason of the libel being a negative, proved itself, unless the defenders will offer to prove, that the said James's mother was lawful wife, at least, that her father was *tentus* and *reputatus* to be her husband.

THE LORDS having debated among themselves the reasons *alleged hinc inde*, and that it was of a general concern, being after many years, and the decease of the parents of the alleged bastards; that it was sufficient to libel that they were bastards, without necessity to prove; did find, by their interlocutor *in favorem fisci*, That the summons needed not to be continued, it not being in use heretofore; but they ordained the pursuer to prove his libel as to that part that the woman condescended on was mother to the said James, which they found sufficient, unless, that the defender would allege, that the said James's father was married to the said woman, or was *tentus et reputatus* to be so.

Gosford, MS. No 269. p. 114.