

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 condescendence 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.

No 543.

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

What affords evidence of bastardy?