

No 538. bastard cohabited together by the space of ten years as married folks, and were reputed to be married folks. Which exception was sustained, notwithstanding of a reply, bearing, that the person whose bastardy he sought, was reputed and esteemed by all the persons in the whole country, where the parents of the bastard and also himself dwelt and conversed, a bastard, which being *pro fisco*, he ought to be preferred. This reply was repelled, and the exception sustained. See BASTARDY.

Fol. Dic. v. 2. p. 262. Durie, p. 210.

1642. February 25. CRAWFURD against PURCELS.

No 539.

Status defunctorum not to be enquired into after a long tract of time.

MALCOLM CRAWFURD having by gift under the Great Seal, the right of a tenement of land in Edinburgh, pertaining to the King as *ultimus hares*, by the decease of umquhile Hugh Crawford, last infest therein, who was bastard, and who died without lawful bairns, and Helen and Bessie Purcels, who were possessors of this land; and these defenders *alleging*, That this action ought not to be sustained, because it is 30 years since the time of the decease of the said umquhile Hugh, who is alleged to be bastard, and at the time of his decease he was betwixt 40 and 50 years of age, so that before that time there can be none living to prove the marriage of the said umquhile Hugh's parents; or that they cohabited together as married folks, for this is *ultra hominum memoriam*, and his lawfulness was never drawn in question all this time while now; likewise, while he lived, he was ever reputed lawful; the LORDS, in this case, (which was a case of such antiquity) found it a matter of dangerous preparative to give way to such actions, and to sustain and draw in question *statum defunctorum post lapsum tanti temporis*, which may concern the subjects of all qualities, who are of any years; and therefore, found no process on that gift, this allegiance being proved.

Fol. Dic. v. 2. p. 263. Durie, p. 894.

* * * Kerse reports a similar case, 10th January 1618, Hirpet against Scot, No 42. p. 2197. *voce* CITATION.

1667. February 25. LADY MILTON against LD MILTON.

No 540.

ADULTERY was found proved, though not any two of the witnesses concurred in the same individual act; for in such crimes which allow of reiteration of acts, all proceeding from the same *animus*, like so many links of a chain, the *semiplena probatio* of every one fortifies the whole, and makes it equivalent to the full proof of two concurring witnesses to one specific act; which

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.

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?