

suborning an impostor to personate and give himself out to be that man's son, and that he might be only a bastard; they inclined to stop the service, and to direct a commission to Dantzick, to try if Andrew had left a lawful son called David, and if he be yet alive.

But, lest any of Mr Gordon, the factor for the said David, his witnesses, by whom he offered to prove David was his son, should die *medio tempore*, they examined them immediately, to lie *in retentis* for the use of the inquest, when they should come to serve affirmatively or negatively, conform to the probation; which must be the more concluding and pregnant here, where there is another though remoter served already, or else they may be pursued as *temere jurantes super assisam*. *Vide infra*, 13th Feb. 1683.

*Vol. I. Page 215.*

February 13.—The macers and their assessors having met again on David Peacock's service, (mentioned 3d February current,) they led some more witnesses for either party; and it was proven by two that Andrew Peacock had a son called David, who was reputed a bastard.

The three Lords, by their interlocutor, ordained a commission to be directed to Dantzick and Vidavia, to examine if David be alive, and if he be a lawful son; and to try Andrew's relict, the mother, yet living, if she owns him for her lawful son; with this declaration, If he die *medio tempore*, this delay of his service shall not prejudge him, but, *quoad* Margaret, it shall be reputed as if he had been served.

But Gordon, the pursuer of the brief, offering caution to refund the money, if the probation on the report of the Commission should go against him; the three Lords condescended to give him the whole Lords' answer, if the service or commission should precede one another: which they did upon the 16th day of February; and the Lords, on Castlehill's report, ordained the service to go on; but, before extracting, ordained Gordon to find sufficient caution in the Clerks of Sessions' books, that, if he uplift the money in the Town of Edinburgh's hands, and his service be afterwards reduced upon trial, finding either that he is dead, or was not a lawful son, he shall then refund and repay the money. And accordingly the inquest served him nearest heir; and Margaret Peacock, who was already served, her procurators protested against them for an assize of error.

*Vol. I. Page 217.*

---

1683. February 18. JEAN WISEHEART *against* The HEIRS of JAMES BONNAR.

JEAN Wiseheart, relict of James Bonnar, and Alexander Wiseheart, now her husband, against Bonnar's heirs. The Lords found a bond secluding executors heritable *quoad fiscum et relictam*, though a charge of horning given upon it was produced; which seemed, by the principles of our law, to render it moveable, as well as a requisition or charge looses an infeftment or wadset, there being no apparent disparity betwixt the two; but the Lords found it continued still heritable, because of its express conception of secluding executors *in omnem*

*casum*, and as if the party intended a substitution to the heir. Which is very subtle.

But, on a bill, they ordained this point to be heard again in presence. Which was accordingly done on the 1st of March 1683, and then they reversed their former interlocutor; and found a charge of horning rendered a bond secluding executors moveable, as well as any other bond would be so loosed.

*Vol. I. Page 217.*

1683. February 16.

BAITH against BEITH.

BAITH against Beith, reported by Redford. In a contract-matrimonial, the husband's father obliges himself that his son shall come in equally with the rest of his children, both as to all moveables and heritage he shall happen to have at the time of his decease: thereafter he assigns an heritable bond to another son: the brother quarrels this; and, craving a share of it upon the fore-said clause, it was ANSWERED,—The clause not took away his *jus et liberum arbitrium disponendi*, and he had not this at the time of his decease, being denuded; and so fell not under the clause.

The Lords finding it was not for onerous causes, nor upon necessity, to a stranger, but merely gratuitous to another child, they judged it fraudulent; at least not the parents' design to innovate the clause, and only to give it *pro tanto*; and therefore admitted the brother to a part of it.

*Vol. I. Page 218.*

1683. February 17. INGLIS of CRAMMOND against JAMES CURRY, late PROVOST of EDINBURGH.

THE Lords repelled Curry's ground of compensation founded upon Samuel Moncrief's debt, which Samuel was Crammond's author and cedent; because not instructed nor liquidated before Crammond's arrestment, but long after; and even then it was only by holding Moncrief the bankrupt as confessed upon a debt alleged owing by him to Curry: and, though he had compeared and deponed, his oath could not prejudice Crammond, or his other lawful creditors doing prior diligence, against whom nothing could compensate but a debt owing by Moncrief by bond or decreet anterior to their arrestments or other lawful diligences done by them against him.

And on occasion of this interlocutor, I heard the Lords had found the like within these few years, in a case between the Earl of Annandale and William Johnston of Wamphry and his Creditors. Annandale offering to prove payment of some articles by Wamphry's oath, the Lords found his deposition could not prejudice his creditors who had adjudged from him. See Stair 14th July 1666, *Sharp against Glen*.

*Vol. I. Page 219.*