

1696. *December 16.* GEORGE FORBES *against* YEAMAN and OTHERS, Dounie's Debtors.

IN the declarator of bastardy pursued by George Forbes, against Yeaman and others, in Haddington, debtors to one Dounie, it being *in re antiqua*, and the defenders having produced a testificate, out of the kirk-session books, of his father's marriage, but would not burden themselves to prove, that, by the common belief of the place, he was holden and reputed born of lawful marriage; for, to prove the marriage and cohabitation after so long a time was now impossible, being *ultra hominum memoriam*;—the Lords considered, That, though the favour of marriage, and being legitimate children, gave the prerogative of probation, yet, if they would not make use of it, then the donatar might be allowed to prove, by common fame and report, he was holden and reputed a bastard; and gave the defenders their election; but thought it not safe to trust a conjunct probation, *ad evitandum perjurium*. See the 20th of February 1642, *Malcome Crawford against Pursells*.

The next defence was, They had right to the moveables by disposition; and, though a bastard was incapacitated to make a testament, so that he had not *testamenti factio activa*, but only *passiva*, yet he might validly dispone *inter vivos*. ANSWERED,—Though this was done by way of disposition, yet it was done when he was *in lecto*, and so *sapit naturam testamenti*; and at that time he could not wrong the fisk.

The Lords found, If it was on deathbed it could not defend them against the donatar, though it were in form of a disposition. See 18th July 1678, *Craw*; and *Stair, tit. Confiscations*. *Vol. I. Page 743.*

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1696. *December 16.* JAMES CRAWFURD of MORQUHANY and GEORGE MACKENZIE *against* SIR THOMAS KENNEDY and the OFFICERS of STATE.

[See the prior and posterior parts of the Report of this Case, Dictionary, page 7866–7870.]

THE Lords advised the probation of Crawford of Morquhany's damages in his sub-tack of the shire of Fife's excise, mentioned 2d July 1696, and found, It was not so notable as to afford him an abatement of his tack-duty, seeing it did not amount to the fourth or fifth part of the tack-duty; and this loss might be compensated by what he gained in former years. *Vol. I. Page 744.*

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1696. *Feb. 12 and 22, and Dec. 17.* SHORTS and CRAIG *against* SIR ANDREW BIRNY, LORD SALINE, and his CHILDREN.

[See the prior part of the Report of this Case, Dictionary, page 12,856.]

*February 12.*—RANKEILOR reported Shorts and Craig, their mother, against

Lord Saline and his Children, (mentioned 19th February 1695.) As the Lords had formerly found there was no need for the pursuers to serve heirs, *ad inchoandam litem*; so they now insisting against the defenders to denude of the *fidecommiss.* in their persons, they found, that their being potestative heirs *designativè* was enough without a retour, it being provided to them *qua* bairns and children; though, in another part, it provided the sum to the heirs procreated of the marriage. But *heir served* are legal terms, and come not by procreation,—none being born with a retour in his hand. *Vol. I. Page 710.*

*February 22.*—On the occasion of a cause depending betwixt my Lord Saline and Shorts, in Stirling, it was moved, If Saline ought to stand covered at the bar, having once been a Lord of the Session, and so retaining the privileges, *per tit. D. et C. de Senator.*; and it was always allowed them, as to Abbotshall and others. Polwart, and some with him, argued, That a Lord's eldest son stood there bare, and yet he would take the place of an outed Lord of the Session; and that those in possession ought to have the precedency of those who were out of it.

The Lords declared they would allow it to none but the nobility, the present Lords of State, and such Lords of the Session as were actually in office at the time. Which resolve gave offence to severals; for, though they acknowledged that the King, and not the Lords, could confer honours, yet, they being in possession, it could not be taken from them but by a declarator; and to make an act of sederunt on it was to deprive and condemn them without hearing.

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*December 17.*—The Lords advised the mutual declarators between the Children of Alexander Short, in Stirling, and Sir Andrew Birny, Lord Saline, mentioned 12th February 1696. The children ALLEGED,—The rights in his person were but a trust, and craved he might denude, he and his children being all-enarily constituted fidecommissaries by Mary Scot, in her disposition, in the event of Sir Alexander Short's having children, to whom they were bound to restore the houses, lands, and sums. Saline, on the contrary, insisted on his declarator of property, that the same were no trust, but properly his own. There were many adminicles advanced on both sides; as a back-bond under Saline's hand in 1673, which he contended was renounced and discharged by Alexander Short in 1679.

The Lords found,—Alexander could only renounce and discharge his own part, but not the provisions and clauses conceived in favours of his children; and found even that ratification itself bore its dittay in its bosom; for it reserved the children's right, and declared it should be but prejudice thereof.

Saline ALLEGED,—This reservation did not impede him, why he might not make use of the debts and adjudications in his own person, to exclude. But the Lords considered, that, by the *salvo* adjected, he had reserved their rights, yet he had not reserved to himself a power and faculty to quarrel them; and, therefore, declared the trust to this effect, that he could not impugn Short's children's right by any right standing in his person. *Vid. supra, 22d June 1678, Birny against Polmais and Brown, where Saline founds on Mary Scot's disposition, which he now seeks to evacuate by the rights in his own person.*

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