

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