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***Who's Offensive Now?  
Trans law at the time of the Sexual Offences Act***

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At the same time as a highly public parliamentary debate was taking place about the Sexual Offences Act, an *in camera* private hearing was being held in Scotland by the Court of Session, which provided summary trial by a judge, without a jury. The case was *Forbes v Forbes*, an aristocratic family squabble to decide the rightful inheritance of a title limited by *primogeniture* between trans man Ewan Forbes and his cis cousin John.

In court, Ewan presented himself as an ordinary, simple, rural GP and farmer, but he and his family were highly privileged and very exclusive. His Grandfather had been an intimate friend of Queen Victoria; Ewan's Father had the titles of both Lord Sempill and Baron Sempill of Craigevar Castle and Fintray House and was aide de camp to King George V; as a child his playmates in St Moritz had been the Cartier children; typical family visitors included the Queen of Spain and Alfred Adler; one cousin was Head of MI6 for Austria, Hungary and Yugoslavia and another an American author linked to the international avant garde. Ewan and his family had huge access to power and influence of every kind: familial, political, financial, intellectual, even secret power.

Ewan was born in 1912, the youngest of three children, with a brother, William, nineteen years older than him and a sister, Margaret – always called Peggy – seven years his elder. His father was very distant from all his children but his mother was close and caring, and very concerned about Ewan, who refused to dress or act like a girl. In a narrative mirroring that of trans children today, from when he was six to when he was twentyone, Lady Sempill started consulting the most senior clinicians about him, in the UK, St Moritz, Dresden, Prague, Vienna, Budapest, Paris, Baden-Baden, and Munich. They were able to access early treatment with male sex hormones, so that by the time he was 20, Ewan was shaving daily. As the youngest child, he had to make his own way in the world, and in 1944 he qualified as GP at Aberdeen University and bought a local General Practice at Alford. By 1950, he was able to acquire a large estate at nearby Brux, and became known as both Dr

Elizabeth Forbes and the Laird of Brux. He had fallen in love with his housekeeper and medical secretary, Patty, and in 1952 he published a newspaper announcement that he had changed his name to Dr Ewan Forbes, had his Birth Certificate corrected from 'F' to 'M' and from 'Elizabeth' to 'Ewan', and married Patty. His life seems to have been very happy – he was an enthusiast for traditional Scots country dancing and an elder of his local Kirk – and in 1955 he took to farming full-time, leaving his GP practice to be run by his former assistant.

This idyll was disturbed in 1965 when William died, and the Lordship he had inherited went to daughter, leaving the Baronetcy subject to primogeniture. Immediately after William's funeral, cousin John approached Ewan to say that he intended to claim the baronetcy, on the grounds that Ewan was female, triggering the hearing. In fact, the hearing found in favour of Ewan, and John's contest of that decision was decided in Ewan's favour by the Home Secretary, James Callaghan. And then, all records of the case disappeared.

In March 1996, after a Judicial Review found against the right of trans people to correct their Birth Certificates I was informed of a prior case. All records of it had been removed from public eye, those who knew of it were forbidden to refer to it, and it had been followed by a secret blanket ban on Birth Certificate corrections because, as my informant put it, 'some things are more important than the rights of ordinary people'. Conspiracy theory is perilous for activists, but when Stephen Whittle faxed Ewan Forbes's obituary to me, and I could find no records of the hearing at the Institute of Advanced Legal Studies, I started ringing round. The Signet Office in Edinburgh said they had no record of the case; the Lord Advocate's office suggested I write in but then didn't reply to my letter; the Registry of the Baronetcy said they would ring back and didn't; the Court of Lyon said they'd have to ring me back, and did, to say the records for the case were stored in a room that was currently inaccessible.

At the Scottish Records Office neither I nor the staff there could find the Forbes case in the indexes to the Court of Session Minute Book, or in the Index of Extracted Processes, or in the Index of Unextracted Processes. Back in London, in August 1996, Dr Lynne Jones MP, chair of the Parliamentary Forum on Gender Identity, kindly wrote to Lord Advocate – Baron Mackay of Drumadoon – asking for details of the case and he replied first, that 'No decision or judgement was ever issued in those proceedings' and later, in December, that he had 'uncovered some relevant documents' but believed it was 'not appropriate to let you see copy papers or indeed disclose the details they contain'. Lynne asked for confirmation that Ewan was chromosomally male, and a year later, in December 1997 a new Lord Advocate,

Lord Hardie, replied that 'I do not consider that it would be right for me to release any of the documents or disclose the details they contain' but that 'the Forbes case does not bear to involve any element of transsexualism as I understand the term'.

However, trans activist Kristina Sheffield complained to her MP, Home Secretary Michael Howard, that justice was being undermined by secrecy, and on 19 December 1967 the Scottish Records Office said that the Forbes hearing had come to light - 530 pages of verbatim transcript. The Forbes decision could have been persuasive in Europe after UK joined EU in 1973, but its disclosure came too late for Mark Rees (ECHR 1986), Caroline Cossey (ECHR 1990), P & G (Judicial Review 1996), and Kristina Sheffield and Rachel Horsham (ECHR 1998): its sequestration had a devastating effect on trans rights.

The transcript reveals that Ewan faced a very particular problem. When he changed his name, corrected his Birth Certificate, and married Patty, in 1952, being trans was regarded as a congenital biological, neuro-endocrinological, asymptomatic intersex condition. Ten years later, the 1960s USA 'turf war' between endocrinology and psychiatry, which endocrinology lost, had psychopathologised trans people. Similarly, in the UK, John Randell was running a punitive 'bait and switch' operation at Charing Cross GIC, in which trans people arrived in the belief that there was a surgeon there who would help them, but discovered there was only a bigoted psychiatrist, himself a deeply closeted cross-dresser, who refused medical assistance, projected his own fears onto them, and kept them dancing attendance for years.

So, by 1966, if Ewan presented in court as trans, he would be regarded as a mentally ill woman, and would lose his whole personal and professional life. Worse, he was trapped by primogeniture, unable to renounce the title or divert its inheritance. It had neither money nor lands attached and he could have let it languish, but John's application on the grounds that Ewan was female, forced him to fight. Unfortunately, Ewan and his older sister Peggy, were estranged and John had paid her to write a letter saying 'I always regarded Dr Ewan as my sister and I feel quite sure there was never any doubt as to her sex . . . she had her periods regularly just the same as any other girl'. When Ewan heard of the letter, his solicitor contacted Peggy to offer reconciliation and dinner at Brux. A bidding war, in which Peggy was meeting both Ewan and John to discuss her evidence, ended a fortnight later when, driving to Brux for to dine with Ewan again, Peggy's car crashed and she was killed. Her letter, however, remained as part of John's evidence.

Events followed rapidly. On 25 November 1966 John's doctors, led by Professor Strong from the University of Edinburgh examined Ewan, on behalf of John, and Ewan pointed to swelling in his groin as a possible testis. After Ewan's unconsented, forcible anaesthetisation, and examination by 7 people for 3 hours. Professor Strong made his Report on 30 December. He said that the swelling in Ewan's groin was varicose veins, and that there was no sign of a testis anywhere. He concluded that 'In anatomical terms, examination indicates that Dr Forbes Sempill is female' with possibly 'a moderate degree of congenital hyperplasia'. Ewan had 'Two x chromosomes and therefore genetically . . . a normal female'.

After reading Strong's Report on 5 January 1967, Ewan set out to hi-jack the clinical narrative. Recalling that a nephew of Patty's, who had had an undescended testis removed, Ewan visited the famous paediatric geneticist Professor Polani, at Guy's Hospital. Polani, an expert on childhood gonadal variations, on conditions such as mosaicism, and was surrounded by slides and samples of gonadal tissue in all its varieties. After seeing Polani, and just a fortnight after seeing Strong's report Ewan said he had severe bronchitis, and during a violent coughing fit on 19 January a testis suddenly appeared in his groin, at the place he had pointed out to Professor Strong. Immediately he biopsied himself, and sent the tissue sample to his late brother William's physician, who passed it to a pathologist for a confidential examination. Unfortunately, though, that pathologist had a coronary thrombosis, and so on 3 March, Ewan did a second biopsy on himself and sent the tissue sample to Aberdeen, his old medical school, with which he still stayed in touch. Finally, just so there could be no doubt, on 28 March Ewan got his former Assistant to do a third biopsy with the Minister of the Kirk as witness, and got the Minister to deliver it to the university by hand. There was no prior medical history, no independent examination of testis in situ, and no externally independent biopsy: the court was asked to believe that twelve years after giving up medical practice, Ewan just happened to have to hand all of the sterilised equipment and pharmaceuticals necessary for multiple biopsies, and that his hand was so steady that the first two biopsies produced only one scar.

The testis was crucial. His XX chromosomes meant that Ewan couldn't have 'testicular feminisation' or Androgen Insensitivity Syndrome as is now known, while the testis meant that he couldn't have Congenital Adrenal Hyperplasia: both of the commonest intersex conditions ruled out in one go. All of the medical experts in court agreed that in order to have

a testis, Ewan had to have had a Y chromosome at some point, but that it might never be found. Mosaicism, in which chromosomes in one part of body are different from those in another part, meant you would have to test every cell in his body before you could be sure one of them didn't have a Y chromosome. Even then, there was the possibility of translocation, in which a former Y chromosome could have been absorbed by X chromosomes, and now be completely lost or invisible. In other words, it was impossible to draw any conclusions about Ewan's sex from his chromosomes. In evidence, Ewan had present a BMJ article in evidence, about the existence of ovotestes – a combination of testicular and ovarian tissue – and it was well known that in 'true hermaphrodites' both kinds of tissue existed. In Ewan's case, he was too old for ovarian tissue to be found, even using a surgery, but it was assumed that he had some, apparently simply because he had been identified as female at birth. Given the magically-appearing testis, therefore, Ewan could claim that he was a 'true hermaphrodite' and there was no way of disproving his claim. He had outsmarted everybody on the trans issue.

Because the court proceedings pre-dated DNA testing there was no way of disproving Ewan's claim that the testicular tissue in evidence came from him. But considerable doubt was cast on their authenticity in court. There had been no secure custodial chain of evidence for any of the samples, and somewhere along the way a portion of mature testis had been added to them, which was hastily explained away as 'a control' sample. Every clinician who had to refer to the testis danced round the issue with extreme circumspection, using phrases such as 'if the testis had been found'; 'said to be associated with Dr Forbes Sempill'; and 'a certain confusion'. The samples were probably from a human being, but there was no way of knowing whether from an adult or a child, or even whether all the specimens were from the same person. The judge, Lord Hunter, was clearly exercised, and in his Opinion he criticised 'secretiveness in connection with the taking of certain biopsies' which had resulted in evidence being 'left in doubt'. He also spoke out strongly and directly about 'perjury committed in a manner that can only be described as lighthearted' and it is clear that his comments could only have been addressed at Ewan, whose evidence throughout was characterised by a breezy manner, feigned innocence, and convenient forgetfulness.

Foiled on biological sex, questioning turned to social gender. Witnesses attested to what his legs looked like when he wore a kilt, to his abilities at hill walking, and to the work he did on the farm. Foiled on gender, questioning turned to sexuality. Ewan had had sexual relationships prior to his marriage, with women who were now married, i.e. 'not lesbians', but

he had never had any sexual feeling towards a man. Foiled on sexuality, questioning turned to a brutal interrogation of Patty about sexual intercourse, who said Ewan placed his phallus in her vagina, he always had an emission from behind the phallus, they had sex twice a week and she always had an orgasm. Ewan was a brisk man.

Finally, Lord Hunter gave his Opinion. Intersexed people were unfortunates who had to be classified as either male or female, irrespective of all the scientific evidence that biological sex is a spectrum – anything else was just too complicated. ‘Transsexuals’ were a far more dangerous group of unfortunates since ‘success in achieving the social sex of their desire, might bring disastrous consequences not only upon themselves but upon others in the society in which they live’. Rejecting the medical evidence, Hunter created his own diagnostic criteria. Chromosomal sex was irrelevant, but the presence of gonads – testes and ovaries – was important. How people’s bodies looked – phenotypical sex – was important. Psychological sex was only important where ‘true hermaphrodites’ were concerned, and nothing was more important than sexual intercourse, which provided evidence of something that was not available to view – an ‘adminicle’ – in this case, Ewan’s biological maleness. So, Hunter said:

‘Judged purely by appearance, the external genitalia are predominantly female, but, judged by function, they are predominantly male . . . The fact that in sexual intercourse the Second Petitioner is, despite his physical handicaps, able to penetrate with his phallus the vagina of his wife and to function mechanically as a male, to the satisfaction both of himself and his partner and to the point of orgasm and emission, is in my opinion of greater importance than the predominantly female external appearance of the genitalia.’

Consequently:

‘in a case where a person can function sexually as a male to the extent which the Second Petitioner is able to do, and where there can be found in that person’s body male gonadal tissue from which masculine attitudes, behaviour and desires, both sexual and otherwise, may reasonably be assumed to have emanated, directly or indirectly, the fact that the psychological sex is male is in my opinion an adminicle of evidence of some importance’.

Hunter’s decision, therefore, was that Ewan was ‘a true hermaphrodite in whom male sexual characteristics predominate’.

The case exemplifies a range of theoretical positions – a brilliant display by Ewan of what de Certeau terms ‘tactics’; a literal phallogocentrism in the Judge’s Opinion; post-colonial violent binarisation of trans and intersex; the simultaneous discovery and concealment of third space; Ewan’s paradoxical destabilisation and reinscription of masculinist heterosexuality; and so on. Today, though, I want to draw attention not to cultural theory but to the practical consequences of Ewan’s ruse. Because the British Crown was inherited by primogeniture, a trans man or a ‘true hermaphrodite’ gaining a primogeniture title heralded a potential constitutional crisis. The succession of the crown was no longer secure. There were Jacobite undertones to the Forbes family’s aristocratically privileged arrogance: Ewan’s blithe perjury and falsification of medical evidence was peanuts in comparison to his brother William, who, in the Second World War, had openly used his senior positions in the Admiralty and House of Lords to spy for the Japanese, in defiance of Churchill, who was unable to sack him, still less try him for treason. Ruthlessly having your own way was a family trait.

The political motivation for preventing any future correction of Birth Certificates was obvious, but Ewan’s hearing had been in secret and its decision hidden from sight. A show-trial was needed to make trans people publically offensive, and this was soon provided by April Ashley’s liaison with the son and heir of Lord Rowallen and the 1970 *Corbett v Corbett* decision, which rejected and reversed the medical evidence that Hunter had accepted for Ewan. Now, ‘transsexual’ had been re-created as a political category, removed from the biological ‘intersex’ taxonomy and set in a binary to it: intersex was sad, but trans was mad, bad, and dangerous to know. Simone de Beauvoir’s carefully made distinction between ‘sex’ and ‘gender’ had been elided: ‘sex’, ‘sexuality’, and ‘sexual intercourse’ were collapsed into ‘gender’, legitimising the psychopathologisation of ‘transsexuals’. Psychiatrists coerced trans people into sterilisation, while leaving them absent from the public health record; gay and lesbian communities distanced themselves; influential feminist writers vilified ‘transsexuals’; and suddenly, trans people could no longer correct their Birth Certificates, could not marry or adopt children, had National Insurance and other documentation in wrong name and sex, could be instantly dismissed from employment just for being trans, and if they could not pay their parking fines, served custodial sentences in the wrong sex prison where they were routinely raped by inmates and warders alike.

Unlike the Sexual Offences Act, all of this happened without public awareness, without parliamentary debate, without legislation, without visibility, without accountability, and

deliberately hidden. Government effectively initiated and concealed a eugenic project – biological genocide, cultural genocide, disenfranchisement, exclusion from public record – that is still in operation today. Who's offensive now? Those who ordered it, those who did it, those who tolerated it and those who still propagate it. They are all guilty.