

ply denied the dittay, without any defence, they found the panel guilty of the reset of the stolen goods: and although, by the law and constant practise of this kingdom, resetters of thefts are punishable with the punishment of thieves; *viz.* by death, and confiscation of their moveable goods, to be escheat and in-brought to his Majesty's use; yet, without any warrant from his Majesty's Council, the commissioners did alter the statutory punishment of the law; and ordained two of the said persons, convicted of reset, to be publicly scourged in Jedburgh, and thereafter to be imprisoned till they should find caution for their good behaviour; and ordained the said John Wauch to [pay] 1200 pounds Scots, within 24 hours; wherein if he failyied, ordained him to be sent to the Barbadoes, and his moveable goods and gear to be escheat and in-brought to his Majesty's use: and Mr Andrew Hedderwick, [having obtained] the gift of the said John Wauch's escheat, pursues a declarator.

It was ALLEGED, There could be no declarator of the escheat; because there was no doom pronounced, escheating the goods to his Majesty's use; at least the doom pronounced was conditional, *viz.* that Wauch should either pay 1200 pounds, or otherways his goods should be escheat,—like as he has purged the condition by payment of the 1200 pounds. *2do.* As no doom of confiscation was pronounced, so there could no such doom be pronounced; because, although the crime of theft be punishable by death, or confiscation of moveables; yet every accession thereto is not punished with the same punishment: such as, is uplifting of goods, which is only the accession libelled; and is punished *arbitrio judicis*.

Whereunto it was ANSWERED, The doom is opponed,—bearing that his moveables could be escheat. And, as to the condition adjected, the same cannot be respected; because the punishment being certain in law, it could not be qualified by the addition of any adjected condition; so that the foresaid condition must be repute *tanquam [non] adjectus*. *2do.* Though there had never been any doom pronounced, yet there was *jus quæsitum domino regi* of the moveable escheat of the defender, by the commission of the crime, and declaring of the fact, by the proper judge, *viz.* the assize; who, by their verdict, found him guilty of the reset: and, therefore, seeing the constant law and practise of this kingdom ordained the resetters of theft, and thieves, to be punished as the principal thief; as K. Ja. VI. Par. 1. cap. xxi. and Par. 11. cap. ci.: conform whereunto, the justices of this kingdom have constantly been in use to condemn the said resetters by death, or confiscation of moveables; except the punishment were remitted by his Majesty; or allowed by warrant from the Secret Council.

The Lords repelled the allegiance proponed for the defender Wauch; and sustained the declarator.

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1666. July 25. SIR GEORGE MACKENZIE, Advocate, against MR JOHN FAIRHOLM of CRAIGIEHALL.

IN a reduction of a bond, granted by Pluscardin and Loggin, as principals, and Sir George Mackenzie, advocate, as cautioner for his father Loggin, against Mr John Fairholm of Craigiehall; Sir George pursues a reduction of the bond,

as to himself, upon these reasons: *first*, That he was minor the time of his granting the bond. *2do*. That all bonds granted by pupils *in familia*, who have their father allowed to them by the law to be administrators, are null, if they be granted without their consent; or granted as caution for their administrator; who cannot authorize his own son *in rem suam*: and subsumes, that he subscribed the said bond, without his father's consent, as administrator to him.

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1666. July 31. THOMAS CRAWFORD *against* The TOWN of EDINBURGH.

THOMAS Crawford, having obtained a gift of *ultimus hæres* of one Oliphant, pursues the Town of Edinburgh, as they who were debtor to the defunct in the sum of 2400 merks, for payment thereof.

It was ALLEGED for the Town, No process for payment of the money to the pursuer upon this gift, because it was not declared.

To this it was ANSWERED, No necessity of a declarator of a gift of *ultimus hæres quoad mobilia*, and sums of money:—*1mo*. Because the King's right, as last heir, is founded *super jure coronæ*; and that the King, upon the decease of any person dying without agnate or cognate, may, *brevi manu*, intromit with the moveables belonging to the defunct; and is only liable to restore, *si verus hæres appareat*. *2do*. Such gifts cannot be declared otherwise nor by pursuits against the defunct's [debtors, for] payment; for the defunct, having no relations of blood, there can be no person competent to be called, against whom the declarator can be inteded.

The Lords found there was a necessity of a declarator; and therefore found no process.

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1666. November 8. CHARLES CASSIE *against* COCKPEN and ADAM WATT.

COCKPEN, and the deceased Adam Watt, being infest in a yearly annualrent, effeiring to the sum of 4000 merks, forth of the lands of Auchinharvie, and others; by their back-bond, did declare the right of this infestment, in their favours, to be in trust, and to the behoof of Doctor Cassie. This infestment being dated *in anno* 1647, the trustees, for the arrears of the said annualrent, did not only comprise the lands of Auchinharvie, which were affected with the said annualrent; but also the lands of Fairherrivo, belonging to Sir David Cunninghame, the principal debtor; and the estate of Robertland, belonging to his cautioner; and whereupon they were infest. The hails lands of Auchinharvie and others, out of which the annualrent was [payable,] were holden feu or blench of the king, or prince; but the lands comprised for the byrun annualrents were holden ward of the prince; and, before the leading of the said comprising, there were three other comprising of the same lands, led at the instance of Sir David Cunninghame of Auchinharvie, and Robertland, their creditors; and whereupon the comprisingers were infest. Doctor Cassie being now deceased, Charles Cassie, his