

1663. *January 21.* WILLIAM YEAMAN *against* MR PATRICK OLIPHANT.

THERE being a process, pursued at the instance of William Yeaman, advocate, against Mr Patrick Oliphant, advocate, for the maills and duties of the lands of Newtoun ;—it was alleged, That the defender should be assoilyied, because he bruiked the lands by gift and infestment of forefaulture under the Great Seal, through being of Sir James Oliphant declared fugitive in a criminal court, or denounced rebel, not only for matricide, having killed his mother, but for murder under trust, having killed her under trust. It was answered, That, by the Act of Parliament against parricide, the parricide's heritable estate is declared to pertain to the collateral and next heir, excluding only himself and his heirs *in linea recta*. 2. Though murder under trust was libelled, yet it was not proven, nor was the parricide cited to compear before the justices under any higher pain than the pain of horning, and not under the pain of treason : and only his moveables, by the act of adjournal, were ordained to be escheat ; and therefore his heritable estate could not fall, nor belong to the king, by any such determination or act of the justice-court ; and the infestment under the Great Seal is obtained *periculo impetrantis*. The Lords repelled the allegiance in respect of the answer.—*In præsentia*.

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1663. *January 28.* The BAILIE of the REGALITY of GLASGOW *against* JOHN BOGLE.

IN a suspension, raised at the instance of John Bogle and William Mader, against the bailie of the regality of Glasgow, of a decret, whereby the said bailie had fined them in £100, for a riot, committed in the kirk on Sunday ;—it was found, That the fine was not exorbitant, in regard of the fault ; and that the bailie of the regality might lawfully fine for that sum, as well as any other judicatory whatsoever.

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1663. *February.* ALEXANDER FRAZER of PHILORTH *against* LORD FRAZER.

THE deceased Sir Alexander Frazer of Philorth dispones to Alexander Frazer of Durris, in liferent, and Robert his son, in fee, the lands of Cairnbulge and others, with this express provision, that, during the life of Philorth and old Durris together, it should not be lawful to young Durris to dispoise the lands to any person whatsoever, under the pain of £10,000 *pro damno et interesse ex pacto convento* ; and if, after their death, he should be content to sell the lands, he should make the first offer thereof to Sir Alexander's heir-male, or any other person he should design, bearing the name and arms of Frazer, for £38,000 ; and, in case of their refusal, to some other person substituted *successivè*, of whom Andrew Frazer of Staniewood was one. This disposition, by way of con-

tract, was dated *anno* 1625, and thereupon inhibition served at Sir Alexander's instance against young Durriss. Sir Alexander assigns his oye, Alexander Fraser, now of Philorth, thereto: who intents reduction of the right made by young Durriss to Staniewood, (and in the reduction he calls the apparent heir of Durriss, and this Lord Frazer apparent heir to Staniewood;) and that in so far as the same doth concern the clause anent the payment of the sum of £10,000. It was alleged for the defender, Absolvitor, because the sum is moveable, and cannot pertain to the pursuer as assignee, because the defender or his grandfather has right thereto from ——— Forbes of ———, donatar to the escheat of the said Sir Alexander; and which escheat is declared, and his sum, *per expressum*, declared to belong to the donatar; Sir Alexander also compearing. It was answered, That the decret could not militate against this pursuer, on this head,—That the grandfather was debarred by horning, and thereby impeded to propone his defences; which could never have prejudged the rebel himself, if he had been thereafter relaxed; *multo minus* his oye, who pursues as having right: and if his grandfather had been heard, he had this defence to propone, from which he was maliciously debarred, *viz.* the sum is heritable, and cannot fall under the compass of the single escheat, because it is payable *intuitu* of an heritable disposition made of an estate, and, in effect, as a part of the full avail and price *pro damno et interesse*; the estate being the ancient fortune and chief house of Philorth, sold far within the avail to Durriss, being of his own name, whom Sir Alexander bound up from disposing to any other in his own time, and who provided a reversion to his heir-male, if he should dispone after his death: and the price, being *surrogatum, est ejusdem naturæ* with the bond, and ought to belong to Philorth and his heirs-male, just as the lands would have done if they had not been sold; the contract being clear, and binding Durriss not to dispone in Philorth's time; and if he should sell after his death, giving the reversion to his heir for payment of the sum received by old Philorth, which was far within the avail of the land; and to make up the avail, this £10,000 was condescended upon, *pro damno et interesse*, in case of selling *ut supra*. It was replied, That the £10,000 was not a part of the price, but *pæna*, in case of doing a deed prohibited;—that it would have fallen to Philorth's executors;—that Philorth reserved no reversion of the land to himself, but disposed the same irredeemably, only under a prohibitory clause not to sell it to another, which, of the law, is reprobated. Duplied *ut supra*, And that the sum, if Philorth had died, having right, would have belonged to his heir-male, to whom the estate should have appertained, and in whose favours a reversion was conceived *ut supra*, and not to his executors; and such clauses, conceived upon so reasonable and just considerations, are by no law reprobated. Much more was said, *pro et contra, in præsentia*. The Lords found the sum moveable; *me et multis aliis contradicentibus*.

No. 79, Page 59.

1663. June. GEORGE HOME of FOORD *against* THOMAS WOLFE.

GEORGE Home of Foord obtains decret against Mr Thomas Wolfe for poinding the ground of his lands of Wedderly, for an annualrent of 100 merks, contained in an infeftment granted to Foord's father by Mr Thomas's father.