

doun of Birsmore, with absolute warrandice; and Birsmore being denuded in favours of Alexander Burnett, he has charged Frosterhill upon the clause of absolute warrandice; and declares his special charge to warrant, in regard Frosterhill had granted a second disposition, in favours of Mr William Johnston, who is infest thereupon. Frosterhill has suspended upon this reason; because, in the pretended disposition made to Birsmore, the suspender's, and his wife's liferent are reserved; so that the charger being debarred from the possession, he cannot seek warrandice.

To this it is ANSWERED, That the suspender having granted double rights, and the right granted to William Johnston being such a right as may debar the charger, he has good interest to the warrandice: and, if this action should not now be sustained, it would be *frustra*; Frosterhill having no other visible portion but only the naked liferent.

The Lords found the letters orderly proceeded, notwithstanding of the reason, that there was, nor there could be, no present distress.

Page 76.

1666. July 17. HARY STEWART of BAITH *against* MARION BRUCE his Mother.

HARY Stewart of Baith against Marion Bruce, his mother, and James Balfour, now her spouse, for his interest. The said Marion having granted bond to her son for payment of 300 merks, for helping him to pay his debts, and better enabling him to live; and being withal provided to 1000 pounds Scots of jointure, by his father, to be paid to her out of certain of his lands; which not being worth the said 1000 pounds, there was an action raised, at her instance, against him, for making up, &c.; and the son having excepted upon the 300 merks;—

It was ALLEGED for the mother, That the 300 merks, contained in her bond, could not compensate, but only for one year.

To which it was answered, That, in respect of the conception of the bond, and that the word yearly was in the margin, albeit not subscribed, and that, [by] the haill tract and tenor of the bond, it appeared it behoved to be so; the same ought to defease to him yearly, *pro tanto*.

The Lords found, That Marion Bruce and her husband were liable in payment of the 300 merks yearly, albeit the word yearly was added in the margin.

Page 76.

1666. July 17. MR ANDREW HEDDERWICK *against* JOHN WAUCH.

JOHN M'Kinlaw being convicted for killing and stealing of four cows from Cuthbert Home, and being hanged for the said theft,—John Wauch, and several others, (being also indicted by the justices appointed by Parliament Commission of Justiciaries, within the sheriffdom of Roxburgh, in a justice-court at Jedburgh,) was indicted of theftous resetting, concealing, and away-putting the said stolen goods. And probation being led against them, after they had sim-

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.

Page 78.

---

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,