

nouncer's share accresces to those who renounce not, as in this case. And albeit, at the defunct's decease, there were no bairns, beside the heir, but these two; yet, the time of Agnes her contract, there were other bairns who died before the father. And the clause in Agnes's favours, "to be a bairn in the house," by the conception thereof, extends not only to the bairn's part, but to the dead's part; and, therefore, Rachel's renunciation excludes her, and makes the whole executry to befall to Agnes.

The Lords sustained the confirmation of Agnes; and found, that by the acceptance of the tocher in Rachel's contract, "in full satisfaction," &c.—not being in Agnes's contract, but Agnes being provided to be a bairn in the house, and no relict having survived,—that the whole executry of the defunct accresced to Agnes.

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1680. *January 28.* PHILIP VAN PORTAN and SANDILANDS *against* CAPTAIN ANDREW DICK.

PHILIP Van Portan pursues Captain Andrew Dick, for certain merchant ware, which was robbed at sea from him by Captain Martine, and intromitted with by Captain Dick.

The defender alleged Absolvitor; because he bought the goods *bona fide* from Martine, and did not know that they were taken in piracy.

It was REPLIED for the pursuer, *1mo.* That stealth or robbery are *vitia realia*, and so give interest, to the party injured, to recover his goods, *rei vindicatione*, from any intromitter or haver.

It was DUPLIED for the defender, that *rei vindicatio* hath only effect against the present haver, *aut qui dolo desiit possidere*.

It was TRIPLIED for the pursuer, That *vindicatio* takes not only effect against the present haver, but against any who had the same, *in quantum sunt lucrati*; and, therefore, Captain Dick is liable for what more he got than he gave. *2do.* He is liable for the whole value, because he was accessory to the piracy, by resetting goods from a privateer, with whom he could make no bargain *bona fide*; because, by the law of nations, and the custom of all Admiralties, buying goods from a privateer is prohibited, till they be declared prize; and Captain Dick, by his oath, acknowledged that Martine told him these were prize-goods.

The Lords found it relevant, That these goods were robbed at sea, and were not declared prize, to make the defender liable for restitution of what he had in his possession the time of the citation, and for what he made profit of, which he had disposed of before the citation. And ordained either party to adduce evidences of the neighbouring Admiralties, for clearing the custom,—whether it be unwarrantable to buy any goods from privateers, not only that are in ships taken prize by them, but that are in their caping frigate, until the adjudication pass; to the effect, that, if that custom shall be proven, Captain Dick may be liable for the whole value: for there was produced the late treaty of Breda, in which there was an article to that purpose, but did not sufficiently instruct it to be the common custom of nations. And it was not found sufficient to prove that these goods were taken in piracy by Martine,—that both he and Captain Dick

being cited before the admiral, Martine was decerned for not finding caution *judicio sisti*, and was fugitive ; and, being apprehended at London by Van Portan, he did acknowledge the piracy, and enumerated the goods, amongst which these in question were contained : he being voluntarily dismissed by Van Portan, upon that confession.

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1680. *February 6.*

NAPIERS, Supplicants.

NAPIER of Wrights-houses having died without issue, two women of his name, of a far relation, gave in supplications, bearing,—That either party might take out brieves out of the Chancellery for serving themselves heirs to the defunct, which might be directed to any judge ordinary in Scotland, which cannot otherwise be known to the supplicant ; whereby an ignorant inquest may serve ; which will put them to the difficulty and necessity of reduction ; and therefore desiring that the Lords would prohibit brieves to be issued or served, till they were cited to the service.

The Lords gave an injunction to the director to the Chancellery, ordering that he should give out brieves to neither party, till that party demanding the brief return an instrument of the intimation to the Chancellery ; bearing intimation of the brief demanded, and of the judge to whom directed, and of the day in which she is to be served : that thereby the other parties might attend, and might be heard for their interests.

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1680. *February 18.* The EARL of MARR *against* His VASSALS.

THE Earl of Marr having pursued reduction of a feu, upon a clause therein,—“That upon two terms running in the third it should be null ;” and for instructing thereof, produced the vassal’s retour :

The Lords suffered the vassal to purge by payment at the bar ; seeing the retour bears a feu-duty, *si petatur*, in the first part of the retour bearing the defunct’s right ; though these words were not repeated in the posterior clause of the retour or precept, declaring the feu-duty, and expressing the clause irritant.

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1680. *February 25.* SIR JOHN SCOT *against* The ARCHBISHOP of GLASGOW.

SIR John Scot, having right from the Earl of Lothian, who had the gift of patronage of the church of Ancrum from the King, *in anno 1625* ; did thereupon present ; and having obtained horning of course, did charge the Archbishop to try and admit. He gave in a bill of suspension ; whereupon the cause was ordained to be discussed ; and insisted upon this reason,—that he was not obliged