

given be the commissars, there behoved ane declarator of the civil judge to follow upon these lands, because the commissars being judges spiritual, their decret could not be extended *ultra fines suæ jurisdictionis, et quæ civilia fuerunt et profana, non debebant ab iis tractari extra de ordin. cognit.* To this was answered, that first to the practics, that they were not alike, for in all the practics before past, both the parties, *vel saltem* the party failzier was in the land, either be conjunct fee or otherwise; but in this case the Lady Restalrig was only in the land, and so being only infest, there misterit na declarator more nor if her husband the laird had been naturally dead. And as to the law, it was nothing against the law, that the commissars' decret should, be their ain sentence, take effect *quia unicuique judici licet sententiam suam executioni mandare.* THE LORDS pronounced be interlocutor, that in respect the Lady was only in the lands there misterit na declarator, albeit the same appeared to repugn to all the precepts past of before.

No 14.
session of her
liferent lands
without any
declarator.

Fol. Dic. v. 1. p. 229. Colvil, MS. p. 277.

1624. January 21.

M'MATH against L. OCHILTREE.

JAMES M'MATH and some other merchants, having furnished to my Lord Ochiltree certain sums of money, which he bound him to pay to them at the terms contained in the bond, and for their security of payment, in case of failzie of payment, and in warrandice thereof, he gave them charter and sasine of the lands of Saltoun; upon the which charter and seisin, they having convened the tenants of the said lands for payment of their duties,—THE LORDS found that the tenants could not be convened for payment, by virtue of the foresaid charter and sasine, which was given in warrandice, as said is, until the time that the pursuers had obtained declarator, upon the failzie of payment, against the principal party their debtor; for it was not pertinent to these defenders to dispute, neither could they know if the pursuers were paid or not, or if there was a failzie, or if the party had made payment, and so had purged the failzie; for that dispute was only proper to the debtor, who contracted with the pursuers, and not to these defenders.

Act. Stuart.

Alt. Neilson.

Clerk, Hay.

Fol. Dic. v. 1. p. 229. Durie, p. 92.

No 15.
An heritable
bond was
granted for
security of
payment of a
debt in case
of failzie.
The creditor
raised an ac-
tion of mails
and duties.
The Lords
found that he
behooved first
to obtain de-
clarator of the
failzie.

1629. July 29.

PHILIP against PHILIP.

A FATHER having infest his daughter in an annualrent furth of his lands, redeemable by himself for a small sum, and in his own time redeems the said annualrent; after his decease, the daughter pursues pointing of the ground for the said annualrent, from the heir of one to whom her father sold the lands.

No 16.
A father infest
his daughter
in an anual-
rent, redeem-
able by him-
self. He hav-
ing redeemed

No 16.
it, the Lords
found no ne-
cessity for a
declarator of
redemption.

He *alleges*, That the annualrent was redeemed by her father. It was *replied*, That no declarator was obtained against the redemption. THE LORDS found no necessity of a declarator in this case.

Fol. Dic. v. 1. p. 229. Aucbinleck. MS. p. 183.

No 17.

1673. July 25. MURRAY *against* The TUTOR of STORMOUNT.

BY a contract of wadset, the wadsetter being liable to compt for the excrescence of the duties more than should satisfy the annualrent ;

THE LORDS, in a process for mails and duties, found the exception relevant, that the pursuer was satisfied of the sum upon the wadset, by his intromission, without declarator.

Fol. Dic. v. 1. p. 229. Dirleton, No 176. p. 71.

No 18.

Though a gift of forfeiture pronounced in Parliament need no declarator, there can be no action upon such gift, without declarator, where the forfeiture is in virtue of a sentence before the court of justiciary.

1683. March. LORD LIVINGSTON *against* ROGER GORDON of Troquhen.

IN an action of mails and duties, at the instance of a donatar of forfeiture, it was *alleged* for the defender, No process till the gift be declared.

Answered : Gifts of forfeiture pronounced in Parliament need no declarator ; and by a late act of Parliament it is declared, That forfeitures in absence before the justice court, shall be in the same case as if they had been led in Parliament.

Replied : The design of the late act was only to make forfeitures in absence before the Justices equivalent to forfeiture where the party is present ; and as gifts of forfeiture where the party is present, have always required to be completed by declarator, that can be no less necessary to gifts of forfeiture in absence. And Hope, in his Form of Process, and likewise Craig, are clear, that where forfeiture passes by act of adjournal, the gift requires declarator.

‘ THE LORDS found declarator ought to be raised incidentally, and thereafter the pursuer might insist in his process ;’ although it was contended, that seeing the Lords of Session were not competent Judges to any nullity or informality of a criminal process, they could not be proper Judges to the declarator.

Fol. Dic. v. 1. p. 229. Harcarse, (FORFEITURE.) No 491. p. 135.

Irritancy, whether it requires declarator ; *See* IRRITANCY.

See Ramsay *against* Mackison, 5th March 1624, Durie, p. 117. *voce* ESCHEAT.

Touch *against* Hume, 9th March 1624, Durie, p. 119. *voce* ESCHEAT.

See ESCHEAT.—*See* APPENDIX.