

they were declared lawful prize, being presumable they were caped. Yet the plurality of the Lords allowed this article to him, seeing he could not be said to be *lucratus*, except the price paid out by him were first deduced. The witnesses in this cause were the shipmen who were aboard the time of the robbery.

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1680. *January 31.* The EARL of SOUTHESK *against* BOSWELL.

It was thought, though a reason of suspension ought to be instantly verified, yet a reply or duply in a suspension (which is also *pars libelli*,) needs not, since it may be emergent, and the proponent cannot come *paratus et instructus* to verify it: which is also Stair's opinion, in his Form of Process.

Yet, this point being reported on the 5th of Feb. 1680, the Lords found a reply upon re-compensation ought to be verified instantly, being in a suspension which was turned to a count and reckoning. This many thought strange; yet compensations should be instantly verified, especially in suspensions.

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1680. *January 31.* HAMILTON of BANGOUR *against* ALEXANDER HAMILTON.

IN the action betwixt Hamilton of Bangour and Mr Alexander Hamilton, upon the Lady's liferent, a bill having been given in against Mr William Hamilton, advocate, for exhibiting summarily some writs in his hands, because he was a member of the house; the Lords, *maxime refragante Præside*, refused it, because he had not these papers consigned in his hands as an advocate, but as uncle and tutor to the children, and here was to be considered *tanquam quilibet*.

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1680. *January 31.* DUNCAN FORBES *against* EDGAR of WEATHERLY.

JOHN Edgar of Weatherly grants a bond to his brother, Mr William, for 500 merks *per annum*, and, in case he married, he adds 300 merks more,—in all, 800 merks; and, if he have children, then John obliges himself to pay him 6000 merks; and, if he died without leaving any children behind him, then he is to pay him 4000 merks only. Mr William assigns this bond to Nicol Edgar, another brother, and dies without ever being married, and so without children. Mr Duncan, having married Nicol's daughter, craves the 4000 merks provided *in eum casum* that Mr William should have no children.

ALLEGED,—The clause is only to be understood if he had been married, and then had deceased without bairns: but *ita est*, he was never married, and so the condition never existed.

ANSWERED,—The clause is general, and is opposed, and comprehends *casum*

utrumque. This was not decided, but transacted. It was *casus judicis arbitrarius.* *Vide infra, 18th June 1680, Oswald.* Vol. I. Page 80.

1680. February 3. JAMES SUTHERLAND *against* JOHN GALLOWAY.

IN the case betwixt James Sutherland, late Treasurer in Edinburgh, and John Galloway, the Lords shunned to determine whether or not the Town of Edinburgh might legally and warrantably imprison the tacksmen of their common good, and their cautioners, summarily, for their deficiency in payment, without registrating their tack or charging them thereon; in respect not only Edinburgh, but likewise the other royal burghs, are in constant use to imprison summarily, providing it be for their common good allenarly. Vol. I. Page 81.

1680. February 3. JOHN JONES, Procurator-Fiscal of Glasgow, *against* —
WOOD, Relict of Bailie Fairie.

IN the action betwixt John Jones, Procurator-Fiscal of Glasgow, and — Wood, relict of Bailie Fairie there; she ALLEGED, Though she had no right nor assignation to the reversion, yet she, as liferentrix of the tenement, might redeem Jones's infeftment of annualrent, and so remove impediments that hindered her from possessing.

ANSWERED,—*Esto* she did redeem, she must ascribe her possession, *primo loco*, to the extinguishing of this infeftment of annualrent; for, if she should buik for her liferent, and suffer this annualrent to run up unpaid, if she lived eight or nine years, it would exhaust and absorb the whole value of the tenement; and so would recur against the fee which the said Jones had acquired from the heir, and so, in process of time, would render his fee unprofitable; which iniquity she ought not to be permitted to do.

This case being reported on the 5th of Feb. 1680, the Lords found, that Jones's infeftment of annualrent was preferable to her liferent, and that, if she redeemed, she behoved to ascribe her possession *primo loco* to the said annualrent; and, if the rent of the tenement exceeded the said annualrent, then to her liferent *pro reliquo*: and found his infeftment of annualrent preferable to her, both *quoad* the annualrent and the stock or principal sum.

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1680. February 3. ANENT A CHAPLAIN GOING TO CONVENTICLES.

A CHAPLAIN pursues for his year's fee. ALLEGED,—After you had staid three or four months in my house, I discovered that you went to conventicles; and so, by the Acts of Parliament and Privy Council, I was not *in tuto* to keep you; and therefore I put you from my service, and I am willing to pay *pro rata temporis* that you staid.

ANSWERED,—The King's indemnity purges and pardons his going to conven-