

receipt of bolls of good and sufficient victual; which they found obliged the said Thomas. Barns had receipts for all except 18 bolls: which they denying, it was sustained relevant to be proven by his servants who brought it in to them.

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1680. *January 31.*

DAULING *against* MATHIE.

IN an action, Dauling against Mathie, a bond was ALLEGED to be wrong registrate in the bailie court-books of Edinburgh; whereas the parties dwell in the Pleasants, at the Cowgate-port, which lies within the regality of Broughton, and answers with the shire; and should either have been registrate in the sheriff-court books, or in the books of the Canongate.

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1680 and 1681. PHILIP VAN PORTEN *against* ANDREW DICK and OTHERS.

1680. *January 31.*—IN the case betwixt Philip Van Porten, and Andrew Dick and Others, anent the ship taken by Captain Martine from the merchants of Hamburg, the intromitters with the goods being pursued, the Lords found, *1mo*, That it ought to be proven the goods were piratically taken; and found the Admiral's decret not sufficient to prove it, but required the oaths of the seamen and other habile witnesses who were robbed. Now, they dwelt in Hamburg, and might be dead. *2do*, That the cautioners for the privateer who took the said ship behoved to be discussed before the intromitters with the goods. *3tio*, Ordained the stranger to prove and adduce the laws and customs of the other nations in Europe, that the Lords may see what is the *jus gentium* in making intromitters *bona fide* with goods robbed at sea liable for restitution, and if it be *vitiū reale*. For, in goods stolen by land, it is certainly an inherent vice, and they are recoverable, *rei vindicatione*, wheresoever they are found. *4to*, They reserved to themselves to consider if it should assoilye the intromitters, that the owners had once Captain Martine, the pirate, prisoner in Edinburgh, where he escaped in woman's apparel; and again prisoner at London, where they consented to his liberation. This was thought an odd and wimpled interlocutor. *Vide Zeigler. ad Grotium de Jure Belli, p. 548.*

The late author of *Jus Maritimum*, c. 4, Of Piracy, shows that the buyers of caped goods in England are not liable in restitution; but our countryman, Wellwod, in his *Sea-Laws*, c. 25, Of things taken on the Sea, shows a decision to the contrary; but it is in 1487, near 200 years old.

*Nota.*—Upon the 19th day of January 1681, the Lords having advised the probation taken at Hamburg, with a complimenting letter from the magistrates to the Lords, thanking them for their justice; the Lords found the robbery to have been clearly done *in alto mari* by Captain Martine, and therefore decerned Captain Dick the intromitter with the robbed goods to restore *in quantum lucratus*. His oath being taken, he deponed he had paid so much to Martine, the robber. Several of the Lords voted that this ought not to be discounted nor allowed to him, because he was *in pessima fide* to buy such goods before

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*