

But the Lords thought this procedure too arbitrary, for finding only the *res furtiva* beside him ; and therefore passed the bill of suspension.

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1694. July 24. The LADY ENTERKINE and LAMINGTON, *against* CRAWFURD of DRUMSUY.

THE Lords found the letter discharging the tenants to pay Drumsuy, the tacksman, in respect he was slack in paying the tack-duty,—was not a liberation of him from the tack, (for that he could not do,) but that he may have retention, on account of the damages by that stop.

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1694. July 24. COUPER *against* MEIK in Kirkaldy.

THE case was, If a vitious intromission may be proven against a party dead, when it is not constituted by a process against him during his life ; or, if there was a process, but not come the length of litiscontestation. The Lords found, conform to the famous decision in July 1666, *Cranston against Wilkyson*, that, not being established in the intromitter's lifetime, it could not be proven now to infer an universal passive title ; because the party, if quarrelled in his own life, might have had several defences to purge his intromission, which may be altogether unknown to his successors ; but that it could only make the successor liable either *secundum vires inventarii*, on their intromission, or *in quantum lucratus, et ad valorem* of what they shall prove the defunct intromitted with.

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1694. July 24. LUMSDEN of AUCHINLECK *against* LIETH of HARTHILL.

LUMSDEN of Auchinleck against Lieth of Harthill, who had obliged himself to pay 2500 merks of tocher with his daughter ; but 1000 merks of it was suspended till he should attain possession of his lands of Harthill. And now, it being contended, that he behoved to be liable, because he had denuded himself of the right he had in favours of his eldest son, and so had put it out of his power to purify the condition :

The Lords found this was a conditional obligation, not yet purified ; in regard both he and his son had depending processes for the recovery of the estate, and it did not appear he was *in mora* ; and it was not presumable, that, for eviting this 1000 merks, he would be negligent in pursuing : yet they limited him to a year to perfect his diligence, otherwise to be liable ; seeing, it being *conditio potestativa*, at least *mixta*, he might delay for ever.

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