

**D E C I S I O N S**  
OF THE  
**LORDS OF COUNCIL AND SESSION,**  
REPORTED BY  
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1661 *June.*

**AFTER** two years surcease of justice, the Parliament called by King Charles the Second, (whom God preserve!) did sit down, the 1st of January, 1661, the Earl of Middleton being his Majesty's Commissioner therein; when, according to old custom, there were *domini ad articulos, et domini ad interdicta et judicia*; the first meddling with civil and criminal matters, the other only with matters civil. But the long want of justice, through the confusion of the times, occasioned a great number of pleas merely civil before the Lords of the Bills: who, being a Parliament, did not tie themselves to law; but, upon complaints most informal, they ordinarily reduced decreets given by the Lords of the Session in 1649, and by the English Judges: which occasioned much clamour against them, especially against my Lord Cochrane, who was President thereof, for his forwardness that way. Before this Court there were commenced a number of criminal actions, containing a civil conclusion, or rather civil actions on a criminal mode, which they ordinarily referred to parties' oaths, to infer the conclusion: contrary to the custom in criminals, where parties are not tied to give their oath to in-

fer any punishment. Yea, they proceeded so irregularly in Pittarro and Craig's case, that they did not so much as examine the witnesses upon oath, but took their naked declarations. Zenocrates at Athens was dispensed with. See this at large *alibi*. *Vide Gardener against Tenant, July 7, 1677.*

Among other questions this fell in to be debated, if the probation of a criminal *medium*, with a civil conclusion, in a civil court, might be repeated in a criminal court to infer punishment: which they found not relevant; but that the parties might object against the witnesses in the criminal court, and to them examined in his presence; which is not permitted in a civil court

Before the Lords of the Bills there was a disposition reduced by the laird of Craig against Pittarro, *super capite fraudis et circumventionis*, and they had made him drunk when he gave it; the disposition bearing the receipt of L.10,000 as the price, whereas he never received a denier. But the decision and the manner of it were more in a parliamentary nor a juridical way.

Before the Lords also, in the case of Montrose and Argyle, it came to be debated, whether, if a forfeiture be reduced *ab initio*, and declared null, and the very authority itself by which he was forfeited evacuated, if in that case the donator to the forfeited person ought to be countable to the person restored, not only from the date of his restitution, but from the very day and date of the forfeiture. ALLEGED for the donator, He was *bonæ fidei* possessor, *qui fructus perceptos facit suos*; my Lord Argyle having got the gift of Montrose's forfeiture from a parliament reputed and holden for the time to be a lawful parliament, and by virtue thereof twenty years in possession: as in a decret of reduction of an infestment, the defender is only liable from the act of *litis-contestation*, if sentence follow thereon; though the decret bear the infestment craved to be reduced, to have been from the beginning, to be now, and in all time coming, null and of none avail, &c. ALLEGED for Montrose, There was a difference betwixt a restitution *ex gratia*, and *ex justitia*, and where the authority by which the forfeiture was pronounced is *funditus* taken away: in that *ex gratia*, it is true, the donator *fructus facit suos*; but not in that *ex justitia*, which is Montrose's case. Farther alleged, It is of dangerous consequence to bring men upon the stage, for giving active obedience to acts of Parliament, reputed and holden to be lawful for the time, and a long time after, though rescinded.

There were many pleas of this nature before the Lords of Articles, and bills against particular persons, for fines and forfaultures and wrongs done from the 1638 to 1651 and 1660, and for particular murders and slaughters and burnings, done twenty years before; wherein parties were very earnest, for fear the act of indemnity should pass before the closing of their processes: and the Commissioner was forced to put a demurr upon these actions till the King's mind should be known thereanent.

*ADVOCATES' FOLIO MS. folio 50.*