

No. 2.

1674. *January 20.* JACOBSON *against* The EARL of CRAWFORD.

Milliad Jacobson, master of the ship called the Hope of Bridges, having made shipwreck upon the coast of Fife, where the Earl of Crawford is heritable Bailie, his depute caused gather what could be had of the wreck, and did declare the same as wreck, to belong to the Earl by his infestment, as being infest in the regality with the Admiralty within the bounds thereof. The stranger gave in a supplication to be heard against the decret confiscating his goods, being no enemy, upon pretence of shipwreck, contrary to the law of nations, and the particular law of this kingdom, by the statute of King Alexander, declaring, "That when any thing comes alive to shore, the goods shall be restored to the true owners, if they can be known;" according to which the Lords of Session found that an ox coming alive to land, the goods were not confiscated as shipwreck. It was answered for the Earl of Crawford, that by the law of most nations, and by the custom of the Admiralties of Scotland, shipwreck did always confiscate the goods to the Admiral; *2do*, That there was a far later statute, declaring, "That stranger's ships broken upon our coast, should have restitution of their goods, where they observed the like law upon their coasts," and offered to prove, that in Flanders shipwreck is confiscated, albeit the owners be alive.

The Lords found that this act of Parliament behoved to rule the case, and granted commission to either party here, or in Flanders, to adduce witnesses for proving the custom there.

Stair, v. 2. p. 254.

No. 3.

1677. *July 27.* The DUKE of YORK *against* The EARL of ARGYLE.

There being a pursuit before the Court of Admiralty, at the instance of the Procurator-fiscal against the Earl of Argyle, bearing, "That his Royal Highness the Duke of York, as Admiral of Scotland, hath good right by the said office of Admiralty, to all wreck befalling within the rivers, lochs, ports, or seas within his Majesty's dominions of Scotland, and particularly to a ship sunk near the Isle of *anno* 1588, being one of the Spanish Armada, which then intended to *ese* kingdoms, and yet the Earl of Argyle intends to recover the said ship, appropriate her to his use," and concluded, "that the said Earl ought to be to desist and cease therefrom;" whereupon there was a bill of advocation to the Lords, for calling this cause from the Court of Admiralty, his being Lord Admiral, and this pursuit being to his Highness' behoof, to be determinated in that Court: Whereupon the cause was advocated, with consent of both parties, and a diet assigned to hear the same in the whole Lords. It was alleged for the Earl of Argyle, that he ought to be discharged from this pursuit, because he produces a right from James Duke

of Lennox to Archibald Marquis of Argyle *in anno* 1643, bearing, "That the said Duke being informed that there were some ships in the said Armada, sunk near the Isle of Mull, in the Bay, called Tiber Mori, wherein there were goods of great value, and that the said umquhile Marquis was willing to search and recover the same; therefore the Duke, with advice of the King, gifts and dispones to the Marquis, his heirs and successors, the said sunk ship, with all the goods therein, with power to employ douckers, and all artizans, and all means to recover the same, paying the Duke the hundred part of the said goods;" of the which gift there was a ratification by the Exchequer of Scotland, under the King's cashet, but not under his hand; there is also a ratification obtained from this King, *in anno* 1667; which rights being granted by the Duke of Lennox, heritable Admiral of Scotland, are sufficient to warrant the said Marquis; and the Earl succeeding in all his rights, by his Majesty's gift of forefaulture, hath right to recover and appropriate the ship in question, and the goods therein. It was answered by the pursuer, That the evidents produced can give no right to the Earl to this ship, *1mo*, Because the Duke of Lennox's right bears expressly to be with the King's consent, which must imply a condition not to be effectual, unless the King consented, especially seeing the King had a proper interest, because the ordinary wrecks belong to the Admiral; as the casualty of his office by ancient custom; yet this ship and loading were *bona hostium*, and did contain treasure, both which belong to the King *jure coronæ*, as *inter regalia*; neither did the King consent, for what was done by the Exchequer, was during the troubles by authority of Parliaments now reduced; *2do*, The Duke of Lennox's gift produced, by ocular inspection, appears to have been blank in the Duke's share, and filled up with another hand to the hundred part, which hath been unwarrantable; and if the gift had stood blank, it would have been imperfect and void; and the King's ratification *nihil novi juris tribuit*; *3tio*, Though the Duke's gift had been unquestionable and effectual during the Duke of Lennox's right, and that thereby search and appropriation might have been made of the ship, yet after the Duke's right had ceased, and his Highness is now constituted Admiral, he as present Admiral hath only right to recover and appropriate wreck, for wreck in the bottom of the sea is *nullius*; and by the ancient law of the Romans, and other nations, *quæ sunt nullius cedebant occupanti*, the first possession giving the full property; but later times having as a part of the public revenue yielded unto Princes and Sovereigns that uncertain expectation, which they might most easily quit by the occupation or possession of vacant goods *quæ sunt nullius*, they are reduced *inter regalia*, except such moveables as are not very considerable, which yet remain *inter occupabilia*, whereby wreck goods are now *inter regalia*; but thereby the King hath no property but the sole power of seizure, excluding all others, which is yielded to the Admiral as a casualty of that office; and therefore the King hath no right of property in this ship, much less the late Duke of Lennox; and though by the Duke's right of seizure as Admiral, if he had recovered, he would have appropriated the same; but not having done it, his Royal Highness becoming Admiral, that power

No. 3. of recovery and appropriation befalls to him with the office, and none can search or work for recovery thereof but by his warrant; for if the office of Admiralty had given the late Duke of Lennox the property of all wreck goods sunk within the seas belonging to Scotland, he could never have right to this ship, which was sunk before his right of Admiralty; and it is certain, that there can be no property without possession; for though the Spaniards had disposed these goods and loading, the property could not be conveyed without possession; and though the Earl of Argyle had lifted this ship and goods, and had been fully master thereof, yet if the same had fallen again to be sunk, it returned to its ancient condition as *naufragium*; and therefore though the Earl and his father have recovered some cannon out of the ship, yet what remains in the bottom of the sea is still *naufragium* and *nullius*, and the power to recover it is lost, by the ceasing of the Duke of Lennox's office of Admiralty, *quia resoluta jure dantis resolvitur jus accipientis*; for if an Admiral have an office with wreck as a casualty thereof, after his death, that wreck would not belong to his heirs nor executors, if it were not recovered, therefore not to his assignees, but would belong to the next Admiral. It was replied for the defender, that his defence stands yet relevant, notwithstanding of the objections and reply; for there can be no more devised to give him full right, but the Duke's disposition of the ship and whole goods of great value, which was all that could be said, the loading being uncertain, to show there was no deceit or subreption; which disposition being ratified by the King, by his Majesty's ratification passed in Exchequer, and under his Seal, carries his consent, and consequently his Majesty's interest, which excludes all question as *bona hostium*, or treasure, though that were an exception from the Admiral's wreck, as it is not; so that the King's consent being anterior to his Highness' right, the Admiral's disposition with his Majesty's consent, makes an unquestionable right, and all the pretences to the contrary are of no moment; for it is without all ground to allege, that the King hath only the power of occupation, and not the property of goods sunk within his dominions, or that he requires any possession, but that *jure corona* he hath right to all *regalia* within his dominions, and the law holds him as possessed thereof, and not only his own subjects would do him wrong by seizure and appropriation, but strangers also, who can be reached by no positive law, hindering them to seize. It is true that the property of wreck goods is not transmitted from the King to a subject without some possession, but possession of a part will establish property of the whole, being *in uno aggregato*, as a few sheep of a flock, much more a part of a ship and loading, which this Earl and his father have attained: But suppose, as is alleged for the pursuer, that the King or Admiral's right were but a power of seizure and appropriation, and that an Admiral for life had nothing by his office but what he recovered during his office, that can import nothing to this case, where the gift to Argyle is a gift from an heritable Admiral, who and his heirs for ever had the right to seize and appropriate, and hath by that right given many subaltern rights of Admiralties upon several shores in Scotland, which are unquarrelable, and yet would fall upon the supposition made by the pursuer;

so that the Duke of Lennox's rights are nowise extinct, but are perpetual, and befall to the King as nearest heir to the Duke; yea, though it had fallen to the King as *ultimus hæres* to the Duke, yet Argyle's right communicating the heritable Admiral's right as to the ship in question, and therewith the King's right as author to, and consenter with the Duke, no posterior right and deed by the King in favours of his Royal Highness, can hinder or prejudge the Earl's constituted right; for if the Admiral's right be but by seizure, the appropriation requires no possession, and so is established by delivery of the Admiral's gift, which neither can be prejudged by the Admiral's heir nor successor; and it is a groundless pretence that the gift was blank, it being most ordinary before subscription to fill up blanks in writs, and though it were yet blank, the delivery thereof by the Duke, puts it in the receiver's option to fill up what he pleaseth, though it had been a charter which requires a *reddendo*, which would thereby have become a blench or blank feu, much more in the disposal of a ship and loading which are allodial only, and require no *reddendo*.

The Lords found the Earl of Argyle's defence upon the gift and ratification produced relevant, and therefore assoilzied.

Stair, v. 2. p. 551.

* * * Gosford reports this case:

In a declarator at the Duke's instance as High Admiral of Scotland against the Earl of Argyle, to hear and see it found, that the ship which belonged to Spain, and was shipwrecked in the year 1588 on the west side of the Isle of Mull, did belong to his Highness as Admiral conform to the special law of England, and most part of all other kingdoms, upon that ground, that the ship being still *in profundo maris*, not seized upon by any person who had right from the King to wrecked goods, or from the Admiral, who is in place, and during their office have only right thereto, they belong to the next succeeding Admiral *virtute officii*, and he being willing to use all endeavours for regaining that ship, and the whole loading and goods not actually seized, no other subject could pretend right thereto, or obstruct him or those employed by him. It was alleged for the Earl of Argyle, absolutor, because the Duke of Lennox being Admiral, and having the only right as said is by virtue of his office, had *in anno* 1643 disposed his full right to the defender's father, then Earl of Argyle, which right was thereafter ratified in Parliament; and after the death of the Duke of Lennox, the whole right of the Admiralty being in the King's own person, his Majesty did not only ratify to the defender the right made to his father, but did give him full power to search and use all ways he could for seizing upon that ship and goods; and conform thereto he did enter into possession, by employing the most expert men, and bringing them from foreign places and kingdoms upon his great charges, who had been so successful as not only to find out the ship, but to enter therein and seize upon several pieces of cannon, which they have brought up and carried ashore; as

- No. 3. likewise had secured the ship, that she could not be taken away by storm, but was in that condition, that the whole loading and goods were now in their power to be recovered. It was replied, That notwithstanding the declarator ought to be sustained as to all goods not seized upon, because, until there be actual possession and seizure, they are still *bona vacantia*; and by the death of any Admiral who gave right to follow and recover, it doth expire with him, and *in jure* belongs to the next succeeding Admiral, as is clear not only by the law, but by many instances of England lately. The Lords did assoilzie from the declarator, and found that the Earl of Argyle has still right to recover that ship, and all goods not seized upon as yet, upon these grounds; that not only his father had a right from the Admiral for the time, but likewise after his death; the right of Admiralty being in the King's person, he did not only ratify, but granted a new gift, by virtue whereof this Argyle had actually seized upon the whole ship and loading, and recovered some cannon which were of great weight, and being master of the whole bulk of the ship, it did in law include the whole individuals of the ship and loading, seeing we have no other specific symbols by our law or any other, for conveying the property of goods, but by seizing upon the ship, after which the right becomes perfect: And if it were otherwise, then those who by virtue of such rights, have spent much time and charges, and succeeded so far as to secure the vessel and goods, might be deprived of all benefits which would accresce to another that never took pains; which were against all law and encouragement of those who would adventure on so great a business of public concernment; especially in this case, where, upon information from Spain, there was a great quantity of Spanish pistoles, and other materials which would amount to a great value.

Gosford MS. p. 683. No. 1008.

1725. February 17.

MONTEIR and Others, Merchants in Glasgow, *against* SIR JAMES AGNEW of Lochnaw and Others.

No. 4.

The pursuers had obtained a decret in absence before the High Court of Admiralty against Sir James for a considerable sum, as the value of goods belonging to them, which were wrecked and cast upon the shore of Whitehorn in Galloway, and intromitted with by him as Admiral of these bounds: He raised reduction of the decret, and being reponed, he pleaded, *1mo*, That the goods were confiscated and belonged to the Admiral, because no living creature was found aboard, which was agreeable to the old statute, 25th of Alexander II. observed by Lord Stair, Lib. 3. Tit. 4. § 27. of his Institutions, upon which the decision December 12, 1622, Hamilton against Cochran, No. 1. p. 16791. proceeded; and which was likewise agreeable to the English law, anno tertio Edwardi I. Cap. 4. and Henry III. anno 1226, observed by Skeen, De Verb. signifi. verbo Wreck: And as to