

No 219. tude ; so that, in Justinian's time, nay, by the very above cited *Parag.* the *juramentum calumniæ* succeeded ; and the plaintiffs having omitted to put this chamberlain to his oath, if he had just reason to pursue them, they cannot afterwards charge him as an *improbus litigator* ; seeing, if he had deponed *de calumnia*, that would have effectually excluded all that can be pleaded against him.

*Replied* for Fullarton, That, though the Judges did sustain his process, and gave him a decret, yet one wrong can never excuse another, specially considering the chamberlain was *origo mali*.

*Duplied* for the Chamberlain, That the pursuer might as well say, that an exceptionable decret, used for poinding, could not defend against a spuilzie, because both were wrong. *2do*, Injustice may be also done to a pursuer ; and, therefore, he, as such, is not always *origo mali*. The commencement of this action was agreeable to the chamberlain's trust and duty, and what followed upon his complaint was not of him.

*Triplied* for Fullarton, That his character could not excuse him, otherwise a factor would be privileged to oppress his neighbours, if he can but thereby enrich his master.

THE LORDS found no damages due by the Justices of Peace ; but found the chamberlain liable in damage ; and restricted the L. 10 Sterling, decerned by the Ordinary, to L. 5 Sterling.

Act. M'Dowall.

Alt. Nasmith.

Clerk, Gibson.

*Bruce, v. I. No. 8. p. 11. & No. 83. p. 99.*

## DIVISION VI.

### Admiral Court.

1672. June 19. SIR JOHN URQUHART *against* ANDREW JOHNSTONE.

No 220.

Before act 16. Parliament 1681, it was not competent to the High Admiral to reduce the decrees of depute Admirals.

SIR JOHN URQUHART having seized upon a ship at Cromarty, did obtain the same to be declared prize by Sir George M'Kenzie of Tarbet, as Admiral-depute ; whereupon the stranger intents a reduction of that decret before the High Admiral at Leith. Cromarty gave in a bill of advocation, upon this reason, that Tarbet having commission from the Duke of Lennox, Admiral, his decret could not be reduced by the Admiral-depute, *quia par in parem non habet imperium* ; and, as the High Admiral cannot reduce his own decret, so

neither can one depute reduce the decret of another ; for, they being both deutes to the Admiral, it is his jurisdiction that is exercised in both. It was *answered, 1mo*, The reason of advocation, being founded upon Tarbet's commission, is not instructed, as all reasons of advocation ought to be ; *2do*, Albeit Tarbet might have some commission in matters of wreck, and other ordinary cases, yet he hath no power of declaring prizes, unless he had a special commission therefor, which is neither known nor shown ; *3tio*, The Admiral Court of Leith hath a general commission for all the kingdom, and hath always been in use to reduce the sentences of the deutes, which have limited commissions to certain bounds.

THE LORDS having ordained the parties to be heard upon the bill, as if the advocation were passed, did advocate the cause to themselves from the Admiral ; and found, that he, nor no depute, could reduce the decret of any other depute ; and ordained the parties to insist in this bill, as in a reduction, and the stranger to give in his reasons of reduction, without further delay ; and gave warrant for production of Tarbet's decret, and the testimonies of the strangers.

*Fol. Dic. v. 1. p. 503. Stair, v. 2. p. 85.*

\* \* \* Gosford reports this case.

THERE being a reduction intended before the Admiral Court at Edinburgh, at the instance of Adrian Janson, for reducing a decret pronounced by Tarbet, at Cromarty, adjudging the said Janson's ship lawful prize ; there was a bill of advocation given in upon this reason, that Tarbet had his deputation from the High Admiral, to proceed in all cases within the bounds of his deputation, which is benorth Aberdeen ; and the Admiral Court here being only a deputation from the same Admiral, as to all other bounds, could not reduce his decret, *quia par in parem non habet imperium*. To this it was *answered*, That the most sovereign Court of Admiralty being settled here at Edinburgh, where strangers and parties might have advice of eminent Lawyers, no processes for the adjudging of prizes, which are of great consequence, and full of intricacy, ought to be intended before any depute, in places far remote from the Seat of Justice.

THE LORDS did advocate the reduction, and found, that the Admiral-deutes here were not competent Judges to the reduction of the said decret ; but ordained Tarbet's deputation to be produced, that it might be known if he had particular power to judge of prizes, before they would decide if the Admiral here was only Judge as to prizes brought in in other places, which were far off, and within the bounds of another depute.

*Gosford, MS. No. 488. p. 257.*

1694. February 21.

ROWAN *against* DARLING.

## No 221.

The Court of Session allowed a cause not strictly maritime, to be advocated from the Admiral, and refused to remit it.

A SKIPPER in Port-Glasgow being pursued by some Merchants before the Admiral of the West Seas, for contravening his charter-party, and malversing in his trust, in selling the cargo of herrings at Stockholm to one Patullo, a broken factor; and which cause having been advocated, the parties, at calling, declared they advocated the cause of consent, and were willing to debate *in causa* before the Lords; which the High Admiral and his Procurator-fiscal opposed, alleging the cause being a maritime affair, it behoved to be remitted, conform to the act 16th Parliament 1681; and that the Lords could no more meddle with it, *in prima instantia*, than they could with confirmation of testaments, or a process of divorce. *Answered*, *Jurisdictio potest consensu partium prorogari*, and that Judges, though never so incompetent, *forum sortiebantur*, if the parties subjected themselves to their jurisdiction. THE LORDS considered not only the parties consent, (which they thought was not sufficient alone to advocate the cause from the Admiral Court, and table it before them,) but also that this was not purely a maritime affair, but such as was *fori communis*, wherein, as the Admiral was competent, so he was not privative Judge, (as he is in adjudging the prize ships taken by capers, &c.) and in which the Lords had a cumulative jurisdiction with him; and that such a case might, *in prima instantia*, have been brought before the Lords, even as charges on charter parties for freights, caplagen, &c. usually are; and, by a division of seven against six, sustained their own jurisdiction, refusing to remit it back to the Admiral.

*Fol. Dic. v. 1. p. 503. Fountainhall, v. 1. p. 612.*

1699. January 24.

Captain CAIRNS, &c. *against* ISAAC JACKSON, &c.

## No 222.

Afterwards it was found, in such a case, that the jurisdiction of the Admiral being prorogated by bringing the cause before him, it could not be advocated.

WHITELOW reported a bill of advocation from the Admiral, at the instance of Captain Cairns, and Patrick Don, his factor, against Isaac Jackson, merchant in London, and Robert Innes, his factor, in an action of forthcoming on bills of exchange. The reason of advocation was, manifest iniquity committed by the Judge Admiral, in sundry particulars. *Answered*, By the act 16th Parliament 1681, the Admiral Court is declared sovereign, and all advocations discharged from it *in prima instantia*, and no remedy left but suspension and reduction. *Replied*, That holds in cases maritime and competent to that judicatory, so that advocations upon incompetency may yet pass; and every day we have advocations where the Admiral sustains himself to cases noways maritime; and this action is such. *Replied*, You can never obtrude that, because you elected this judicatory yourself, and provoked to judgment, by ci-