

It was REPLIED, That that ticket being only an obligation *ad præstandum*, and to deliver to a third party a sum of money, could be no ground of compensation competent to the defender, who had no right to that sum, but only the executors of the father; likeas the defender was content to make faith, that, as he received the sum, so he did truly deliver the same to the father, conform to the ticket.

The Lords did sustain the compensation founded upon the ticket, notwithstanding of the reply; and found, That the receipt of the money being instructed *scripto*, and bearing an obligation to pay annualrent, was obligatory against the subscriber, unless he could produce a receipt under the father's hand, to whom it was payable. And as to the father's executors, they did not compear; and if they should compear, they could pretend no right, unless that they would instruct that the defender was debtor to the father in that sum; otherwise, if his father had granted receipt conform to the ticket, his executors would be liable to the defender for payment or redelivery thereof: The want of the receipt being the pursuer's fault, his offering to make faith that he did truly deliver the same, did not exoner him, who was obliged, by writ, to deliver, and could not be taken away but by a written receipt of the father.

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1674. December 16. CAPTAIN GORDON and his OWNERS against CORNELIUS JANSONSKIE, Skipper of the Wine-Grape.

In a reduction of a decret, pronounced by the Admiral-depute, for assoilyeing the ship called the Wine-Grape, as not being lawful prize, but did truly belong to Swedish subjects, upon these reasons, That, *first*, the passes and documents found aboard the ship were false, and not conform to the *formula* required by the Swedish treaty; in so far as, that the skipper, having been born a Hollander, and the most part of the company being Hollanders, there was found aboard of his ship a pass, bearing, that the skipper did compear and make faith that the ship and loading belong to Swedish subjects; whereas, being examined upon oath, he did acknowledge, that he was neither present nor made faith when that pass was granted and subscribed by the College of Commerce; likeas, several of the company being examined, did depon contrary to the skipper's deposition, *viz.* that a part of the ship did belong to Abraham Cranstoun, as owner of the half thereof; whereas the skipper had deponed that the ship did belong to one Abraham Volters; and thereby concluded, that, by his Majesty's express instructions, the pass, being simulate and false, was *per se* relevant to condemn the ship as lawful prize. The *second* reason was, that the ship was built in Holland, and, since the war, navigated by the skipper, who was a Hollander, and did contribute to the wars against the King; and did bear scot and lot with the Holland subjects, and that the most part of the company were Hollanders.

It being ANSWERED, That the admiral's decret could not be reduced upon these grounds; because, albeit the ship was built in Holland, and the skipper a Hollander, yet they offered to prove *quod mutavit domicilium*, and had become a true Swedish subject before the capture, by bringing his wife and family there.

To the which it being REPLIED, That any change or transporting of his family was only simulate, and that, albeit his wife went with him in that ship to Sweden, before he was taken, yet that she was there only as a stranger, and had no house nor family, and did come back with him from Stockholm to Elsinure, which is in Denmark :

It being ANSWERED, That albeit his wife came back to Elsinure, yet it was in order for her going to Hamburgh for craving-in her husband's debts; and so could not take from him the benefit of that allegiance that *mutavit domicilium*, and was a Swedish subject before he was made prize :—

The Lords, having seriously considered this debate, did grant commission to the magistrates of Stockholm to examine the matter of fact for both parties, upon such interrogatories as were then condescended upon, for clearing that the skipper had truly changed his domicile, and transported his family, before he was made prize, or if the mutation and transporting of his family was only simulate or coloured; as likewise, upon such interrogatories as might clear that the skipper was truly made a Swedish subject, or that the ship or goods did truly belong to Swedish subjects.

The report being returned, and parties heard, it was ALLEGED, by the captain of the privateer and his owners, that no respect ought to be had to the report of the magistrates of Stockholm; because they had been most partial in executing the commission sent to them; in so far as Matthew Colvill, having a commission from the privateer and his owners, having been shipwrecked when he went to Stockholm upon that account, which kept him from being present at the day appointed, he having escaped that danger, did obtain a new commission for examining such witnesses as he should adduce to clearing the simulation and falsehood of the mutation of the skipper's domicile, and that the property of the ship and goods did belong to Swedish subjects; which commission being offered by him to the magistrates of Stockholm, they altogether refused to execute the same, by examining, *de novo*, the witnesses who had already deponed, or any new witnesses that he offered to adduce for clearing these allegiances of simulation and falsehood; whereupon he did take instruments, and, before a public notary, caused several witnesses depone upon oath; which he craved might be advised, and sentence accordingly pronounced; and thereupon the admiral's decret reduced; and the ship declared lawful prize.

This debate, and state of the process, being considered by the Lords, they were much divided in their judgments and votes; many being of opinion, that, in form of process, there could be no decret upon the report from the magistrates of Stockholm, who had been most partial in refusing to execute the last commission sent to them by Matthew Colvill, as being most just and necessary, seeing he was hindered to be present by storm of weather, and was ship-broken; and therefore, they being suspected that a new commission might be granted to Holland or Hamburgh, or any unsuspected judges, where the truth and verity of the allegiances foresaid, proponed for both parties, by the depositions of witnesses of both parties, might be tried. But many of the Lords being of another opinion, that, without any farther probation or commission, the reasons of reduction of the decret of the admiral being sufficient in law to have made her lawful prize, seeing the skipper and company did depone upon oath contrary to the pass and documents produced—it was carried, by one vote, That the admiral's decret should be reduced, and the ship declared lawful

prize : Which was hard, there being *litiscontestation* in the cause, act and commission extracted for proving the allegiances for both parties ; so that, in form of process, no decret ought to have been pronounced for either party, but upon the advising of the depositions of the witnesses ; and finding, that they who had been most pregnant and fully proven ought to have had decret pronounced in their favour.

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1674. December 23. SIR RICHARD MAITLAND, Younger of PITTRICHIE, *against* SIR GEORGE GORDON of GIGHT.

IN a removing, pursued at the said Sir Richard's instance, as having obtained a declarator of recognition, as donatar from the King, as is before mentioned ;— it was ALLEGED for the Laird of Gight, That the foresaid gift and declarator could be no title whereupon to pursue a removing ; because they were obtained by the assistance and concurrence of the Laird of Gight himself, in prosecution of articles of agreement betwixt Gight and the pursuer's father, long prior to the gift of declarator ; by which Gight had given security for 4000 merks to Pittrichie ; and was to give him an irredeemable right of lands, whereof he had a reversion for 6000 merks ; as likewise the heritable right of the teinds of the said lands ; all which he was willing to perform : and farther, he had furnished the evidents and charters of that base infestment which was the ground of the recognition to Pittrichie, who was absolute in that declarator of recognition ; which, by the articles of agreement, was to be security only to Pittrichie of these lands and teinds disposed to him ; and to the Laird of Gight, for the rest of the lands and barony.

It was ALLEGED for Pittrichie, That the allegiance founded upon the agreement could not be obruded ; because these articles were declared void and null for not performance of the Laird of Gight his part, *viz.* in not granting him a perfect and absolute security of the teinds of the lands disposed to him irredeemably, which were formerly wadset.

It was DUPLIED for the defender, That if these articles were declared void, then Pittrichie could not found thereupon ; nor have any right of recognition or declarator, which was only the effects thereof, and obtained by concurrence of the Laird of Gight ; and, therefore, they ought to be heard to debate as if they were *in prima instantia* ; whereupon he desired to be heard *in præsentia* : Likewise, upon a reduction which he had of that decret, declaring the articles of agreement to be void and null :—

The Lords did consider this case as of great consequence ; seeing that, upon pretence that the heritable right of teinds of a small parcel of lands was not secured, Pittrichie should have right to the whole barony of Gight, and remove the whole tenants : but, having two decreets, one of recognition, and a declarator of the nullity of the articles standing unreduced, they did decern in the removing ; but superseded all execution until the defender should be heard in the reduction of that decret of nullity, how far it ought to take effect, or could be extended any farther than to damage and interest, for not giving an absolute security to the teinds of these lands, as being all that in reason could be demanded.

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