

she being charged by the Earl to uphold it as liferentrix, it being ruinous before her entry; of which, *vide plura infra*, No.

*Advocates' MS. No. 533, folio 273.*

1677. *January 24.* THE KING'S FRIGATE *against* A SCOTS CAPER.

THIS day the case of the Tortoise ship was debated betwixt the King's frigate and a Scots caper: this ship being first discovered by the King's frigate, and so disabled by its cannon that it could not have escaped,—in come other two Dutch ships to rescue and bring it off; the King's ship being engaged in discussing of them, Captain Ranken, commander of a Scots privateer, comes in upon its play, and seizes upon the Tortoise, and carries it away. The King's Advocate, &c. raise a declarator that the ship belonged to his Majesty's frigate, because it having chased away the other two ships, nothing could have hindered her from becoming master of the Tortoise, that lay exposed to mercy, unable to resist, unable to flee, unfit to sail.

Alleged for the Scots privateer, that such things are *primi occupantis*; that the case is already determined by the Emperor Justinian, in § 13, *Institutionibus de rerum divisione, et acquirendo rerum dominio*, in the parallel of a wild beast that one hath wounded so as it can hardly easily escape, and he is in prosecution of it, another nearer hand it than he first apprehends it:—Trebatius thought the first was *dominus*: but the law says it becomes *ejus qui ceperit, quia multa accidere possunt ut eum non capiat, multa inter calicem supremaque labia*; and the other is only guilty of incivility, and may be fined therefore, but the property is transmitted to the taker. Thus Plutarch, *Quæst. Grecanica* 29, tells, the Isle of Acanthos being deserted, was adjudged to the Chalcidians, who first entered it, and not to the Andrians, who first took symbolical possession by throwing in a dart; see *Vinnius ad dictum* § 13, *et ad parag. 46 Institution. dicto tit. de rerum divisione*, &c. Mr Alexander King, in his *tractatus consuetudinum navalium, Tit. 4. No. ultimo*, decides in favours of the taker. *Vide Ærodii Pandectas rerum judicatarum, tit. De acquirendo rerum dominio, cap. 10.* See Paulus Voet. *De Jure Militari, pag.* .

The Lords first before answer took trial, if the said ship was so embeciled that it could not have escaped the man of war.

1677. *February 15.*—The Lords having advised the debate on the 15th of February, 1677, preferred the Scots privateer to the King, to give a demonstration of their equity that they durst determine against the King. This was done *valde reclamante Præside*, for Sir James Stamfeild's sake.

*Advocates' MS. No. 535, folio 273.*

1677. *January 25.* CAPTAIN JOHN BROWN *against* WILLIAM NEWBERRIE.

CAPTAIN JOHN BROWN, in Leith, as assignee constituted by his brother, pursues William Newberrie, as he, who, for payment of L.413 Scots, had got an assign-