

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 advocacy 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 advocacy 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-

ting the defender before this Court, and so, of consent, having given him *jurisdictio prorogata*, you can never reclaim nor quarrel the power given him by law. *Duplied*, Though I submitted to the Admiral's jurisdiction, by tabling my cause before him, yet the same being noways maritime, and he no otherwise Judge competent to it, but by my consent and prorogation, if he injure me by iniquitous interlocutors, I may advocate, as any other might do. THE LORDS, by their plurality, thought he who elected a Judge, took him with all the qualifications and extent of his power, as it is explained by law; and, therefore, advocations on iniquity being prohibited by that act of Parliament, (which well deserves a review,) and you having made him competent, they refused the bill of advocacy *quoad* him.

*Fol. Dic. v. 1. p. 503. Fountainhall, v. 2. p. 37.*

1705. June 26.

MR ALEXANDER HIGGENS, Advocate, and Procurator-Fiscal in the High Court of Admiralty *against* SIR ALEXANDER BRAND of Brandfield.

THE Catharine of Rotterdam and its cargo being adjudged as prize by sentence of the Admiral, and the wines aboard that ship exposed by his order to a public roup, whereof it was a condition and article, that the greatest offerer should be preferred, upon giving bond and sufficient caution to pay the price offered to the Clerk of Admiralty within ten days, under the penalty of L. 2000 Scots; Sir Alexander Brand was preferred as the highest offerer, and signed the articles and conditions of roup; who having failed to perform, was pursued before the Admiral Court at the instance of Mr Alexander Higgens, procurator-fiscal there, for payment of the L. 2000 of penalty.

Sir Alexander raised advocacy of the process upon the head of incompetency, *alleging, imo*, That albeit the Admiral was the only proper judge in the first instance to the roup of the wines declared prize; yet after the roup was over, he was not competent to determine how far the defender had incurred the penalty, which is a liquid sum of money, and no maritime subject.

*2do*, The pursuit being at the Procurator-fiscal's instance; for the behoof of himself and the Admiral Court, if the Judge Admiral should determine therein, he would be both judge and party.

*Answered*, If the Admiral had not power to judge of penalties incurred through not fulfilling of the articles of roup, his jurisdiction would be altogether elusory, and insignificant; *et concessa jurisdictione, omnia concessa videntur, sine quibus explicari non potest*. 'Tis ridiculous to allege, that the Judge Admiral cannot determine in penalties consisting of liquid sums; for then he could not judge of penalties in charter parties. *2do*, He is most competent to judge as to the penalty, though some part of it be to come to his own use;

No 222.

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A person bought goods which were exposed to public auction by decree of the Admiral. One of the articles was, that the price should be paid to the Clerk of Admiralty under a penalty. The jurisdiction of the Admiral, in a process for payment of the penalty, was sustained.