

1739. June 5.

Competition, SIR JOHN HOME of Manderston, with MR. ALEXANDER LIND,
Admiral-Depute upon the East Coast.

No. 5.

Whales do
not come
under a grant
of wreck.

A whale having been cast ashore in the barony of Coldingham, a question arose betwixt these parties, to which of them the same should belong.

Sir John claimed it, in virtue of charters from the Crown disposing the said barony to him and his predecessors, containing also the clause "with wreck and ware;" under which grant of wreck he pleaded the subject in controversy was comprehended; and, in support thereof, it was observed, That, by the civil law and law of nations, the right of wreck, which never had been in the possession or property of any one, was given to the persons who had saved or preserved the subject (which he had done in this case;) as also, that the policy or interest of different nations had made some alteration from the natural rule of equity of giving to the preserver; for instance, in Scotland it had been thought good policy to give the right of wreck in general, without any distinction, as escheat to the Crown; and that, under this clause, whales behoved to be comprehended, as they were not deemed Royal fish, either by the law of this, or any other country in Europe (England excepted;) for proving whereof, the following authorities were referred to; Ordinance of Lewis XIV. *in anno* 1681, § 53. as translated by the anonymous author of a Treatise of the Dominion of the Sea and Sea-laws; Craig, Lib. 1. Dieg. 16. § 38.; Laws of Alexander II. Chap. 25.

Pleaded for the Admiral-depute: That, as whales were *inter regalia*, the one in question behoved to belong to him, in virtue of his commission from the Crown; and that they were always deemed Royal fish, appears from Balfour's Practics, Chap. 8. Fol. 191.; Manuscript of the Forest Laws in the Advocates' Library, Tit. De Judicibus; Welwood's Treatise of the Sea-laws, Tit 2. Of the Judge-Ordinary in sea and sea-faring causes; Stair, Lib. 2. Tit. 5.; and the Decisions, Procurator-fiscal of the High Court of Admiralty against John and Andrew Tods, *in anno* 1665; Earl of Rothes against Murray, *in anno* 1720; *2dly*, They could not be considered as falling under the notion of wreck, and so passing to the Baron under that clause; as was evident from the 25th Chap. De Statuta Alexandri II.; Skeen in his Interpretation of Wreck of the Sea; and Craig's definition of that word. See APPENDIX.

The Lords found, That whales do not come under the grant of wreck.

C. Home, No. 118. p. 189.

1751. February 19. The EARL of PANMURE *against* JAMES BISSET.

No. 6.

The valuable
effects of ene-

During the Rebellion a French ship came into the river of Montrose, where she run a-ground, and was damaged, so as to be unfit for sailing; but the rebels

and crew having found means to seize the Hazard sloop of war, what of her furniture and rigging could be removed was carried on board the sloop; which the crew took possession of, and carried off; and their own hulk was left in the harbour, till the rebels were driven from Montrose.

Captain Thomas Dove of the Hound sloop of war seized the hulk, and left a commission with James Bisset to dispose of it.

The Earl of Panmure on a deputation of Admiralty, the bound whereof comprehended Montrose, from the Earl of Findlater, Vice-Admiral of Scotland, pursued James Bisset as introriter with the ship.

The Judge-Admiral found "That in all cases of wreck, or where ships were stranded on the coast, and deserted by the crew, the Vice-Admiral, and his deputies, had the sole right of keeping, preserving, and introriter therewith; and found, as the facts were stated by the defender, that the ship libelled was a stranded vessel deserted by her crew, to which neither Captain Dove, nor any other of the commanders of his Majesty's ships of war could claim a right; therefore found that the pursuer had good right to the custody of the said ship, or the price thereof, if sold, preferably to any of the commanders of his Majesty's ships of war, or the defender, subject always to the claims of those who could thereafter make appear they had right to the same."

A decret being pronounced in terms of this interlocutor, was craved to be suspended, for that the ship was not wreck, but the property of Frenchmen, the King's enemies; and continued in the possession of the rebels their adherents, till they were driven from Montrose, where it was left by them; that Captain Dove being in the King's service, was entitled to seize ships and other things left by the enemies; and had right to the ship by his Majesty's proclamation; that considering it as in the case of other things left by an army on their retreat, these may be seized by the pursuers, or by any person, though not in the service; and by the custom of war, are allowed to the capturers; neither is the Sheriff entitled to take them into custody, nor in this case the Admiral.

Answered: Captain Dove has no right to this ship by the King's proclamation: It was lying in the harbour of Montrose in the possession of nobody; so he could not be said to have taken it from the enemy: It was a wreck, being deserted by the crew; but considering it as left by the enemy, it did not belong to the seizer: The spoils of war belong to the King; and though it may be ordinary to allow captors to retain what they can carry away, yet a person, by saying he had seized the enemy's artillery, would not make it his own: The Admiral is entitled to the possession, as it was left in his jurisdiction.

The Lords considered it neither as capture, nor as wreck, but as *res hostium* and escheat to the King, of which the Admiral had the custody; and therefore refused the bill.

D. Falconer, v. 2. No. 200. p. 241.

See APPENDIX.

No. 6.
mies do not belong to the seizers, but the custody of them to the Judge in whose territory they are found.