

speak of marine cases before his Royal Highness, who was so expert therein, was as impertinent as Phormio's harangue to Hannibal concerning the art of war.

The Lords found these ships had carried double documents ; yet, to pay the more respect to his Majesty, they referred the whole case to him.

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1682. *November 24.*—The case of the *Patience* and *Palmtree* ships, (mentioned 14th Feb. 1682,) was this day advised, and decided against the capers, in favours of the strangers ; finding them to be free ships, and so reducing the admiral's decret which had adjudged them prizes ; and the capers are made liable *in solidum* for restitution.

Their refusing to show their documents or passes to the capers or privateers is a great presumption of an enemy's ship, and that it is unclear. Yet it is no probation, for ships may be unwilling to show their passes for fear privateers may destroy them ; yet it is a ground to bring them up, and to assoilvie the privateer from damages and expenses for so doing. But it is not a sufficient ground whereupon these ships can be adjudged.

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1685. *January 22.*—The Lords sequestrated this forenoon for advising and deciding the famous and oft debated cause of the capers of the two prize Danish ships, called the *Patience* and *Palmtree*, mentioned Nov. 7th, 1684. It was now debated, that the King's letter could not take away the strangers their decreets *absolvitor in foro*. *2do*, They argued, they were not in the case stated in the King's letter.

There arose a great dissension, if the proving that they carried either double or concealed documents, any one of them was sufficient to confiscate the ship, or if they behoved to prove both,—whether it was the *and* copulative, or the *or* disjunctive. Though some lawyers inclined to think any one of them sufficient, yet many of the Lords were for adhering to their last interlocutor, that they were free ships ; but that the capers had probable grounds to bring them up, and therefore assoilvieing them from all damages, and finding them only liable for the value as they were roused. But the Statesmen carried it, that the case should be remitted to be finally decided and determined by the King. So, if his Majesty pleases, he shall get causes enough to hear, by this his cumulative power. *Vide* another letter from the King anent these ships, 5th March 1685.

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1685. *March 5.*—There is a letter from his Majesty, anent the two ships called the *Patience* and *Palmtree*, mentioned 22d January 1685, explaining his brother's letter, and declaring them lawful prize, because of their double documents. This was procured by Sir William Bruce, then at London. And thus John Inglis, advocate, *multam operam et oleam perdidit* in this cause.

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1685. *March 6.* CALDER of MUIRTON *against* The LAIRD of BRODIE.

CALDER of Muirton having charged the Laird of Brodie on a contract, for

delivery of eight last of salmon yearly, towards paying him £10,000 Scots, which he had lent Cromarty, for whom Brodie had become cautioner; the price of each barrel being £16, and the price of each undelivered barrel liquidated to 40 merks; with annualrent from Martinmas, which was the time of the delivery:—the reason of suspension was, That this was truly *mutuum*, being the loan of £10,000 Scots; and therefore, his just interest resolves into principal and annualrent, and he cannot claim farther.

ANSWERED,—This is truly a mercatorian bargain; and so he must not only have his *damnum emergens*, but his *lucrum cessans*, and he had suffered in both; for, by their failing to deliver the salmon, he, being engaged to others on the faith of this contract, was forced to furnish himself at a dear rate.

The Lords, on Boyne's report, modified, for every undelivered barrel, £4 Scots more than the £16 which was the price liquidated for delivered barrels, and likewise decerned for the annualrents of these undelivered barrels.

But, on the 19th of March, on the King's Advocate's application, the Lords altered their former interlocutor, and found the contract is *principaliter* an obligation for principal sum and annualrent; and that the salmon is only adjected as the *modus solutionis*, and for his better security; and therefore decern only for the principal sum and annualrents, and assoilyied from the failyies of the undelivered fish, because the annualrent succeeds here as damage and interest, *loco facti imprestabilis*.

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1685. JAMES GORDON, Parson of Banchorie, *against* SIR ALEXANDER BANNERMAN of ELSICK.

February 24.—MR James Gordon, parson of Banchorie, pursues a reduction of a decret *in foro*, obtained against him by Sir Alexander Bannerman of Elsick; finding that Sir Alexander had the sole right of property and pasturage in the Hair-moss, by virtue of his lands of Cuckston, and that Mr James and his tenants of Airdoch had no right; which was carried by the late Chancellor's moyen.

The reasons of reduction were,—1^{mo}, The decret was *ultra petita*; for Elsick's summons craved but common pasturage; and there being more given him on the Lord's advising, they cutted the summons and scroll of the Act, and interlined the Bruntland beside the Cowford, to make it meet the decret. 2^{do}, Mr James had produced a decret of perambulation in 1630; and yet it was not considered. 3^{tio}, The decret proceeded only upon half advising, and half probation, *viz.* only of Elsick's witnesses, and not of Mr James's; and only one of them was positive; and yet he deponed he saw them in possession of casting of peats, when, by calculation, it appeared he was then but five years old.

The Lords, having advised the debate, before answer, ordained the summons and acts to be produced; and remitted to the Ordinary upon the witnesses, to take the oaths of Mr George Bannerman, Alexander Deuchar, agent, and the extractor, or any others whom the pursuer shall condescend upon, anent the