

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-

nation to debts of a triple value for his payment, to count and reckon for the surplus, before the Bailies of Leith.

The defence was, that the disposition was absolute, and he was not liable to count, &c. ; which see in the informations. The Bailies, with advice of their assessors, having fully considered the defender's eiked defences, and replies made thereto, with the registrate bond granted by the pursuer's cedent to the defender, containing an assignation relative to the bond joined in one writ, and that the said assignation is granted on the special causes and considerations therein mentioned, viz. In regard and on the account the granter was then instantly to pass furth of the realm to foreign parts, and that it was reason the defender should be secured anent his better payment of the sums contained in the bond ; and that the assignation was granted but prejudice of the personal obligement : therefore they repelled the eiked defence, and found the defender liable in the surplus of the sums assigned and intromitted with by him, more nor satisfies the sums contained in the bond granted to him ; and ordain the defender to discharge the said bond, and to retrocess the pursuer to what of the cedent's money is not yet uplifted ; and admit the pursuer's claim to his probation ; and that notwithstanding of these general words in the narrative of the assignation, bearing for other weighty causes and good considerations, which are only a superfluity and redundancy of the common style of writing, unless the defender will condescend on other onerous causes beside the sum in the bond ; and that by the particular causes of the assignation above mentioned, and the generality of the assignation to all the granter's means and estate, sufficiently clears that the true intention and design of both parties, was allenary for securing the defender for payment of the sums contained in his bond ; and the express consideration of the granter's going out of the country, manifests and demonstrates that what surplus should be intromitted with by the defender, was only as a factor and administrator for the pursuer's cedent during his absence, he being first paid.

Of this decreet, Newberrie having given in a bill of suspension before Craigie, and, upon the amand of a dollar, having obtained the Lords' answer, they repelled his reasons, and adhered to the Bailies' interlocutor, as most just.

*Advocates' MS. No. 536, folio 273.*

1677. *January.* JAMES JOHNSTON *against* JAMES SYME.

ON the occasion of James Johnston, writer to the signet, his action against James Syme, burgess of Hamilton, for payment of a debt owing by his good-sire, wherein we did his process, because Syme was only descended of a third son of the debtor, and so could not be his heir, (see many other defences in the information *apud me*,) we fell to discourse on this point of law, viz. Where a man assigns a debt to another, and gives warrandice from his own fact and deed, and there be a prior sentence absolvitor from that debt, we thought it would fall under the warrandice ; but if the warrandice in the assignation be so qualified, that it is only from all former assignations or discharges, a sentence does not fall under the warrandice of fact and deed. See *Mangilius de Evictionibus, Questionibus* 14, 15, and 16.

*Advocates' MS. No. 537, § 1, folio 273.*