

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 advocation *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 advocation 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;

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No 223.

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.

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for what is more ordinary, than for sheriffs and bailies of regality to decern for payment of fines in processes at their procurator fiscal's instance, albeit these fines belong to themselves? And this holds in the contravention of all penal statutes. And here there is a *jus quæsitum* to the Court of Admiralty, by the defender's obliging himself to give bond and caution to the clerk, for payment of the price of the wines bought by him under the foresaid penalty; and he having failed to perform, the Admiral is only Judge competent to cognosce how far the penalty is incurred.

THE LORDS repelled the reason of avocation, and remitted the cause.

*Fol. Dic. v. 1. p. 502. Forbes, p. 11.*

1705. June 28.

SIR ANDREW KENNEDY, Conservator, *against* WILLIAM GORDON, Merchant.

No 224.

An action raised before the Admiral, at the instance of the conservator of Campvere, against a factor abroad, for money expended in negotiating his affairs in Holland, advocated *in jure* as not being maritime.

SIR ANDREW KENNEDY having pursued William Gordon before the Judge of Admiralty for sums of money which he alleged were spent by him, his son, and servants, at the Hague, and other places in Holland, in defending William Gordon in a plea betwixt him and his wife, a Dutch woman; a bill of avocation was expedé, and coming in to be discussed before the Lords, this reason was *propounded*, That the cause was not maritime, and therefore not competent to be judged by the Admiral.

*Answered* for the pursuer, He being a foreign Minister, and the defender a factor abroad, where the money pursued was expended at his desire and order, and so a foreign debt; the Admiral was most competent to decide therein. For it was found in the case of Van Rixel and his factor against Black, That a foreign bill of exchange fell properly within the Admiral's cognisance.

*Replied* for the defender, No cause can be called maritime, except what relates to vendition or freighting of ships, differences betwixt masters and seamen, masters and owners, masters and freighters, bills of bottomry, and the like, in the terms of the act 16th Parliament 1681. Therefore, to pretend that a foreign debt is a maritime cause, is a jest. As for the cited decision, it has certainly concerned a bill of bottomry, and not a bill of exchange.

*Duplied* for the pursuer, That he (who is in effect general factor for the Royal Boroughs, and the preservation of trade) had, in discharge of his commission from Gordon, been put to several necessary voyages at sea, in order to exempt him from the Dutch jurisdiction, when he was at the point of being run down by the eviction and seizure of all his effects, bills, compt-books, &c. And therefore an action for refunding expenses and repairing damages by such an employment relating to trade, is precisely in the terms of the act of Parliament.