

age friends and relations to settle gratuities on their blood-relations' posterity, who noways design to put it in the parents' power to dissipate or disappoint their gift, but design it wholly to go to the pupil's behoof.

The Lords found there was no evidence here of its being acquired by the father's means, and so Capinoch could not claim it as executor-creditor to him. It is true some have taken right to lands and sums in their children's names *in familia*, to cover them from being affected by their creditors ; but that is not the case here.

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1712. *February* 13. JOHN FORFAR and ROBERT MOYES *against* ALEXANDER STARK.

JOHN Forfar and Robert Moyes, sailors in Aberdour, having a small bark belonging to them, which they had loaded with coals to Dumber ; Alexander Stark, skipper in Borrowstounness, being in company with sundry ships that were sailing for Holland, in November 1710, did chance to run down the said bark, and with great difficulty the two men were saved from drowning. Whereon they pursue the said Stark before the High Court of Admiralty, for their damage ; and obtain a decret for £337 Scots, as the price of the cargo and bark : Which he suspends on thir reasons, *1mo*, That the only relevancy in the pursuer's libel was, that their bark was run down through his fault ; and yet no fault proven, but a mere accidental rencounter through the violence of the wind, which they could not prevent ; *et nemo tenetur de casu fortuito*. And thir parties were the only occasion of the loss, and had none to blame but themselves, having too few hands to navigate and manage the boat, being only two in number, and one of them an old infirm body, who could not go out of the way though cried to. *2do*, Stark appeared in court at the first calling, and offered either to depone himself on his innocence, or to adduce his crew ; which was refused, though he was freighted and under charter to sail, and could not lose the opportunity of a convoy and voyage, to attend the event of that process ; which might have been more prejudicial to him than all their claim amounted to. So he sailed for Holland, and they proceeded to take the affidavits of one Duck his ship's crew ; who, to free themselves, (being as near the bark as he,) laid the blame on Stark. *3tio*, The common rule, where one ship damnifies another at sea, [is,] the owners of both the vessels bear equal share of the loss : and it is made up by contribution, as our learned countryman, Wallwood, in his Abridgment of the Sea Laws, tells us ; and Molloy, *de Jure Maritimo et Navali*, *tit. Of Average and Contributions*, says,—If two ships cross each other, and the crew swear their innocence, a mutual contribution must be made by a just equality : but if one of the ships be lost, then no contribution ; for this would tempt one who had an old leaky ship to set it against a strong one, of purpose to be run down, so to hedge himself into a contribution, and get an upset and recompense for his crazy ship.

ANSWERED,—They opponed the probation taken before the Admiral, who depone, that the storm was not so great but Stark might easily have steered by the poor men, but most inhumanly and carelessly run them down. And, as to the necessity of his going abroad, they were not bound to sist their process, and wait

his uncertain return : and his crew, who had occasioned the damage, and lost them both their boat and cargo, would have been most suspect and incompetent witnesses. And it is proven to have been *ex culpa latissima*, and far from an accidental rencounter.

The Lords, on Royston's report, sustained the Admiral's decret, repelled the reasons of suspension, and found the letters orderly proceeded.

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1712. February 15. JOHN GIB of CASTLETOWN *against* DAVID ROBERTSON of TOUCHY.

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JOHN Gib of Castletown having obtained from the Exchequer the gift of the single escheat of David Robertson of Touchy, and pursuing a general declarator, it was alleged, this was a most humorous and invidious process ; for the debt of the horning was not full twenty merks Scots, as the dues of the schoolmaster, and now paid, and yet he has raised this vexatious process thereon ; which is still irrelevant,—for his lands lie within the regality of Kinross ; and if his single escheat be fallen, it belongs to Sir William Bruce, the lord and heritable bailie of that regality, whose charters dispoone the escheats of all living within that bounds ; and from whom the defender has the gift of his own escheat ; and so yours being *a non habente potestatem*, it is absolutely null.

ANSWERED, *Imo*, Sir William's erection will not extend to single escheats ; for it runs in thir terms :—*Cum eschetis vitalibus reeditibus et foris-facturis omnium personarum infra dictum territorium* ; so this clause gives him only liferent escheats : for when it desigus to convey both, then it runs in this strain,—*cum eschetis tam simplicibus quam vitalibus*. *2do*, *Esto* it extended to both, yet Sir William's right thereto was superseded, cassed, and annulled by the 6th Act of Parliament 1693, declaring, that where the lords or bailies of regalities, or other heritable offices derived from the Crown, did not qualify themselves to the government, by taking the oath of allegiance and assurance to King William and his successors, they shall, *ipso facto*, be deprived of these offices and employments : but so it is, Sir William Bruce never took these oaths, and so incurred the certification ; and the casualties falling back to the Crown, during his incapacity, my gift is well founded, and yours is null ; for it behoved either to belong to the Queen or to the lord of regality ; not to him, for he had defaulted and tint his right, during his not qualifying ; *ergo* it fell to the Crown ; for there is no medium.

REPLIED,—The construction put on Sir William's gift is a downright quibble and catch ; for the word *vitalibus* is not to be joined with the preceding word *eschetis*, but to the subsequent word *reeditibus* ; so it is a downright mistake in grammar : and he has as full right to all sorts of escheats as any regality whatsoever.

To the *second*, founded on the Act of Parliament, ANSWERED,—That certification seems only to concern the bailie of the regality, and not the lord of it ; whereas Sir William was both : and does only restrain them from exercising acts of jurisdiction, and holding of courts, and loses the perquisites and fines there ; but noways deprives them of the casualty of escheat, which is no part of the jurisdiction, but a private right and consequence of his property. Now, suppose