

1779. *March 10.*MOIR *against* JACKSON.

No 243.

THE LORDS found, that, processes against underwriters for insurances at sea being causes strictly maritime, advocations thereof were incompetent.—See APPENDIX.

*Fol. Dic. v. 3. p. 352.*

1780. *July 5.*HENRY RITCHIE and Others *against* JAMES WILSON and Company.

No 244.  
Jurisdiction of the Court of Session, in the first instance, in a question of insurance on a ship, sustained. See Moir *against* Jackson, No 243. *supra*, and Clark *against* Robertson, No 246. p. 7532.

A SHIP belonging to Wilson and Company, which was insured by Ritchie and other underwriters, having been taken by the enemy, the owners brought an action, in the first instance, before the Court of Session, for recovery of the insured value. The Court repelled all the defences then offered by the underwriters; but when a reclaiming petition and answers came to be advised, the defenders insisted on this new objection, that a question relative to insurance of a ship, being of a maritime nature, ought in the first instance to be judged by the Admiralty Court. THE LORDS having appointed a hearing in presence on this point, it was

*Pleaded* by the Objectors: Prior to act 1681, cap. 16. the jurisdiction of the High Court of Admiralty was not accurately defined; Stair, b. 2. tit. 2. § 5; but this statute has declared it to be exclusive in all causes maritime. Nor have the articles of the treaty of Union in any degree diminished the extent of this jurisdiction; Steven *contra* Officers of State, No 235. p. 7515.; Edmonstone *contra* Jackson, No 28. p. 7112.; though Mr Erskine insinuates a doubt in this matter, which he founds on a case in the Court of Justiciary in 1723; whereas, in fact, no judgment was given in that cause; and it appears from Lord Royston's\* Manuscript Notes on Mackenzie's Criminals, in what manner Mr Erskine has been led into a mistake in this particular.

The powers of this Court are more extensive than those of the English Admiralty. If it can be shown, that the contract or fact which has given rise to the action took place within the body of any county in England, this will exclude the cognizance of their Admiralty Court. In Scotland, on the other hand, the Admiral's territory is less limited than that of the other supreme courts, his jurisdiction being only confined by the nature of the causes to be judged; Cormack *contra* Tait, No 229. p. 7512.

If then questions relative to policies of insurance on ships be maritime causes, that they fall under the exclusive jurisdiction of the Admiralty Court, in the first instance, is not to be doubted. Nor can the maritime nature of such con-

\* In the Advocate's Library.

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tracts be denied, whilst it is apparent from the style of the policies themselves ; and none of our lawyers have ever given an enumeration of causes strictly maritime, in which those respecting insurances on ships are not particularly referred to.

As therefore the Court of Session is excluded by express statute from judging, in the first instance, the present cause ; so it is evident that no prorogation of jurisdiction can arise from the consent of parties, since the law admits none *de causa in causam*. Were it otherwise, this Court might equally extend their powers to the trial of questions invariably held proper to all the other supreme judicatures, as the Justiciary, the Exchequer, or the Commissary Courts.

*Answered* ; Anciently the powers of our Admiralty Court were very much limited. The Admiral then held his courts only at sea, or within flood-mark ; and before 1609, cap. 15. nothing could not pass on his decrees. At that time the Court of Session, who had a cumulative jurisdiction with him, permitted him to sit among them as an extraordinary Lord, and then his sentences went out in their name ; Sinclair, 9th March 1543, Lord Bothwell *contra* Flemings No 47. p. 7322.. The act 1681, cap. 16. no doubt enlarged his powers, and gave him an exclusive jurisdiction in maritime causes. Since the Union, however, his exclusive authority has been considerably diminished, of which the following cases afford satisfactory examples ; Graham *contra* Piper, No 226. p. 7509. ; Crosbie *contra* Corbet, No 228. p. 7512. ; Rowan *contra* Fleming, No 10. p. 2043. ; Campbell *contra* Montgomery, No 236. p. 7517. In these cases, the privative jurisdiction was denied to the Admiralty. That of Long and Macadam, who were charged with committing a murder on the high seas in 1735, likewise deserves notice. Though the Admiral passed sentence of condemnation on these men, the Court of Justiciary interposed, by suspending his judgment, and the men were set at liberty ; which could not have happened, had the act 1681 continued in full force. And the reason of such restrictions being now introduced is, that the Admiralty Court is, by the treaty of Union, rendered subordinate to the Lord High Admiral, or Commissioners of the Admiralty of Great Britain.

The Court of Justiciary, indeed, appears to have always held a cumulative jurisdiction with the Admiral, as in the case of a lady, Jacobina Moir, on whose person a forcible abduction was committed, and likewise in that of Mungo Campbell, accused of murder ; in both which instances, though the crime had been perpetrated within flood-mark, the Court of Justiciary tried the cause, and pronounced sentence.

But further, it does not seem that the present question is truly of a maritime nature. A policy of insurance is a contract entered into at land, and which is to receive its execution likewise on shore. Had this question occurred when the Admiral held his courts within flood-mark, it could not have been brought before him ; and at this day many disputes may arise concerning policies, to which he is still an incompetent judge ; as, for example, that relative to a sus-

picion of forgery in a policy, or in the subscription of any underwriter. Nay, the present question itself affords a similar instance, for it too respects the vitiation of a policy by the commission of a fraud ; at least, it must be ranked with those causes which may be tried in either court, such as what relates to average loss, regulated by the *Lex Rhodia*. In all cases not maritime, advocacy from the Admiralty Court is competent (as that of Bartholomew, No 240. p. 7521.;) which will always be allowed, except where the pursuer alone, who himself has made choice of the Admiralty Court, seeks afterwards to advocate. But though the Court of Session had been otherwise incompetent, their jurisdiction has been prorogated by the parties litigants ; for, having been a radical one, though afterwards limited, it may be thus again extended by consent, Brown *contra* Burnet, No 29. p. 7314. ; Sheriff-clerks *contra* Commissary-clerks, No 27. p. 7310; in which last case, one like the present is given as an instance of prorogation.

No 244.

Some of the Judges thought the prorogation effectual to extend the powers of the Court, though the cause were strictly maritime, on account of its original jurisdiction, which was not taken away by act 1681. Others, who seemed to deny this prorogation, considered the cause as not maritime, observing, that the criterion of this matter is, whether execution is to fall within the limits of the Admiral's proper jurisdiction.

"THE LORDS sustained their jurisdiction in the first instance, and adhered to their former interlocutor."

Lord Ordinary, *Menboddo*.  
and *Ilay Campbell*.

Act. *Crosbie, Scot.*  
Clerk, *Campbell*.

Alt. *Solicitor-General Murray*.

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*Fol. Dic. v. 3. p. 352. Fac. Col. No 113. p. 210.*

1781. February. 20.

JOHN MONRO, Procurator-fiscal of the High Court of Admiralty, *against* MAGISTRATES OF EDINBURGH, and their ADMIRAL-DEPUTE.

CAPTAIN WATT of his Majesty's navy having brought into Leith-road an American ship which he captured, instituted an action for condemnation of the vessel, before the Admiral-depute of Leith. Mean time, an application for an interdict to stop procedure in this action was made to the High Court of Admiralty by the Procurator-fiscal, who alleged its exclusive jurisdiction in the condemnation of prize vessels. The Judge-admiral having granted the interdict, a bill of suspension, complaining of it, was presented to the Court of Session, by the Magistrates of Edinburgh and their Admiral-depute ; in consequence of which, this question of controverted jurisdiction was discussed in the following manner :

No 245.

Action for the condemnation of a prize not competent before the admiral depute of Leith.