

resenting, attended Sir G. M<sup>c</sup>K. at twelve o'clock that day, and gave him a challenge. Whereof the President and some other Lords being informed, they put them both under arrest; and next day citing them before them, caused them find caution to keep the peace under the pain of 10,000 merks, and proffered them a bond to be subscribed for that effect. Which Mr G. B. refusing, was ordered to prison, but was only attended by a macer till six o'clock at night; at which time he engaged.

The Lords fell upon sundry models of the outer-house, to please the Lords and others: but it was to no purpose.

*Advocates' MS. No. 530, folio 272.*

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1677. *January.* ANENT THE PRIVILEGES OF ADVOCATES.

BAILIE CHARTERIS about this time imprisoned Mr Thomas Baird in the Tolbooth of Edinburgh, whereupon a great complaint was made by the Advocates. See the story of it, and about the privileges of Advocates, and anent the town officers pointing a silver dish from George Stewart, Advocate, for not paying annuity, &c., in my manuscript containing the occurrences emerging in the session, page 4 *et seq.*

*Advocates' MS. No. 531, folio 272.*

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1677. *January 17.* The COUNTESS DOWAGER of ERROL, *contra* The EARL of ERROL.

THE Lords having this day advised the point mentioned *supra*, in July, 1676, No. 492, § 5, whether, *in debito annuo*, the election should be made once for all, or *quotannis*; and the Lords found the Earl ought to choose either money or victual; and which of the alternatives he elected, it behoved to stand for the rule in all time coming, since it were very hard for the liferentrix that the fiar should give her money, when the victual sold at a high rate, and victual again when it was cheap. And assigned to him the 15th of February, betwixt and which the Earl should declare his option by a declaration under his hand to the clerk, to be inserted in the decret; else they decerned for victual, the Countess electing that. The Earl elected victual.\*

*2do*, In the other process betwixt them, whereby it was admitted to her probation that the mains of Essilmont paid victual, the Lords this day advising the depositions, found in respect of their unclearness, some deponing money, and some victual, the probation resolved in an equality, and therefore (as in *causis dubiis*) divided it into half money and half victual. See the information of it beside me.

The 3d process was the cognition anent the condition of the Tower of Essilmont,

\* *Vide L. 5. in princ. ibique Gothofredum in notis, D. De Legatis, 1mo; L. 20, D. De optione legata.*

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-