

- No. 3. likewise had secured the ship, that she could not be taken away by storm, but was in that condition, that the whole loading and goods were now in their power to be recovered. It was replied, That notwithstanding the declarator ought to be sustained as to all goods not seized upon, because, until there be actual possession and seizure, they are still *bona vacantia*; and by the death of any Admiral who gave right to follow and recover, it doth expire with him, and *in jure* belongs to the next succeeding Admiral, as is clear not only by the law, but by many instances of England lately. The Lords did assoilzie from the declarator, and found that the Earl of Argyle has still right to recover that ship, and all goods not seized upon as yet, upon these grounds; that not only his father had a right from the Admiral for the time, but likewise after his death; the right of Admiralty being in the King's person, he did not only ratify, but granted a new gift, by virtue whereof this Argyle had actually seized upon the whole ship and loading, and recovered some cannon which were of great weight, and being master of the whole bulk of the ship, it did in law include the whole individuals of the ship and loading, seeing we have no other specific symbols by our law or any other, for conveying the property of goods, but by seizing upon the ship, after which the right becomes perfect: And if it were otherwise, then those who by virtue of such rights, have spent much time and charges, and succeeded so far as to secure the vessel and goods, might be deprived of all benefits which would accresce to another that never took pains; which were against all law and encouragement of those who would adventure on so great a business of public concernment; especially in this case, where, upon information from Spain, there was a great quantity of Spanish pistoles, and other materials which would amount to a great value.

*Gosford MS. p. 683. No. 1008.*

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1725. February 17.

MONTEIR and Others, Merchants in Glasgow, *against* SIR JAMES AGNEW of Lochnaw and Others.

No. 4.

The pursuers had obtained a decret in absence before the High Court of Admiralty against Sir James for a considerable sum, as the value of goods belonging to them, which were wrecked and cast upon the shore of Whitehorn in Galloway, and intronitted with by him as Admiral of these bounds: He raised reduction of the decret, and being reponed, he pleaded, *1mo*, That the goods were confiscated and belonged to the Admiral, because no living creature was found aboard, which was agreeable to the old statute, 25th of Alexander II. observed by Lord Stair, Lib. 3. Tit. 4. § 27. of his Institutions, upon which the decision December 12, 1622, Hamilton against Cochran, No. 1. p. 16791. proceeded; and which was likewise agreeable to the English law, anno tertio Edwardi I. Cap. 4. and Henry III. anno 1226, observed by Skeen, De Verb. signifi. verbo Wreck: And as to

our statute, James I. Cap. 124. He contended that it only concerned the case of strangers, but did not alter our old law as to natives; *2do*, He pleaded, That there was no claim for wrecked goods, unless it was made by the owner within year and day; as was observed by the foresaid authors upon the old statute, and by Sir George Mackenzie upon the statute of James I. and which obtained by the present custom of the Admiralty founded on the foresaid ancient statute, the reason of which was, *Ne rerum dominia in incerto essent*; and was likewise agreeable to the custom of Holland, France, England, &c. as Vinnius observes in his notes upon Peckius, *ad legem Rhodiam*; and Sken takes notice, that the same limitation holds as to the claim of waif goods, that it is lost if the proprietor does not enter it within year and day.

It was answered to the 1<sup>st</sup> defence, That the old, inhumane, and barbarous law of Alexander's was long ago in desuetude with us, as appeared from the practice of the Admiralty; and that no such confiscation obtained in other places, as England, France, &c. which Vinnius takes notice of in the notes cited for the defender. To the 2<sup>d</sup> it was answered, That so short a prescription would be absurd, since in many cases it might happen that a year would elapse before the proprietors could get notice where these goods were wrecked; and therefore, as Mackenzie observes, upon the 124th act of James I. it was contrary to the custom of this country: And Lord Stair, *Tit. Confiscation*, lays it down in general, "That except it be upon the law of Reprisals, every true owner instructing his right ought to have it." And by the British act of the 12th of Queen Anne, for preserving of ships and goods that are forced on shore, it is provided, "That the goods may be sold, and the price transmitted to the Exchequer, there to remain for the benefit of the lawful owner, when ever he shall claim them;" from which it was contended, that the intromitter was accountable at any time. As to the case of waif goods, it was answered, That waif, for the most part, consists of such goods as are strayed or lost, which generally happens to be at no great distance from the owner; whereas, in the case of wreck, goods may be cast away in remote corners, with which the owner may have little correspondence, and cannot have access to know of the disaster.

The Lords repelled the defence of prescription, and that no living creature was aboard when the boat was cast on shore; and found the libel and property of the goods relevant to be proved *prout de jure*, and the defenders' intromission relevant to be proved by their oaths.

Act. Ja. Graham, jun.

Alt. And. Macdowal.

Clerk, Dalrymple.

Edgar, p. 172.