

They thought fit to know his Majesty's pleasure, and the custom of England, and a letter was written to my Lord Secretary to that purpose. *3^{to}*, The ship in question having carried contraband goods to Holland, and having thereafter made a voyage to France, and there having taken a new loading of salt upon the account of the owners, and being taken upon her coming from France, if it should be found that she might have been seized upon pretence that they had carried the said goods to Holland; it was debated, whether the return should be understood of the immediate voyage from Holland to France, or until they should return to Sweden? And as to this part, the LORDS thought good to take advice of merchants. *In præsentia.*

No 7.

Act. Lockhart & Wedderburn.

Alt. Wallace.

1668. February 4.—THE LORDS found, that in the case mentioned 15th January 1668, until the ship should return to Sweden, it should be esteemed a voyage, *quoad* the effect and point in question.

Dirleton, No 132. p. 55. & No 153. p. 61.

1668. February 7. Captain CONINGSBY against Captain MASTERTOUN.

CAPTAIN Coningsby, captain of a privateer, pursues Captain Mastertoun for his share of two prizes, taken upon the 5th of August 1666, upon two grounds; *imo*, Upon concurrence, because both these privateers being in view of the first prize, did both make up to her, Coningsby being nearest, and that when they came to near distance, within half a mile, Coningsby fired the first gun, Mastertoun the second, and Coningsby the third; at the firing of which, the prize struck sail, which signified her surrender, without more resistance; and albeit Mastertoun being to the windward, came first aboard, yet it was without resistance, the prize having rendered before, by striking sail; Coningsby being within a small distance, came presently up, and demanded his share, according to the proportion of the men and guns of both frigates, being the ordinary rule of division of prizes betwixt concurring frigates. *2do*, Upon the ground of consortship, or society made up betwixt the two Captains, after taking of the first prize, and, by the same consortship, craved the share of a second prize, taken that same day, it having been agreed that both should be sharers in all prizes that should be taken by either, till their victuals were spent. The defender Mastertoun, and his owners, *alleged*, Absolvitor from both these grounds; for, as to the concurrence, it is not relevant, unless the pursuer had alleged that he had a real influence upon the capture; for, as to any guns he shot, they were without a mile's distance, and Mastertoun's frigate, being much lighter and swifter, did oversail Coningsby; and when the prize struck sail, Coningsby was a mile behind, and at the same distance when she was taken; and therefore was nei-

No 8.

Case in which
a common
concern in
prize was
ascertained.

No 8. ther concurrent in the force, nor in the fear. And as to the consortship, it was answered, *first*, That albeit there was a communing of consortship, yet there was no concluded agreement; for Coninsby claimed a share according to men and guns, which Masterton denied, having far fewer men and guns, whereby he that took the prize would have had the smallest share; so that it vanished. *2dly*, Albeit there had been a consortship made by the captain, yet that could not be effectual, until it had been concluded in writ. *3dly*, It could not be effectual in prejudice of the owners, the captain having no power to make any such consortship, either by his office or special commission. The pursuer answered, That his allegiance upon concurrence was most relevant, he being nearer when the chase began, and within a small distance when the prize struck sail, and was taken; and it cannot be doubted but the prize had terror of both. To the *second*, Masters of ships, by their office, may, in many cases, impignorate or sell the ship, or outreik; and captains of privateers, having commission to make prize, have *eo ipso* the power to use the most conducive means, and so to make consortship for that end. And albeit the first prize was taken before the consortship, yet the pursuer having, upon his concurrence, demanded a proportion, conform to his men and guns, and being far stronger than Mastertoun, and able to master him, and his prize both, he might, in such a case, transact and make this copartnery, which was useful to his owners, making them to have the half of the first prize, whereof they would not have fallen above a third or fourth part; so that it was *utiliter gestum et transactum in re dubia*; and whereas it is alleged to have been but a communing, the contrary is evident, by the putting in of Coninsby's men, both in Mastertoun's ship, and in the prize; neither is there any necessity of writ in such transactions made *in pro-cinctu belli, et in alto mari*.

THE LORDS having, before answer, examined Mastertoun and witnesses, *hinc inde*, for clearing the matter of fact, Mastertoun himself did acknowledge the consortship to have been agreed upon, but affirmed, that when they came to subscribe the writ, Coninsby craved a proportion by men and guns, which he refused, without an equal division; and several of the witnesses having deponed, that that difference was referred to the owners, without dissolving the consortship; Mastertoun himself having also deponed, that, in contemplation of the consortship, Coningsby's men were put aboard of him and the prize; and the witnesses having variously deponed anent the distance when the first prize struck sail and was taken;

THE LORDS found a consortship sufficiently proved, and that there was a course as to the first prize; and therefore found Coninsby to have a right to a share, which they found to be the equal share, seeing Mastertoun was most instrumental, and did actually seize upon both prizes.