

No 48. and might be employed even in the very retaking of Gibraltar at this present juncture of affairs.

On the 27th February current, an appeal was entered by the owners of the Catharine against the above sentence.

*Fountainball, v. 2. p. 271.*

1713. February 13.

ROBERT STUART, Merchant in Aberdeen, and Others, *against* Captain WILLIAM COLLIER, Commander of Her Majesty's Ship the Mermaid.

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Found, that the property of money and goods taken by a privateer, and not contained in the ransom-bill, remained still with the original proprietor.

THE ship the Joanna of Aberdeen being taken in her voyage to Virginia, 17th May 1710, by the Pontchertrain, a French privateer, who took four bales and two casks of goods out of her, and 26 guineas out of the skipper's pocket, and detained him prisoner till an agreed ransom of 200 guineas was paid; May 28th, the privateer was taken, as she was still hovering upon the Scottish coast, by Captain Collier, and adjudged prize. Robert Stuart and Company, freighters, and Mr Alexander Inglis, master of the Joanna, pursued Captain Collier, for restitution of the goods and the 26 guineas, with the 200 of ransom found by him on board the privateer; in respect, the privateer had not attained to the absolute property of the money and goods, being re-taken with them before he returned *intra præsidia hostium*, that is, the French ports and harbours, or their fleet, where the captor is reckoned in security, without danger of having the goods recovered from him, *Grotius de Jure Belli et Pacis, Lib. 3. C. 6. § 3. C. 9. § 16. Voet. de Jure militari, C. 5. § 23. Molloy de Jure maritimo, tit. 1. of Ships of War, § 7.*

*Alleged* for the defender; *imo*, There is a difference between goods found aboard a privateer, and money; for money being a fungible, it is impossible to distinguish what species belonged to the privateer, and what to the pursuers. Besides, even as to the change of the property of goods, the pursuers have not only the express words of the civil law against them, *Res ab Hostibus captæ statim fiunt capientium*, § 17. *Instit. De Rerum Divisi.*, but even the authors whom they cite, *sed recentiore jure gentium, inter Europæos populos introductum videmus, ut talia captæ censeantur ubi per horas 24 in potestate hostium fuerint, Grotius, Lib. 3. C. 6. § 3. in fine.* And Zieglerus, in his observations upon that place of Grotius, confutes the opinion, That the dominion of the goods was not changed till they were carried *intra præsidia*. What Grotius says, cap. 9. § 16., is to be understood with consistency to what he advanceth in the fore-cited place, where he treats the subject expressly, *viz. De jure acquirendi bello captæ*, and so doth *Voet. De jure militari, cap. 5. § 23.*, take the matter, joining these two places of Grotius together. A little after, he says, The Dutch made a special regulation different from the common rule, but that doth not alter the general rule. So the naval laws of France provide, That any of their subjects' goods re-taken from their enemies, after having been 24 hours in their hands, shall be good prize. The authority of Molloy

doth also turn upon the authority of the pursuers, and *Loaccenius de Jure maritimo*, Lib. 2. C. 4. N. 4., is also of the same mind. *2do*, There is no shadow of reason for repetition of the money and goods found aboard the privateer, that had been given to him by way of ransom; because, agreements for ransom are lawful transactions, whereby the property of things given in ransom becomes the privateer's immediately, and want not to be declared prize before a Court of Admiralty when carried *intra præsidia*, as other goods do. Both lawyers and casuists agree, that such pactions with enemies ought to be observed and fulfilled even after peace, unless expressly discharged by the treaty: The ransom brieve being an absolute security to the ships ransomed against all the enemies' ships, as well as her that received the ransom; and the pursuers having had the benefit thereof, the ransom which is the price of their ships and goods did belong to the privateer, by the equitable rule of a mutual contract. *3tio*, By the 6th *Anne*, cap. 13, for the better securing the trade of the kingdom, it is statuted, That all prizes taken by any of her Majesty's ships of war or privateers, shall, after condemnation, solely belong to the takers, without their being farther accountable for the same, and be distributed according to certain rules by an agent or factor to be appointed for that end; and the defender had *bona fide* delivered the ship and cargo, after condemnation, to an agent whom they may pursue as accords.

*Replied* for the pursuers; *imo*, To take off the insinuation that money is *res fungibilis*, and so perisheth upon payment, it is offered to be proved, That the individual species of gold partly pillaged, and partly paid to the privateer, were re-taken from him in so much specie of gold; and its having been once in the captain of the privateer's pocket, cannot be a ground to hinder restitution to the owner. The property of a prize seems never transferred to the enemy till it be carried *intra præsidia*, or otherwise secured from recovery out of their hands. As to the citation out of the Institutions of Justinian, lawyers observe, that at that time, the matter of sea-capture was not so well ascertained, as it came afterwards to be by the law of nations, when commerce increased. Besides, the word *statim* there is to be understood *civiliter* when the other requisites concurred, that is when there was no hope of recovery left, which came to be determined by a certain indication. Grotius gives his opinion in law, that moveables *dominum nondum mutarunt*, till they be taken *intra præsidia*; and narrates only matter of fact concerning the 24 hours, as the rule in some places. Zieglerus is indeed of another opinion, but stands therein singular. Voet. again takes notice of and rejects the rule of 24 hours observed in some places, and approves the constitution of Holland, whereby *nulla temporis habita ratione*, a ship recovered from the enemy, before it was carried *intra hostium præsidia*, ought to be restored to the owners for a proportionable reward to the recoverers. Molloy doth plainly reprobate the 24 hours, calling it a new law against the ancient and modern practice of the common law; but is indeed not very distinct betwixt his position, and his cases. The late French constitution,

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making 24 hours the rule, argues, that it was not determined before, at least so doubtful, that it wanted a constitution. And where there is any dubiety or unfixtness, as to the rule, the favour of restitution, and that none of her Majesty's subjects be enriched with the loss of others, ought to predominate. As the pursuers are thus founded in the general argument, so this special circumstance differenceth them from the present case, that the privateer was taken, not *in alto mari*, but hovering upon the Scottish coast, and so, in a manner, within the confines of her Majesty's dominions, who is sovereign of the narrow seas; so that neither hours nor days could state him without the reach of her naval force. *2do*, It doth not alter the case, that the ship was ransomed; for the goods pillaged, and 25 guineas taken out of the skipper's pocket, fall not under the ransom-bill, seeing these are usually taken away when the ship is first seized, and nothing is understood to have been ransomed but what remained unpillaged; unless the defender will prove, that what was pillaged, was expressly ransomed. As particular persons' goods plundered fall not under contribution in the case of *Jactus navis levandæ gratia*, but only what is given by common consent for the safety of the ship, *L. 2. § 3. D. Ad L. Rhod. de Jactu*. And in this case, the ransom paid by bill, would indeed fall upon the owners and freighters proportionably; but the plunder would not, unless specially pactioned. Again, even the proper ransom falls under repetition; because the pursuers consented thereto only *rebus sic stantibus*. And albeit, in the case of *jactus* in a storm, the owners' goods are thrown over with their consent, yet if they be fished up by others, or cast ashore, they must be restored to them; so the pursuers consented to the ransom as *minus malum*, but not irreversibly or absolutely, so as they might not recover *jure belli*, what was thus transferred in a case of necessity. Suppose, instead of paying the ransom, a hostage had been taken till the bill had been answered at Dunkirk, the recapture of the privateer with the hostage aboard, would have exonerated the pursuers from payment. Besides, whatever allies might pretend by the capture, yet what is so recovered by her Majesty's own subjects, who have a common interest in weakening the enemy, and preserving their own, ought, by the rule of fraternity, to be understood done for the benefit of the true owners. The law of nations doth also distinguish betwixt what is thus recovered by private captors, who sail upon their own charges, and her Majesty's ships of war, who (being maintained by the public, and set out for a safeguard to the persons and goods of the state they belong to, to protect their trade,) must restore to the owners what they recover from the enemy, upon payment of the allowed premium, commonly called salvage money, *Voet. Comment. ad Pandect. Tit. de Captiv. et Postlim. § 4.* and his Book *De Jure militari*, and Molloy, in the fore cited place. Now the defender is more particularly bound to restitution; because, he was specially commissioned and sent down by the Admiraty-Board, to protect the Scottish coast, to prevent the enemy's making seizures there; and it were against reason for him to pretend to make benefit of the

subject of his trust. *3tio*, The late statute for encouraging men of war and privateers to be diligent in scouring the coasts, and protecting the trade, gives the captors the whole of any seizures they make; whereas before they had only a proportion, and accounted to the public for the rest; but then that is the whole of what properly was the enemy's, viz. The ship and armature, the proper subject of division formerly betwixt the government and the captors, without prejudice to any subject's right to claim restitution of their own goods.

*Duplied* for the defender; That the privateer was taken within the narrow seas, doth not alter the case; for the reward allowed by law to the Queen's ships, respects chiefly prizes taken upon the coasts of Great Britain, the chief resort of privateers. Privateers would be but a sorry prize, if the goods taken on board them did not belong to the captors; seeing all the world know, that privateers set out very ill furnished, and can have nothing aboard upon our coast, but what they have taken from the Queen's subjects, *Grotius, Lib. 3. C. 9. § 13*, says, *Passim tradunt morum periti res mobiles postliminio non redire. 2da*, Captain Collier's commission to protect the coasts, and defend the merchants from privateers, doth not infer that any thing recovered by him that formerly belonged to the merchants ought to be restored, unless he could suppose what cannot hold, viz. That Captain Collier lay under such an obligation to protect all the merchants from being taken with privateers, that he was liable for their being taken. It is acknowledged, that he was bound to do such diligence as law requires in other commanders of ships; but it will not follow, that, if, without his fault, ships were taken, and the property of the merchant, goods or money, stated in the person of the privateer, by seizure or transaction, such goods or money re-taken by him, should not follow the common fate of goods taken from the enemy. If it were true, that goods re-taken from an enemy can belong to ships of war, all debates about how long goods must be in the possession of the enemy before they become their property, are useless; or at least can bind none but privateers or private parties, which is absurd in the opinion of all lawyers that ever wrote.

THE LORDS found, That the property of the money and goods which were taken from the pursuer by the privateer, and not contained in the ransom-bill, remained still with the pursuer; and therefore that the privateer having continued upon the coast of the kingdom, and been taken there by the defender, as commander of one of her Majesty's ships of war, within the bounds of his cruise, he ought to restore such money and goods to the pursuer. But delayed to advise the debate as to the contents of the ransom-bill.

1714. February 16.—IN the pursuit at the instance of Robert Stuart and others against Captain Collier, the LORDS having advised the debate *supra*, 13th February 1713, as to the ransom-bill, finds, that the 200 guineas remain still with the pursuer.

*Fol. Dic. v. 2. p. 177. Forbes, p. 663. & Forbes, MS. p. 27.*