

APPENDIX.

PART I.

PRIZE.

1801. *July 7.*

THOMAS WAKE AND ATTORNEY, *against* HILLARY BAUERMAN & SON,
AND JACOB RUNKE JACOBS.

NO. 1.

THE *Mary* of Sunderland, belonging to Thomas Wake, was in 1797 captured by a French privateer, carried into Delfziel in Holland, and condemned as a lawful prize by the Commissary of Marine and Commerce appointed by the French Republic, resident at Amsterdam.

This act of jurisdiction was exercised by him, under authority of the law of the 8th Floreal of the 4th year of the French Republic, (28th April 1796), authorising the consuls appointed by the Republic to decide upon the validity of prizes brought, by French ships, into the ports of their residence.

The officer designed Commissary of Marine and Commerce in Holland, exercised all the functions of consul, and had been in the habit of condemning prizes under the law above mentioned.

The *Mary* was afterwards exposed to public sale, and purchased by Hillary Bauerman and Son, merchants in Embden, subjects of Prussia. She was by them named the *Stettin* of Embden, and was in their employment till 1799, when she sailed from Rotterdam with a cargo for the Frith of Forth, but was cleared out nominally for Bergen in Norway.

In the mouth of the Frith of Forth, she was seized by Lieutenant O'Neal, of the *Prince de Cobourg* cutter, and brought up to Leith, on suspicion of being enemy's property.

A sentence of condemnation is necessary to prevent the former owner of a captured vessel from recovering her out of the hands of a neutral purchaser. A sentence pronounced by a French Commissary of Marine and Commerce re-

NO. 1. Mr O'Neal raised an action before the Judge-Admiral, for having the vessel and cargo condemned. In the course of the action, he became satisfied that the vessel was Prussian property, and not subject to seizure. But Mr Wake having discovered that the Stettin had formerly been the Mary of Sunderland, claimed her as his property, upon the ground that no legal sentence of condemnation had been pronounced against her. The Judge-Admiral "repelled the preliminary objection to the form of the decree of condemnation," (alluding to the designation of Commissary, instead of Consul, held by the officer who condemned the vessel), "and found, That as the French and Batavian nations are leagued together in a state of avowed hostility and warfare against Great Britain, Thomas Wake and attorney, the claimants, are not entitled, *jure gentium*, to challenge the said decree of condemnation."

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A suspension and reduction of this decree were reported by the Lord Ordinary on memorials. Parties were heard in presence, and additional memorials were ordered. Mr Wake

Pleaded: *imo*, By the *jus gentium*, as recognised among the civilized nations of modern Europe, a sentence of condemnation pronounced by a court of Admiralty in the country of the captor, is necessary to transfer the property of a captured vessel; or, at least, is held to be evidence of the legality of the capture indispensable to put third parties *in bona fide* to purchase. This appears from various treatises; Douglas's Reports, p. 613., *Le Caur versus Eden*, 7th February 1781; *Collect. of Marine Treaties*, Lond. 1779, p. 31. 35. 56. 98. 161. 278.; *Coll. of Treaties from 1688 to 1771*, vol. i. p. 7. Lond. 1772, p. 9. 157.; *Holliday's Life of Lord Mansfield*, p. 429.; from the works of systematic writers; *Il Consolato del Mare*; Valin. *Comm.* vol. i. 4to, pref. p. 10.; *Il Cons. del Mare Venice*, 1637, c. 287.; *Us et Coustumes de la Mer Clierac*, 1661, part iii. ar. 21. ar. 36.; *Goth. Cramer Strykii dissert. jur.* vol. i. cap. iii. § 71. 73.; *Colerus*, part i. c. 3. § 14.; *Hein. Exerc. de Nav. Comm.* Hein. op. vol. ii. p. 338. and 360. c. 1. § 20.; ch. ii. § 16, 17, 18, 19.; *Bouchaud, Theorie des Traités de Commerce entre les nations*, Paris, 1777; and from the practice of different courts of Admiralty; *Balfour Pract.* p. 635., *Sea laws of Scotland*, c. 107, 108, 109.; *King, Tractatus Legum et Consuetudinum Navaliu*, MS. *Advocates' Library*; *Forbes*, 13th February 1713, *Steuart contra Collier*; *Forbes's MS.* 16th February 1714, *inter eosdem*; (No. 49. p. 11940.) *Stair*, b. ii. tit. 2. § 4. 19.; *Burrows Reports*, vol. ii. p. 693, 694.; 13th Geo. II. ch. 4.; 29th Geo. II. ch. 34.; 19th Geo. III. ch. 67.; 21st Geo. III. ch. 15.; 33d Geo. III. ch. 66.; *Byhnershoek, quaestiones juris publici*, cap. 4, 5.; *Ordonnance of Louis XIV.* art. iii. tit. 2. b. 1.; *Valin*, vol. i. p. 127., vol. ii. p. 237. 293. 323.; *French Council of Prizes*, January 2. 1695, Oc-

tober 17. 1705, June 14. 1710; Royal edict, 5th November 1748; Clierac NO. 1. Us et Coustumes de la Mer, p. iii. ar. 34.

Many circumstances which do not occur in the case of capture by land, have led to the establishment of courts to ascertain the validity of prizes by sea. In the case of invasion by land, the line of enemy's property is distinctly marked. Allies and neutrals seldom have property within it. The alarm of invasion usually gives time to remove personal property, and which, indeed, is at any rate generally respected. But in the case of property in ships, and which of all captures is, the most frequent, the resolution of the right owner is permitted, for the purpose of weakening the enemy; and there is no marked distinction between hostile and other property. The ship and cargo may belong to neutrals. Enemies assume the appearance of neutrals. Neutrals carry contraband goods, or infringe on the laws of blockade. Captures, too, have been permitted by privateers, as well as by national ships of war, and it becomes necessary, therefore, to check piracy, and other abuses. The capture may not even be legal, though the property belong to an enemy. It may have been made in an allied or neutral port, or within the bounds of a fortress.

All these are frequently points of difficult investigation. If the capture be illegal, no length of possession will transfer the property; and the sentence of a court being the best criterion for distinguishing legal from illegal capture, usage has made it the only legal title of possession, and admissible evidence of it, and most justly, as such sentence alone combines every requisite for the transference of property,—the complete cessation of hope of recovery on the part of the former owner,—complete power over the subject by the captor,—a legal ascertainment of his right,—and a definite rule for third parties to go by.

The act of capture thus gives merely the exclusive privilege of appropriation, which the sentence carries into effect, and the sentence is as essential for transferring the property of a vessel by capture, as a written vendition is in the case of an ordinary sale; Valin, vol. i. p. 602, 603.; 26th Geo. III. chap. 16.; Mably, Droit public de l'Europe fonde sur les traités, ch. 11.; Robinson's Adm. Rep. vol. i. p. 139.; Valin, Comm. vol. ii. p. 251.; Regulation of Louis XVI., 21st July 1778, 9th May 1793.

2do, The alleged sentence of condemnation in the present case was illegal. Questions of prize are always regulated by courts of Admiralty established within the territory of the country whose subject has made the capture, and when the vessel is brought within its jurisdiction. This appears from the authorities formerly quoted; and further, from Bynkershoek, Quæst. jur. pub. cap. 5.; Molloy, de jure Maritimo et Navali, sixth edit. 1707, b. i. c. 1. § 14.; b. i. ch. 2. § 25., ch. 4. § 15.; Park on Insurance, fourth edit.

NO. 1. 1800, p. 333.; State Paper by Lord Mansfield, 1753; Lettres familiares, 45., Oeuvres de Montesq. 1796, vol. v. p. 437.

A sentence of condemnation by a court of Admiralty of a neutral nation, is a breach of neutrality, and a sentence passed by an officer appointed by a foreign state, resident in the country of an ally, is an innovation unfavourable to the original owner, which ought to be resisted.

Jurisdiction as to cases of prize, was not given even to the provincial courts of Admiralty by the former French government.

Commercial consuls are not qualified to decide such questions, and no appeal can lie from their judgments to a superior court in the country of their residence, as is the case when the sentence is pronounced by an ordinary court of Admiralty.

The decree, therefore, being contrary to the *jus gentium*, the Court of Session is entitled to open it up; 27th June 1800, Henderson, Riddel and Company, against Lothian, (APPENDIX, PART I. *voce* INSURANCE, No. 4.) And the title of the purchaser being defective, he cannot be listened to in urging any plea of equity in opposition to the right of the former owner; Robinson's Rep. p. 322.

Answered: *imo*, The transference of property *occupatione bellica*, has been recognised from the earliest periods. No process at law is necessary to transfer property in land taken in war. Some authors, indeed, require, that the possession should be firm and complete; Grotius, de jure, &c. lib. iii. c. 6. § 4., lib. iii. c. 13. § 198. But this relates properly not to the transference of property, but to the security of the tenure; Paulus, lib. 12. tit. 2. l. 1. § 1.; Voet, de jure militari, c. 5. § 11.

The same rule holds more clearly as to moveables taken on land; Xenophon, De Inst. Cyri; Joshua, ch. xxii. ver. 7.; Deut. ch. xx. ver. 12, 13, 14.; Vinnius, ad Inst. lib. ii. § 17.; Puffendorff, lib. iv. c. 6. § 12., lib. viii. c. 6. § 20.; Douglas's Reports, 614., Lindo against Rodney and another; Voet, ff. l. 49. t. 15. § 3.; and is equally applicable to captures by sea, though this has been modified in practice, by rules introduced for ascertaining the proper evidence of the *occupatio bellica*.

Some authors require *deductio intra præsidia*; Bynkershoek, Quæstiones juris publici, lib. i. c. 4, 5.; Molloy, de jure maritimo et navali, b. i. c. 1. § 12, 13. 15.; Consolato de Mare di Navi pigliata et recuperata.

Grotius and others think, that it is enough that the subject be twenty-four hours in the possession of the captor; Grotius, de jure belli lib. iii. c. 6. § 3.; Vattel, b. iii. c. 13. § 196.; Marine Law of France, c. 34. § 8.

Both sets of authors agree, that the property is transferred by possession alone. They only differ in opinion as to what shall be considered evidence of secure and complete possession.

Prize courts have been established in the country of the captor, to try NO. 1. questions which may occur with neutrals, or, in the case of recapture, between the former owner and recaptor; Douglas's Reports, p. 614.

All parties interested are called as parties in the process for condemning the vessel; but there is no instance of an enemy appearing; and his appearance in that character would, of itself, be sufficient to condemn the vessel. The ship may be proved to be neutral, or it may be proved that there was no war between the alleged enemies at the date of the capture; but there is no instance of restitution to an enemy.

The treaties quoted on the other side, regulate questions between nations at peace with each other, in the event of one of them going to war with a third, but do not apply to a case like the present, of seizure in possession of a neutral who has acquired at a public sale, under the authority of the existing government of a belligerent state.

In judging of the English authorities, it is necessary to distinguish questions between the former owner, and a recaptor of the same nation, from questions between the former owner and a neutral purchaser from the enemy. The former are regulated by 13th George II. c. 4. and subsequent statutes. On the latter, the general current of English authority is against the original owner; Works of Sir Leoline Jenkins, vol. ii. p. 770.; Blackstone, vol. ii. p. 401.; Case of St Jago, decided by the Lords Commissioners of Appeal, 28th January 1795. The same appears from the Scotch authorities, Balfour's Sea Laws, Pract. p. 635-638.; 23d July 1761, Benton against Brink, No. 51. p. 11949.; and the result of the whole seems to be, that though it has become customary, it is not essentially necessary to condemn vessels in order to transfer the property of them.

2do, Although a sentence of condemnation were necessary, the one here pronounced must be held sufficient. It was pronounced by the existing government of the country, and the purchase made *bond fide* on a reliance on it.

Holland is at present substantially a province of France, and the conquering country has right to regulate the courts within it.

If, again, Holland is to be considered an independent state, it is entitled to regulate its own courts, and to place the jurisdiction in whatever hands are judged most expedient. The Parliament of Great Britain might abolish the present courts of Admiralty, and form a court upon a different principle. There is nothing even to prevent a country from delegating in part the power of naming judges to another. The conservator of Scotch privileges, at Campvere was an instance of a delegation of this sort, in favour of Scotland. Nor is there any thing in the law of nations which disqualifies consuls from deciding questions of prize, and, from the acquiescence of the

NO. 1. Dutch Government, the consuls named by France became substantially of their own appointment.

The validity of the condemnation, even in a neutral port, is supported by some authorities, and the propriety of sustaining it is doubtful only in consequence of its being a breach of neutrality; Vattel, b. iii. c. 7. § 132., 23d July 1761, Benton against Brink; No. 51. p. 11949.; 6th July 1764, Hunter against Baron Count de Bothmar, No. 52. p. 11957., whereas the vessel here was condemned in an enemy's port.

The doctrine on the other side would bear extremely hard upon neutral purchasers.

At advising the memorials, a doubt was stated on the Bench as to the jurisdiction of the Judge-Admiral in questions of prize; but minutes were lodged, waving all objection on this account, as done in the House of Lords, 30th January 1783, Hendricks against Cunninghame; No. 53. p. 11959.

On the merits, the Judges were in general clear, that by modern practice, a sentence of condemnation is necessary to annul the right of the former owner; but they were much divided in opinion as to the validity of the sentence in this case pronounced. Several Judges thought, that the jurisdiction exercised by the French commissary within the territory of Holland, being contrary to the law of nations, ought not to be regarded; but a majority thought, that Holland was substantially a province of France, and that, the appointment and jurisdiction of the commissary having been acquiesced in, and recognized by the Government of Holland, his judgments must be supported.

The Lords, on considering the pleadings, and particularly "the minutes for the parties, passing from all objections to the competency of the jurisdiction of the Admiral, and of this Court, sustained the defences pleaded for Hilary Bauerman and Son, and Jacob Runke Jacobs, assolizied them from the conclusions of the action of reduction; and in the suspension, found the letters orderly proceeded."

Lord Ordinary, *Craig.*

Act. Lord Advocate *Hope, Reddie.*

Alt. Solicitor-General

Blair, Ar. Campbell, W. Erskine.

Clerk, *Home.*

D. D.

Fac. Coll. No. 246. p. 556.