

1668. 24. February 24.

Captain MASTERTON *against* STRANGERS of Ostend.

CAPTAIN MASTERTON having taken a ship of Ostend prize, obtained her adjudged before Ludquharn, Admiral-depute of Peterhead. The Strangers pursued reduction before the High Admiral at Leith, and obtained sentence, because the decret at Peterhead, and warrants thereof, were not produced; by which sentence there were decerned 16,000 dollars for the ship and loading, which was fish, taken in Iceland. Masterton raises reduction of the High Admiral's decret, on this ground, that it was merely in absence, and proceeded without valuing the ship or goods, and offered to restore the ship, or value, and what he got for the fish, which was but a dollar the barrel, in regard they spoiled the time of the dependence of the plea; and craved allowance of what he paid to the King, being the fifteenth part, and the tenth part to the Admiral; and *alleged*, he could be liable for no more nor *quantum lucratus est*, seeing he did *bona fide* bring up this ship, finding aboard a pass from the magistrates of Ostend, which was defective, not conform to the articles of treaty with the King of Spain, in so far as it bore no mention of the sailors, that they were the King of Spain's subjects, and the sailors did depone that they did belong to Zuyder-zee, under the states of Holland; and albeit now, *ex post facto*, he is informed that they did reside sometime in Ostend, yet he being *in bona fide*, can be liable in no more than what he got. It was *answered* for the Strangers, That it being acknowledged, that the goods or persons were free, it cannot be denied in justice to restore them to their ship, and true value of their goods, that they might have made thereof in Ostend, and not the price thereof that the Captain made; for seeing he acknowledges that they were corrupted for want of salt, it was his own fault, for he should have raised the fish in the barrels, and salted them again; and as for the King, and Admiral's part, there is no reason to allow the same, and put the Strangers to a process against the King and Admiral; but if it be just he have restitution of his goods, he must have it of his whole goods, at the same avails as he could have sold them, with his damage and interest; and any pretence of *bona fides*, can operate no more but to free him from a spuilzie, and the pursuer's oath *in litem*, for the value and profits, and to restrict the process to wrongous intromission, to the true prices, and true damages. It was *answered* for the Captain, That seeing he was *in bona fide* to seize upon the ship, and seeing he did obtain decret from the Judge Ordinary, he was also *in bona fide* to sell and roup the goods, as they gave at Peterhead; and it does not appear that there was salt there for salting them again, nor men that had skill, nor could they meddle with them till decret was pronounced, which was a long time; they were also *in bona fide* to pay the King and Admiral, neither are the King's officer nor Admiral cited, but only the Admiral-depute.

No 9.

To what extent privateer liable, if the decree adjudging prize be reduced?

No 9.

THE LORDS found, That seeing the pass did not bear the sailors to be the King of Spain's subjects, conform to the articles, that the Captain was *in bona fide* to bring her up, and found him free of any damages, and found him liable for the price of the ship, and fish, as they might have been sold at Peterhead by rousing, as use is, if they had been preserved; and found him obliged to have preserved them; and repelled the allegiance as to the tenth and fifteenth, but prejudice to the Captain and owners to seek repetition thereof; and found no necessity to cite the Admiral, his depute being cited.

*Stair, v. 1. p. 532.*

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1668. February 25. MERCHANTS OF HAMBURGH against Captain DISHINGTON.

No 10.

To what extent captor liable, where probable grounds of seizure?

CAPTAIN DISHINGTON having taken a merchant ship of Hamburg, and obtained her to be declared prize, the Hamburgers raise reduction on this reason, that the only ground of declaring her prize, was, because she carried contraband goods towards the King of Denmark's dominions, being then in enmity with the King, which was no relevant ground, because it is evident the ship was seized a month before the proclamation of war against the Danes. It was *answered* for the Captain, that it is not the proclamation of war that makes the war, for the King's declaration is only to give an account to the world upon what account the King had made war with the Danes; and it is notour that there were frequent acts of hostility, both by the Danes, and against the Danes, before this capture. It was *answered* for the Strangers, That public denunciation makes only a public and lawful war; but whatever might have been done against the Danes, the Hamburgers (being the King's allies and friends) were not obliged to know the same, until such time that the proclamation of war might come to their ears, so that they have done no fault, being *in bona fide* to continue their trade until the war was made public to the world. It was *answered* for the Captain, That he was *in optima fide* to execute the King's commission, bearing expressly to make prize of all carrying contraband goods to the Danes, and therefore he could not be decerned as *prado*, but the most can be decerned against him, (though the pursuer should be found to have been *in bona fide* to trade with the Danes) is to restore *in quantum lucratus est*; but so it is that he made no profit, for after the capture, he being pursued at sea by the enemy, was forced to leave the ship in question, being loaded by him, whereby she was driven ashore and suffered shipwreck.

THE LORDS found that the Hamburgers were *in bona fide* to continue their trade with Denmark, and to carry to them contraband goods at the time of the seizure, and therefore reduced the Admiral's decret, as to the restitution of the ship and goods, or what profit the defender made of them, but for no higher value nor damages, in respect the Captain was *in bona fide* to execute the