

No 46. upon the skipper; and the said interlocutor being since reversed and taken away, (as said is) it was neither needful nor competent until now, to offer to prove *positive* the said allegiance.

THE LORDS, notwithstanding, found, by plurality, and by one vote only, That the allegiance not competent; the President being of a contrary opinion, but being carried by one vote before it came to him, he could not vote.

Je me suis estendu trop sur cet arrest, a cause que les plus habiles et scavans des Senateurs opinoyent pour les estrangers, et maistre du navire; et aucuns des ceux qui estoyent de l'autre coste, estoyent parens ou aliez de Luthquharne, qui estoyt partie; et gaignoit par l'arrest 2000 livres Sterl. ou environ; et l'emportoit par une voix seulement.

Dirleton, No 207. p. 93. & No 208. p. 95.

1677. February 15. The KING'S ADVOCATE *against* RANKIN.

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A frigate in the King's pay having defeated a privateer which had made prize of a French ship; and another ship in the mean time seizing upon the French ship, it was found that this capture was injurious, otherwise than to assist the first attacker, unless it were proved that the French ship would have escaped, if not thus seized.

THE KING'S fleet being at sea, under the command of Prince Rupert, he commanded out the Nightingale frigate of 36 guns, commanded by Captain Price, and a French galliot, to cruise and wait to discover any of the Dutch fleet, or men of war, and they did rencounter a Dutch privateer sailing towards Holland with three prizes; whereupon the Nightingale gave chase to the Dutch privateer, and, after she fled, took two of the prizes, and while he was pursuing the Dutch privateer, the French galliot pursued the third prize, called the Tortoise, a French ship. In the mean time, Captain Rankin, a Scottish privateer, attacked the Tortoise, and made her strike sail; but because the French galliot was under Dutch colours, he forbare to board the Tortoise till the galliot came up, and discovered that he was not an enemy, and then Rankin boarded the Tortoise, and put aboard thereof part of his crew, and brought the master, imput by the Dutch privateer, with the rest of the Dutch aboard Rankin's frigate; whereupon the Nightingale came up, and was about the distance of a cannon shot, when Rankin boarded the Tortoise, which he brought up to Leith, and consigned the same in the hands of Sir James Stansfield and Hooper, having commission from the commissioners of the Admiralty of England to manage prizes that should be brought up into Scotland, but had not power to determine as judges; as neither had the principal commissioners of prizes, but in the second instance, by review of the sentences of the ordinary Judges of Admiralty. Captain Price left a declaration under his hand, bearing, That while he was in pursuit of the Dutch privateer, having in possession three prizes, Rankin did attack the Tortoise, in prosecution whereof, the French galliot was about two miles distant, but that before Rankin boarded, the captain came up, and was about a gun-shot distant; and because Rankin and the galliot contended for the property, he brought the ship, and men aboard, with some

of his own to Leith, and consigned the same to the King's sub-commissioners there. Rankin did raise a process of adjudication of the Tortoise as prize, before the Judges of the Admiralty of Scotland, and cited the Dutch, who were put aboard by the Dutch privateer, who had removed all the French out of the ship. In which process, he libelled, that the Tortoise having become prize to a Dutch privateer, being a French ship, and long in the Dutch possession, and thereby *jure belli* become his property, he had, by capture, attained possession, and the right of his prize, now recovered from the Dutch. In which process, Stansfield and Hooper, sub-commissioners for prizes, residing at Leith, appeared, and declined the Admiral's jurisdiction, and did also propound defences in the cause, viz. That the Tortoise belonged to the King, as being the prize of the Nightingale and French galliot, in the public service of the king, who having defeated the Dutch privateer, who had the right and possession of these prizes, and being in prosecution thereof, had right thereto; and the unwarrantable capture of the privateer could not give, or continue his right of property. The Judge of the Admiralty having examined several witnesses before answer, viz. The Dutch input by the Dutch privateer aboard the Tortoise, and three of the privateer's company, he found it proved, that Rankin had taken this ship, and unless the sub-commissioners would offer to prove, that the King's frigate would probably have taken her, though Rankin had not stopped her, which they do not undertake to prove, but protested, that the King having called for an account of that process, and the same being sent to him by the duplicates, the Admiral could not proceed till his Majesty's pleasure were known; yet the Admiral declared in the decret, that having sent the duplicates a year before, to the Lord Secretary, without any stop to his procedure by the King, he did therefore proceed, and decern as aforesaid. This matter being represented to the King, and the case stated by the Judge of the Admiralty of England, the Frenchman, who was master of the Tortoise, when she was taken by the Dutch privateer, was examined there, and was transmitted by the Lord Secretary, with an order for his Majesty's Advocate to insist for the recovery of that ship, who thereupon raised reduction of the Admiral's decret, on these reasons; 1st, That the decret was null, *ob defectum jurisdictionis*, because this ship being consigned to the English commissioners at Leith, could only be adjudged by the Commissioners of Admiralty, viz. the Judges and Commissioners of the Admiralty of England, the King having taken and possessed this prize by an English frigate, and so as King of England only; 2^{do}, The decret is null, *ob defectum citationis*, because neither the King's officers of state, nor his Commissioners of prizes were cited, though they were in possession of the ship consigned by Captain Price, as said is; 3^{tio}, The decret was unjust, sustaining this irrelevant ground of adjudication, that the privateer's seizure gave the right of property, unless it were proved, that the King's frigates were in a distance, and in condition probable to have reached this prize; whereas, in justice, he ought to have found, that Rankin, having but a small frigate of three guns, being in no capacity to defeat the

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Dutch privateer, who possessed her prizes, but the privateer being defeated by the King's own frigate, *jure belli quæ a victo possidentur cedunt victori*, and therefore, though the King's frigates had not then prosecuted this prize, yet the privateer could not detain her when required; 4^{to}, The King's frigates had not only overcome the enemy, but had possessed two of the prizes, and were within view and prosecution of the third, which is in question; whereby they had right, *jure præventionis*, unless they had ceased to prosecute the capture; so that occupation by the privateer was not lawful, but injurious, and therefore could not give or retain the right of property to him; for it is certain, that all who serve in any public war, do acquire *bello capto*, not to themselves, but to their masters, and ought to be content with their wages, except what is granted or permitted to them, such as the clothes and baggage of prisoners of war, which are allowed to soldiers *in bello*, to encourage them to take prisoners, whose lives they may save; and so privateers have for their pay, their purchase by their commission; but the King's frigates under his pay, or his auxiliaries, have no private right; but their prizes belong to the king, for whom they fight. It was answered for the privateer defender, to the first reason of reduction, that the Admiral of Scotland hath jurisdiction to determine all prizes that are actually in Scotland, *ratione loci*; but suppose he had not, the English commissioners have prorogated his jurisdiction, by compearing and proponing defences in the cause, *et primus actus judicii est judicis approbatorius*, which doth also answer the second reason upon want of citation; for the Commissioners compearing, and not pleading the want of citation, nor insisting upon their declinator, but insisting upon defences in the cause, any Judge ordinary, though otherways wanting jurisdiction, as to the matter in question, might proceed to determine the cause upon the defences proponed, and these defences, with adhering to his declinator, was *protestatio contraria facto*, for proponing a defence *in causa* is inconsistent with declinators. THE LORDS repelled these reasons of reduction, in respect of the defences upon the Commissioners' compearing, and proponing defences *in causa*, instructed by the decret of the Admiral. And as to the main reason founded on the point of right, the defender answered, That the title of property was by the law of all nations fixed, and not left to conjecture or expectation, but is perfected by occupation or possession, whereof the most general rule is, *quod est nullius fit primi occupantis*; and the next is, *bello capta cedunt capienti*. And, therefore, if the ship in question having been first taken, and peaceably possess by a Dutch privateer, who became proprietor *jure belli*, and having escaped from him, and but in the attempt to recover liberty, the capture by the Scottish privateer, by the same right of war, established the property in him; neither was his capture injurious, because both he and the other frigates being in the same public service, it is not the expectation or prosecution, but the capture that gives the right; for which there is a clear instance in the institutions of the Roman law, *De rerum dominio*, that he who pursues a wild beast, though he wound it, acquires not the property thereof, except he take it; and the law

gives that reason, that many things may intervene that might hinder his actual occupation of it; so here the frigate's pretence is far less, never having been within cannon-shot before Rankin's capture; and many things might have intervened to hinder the effect of his prosecution, as a calm, a contrary wind, a leak, or a Dutch man of war; and that ground is most falacious; for, if an army or fleet were defeated, it were absurd to pretend, that the first prosecution should make a posterior prosecution to be vitious and unwarrantable, but the swifter and stronger are ever preferred; and therefore the privateer might very well pursue the common enemy, and take what he could sieze, without any injury but his duty; *2do*, By the witnesses, it is evident, that there was no probability of the King's own frigates reaching the Tortoise, if Rankin had not attacked her, and made her strike sail, otherwise she would certainly have escaped; for Captain Price, in his declaration, acknowledges, " That when Rankin took the ship, he was in pursuit of the Dutch privateer, and that the French galliot was two miles off; and the other witnesses, viz. he who had been the privateer's lieutenant, and the master, a mariner, deponed, that the privateer made the Tortoise strike sail about mid-day; and it was four or five hours after before he boarded her, waiting to know whether the French galliot was an enemy or not; and that the French galliot was six or seven miles to the lee-ward, and a slow-sailing ship; and the Nightingale was in pursuit of the Dutch privateer, and the other prizes. It was replied, for the pursuer, That albeit occupation and possession do accomplish property, yet it must be lawful, and not injurious, for that injury would hinder or resolve the property, and force the injurer to restore, which is as known a principle, as that possession is requisite to property; and the case of a defeated fleet or army meets not; for there all, by custom of war, are invited and allowed to prevene and out-go one another, which is not so in particular prizes, which may be all reached; neither doth the brockard of the Roman law take place, but it is redargued by the commentators and customs of nations, as Vinnius and others remark on the place cited; so that nothing could be relevant for the privateer but the certainty of the escape of the prize, which is not proven, but only by the privateer's own crew, who got share of the booty. It was duplied, That long before they were adduced as witnesses, they were dismissed, and out of the privateer's service, and had received their wages, and could neither tine nor win in the cause.

THE LORDS found, that the frigate under the King's pay, having defeated the Dutch privateer, who was possessed of the prize in question, was in view and prosecution thereof; that the privateer's capture and possession was injurious, otherways than to assist the first attacter, unless it had been proven that the prize would have escaped, if it had not been stopped and forced to strike sail to the Scottish priyateer; but by the documents and witnesses adduced before the Admiral, and reviewed by the Lords, that was found proven;—yet, because the most special and pregnant witnesses had been in the privateer's company, he was appointed to instruct that they were out of his service, and unconcerned in

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Fol. Dic. v. 2. p. 177. Stair, v. 2. p. 507.

. Gosford reports this case :

IN a reduction of a decret of the Admiral Court, whereby a ship called the Tortoise was adjudged lawful prize to Captain Rankin, a privateer, and his owners, at the instance of the King's Advocate, and Sir James Stanfield, and the rest of the King's sub-commissioners for prize goods, the reasons libelled were, first, that the decret was null, *ex defectu citationis*, the King's officers not being called ; *2do*, *Ex defectu jurisdictionis*, the prize ship being taken by the Nightingale, a King's man of war. in England, and in his possession. It was answered to these, That Captain Rankin, being a Scots privateer, by the King's commission, recorded here in Scotland, having first taken, and by his own men having brought up the prize to Leith, in this pursuit before the Admiral, to declare her lawful prize, he was not obliged to call the King's commissioners, and the judicatory was most competent ; but the English sub-commissioners did appear for their interest, and proponed declinator ; and, after it was repelled, did continue to insist, by proponing defences by their procurators, and leading probation by witnesses. THE LORDS did assoilzie from these two reasons, in respect of the answer. Thereafter they did insist upon a third and great reason, which occasioned much debate, viz. That the Admiral committed iniquity, because the prize belonging to the King, *jure occupationis*, being taken by the Nightingale, his own man of war, in so far as before she was intercepted by Rankin, he had that prize still in his sight ; having chased the Dutch privateer, that guarded her, and other two prizes, which were both taken by the Nightingale ; and albeit Rankin at that time had possessed himself, and boarded the prize in question, yet the Nightingale did come up immediately after, and put his men aboard the Tortoise, brought her up to Leith, and consigned her in the hands of the King's sub-commissioners, with the other two prizes he had taken at that time, all of them for the King's use, and so had undoubted right to crave that the Tortoise should be declared his prize, which was well founded in law, upon these reasons ; *1mo*, That the Captain of the Nightingale having first pursued all these prizes, and the Dutch man of war, which was guard, and when he was *in cursu diligentia*, Captain Rankin could not, to his prejudice, interrupt or take any of these prizes, as is clear by these instances, *in fera vulnerata*, which belong to the first pursuer that gives the wound, and not thereafter to any who seizes upon her ; and *in inventione thesauri*, where the first discovery hath right, albeit thereafter another come in, and out run him, and first get the treasure : And as to the subject, *de acquirendo rerum dominio*, Inst. lib. 2. et *de rerum divisione*, and the parallel places, many lawyers, who comment thereupon, all of them agree, that *in fera vulnerata si vulnus sit lethiferum, et vulnerans bestiam prosequitur* ; albeit

the beast wounded be intercepted by another, yet pertinet ad vulnerantem ; far more in this case, where the King's man of war did not only subdue the guard of the prize, but was in pursuit of her when she was apprehended by Rankin ; and, farther, it is of a common concernment, that the King's interest, who is the chief maintainer of the wars, should not be laid in the balance with any private person, who came in by accident, and did only intercept a ship which could not have escaped. It was answered, for the privateer, That, notwithstanding the decret given in his favours was most just, and could not be reduced, *imo*, Because, by the common law, *capta bello fiunt capientium*, and lawyer resemble *bona hostium*, to those things, *quæ sunt nullius et fiunt primi occupantis*, as is clear, lege 51 D. De acquirendo rerum dominio, where it is clear that *Res hostiles non publica sed occupantium fiunt* ; and Vinnius, who comments upon that title, is clear that *non sufficet spes habere nisi manu apprehendamus* ; so that it is not enough to be first in pursuit ; and Grotius, De Jure Belli, lib. 3. cap. 6. et 12 doth expressly make this distinction, that *res hostiles quæ sunt mobiles et se moventes*, are either taken by those that are in *ministerio publico*, and under public pay, or they are taken by such as go to war *privatis sumptibus* ; in which case not only the prisoners of war, but all that belonged to them, such as armour or money, belongs to the common soldiers that apprehend them ; and therefore Captain Rankin, having commission from the King to take all enemies, and serving in that war upon his own charges and his owners' only, and being *primus occupans*, by uncontroverted law the prize did belong to him ; *2do*, As he hath right, not only by maritime law, and by the law of nations, so it will appear, upon probation, that this prize might certainly have escaped ; for when she was taken, she was within fifteen leagues of the coast of Holland, and far without cannon-shot of the King's man of war, and therefore falls not in the case of *fera vulnerata*. THE LORDS, before answer, having caused read all the depositions of the witnesses taken before the Admiral, as likewise those taken aboard of the King's man of war, and the Dutch sailors who were taken in the prize, who were, for the most part, contrary one to another, they did at last find that they did most agree in that point, that when the prize was taken by Captain Rankin, boarded and manned with his men, she was not within cannon-shot of the King's man of war, but was at so great a distance, and so near to the coast of Holland, that she might have escaped, and that it was uncertain if ever she might have been taken by the man of war ; and that Rankin, when he took the said prize, knew nothing of the man of war's pursuit, not having been engaged, but accidentally having rencountered the Tortoise, making for land, he did board her, so that there was no interception, which could put him *in mala fide*. As, likewise, finding by the Admiral's decret, that it was offered to the King's man of war his probation, that it was impossible she could escape, albeit she had not been taken by Rankin, which offer the master of the King's man of war, and sub-commissioners, did altogether refuse to be burdened with ; therefore, by the plurality of votes,

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it was found, That the prize belonged to Captain Rankin and his owners, as having the King's commission, and first apprehending the prize in question, which might have escaped; but it being objected against Rankin's witnesses, that most of them were his own men, under his pay, and so might win or lose in the cause; for which it being answered, that at the time of their deponing they were out of his service, and were hired by other shippers, and were fully paid of their wages, having no interest in any prize that should be taken; the LORDS, before sentence to be extracted, ordained a mutual probation.

Gosford, MS. No 966. p. 640.

1705. February 23.

The OWNERS of the Ship, The CATHARINE of Rotterdam, and GILBERT STEWART, their Factor, *against* CAPTAIN GORDON and The Officers of State.

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A ship loaded in an enemy's dominions, and having double documents aboard, though the property of the goods belonged to the subjects of allies, adjudged prize by the Admiral's decree.

CAPTAIN GORDON, commander of one of her Majesty's frigates, having seized the Catharine of Rotterdam, obtained a decret of the High Court of Admiralty, adjudging the same as prize; and the words of the interlocutor, after admitting probation, are these: "The Judge found it proven, that the ship and cargo libelled, belonged to the subjects of the United Provinces; that the cargo was put aboard in the dominions belonging to Spain, (which is at present at war with this kingdom); and also found it proven, that double documents were granted in favours of the ship and cargo, and found aboard, and therefore adjudged the ship and cargo to be lawful prize."

The owners having raised reduction of the Admiral's decret, upon iniquity, they insist on these grounds; *1mo*, The ship and cargo are found to belong to the subjects of the United Provinces, her Majesty's allies; *2do*, Double documents may presume a covered trade by enemies; but where the property is clear, the presumption is taken off; and more especially where the double documents are not for covering and disguising the property of the ship and cargo, but only of the port to which her course is directed; as in this case the skipper was instructed with documents, as if the ship had been outward bound to Lisbon, and other documents as if she were bound to the Canaries; and so, in her return, she is instructed with bills of loading as from the Madeiras, and also with other bills of loading as from the Canaries, which were to secure her from trouble from the allies, in the war, which is lawful and necessary, and practised by all that are engaged in the war; and whatever may be the effect of double documents in neuters, who need not colour their trade, yet nothing can be founded on double documents, in favours of allies, where the property is acknowledged; *3tio*, Neither was it relevant that the loading was put aboard at the Canaries, belonging to Spain, because her Majesty is in alliance with King Charles of Spain; and though the Duke of Anjou assumes that title, and has seized and possessed the dominions, that ought not to prejudice private persons in the do-