

## C A P T I V E.

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1546. July 31. JOHN HOME of Blackader *against* NINIAN CHERNSIDE.

**G**IF any of our Soverane Lordis liegis be taken be his enemies, and haldin be them in captivitie or prisoner, he may not be callit and perseuit induring the time of the captivitie and subjection, for any action of spuilzie, ejection, thift, slauchter, murther, or uther cause, civil or criminal, done or committet by them, or any of thame, until he be releivit, and restorit to libertie.

*Fol. Dic. v. 1. p. 120. Balfour, (DEFENDER.) p. 296.*

\* \* Execution by horning may go on against a captive. See Oliphant against Innes, from Sinclair MS. *voce* LEGAL DILIGENCE.

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1753. July 20. ALEXANDER JAMIESON, Sailor in Torry, *against* WILLIAM HUTTON Ship-master in Torryburn.

IN 1746, William Hutton went a voyage from Torryburn to Gottenburgh as master of a vessel called the Loyal James, having on board seven hands; and, in his return home, the vessel sprung a leak, and was ready to perish, when a French privateer, happening to come up with her, took the crew on board, and immediately the Loyal James sunk.

A few days after this, the privateer, meeting with a Dutch ship, put the whole crew of the Loyal James on board of her, except Alexander Jamieson, who was detained as a hostage that an equal number of French prisoners might be released; and it appeared from a proof, that William Hutton had suggested to the Captain of the privateer, that Alexander Jamieson was the properest person to be detained. Jamieson was carried to Dunkirk, and remained prisoner there for five months, when an exchange of prisoners was made.

After his return to Scotland, he brought an action against William Hutton for his wages and maintenance during the five months he had been detained prisoner.

**No 1.**

All actions against a person taken by the enemy, cease till his return.

**No 2.**

A person detained, as hostage, after the capture of a vessel, till an exchange of prisoners should be made, found entitled to wages and maintenance from those who thereby obtained their liberty.

No 2.

*Pleaded* for William Hutton, *imo*, That no action lies at the instance of the pursuer against him for any of the crew, for wages or maintenance during the time of his being a prisoner, as it was not on their account that he was made or remained a prisoner: They were all made prisoners by the master of the privateer, who might have kept them all as such: but he, for his own conveniency, chose to liberate them all except one, whom he kept under this condition, that he should remain prisoner till eight French prisoners should be relieved. This was the act and deed of the French Captain only; and the defender and crew's getting their liberty did no damage to the pursuer, nor was his condition worse than if the privateer had carried them all prisoners to Dunkirk.

This case is altogether different from one's being made a hostage till the ransom-money for the ship and cargo be paid; for in that case the hostage remains on account of the proprietors of the ship and cargo, who therefore must pay him his wages; and the time of his remaining prisoner depends upon their paying the ransom-money: But the endurance of the prisoner's captivity did not depend upon the defender, but on the time when the exchange of prisoners should be made, which was regulated by the cartels established between the nations at war.

*2do*, At no rate can the defender be liable, *in solidum*, to the pursuer, because the defender was not profited by the liberty granted to the rest of the crew: As soon as his ship was deserted, all connection betwixt him and the rest of the crew ceased; and therefore, supposing something to be due by the crew to the pursuer, because they obtained their liberty when he was detained as hostage till as many French prisoners should be relieved, yet the defender can only be liable for one eighth part of that sum.

The defender having suggested Jamieson as the most proper person to be detained, cannot make him liable for the whole: He gave no commission or order for the pursuer to stay, having no power to do so; but only gave his opinion *tanquam vir bonus*, when the Captain of the privateer asked, Which of the crew would suffer least by being detained? And it must be admitted, that he hereby acted honestly and humanely, as the defender was then only a boy, had no family to care for, and could earn less wages than the rest of the crew, when at liberty.

*Answered* for the pursuer to the *first* defences, That all the crew were profited by his captivity, as they thereby obtained their liberty, and were put in a condition of doing for themselves; and therefore it was agreeable to law and equity that he should be indemnified by them of the loss he sustained through five months confinement.

To the *second*, That it is laid down as a rule in the sea-laws of different states, particularly by the laws of Oleron, of Wisbug, and of the Hanse towns, that if a sailor is taken by Corsairs, in the ship's service, the master of the ship is bound to redeem him, and pay his wages during his captivity; and although these are not the laws of this country, yet they ought to be regarded as founded upon the

principles of humanity and justice, which dictate, that a master of a ship, who contracts with sailors exposed to so many hazards, should be bound, *ex bono et æquo*, to refund any extraordinary damage sustained by them in his service. But whatever may be the rule in general, the defender ought in this particular case to be liable to the pursuer *in solidum*; because he pitched upon the pursuer as the person to be detained; whereas that ought to have been determined by lot. It is true that the defender had no right to pitch upon him; but seeing he did so, and acted as master after the connection betwixt him and the crew was dissolved, he must be liable to the pursuer for the damages sustained by him through his captivity.

The Lords found it proved, That the pursuer was pitched upon by the defender to remain as hostage with the French privateer; and, in respect the defender and the rest of the crew did obtain their liberty upon the detention of the pursuer, found the pursuer entitled to the damage sustained by him besides his maintenance, and modified the damage to L. 1 : 15s. per month during the time he was detained; and reserved action to the defender for his relief against all concerned.

Act. Ro. Dick.      Alt. Ro. Bruce et Garden.      Clerk, Kirkpatrick.  
Bruce.                      Fol. Dic. v. 3. p. III.      Fac. Col. No 80. p. 118.

1769. February 16.

LOCH against HOME.

ALEXANDER HOME, a boy of 13 years of age, was put aboard a ship belonging to David Loch, destined for Carolina, and to touch at Madeira and Havannah. As this was his first voyage, he had no wages; on the contrary, he was to pay board for his maintenance.

The ship being taken by a French privateer, was ransomed at L. 700, and Alexander Home given as a ransomer. But though, in the ransom-contract, the ship had liberty to touch at Charlestown and Havannah, she was again taken, in that course, by a Spanish guarda-costa, and carried into a Spanish port.

Alexander Home having made his escape on the coast of America, and returned to Scotland, brought an action against David Loch, on the ground, that the ransom-contract was voided by his escape, which therefore was *in rem versum* of Mr Loch; and concluding for L. 50, as his wages, from the date of the capture, till the day of his return to Scotland, with L. 200 as a *solatium* for the trouble and confinement he had suffered.

The Judge-Admiral decerned for L. 40 in full of all his claims; and David Loch brought a reduction of the decree.

*Pleaded* for the pursuer of the reduction: Though, in ordinary cases, wages are due to a ransomer, because he would have earned them, had he remained

No 2.

No 3.

A boy, who received no wages, was given as ransom of a captured ship. He made his escape, by which his master saved the ransom. He was found entitled to a sum as *solatium* for his trouble and confinement.