

1761. *March 3.*

TAMMIE HILLBRANDS Commander of the ship *Stravorse Lynbaan*, of the Province of Friesland *against* Captain JOHN HARDEN of the Private Ship of War, the *Boscawen* of London, and Others.

No 50.  
The produce of the French West India islands, passing from one port of Europe to another in Dutch bottoms, not lawful prize, though French property.

UPON the 15th of June 1758, Captain John Harden, commander of the *Boscawen* private ship of war, seized the *Stravorse Lynbaan*, Tammie Hillbrands master, bound to Amsterdam from Drontheim, where she had taken on board a cargo of cotton, indigo, and sugar, the produce of the French West India islands, and the property of French subjects.

Captain Harden carried the prize into the harbour of Bruntisland.

This seizure produced mutual actions before the Court of Admiralty, the one at the instance of Captain Harden for having the cargo condemned as a lawful prize, and the other at the instance of Tammie Hillbrands for restitution of both ship and cargo, and for damages.

The judge-admiral found the cargo of the *Stravorse Lynbaan* to be no lawful prize, and therefore ordered it, together with the ship, to be restored to Tammie Hillbrands; but, at the same time found, that he was not entitled to any damages or expences occasioned by the seizure.

Captain Harden brought the affair before the Court of Session by suspension.

*Pleaded* for Tammie Hillbrands; Though by the law of nations, the property of the enemy may be seized where ever it can be found; yet this general rule may, by particular treaties betwixt one of two belligerent powers, and a neutral state, be varied, or even altogether departed from: And so it is, that, by the treaties which passed betwixt Great Britain and the States-general in 1668 and 1674, an exception from the general law of nations was expressly introduced.

The treaty in 1674, which is in effect the same with the former, contains the following clauses:

Article I. Omnibus et singulis subditis præpotentium Dominorum Ordinum Generalium fœderati Belgii, licitum et jus esto, cum omnimodo libertate et securitate navigare, negotiare, et mercaturam quamlibet facere, in omnibus iis regnis, regionibus, et statibus, quibus pax, amicitia, aut neutralitas, cum præfatis Dominis Ordinibus nunc subsistit, aut ullo dehinc tempore intercessura est; ita, ut nec vi militum armata, nec navibus bellicis aliisque cujuscunque generis navigiis, sive ad Serenissimum Dominum Regem antedictum, sive ad ejus subditos, spectantibus, occasione vel prætextu hostilitatis vel discordiæ alicujus, quæ inter præfatum Dominum Regem et Principes aut populos quoscunque, pacem aut neutralitatem cum memoratis Dominis Ordinibus colentes, jam flagrat aut in posterum exarserit, in navigationibus aut commerciis suis ullatenus impediuntur, aut molestia aliqua afficientur.

Article II. Neque illa navigandi et commercandi libertas occasione vel causa ullius belli infringetur in ullis mercimoniorum generibus; sed ad omnes merces quæ in pace subvehentur se extendet, exceptis solum iis qui articulo proximo sequuntur, et contrabandæ nomine indigitantur.

Article VIII. Pari itidem ratione, quicquid a subditis Dominorum Ordinum in navem quamcunque ad hostes Regiæ Majestatis pertinentem impositum esse deprehenditur, quamvis de genere mercium prohibitarum non sit, totum id fisco addici potest; cæterum, e contra, omne id quod navibus ad subditos Dominorum Ordinum spectantibus immissum deprehenditur, pro immuni atque libero habebitur, etiamsi totum oneris, vel ejusdem pars aliqua, ad hostes Regiæ Majestatis justo proprietatis titulo pertinuerit, exceptis semper mercibus contrabandis; quibus interceptis, omnia ex articulorum præcedentium mente et præscripto fient.

From these articles of this treaty it is clear, that all goods not contraband carried in Dutch bottoms are free, and cannot be seized, even though French property.

*Pleaded* for Captain Harden; Public treaties, as well as private contracts, must be explained according to the circumstances of the parties and their general plan, and intention at the time: It was intended by the treaty 1674, to preserve to the subjects of each nation, during any war in which either of them might be engaged with another state, the same freedom of commerce which they are in possession of in time of peace, except as to contraband goods. The second article does, in express words, so limit and qualify the freedom of commerce which is stipulated in the first article, that it shall extend *ad omnes quæ in pace subvehentur*; but it is certain, that, by a fundamental law of the French commerce, the produce of the French West India islands must be transported thence directly to France, and on board only of French ships, all other nations being expressly excluded from that trade, under the penalty of confiscation of ships and cargoes; and therefore a freedom to carry on such an illicit commerce, which could not be in the view of the contracting parties, and which neither of them could enjoy in time of peace, cannot be comprehended under this treaty.

It is true, that, since the war, the French have granted a licence to Dutch ships to carry to Europe the produce of their West India islands; but this is not a fair regulation of trade to subsist between the two nations; it is only a temporary expedient in behalf of the French, to enable them more effectually to prosecute the war, by employing their whole ships and seamen against Great Britain, while their trade is carried on, and their goods protected by Dutch bottoms: This could never be in view by the treaty 1675, because it was inconsistent with the friendship thereby established, to suppose that either of the contracting powers would so far deviate from the *bona fides* of the treaty, as to give assistance to the enemy of the other, by entering into a new plan of com-

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merce calculated entirely for that purpose, and not known nor permitted in time of peace.

*Answered* for Tammie Hillbrands; The argument drawn by Captain Harden from the second article of the treaty 1674, does not apply. This cargo was not seized on a voyage from the French West India islands, but on a voyage from one neutral port in Europe to another; and it has never once been questioned, that free ships make goods going from one port in Europe to another likewise free.

*Replied*; It makes no difference, whether a Dutch ship shall bring a cargo directly from the French West Indies to Amsterdam, or if the voyage shall be divided, and the cargo be brought to Dromtheim, in order to be there re-shipped on board a Dutch vessel. The first and last of these voyages is equally prohibited by the commercial laws of France; and as the Dutch could not enjoy such a carrying trade in time of peace, the treaty 1674 can never be constructed to authorise it.

THE LORDS found, That the cargo was not lawful prize, and therefore found the letters orderly proceeded.

For Captain Harden, *Johnston.* For Captain Hillbrands, *Sir John Stuart.* Clerk, *Justice.*  
*Fol. Dic. v. 4. p. 144. Fac. Col. No 27. p. 54.*

\* \* \* Lord Kames reports this case :

By the treaties of alliance betwixt Great Britain and Holland, particularly that in the 1674, the liberty of navigation and commerce is secured to the one state even with the enemies of the other; and, excepting contraband goods, that no ship of either nation shall be searched for goods belonging to the enemies of the other, and that they shall be free to carry all goods which they can lawfully carry in time of peace, even supposing the whole cargo should belong to an enemy.

In the present war betwixt Britain and France, the power of the latter at sea has been so reduced as to oblige them, for safety, to carry on their whole commerce in Dutch bottoms. And if this plan can be carried into execution under colour of the above-mentioned treaties, the British merchants lie under a great disadvantage; for their cargoes lie open to capture, while the French cargoes are free from it.

By edicts of the king of France, no goods can be exported from their colonies but in French bottoms. At present these edicts are suspended, and the commodities of the French colonies are imported into France in Dutch bottoms. At least Dutch ships are employed within the narrow seas where there is the greatest risk of capture. In one instance, a large cargo of cotton indigo, &c. the growth of the French colonies, was landed in Dronthem in Norway, probably by a French ship which durst not venture to proceed further in her voyage toward France. A Dutch ship was sent for express to carry the

goods to their destined port ; and this ship being taken by an English privateer, was brought into the harbour of Burntisland. This brought on mutual processes before the High Court of Admiralty ; the one at the instance of the captain of the Dutch ship, for restoring the ship and cargo ; the other at the instance of the captain of the privateer, for having the cargo declared a lawful prize. The Admiral having given sentence against the captor, the matter was brought before the Court of Session by suspension. And as the Dutch captain did not pretend to assert that the cargo was Dutch property, he laid his claim entirely upon the treaties of commerce above-mentioned. To which the *answer* made was, That the growth of the French colonies could not, in time of peace, be imported into Europe in Dutch bottoms, and therefore the cargo was a lawful prize ; because, by the treaties, the freedom of navigation and commerce is extended no further than to all commodities that may be lawfully carried in time of peace.

When this point came to be advised, what was above urged for the captor had weight. But some of the Judges considered the point in a more general view. It was observed, that if a private treaty or covenant admit an interpretation in equity contrary to the words, much more a public treaty betwixt two nations, which cannot be governed by the municipal law of either. And to show the necessity of taking the sense and purpose of the treaties in question against the words, the following cases were put. It is one article in these treaties, that Dutch property in an enemy's ship shall be lawful capture. And the case was figured, that the cargo in a Dutch ship like to founder at sea is put into a French ship met accidentally. Surely the making use of a French ship in this case, to prevent the goods from perishing, being of necessity not of choice, cannot, in the meaning of these treaties, make the Dutch goods lawful prize. And yet the words are clear. An apposite case was figured, that a French ship chased by one of ours, unloads part of her cargo into a Dutch ship passing that way. By the words of the treaty these goods are safe, but surely not according to the meaning.

These things premised, it was taken for granted in general as the law of nations, that where two states are at war, the subjects of either state, properly authorised, may seize the property of the other wherever found, even in a neutral bottom. Consequently it is incumbent upon the claimant to show that the treaties make an exception in this case. Which point resolves in the following question, Whether a capture lawful *jure gentium* is made unlawful by these treaties ?

It is clearly the design and purpose of the treaties, that the commerce of the one nation should not be put under any disadvantage by a war carried on by the other. Therefore the commerce of the Dutch and their carrying trade, are to have the same free course in time of war that they have in time of peace. But when the English are at war with France or Spain, it is certainly not the purpose of this treaty to privilege the Dutch to cover French and Spanish.

No 50. goods from capture, and thereby to assist our enemies in the most effectual manner. They may prosecute their carrying trade in the usual and accustomed manner; but they must not extend this privilege so far out of its nature as to become real allies to our enemies, under the colour of carrying on their own commerce. For illustrating this distinction, a contract was supposed betwixt the French India company and a number of Dutch merchants engaged to protect the French cargoes from capture, by receiving into Dutch bottoms the French cargoes at Cadiz, and to land them in France. That this would be going against the *bona fides* of the treaties seems evident; and the contract in that view would be justly deemed fraudulent. In short, French goods in a Dutch ship ought to be secure, where the Dutch ship is preferred as the better sailer, or as being hired at a cheaper rate. But where none of these circumstances occur, and that the Dutch ship is preferred for no other reason than to protect from capture, it ought not have the benefit of the treaties. It was admitted to be often nice and difficult to distinguish betwixt these two cases; and it was further admitted, that where the circumstances are doubtful, judgment ought to go for the claimant; but that here the circumstances are not doubtful, they make it evident that the Dutch ship in question was chosen with no other view than to protect the French goods from capture. These goods were brought to Dronthem, we must presume, in a French ship, because it is carefully concealed how they came there. It is not said that the French ship was by stress of weather rendered unfit to prosecute her voyage. The goods were landed at Dronthem, not to be sold there, but to wait a Dutch ship. The ship in question was wrote for, and dispatched by Messrs Hopes, who are known to be in close correspondence with the French ministry. Add to these circumstances, a general concert that the Dutch, during the war, should be carriers for the French. This general concert is made evident from the following fact, that the growth of the several French colonies is brought to France in Dutch bottoms. This proves that the above-mentioned edicts are suspended, which cannot be but by the sovereign authority.

The plurality of the Judges notwithstanding adhering strictly to the words of the treaties, the claim for restitution of the ship and cargo was sustained, and the capture was declared unlawful.

*Sel. Dec. No 178. p. 242.*