

Mr Murray afterwards preferred another petition, setting forth, there being reason to apprehend that the influence of the same persons would in another shape be still exerted to prevent the success of a new sale; and therefore praying, That Mackwhan might be found liable to pay a price to the full extent of his commission, *i. e.* L. 500 above the upset one.

The Court were of opinion, That it was just, besides annulling the sale, to grant reparation of any other damage which could be qualified as arising from the combination; and as Mackwhan, in terms of the articles of roup, on exceeding, by L. 5, the highest offer of Johnston, whose *maximum* was L. 210 above the upset price, must have been preferred to the purchase;

THE LORDS therefore found Mackwhan liable in payment of L. 515.

For the petitioner, Rolland.

Act. Hay Campbell.

Clerk, Home.

Fol. Dic. v. 4. p. 35. Fac. Col. No 104. p. 164.

1784. February 3.

PALMER against HUTTON.

A French privateer having captured a ship, of which Hutton was master, he, together with his crew, were kept prisoners aboard the privateer, and his vessel was sent into port. Meanwhile the privateer made prize of another ship, which had been abandoned by those on board of her, and which belonged to Palmer. It seems, that now the French Captain, unwilling to spare hands for the manning of the second prize, which was but of small value, at first determined to sink the vessel; but afterwards it was agreed between him and Hutton, that the latter should purchase her at the rate of 150 guineas. One of Hutton's crew was retained as a hostage in security of the price, while with the rest he himself returned home in the ship; bringing along with him, in the hand-writing of the French Captain, a sort of certificate of the bargain, specifying the particulars above-mentioned. Having in this whole transaction considered himself to have made a lawful purchase for his own behoof alone, Hutton, without acknowledging any interest in Palmer, employed the ship as his absolute property. Palmer, on the other hand, as soon as he got notice of the affair, reclaimed her, by an action in the High Court of Admiralty, which afterwards came by suspension before the Court of Session.

*Pleaded* for the pursuer, The defender is bound to deliver up, without any recompence or gratuity, a ship of which the pursuer is the only lawful owner. The defender could not acquire a right to the vessel by any contract with the captors. All states deem war unjust on the part of their antagonists; for every state asserts the justice of its own cause. Hence a capture by the enemy is always a wrongful act, from which no right can spring, and by which no property can be transferred; *Vid. Bynkershoek, lib. 1. cap. 3, de statu belli inter hostes.* Thus, in respect of our country and its laws, the capture in

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A British subject prisoner on board of a French privateer while she captured a British ship, having purchased the prize *bona fide* on his own account, was found to have not thus acquired the property; but that the original owner was entitled to reclaim it upon payment of the legal salvage.

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question was injustice and rapine, and the captors mere violators of the pursuer's property, who being themselves destitute of right, could impart none to the defender. This conclusion is not less justified by expedience; for otherwise the chance of re-capture, which naturally continues during the warfare, (Stat. 4th and 5th of William and Mary, cap. 25) would be lost, and scope given to many treasonable frauds. It is true, that in the eye of the power which makes the capture, the same act which on the other side was viewed as unjust in the extreme, appears a result of the principle of retaliation, so perfectly equitable and right, that no *modus acquirendi domini* can be more lawful; and that hence neutral states are permitted to be more impartial, to recognise the rights of war on either side, and acquire property taken in it. Still, however, to give a just title to the purchaser, a previous condemnation in the courts of law of the country of the captors is necessary; so that were the defender even the subject of a neutral power, he could not plead this as a valid sale. See Benton *contra* Brink, 23d July 1761, *viz.* PRISE; Burrow's Reports, Goss *contra* Withers, 23d November 1758.

As, therefore, the defender can claim no right of property in the pursuer's ship, so neither is he entitled to any recompence from him, much less to repayment of the price stipulated by the French Captain, which is almost equal to the value of the vessel. An illegal bargain, as that between the latter and the defender was, can never be the foundation of any claim in a court of law. It is an evil indeed which may be considered as falling under the sanction of the late statute, prohibiting the ransoming of British ships. Nay, though the transaction had been less unlawful, the defender, who even pretends not to have acted on the pursuer's behalf, but for his own interest alone, seems hardly entitled to the character or rights of a *negotiorum gestor*.

*Answered*, It has been admitted, that, by capture in war, property is so far transferred, that the subjects of neutral states may lawfully acquire it by purchase from the captor; and this concession ought not to have been limited, by supposing the necessity of any antecedent condemnation, of which the sole efficacy is to ascertain the *bona fides* of the purchaser, and strengthen his title against future challenge. The right of the captor results immediately from the seizure of his prize, independently of every other circumstance, such as *deductio intra prasidia*, Voet. *ad tit. Digest de captiv.* § 3. Now, why may not a British subject place himself in competition with strangers at the sale of British property taken in war; or purchase without such competition, and do so at sea, as well as on shore? If no good reason can be assigned for these restraints, then is the defender the true proprietor of the ship in question. The statute alluded to relates only to the ransoming of vessels by those in whose possession they are taken; and as to the argument concerning fraud, it is evident that there is not any room for that suspicion in this case.

If, nevertheless, the pursuer shall be supposed entitled to reclaim the property, the defender must have an equal right to a recompence for effecting its

restoration. This equitable claim is not to be forfeited by the inefficacy of the sale, which, on that supposition, influences only his right of property. No fraud in his conduct, nor any criminal act has intervened to bar his retribution; and it is of no consequence, that he acted on the idea of acquiring a right to himself alone; as the effect produced, not its motive, is the ground of that claim. Neither is he requiring in a court of law, the fulfilment of an illegal contract; he demands a just recompence only, for a pecuniary benefit *optima fide* conferred by him. That recompence, if it exceed not the value of such benefit, ought at least to be sufficient to save him from loss; for it is a great maxim of equity, that *nemo locupletior fieri debet alterius damno*. To this degree, the defender consents to moderate his demand; requiring nothing more of the pursuer, than relief from his engagement to the captor, by re-delivery of the hostage.

This cause, was reported to the Court by the Lord Ordinary; when, considering the statute against ransoming as entirely out of the question,

“THE LORDS found, that the property of the ship in dispute was not transferred to the defender by the sale made to him, and that the pursuer is still entitled to reclaim or recover the said ship; but found, that the defender is entitled to a recompence for his bringing the ship within the pursuer's power to reclaim it; and remitted to the Lord Ordinary to call and hear parties' procurators on the extent of that recompence.”

Both parties reclaimed against this interlocutor; the pursuer, so far as a recompence was to be allowed to the defender, and the latter, in as much as the property was adjudged to the former.

On advising mutual petitions and answers, the Court adhered, modifying the recompence to the amount of “the legal salvage premium ascertained by the statute to re-captors, together with the expense laid out on the vessel.”

Lord Reporter, *Estgrove*. Act. *Macloed*. Alt. *Alex. Abercromby*. Clerk, *Robertson*.

*Fol. Dic. v. 4. p. 31. Fac. Col. No 140. p. 219.*

1786. August 2. GRANT against DAVIDSON.

WILLIAM DAVIDSON having been guilty of fornication, agreed to pay to Gregor Grant, the kirk-treasurer of the parish in which he resided, a small sum for behoof of the poor; intending, in this manner, to quash any action which might have been instituted against him in the civil courts, for the penalties imposed by 1661, cap. 38., and likewise to prevent his being prosecuted before the tribunals of the church.

He afterwards refused to fulfil this agreement, on the ground of its being illegal; and

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A transaction between a kirk-session and a person guilty of fornication, whereby the latter became bound to pay a sum of money to the kirk-treasurer for behoof of the poor, legal.