

without providing for the payment of the bill, and leaving no notice where he was to be found, to be a fugitive bankrupt, or swindler. The single question was, Whether, on hearing he was somewhere about Dumfries, they should have sent a letter to that place, or if they did right in writing to Edinburgh? As he lived at a distance from Dumfries, they had reason to think the notice would reach him by writing to Edinburgh as soon as by trusting to the postmaster of Dumfries forwarding a letter. It was impossible to say they had not been as diligent as the circumstances of the case permitted. They were certainly obliged to use all diligence, as every holder of a dishonoured bill is, to give notice to the drawer or indorser."

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"As to the second defence. "If the holder of a dishonoured bill gives an hour's delay to the acceptor, he liberates the indorser; but in this case, the bill was regularly protested; and taking the partial payment some days after, was as much for the benefit of the drawer as the holder. The doctrine, that accepting a partial payment from the acceptor at any time *ipso facto*, frees the indorser, is neither founded on law nor reason. I therefore move a reversal of the judgment in this case."

It was ordered and adjudged that the interlocutor complained of be reversed; and the interlocutor of the Lord Ordinary and of the Court of 3d July 1781 be affirmed.

For Appellants, *L. Kenyon, Henry Dundas.*

For Respondents, *Ilay Campbell, J. Anstruther.*

VOLKERT HENDRICKS, late Master of the Ship Katherine of Amsterdam, and PETER WIL- LEM VAN LANKERN of Amsterdam, Merchant, and the Owners of the said Ship Katherine and her Cargo,	}	<i>Appellants;</i>
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WM. CUNNINGHAM, Merchant, Glasgow,	Respondent.
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House of Lords, 2d May 1783.

CAPTURE — JURISDICTION. — Circumstances in which held that a Dutch vessel, while coming from a French colony, with the produce of that island to Amsterdam, was held to have been illegally captured as a neutral, neither the vessel nor the cargo, nor her papers, shewing that she was an adopted French vessel. Opinion indicated, though the objection to the competency was waived, that the Admiralty Court of Scotland had no jurisdiction to try such a question, but that it belonged to the High Admiralty Court of England.

The appellants were natives of Holland, and their ship,

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the Katherine and her cargo, both belonging to them, were captured by the Bellona privateer, belonging to the respondent, a merchant in Glasgow, under a license which commissioned her to make reprisals against the ships of the *subjects* of France; previous to the commencement of hostilities with Holland.

There had been existing treaties of alliance between Great Britain and Holland, and it was alleged by the appellants that this capture was a violation of these existing treaties, particularly the marine treaty of 1674.

The Katherine sailed from the Texel with her cargo, and all her papers and instructions directed to the Dutch settlement of Curaçoa in the West Indies. Her instructions were to return directly from thence, without any other power to go to any other port. Instead of this, when she arrived at Curaçoa, finding the market glutted with a great part of the goods of which her cargo consisted, he landed the consigned goods, and after attempting sale of the others, he was obliged to look out for a market at some other port in the West Indies. Accordingly he sailed from Curaçoa to Cape François, in the island of St. Domingo, and there delivered her cargo to Monsieur Lambert, a French broker, having, previous to sailing from Curaçoa, obtained from the governor a clearance "for the French colonies, and from thence to Amsterdam," which clearance ascertained the kinds, quantities, and values of the goods on board, and consisted chiefly of provisions.

With the nett proceeds of the sale of her cargo, he purchased a cargo of sugar, coffee and hides, which he shipped in the Katherine, paid duty as a foreigner, and sailed direct from Cape François to Amsterdam, when, in the course of her voyage, she fell in with the Bellona privateer, and was captured by her. The captain of the privateer was shewn the ship's papers; his passport from the government of Amsterdam; ext. from the Admiralty Court at Cape François, of the entry of the cargo at that port, with the account of sales thereof, and likewise with the invoice of the home cargo, docqueted by Mons. Lambert, to show that the Katherine and cargo were the property of the appellants, and that the cargo was not *French property*, but he would not be satisfied. The Katherine was taken as prize and brought to Glasgow.

On arrival of the privateer at Port Glasgow a petition was presented to the Judge Admiral by the owners, setting

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forth the whole circumstances, and concluding that the ship and cargo had been lawfully seized as prize, praying the same might be condemned as such. While the appellants, on their part, brought a counter action, to have it found that the ship and cargo were their property, and being the property of neutrals, and of subjects belonging to Holland, and not the property of a subject of France, or French property, were not liable to capture, and praying the ship and cargo to be restored to them. Both these actions were conjoined; and the Court of Admiralty, by their Judge Admiral, pronounced this interlocutor: “ Having advised the process and writs produced, and particularly the declaration emitted by the said Volkart Hendricks, defender upon the 14th of June last, before the Judge Admiral substitute, at Port Glasgow, &c. found, and hereby finds it proven, That in the month of May 1786 the said ship, the Katherina libelled, the said Volkart Hendricks then master of her, was taken and made prize of upon the high seas, by the ship or letter of marque called the Bellona, libelled, the said James M’Lean then master or commander of the said ship Bellona; and thereafter sent in by their captors to the port of Port Glasgow, where she arrived upon the 14th of June 1786; and found and hereby finds, That the said ship the Katherina libelled, and her pertinents, and the whole of her cargo of sugar, and coffee, and hides, &c., and every thing on board of her when she was taken and made prize of, as said is, is lawful prize; and found and declared, and hereby finds and declares, That the said ship Katherina and her pertinents, and the whole of her cargo of sugar, coffee, and hides, &c. do all pertain and belong to the said James M’Lean and William Cunningham, pursuers, and other owners of the ship or letter of marque Bellona, to be divided among themselves and the officer and crew of the said ship the Bellona, and that in terms of the agreement relative thereto; and therefore decern and adjudge accordingly; assoilzies them from the conclusions of the libel at the instance of the said Volkert Hendricks and others against them, and decerns.”

A suspension and reduction was brought of this decree by the appellants. The Lords, pending discussion, and on application made to them, ordered the ship and cargo to be sold, and, in the meantime, the proceeds to be consigned. In this action the Court of Session found, on the report of

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Lord Braxfield, Ordinary, “ the letters orderly proceeded “ (*i. e.* Judge Admiral’s decree well founded), and assoilzie “ the chargers from the conclusions of the process of reduc- “ tion at the appellants’ instance, and decern.”

Against this interlocutor the present appeal was brought.

Pleaded for the Appellants.—1st, The ship captured is proved to have been Dutch property, and to have been furnished with a regular passport, agreeable to the treaties between Great Britain and Holland, and which treaties were still subsisting and in full force at the time of the capture, and therefore the cargo was free, and not liable to capture on board a ship so owned and documented. 2. Even supposing a doubt existed as to the cargo being protected on board a Dutch ship at the time and place of capture, still as the cargo itself has been clearly proved to be Dutch property, and not French property, the same was not liable to capture. 3. But assuming that the capture was legal, still the whole proceedings have been unwarrantable and irregular before the Court of Admiralty in Scotland. 4. It is now established by decisions, that neither ships nor cargoes, the property of subjects of neutral powers, either going to trade, or coming from French West India islands, with cargoes purchased there, are liable to capture; for in many recent instances, particularly the Tiger, a Danish ship, with a cargo purchased at Cape François, proceeding from St. Thomas to Guadaloupe; the Jonge Jan, a Dutch ship, with a cargo taken in at Port au Prince, and bound to Curaçoa: and likewise in the cases of the sloop Nancy and six other Danish vessels, with cargoes taken in at Guadaloupe, and bound therewith to the island of St. Thomas; all which were captured by British cruisers, and condemned, in the Vice-Admiralty Court in the British West Indies, were reversed when brought here by appeal before the Commissioners of Appeal some years after.

Pleaded by the Respondent.—The papers upon which the appellants rely, and maintain that the ship Katherine and cargo were the property of the subjects of Holland, are unsatisfactory, delusive, and imperfect, while, on the other hand, there was cover and concealment in the case, and strong ground for believing that the cargo was the property of the enemy. There was no passport from the States of Holland on board; 2. The license from the Dutch West India Company restricted the voyage to Curaçoa, and from thence back to Texel; 3. The reports of the French officers

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at Cape François bore that the appellant Hendricks was in the employment of Lambert, a subject of France; 4. There were no orders from Van Lankern, the pretended owner, to Mons. Lambert; 5. The ship sailed from St. Domingo under French convoy, and the master took his sailing orders from the French admiral; and she was only parted from them by accident. She then, in these circumstances, was captured because she was carrying provisions to the enemies of Great Britain, contrary to the article of treaty between England and Holland 1673-4, renewed by subsequent treaties. She was to be taken as an enemy's ship; the ship and cargo were therefore liable to capture as French property.

After hearing counsel,

LORD MANSFIELD,

“ My Lords,—“ This is the case of a ship seized by the *Bellona* privateer, for prize; a ship which sailed from Amsterdam in the month of August 1779, and was returning from St. Domingo to Amsterdam. The captors, instead of resorting to the Admiralty of England, to bring the proper process, chose to commence a *civil action* in the Admiralty of Scotland. It was not an action *ad rem*, by the mode established in every country of Europe, Scotland excepted, by monition, summoning all the world, but a common civil action, directed against the master only. In a proper process, an immediate examination, upon oath, of the master and crew of the prize would have taken place, and all the ship's papers would have been taken into custody of the Court, to ascertain the fact of the property of ship and cargo. The examinations would have been upon established interrogations, tending to bring out the truth, without entrapping the persons examined. Upon such evidence, the Court would have said whether the fact, as to the property, was clear one way or other; and if not clear, would have directed further proofs. But, in the present case, a libel is raised against the master, charging, generally, that the cargo (for there is not a word of the ship,) is French property, or at least it must be presumed French, because it came from a French island. The ship's papers were not brought into Court; none of the crew were examined except the master, and that accidentally, in a way that his examination is no evidence. Every thing is conducted in a manner dissimilar to Admiralty proceedings. The captors plainly relied upon the second alternative of their libel, and go on to discuss it as an abstract point of law. All the objections that have been taken to the ship's papers found on board, or to the want of other papers, and all the argument as to the matter of fact, have arisen *here*. It is needless to speak of them; for as they were not below, the House cannot listen to them. Parties were never put on issue as to the question of fact below, otherwise the Court must have directed them to bring these

1783. proofs. The captors did not indeed admit that the cargo was Dutch property, but they satisfied themselves with throwing out suspicions that it was French property. The judges took nothing into consideration but the question, Whether, as the ship came from the French West India islands, with the produce of those islands, it must not, by legal presumption, be deemed an adopted French ship.”

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(His Lordship then went into the history of the decisions of the Lords of Appeal in prize causes, during the war preceding the late one, condemning ships and cargoes in the same situation with those in question). “They went on the ground of their trading authoritatively, under licenses from the French king, from whence it was held to follow that they were adopted French ships, navigated by French subjects. The Dutch, taking the benefit peculiar to French subjects, were considered as running the hazards too. It was not merely trading to a French island. No neutral ship, smuggling from the French, was ever condemned. But during the present war, the trade to the French colonies had been laid open (to all neutral powers; and by late decisions of the Lords of Appeal in prize causes, this had been held to distinguish the cases of the late war from those of the former; and, accordingly, several Dutch and Danish ships had been restored, which were in the same situation with the one in question. It was not for me to say, if the new doctrine was well or ill founded. I mean to give no opinion on that; but would the House of Lords, in the present case, coming before them incidentally, (and under such circumstances as that they could not have entertained the question at all, but for the appellants waving the objection to the competency of the Courts of Admiralty and Session in Scotland,) overturn rules of law, laid down by the proper Court of the last resort in matters of prize? For my part, I think the House bound by those decisions, right or wrong; and I therefore move, in respect of the appellants’ waver of the objections to the competency, to reverse the interlocutor complained of; to decree the value of the ship and cargo to be restored to the appellants, and to remit the cause to the Court of Session to carry this judgment into execution.”

“The appellants seek costs and damages; but this was not a case for costs and damages; the crew and owners of the privateer were not to blame, for the seizure was made on the faith of the old decisions, the late ones being posterior both to the capture and to the decision in the Court of Session.”*

LORD THURLOW (Chancellor) concurred.

It was therefore ordered and adjudged that the interlocutors complained of be reversed, and that the value of the ship and cargo be paid by the respondents to the appellants.

For Appellants, *Wm. Scott, John Morthland.*

For Respondent, *Wm. Wynne, H. Dundas, Jas. Wallace.*

* The decisions here referred, are those cited in the pleadings for the appellants, *ante*, p. 612.