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verify, because it expressed not Balmellie; and would not allow a term to prove part and pertinent.

It was further *alleged* by the defender, no declarator till the sums consigned were produced at the bar, especially seeing it was offered to be proved, that the pursuer lifted them himself, and he being at the bar, it is instantly verified.

THE LORDS sustained the same, and declared the sums being reproduced before extract, and that the pursuer shall be liable for annualrent, or the wadsetter shall retain the duties effeiring thereto.

*Stair, v. 1. p. 239.*

1667. July 23.

HANS JURGAN *against* LOGAN.

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Competent and omitted before the admiral, could not operate against strangers, *qui utuntur communi jure gentium.*

CAPTAIN LOGAN, a privateer, having taken Hans Jurgan, citizen of Lubeck, obtained his ship and goods, adjudged prize by the Admiral, upon this ground, that he had carried in prohibited or contraband goods to the Danes, being then the King's enemies, viz. hemp and victual, and that he was taken in the return of that voyage, which was instructed by the oath of the said Hans and sailors; Hans raises a reduction of the Admiral's decret, on these reasons; *imo*, That the victual was no contraband goods, but such goods as the King allowed his own subjects to export out of England, and declared that there should be no question thereupon, nor upon any goods not enumerated in an act of council produced, all which are *bellica* instruments and furniture, and have nothing of victual; and albeit hemp be prohibited by that act, and commonly counted contraband goods, yet the quantity deponed was only sixteen stones, which is an unconsiderable quantity, and necessary for calving the ship, and sewing the sails. *2do*, The pursuer produced the Duke of York's pass, warranting this ship to come from Bergen, and therefore she could not have been taken in her return by any privateer. *3tio*, Whatever might have been alleged, if the ship had been taken, having unfree goods in her, there is neither law nor custom to seize upon the ship in her return, when these goods are not in her, for the ship might have been sold to another than he that did the wrong; and it cannot appear, whether the return was made out of the price of the former freight, and though it were, it might be of a hundred times more value. And albeit such seizures in return were allowable, yet they could only be sustained when it is evident, at the time of the seizure at sea, that the contraband goods had been in the ship that voyage, either by bills of loading, charter-pieces, or other writs taken in the ship, or by the oaths or acknowledgments of the company, otherwise upon that pretence freedom of commerce would be altogether stopped, seeing every ship might be brought in, that they might be tried by the Admiral, whether or not they had in contraband goods that voyage. *4to*, These strangers could not be *in culpa* before the indiction of the war could

come to their ears; but the indiction of the war was by the King's *manifesto*, of the date the 19th of September 1666, and this ship loosed from Lubeck the 24th of September, within five days after, and so could not possibly know the indiction; and they trading *bona fide*, as they were formerly accustomed, cannot be seized as injuring the King, in assisting his enemies, and they did not, nor could know they were such. It was *answered* for the defender, That he had walked exactly according to his commission, bearing expressly all kind of grain to be contraband goods, and being empowered to seize upon any ship in return, that had carried in contraband goods; and that it was in the King's power *leges imponere bello*; and that victual is contraband goods, it is evident, not only because it is the first necessary in war, especially for victualing of ships, Norway being a barren country that hath little grain of its own; and produced a treaty betwixt the King and the Crown of Sweden, wherein the Swede hath a liberty to carry contraband goods; bearing expressly in Latin *annona*, in the Dutch *proviant*, which shows what goods are accounted contraband goods, not only by the King, but other nations; and for this seizure in the return, it is not only warranted by the commission, but upon evident reason; because the King's allies have free trade both with him and his enemies, so that they partake not with his enemies against him, by furnishing them instruments, or furniture of war; and any private party transgressing the same, might *de rigore juris* be seized upon as an enemy, and it is favour and benignity, that the seizure is allowed only in that very voyage, in which the wrong is done. As to the Duke of York's pass, Scotland being a free kingdom, and the Duke not Admiral of Scotland, his pass, or passing from any delinquents, can only be operative in England; and that which is produced is only an extract out of the Admiralty Court, bearing, that such a ship was cognosced to be a Lubeck ship, and so that she might freely pass, which cannot import the Duke's knowledge, much less his passing from her carrying of contraband goods. As to the pretence of trading *bona fide*, and the ignorance of the war, no respect ought to be had to the allegiance, because the war was begun, and flagrant, long before the loosing of the ship; and there is no necessity of *manifestos* to indict war, but acts of hostility and public fame of a war are sufficient to hinder allies of either parties or neuters to assist against their friends; and here it is offered to be proved, that six months before this ship loosed, many commissions were granted against the Danes, prizes taken, and the King's subjects taken by the Danes, and declared prize at Bergen, upon the account of the war, which must be presumed to be known by the pursuer; and the city of Lubeck being a Hans Town of trade, which keeps intercourse with London, and other towns of trade; and as to the act of council, permitting the King's subjects to trade even in corn with his enemies, it is a special indulgence in favour of England only, and could not be effectual as to Scotland, and much less to strangers. The pursuer *answered*, That

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there was nothing alleged to show by law or custom, that victual is contraband goods, unless it were carried in to an enemy for relieving a besieged place, but not when it is but in common commerce; and if the Lukeckers be hindered to trade in corn, or the like, being the only growth of their country, their trade is altogether marred, contrary to the King's interest and intention, who has written to the Emperor most favourably in behalf of the Hans Towns, for the freedom of their trade; acknowledges them his good allies, and not merely neuters, which letter is produced; neither is the palpable inconvenience answered, if privateers may bring in all the ships, whether they carried counterband goods in that voyage, though they find none in them; neither is there any thing alleged sufficient to instruct, that the pursuers knew, or were obliged to know of the war betwixt the King and Denmark, before they loosed from Lubeck, for any acts of hostility, before the solemn indiction produced, were such deeds as the pursuers were not obliged to notice; for the taking and declaring of prizes doth not include enmity or war, but may be for reparation of private injuries without intention to make an open war. Although a prize of the King of Britain's subjects, had been declared at Buirran, it does not infer, that Lubeck being a free state, at so far distance, behoved to know the same, much less, that thereby there was a war betwixt the King and Denmark.

THE LORDS having considered the whole debate, were of different opinions, whether the victual could be called contraband goods simply, or only when imported for relieving of sieges, or for the like war-like use, and whether ships could be seized in their return, not having actually contraband goods in, but especially whether they could be seized without evidence at the time of the seizure at sea, that in that voyage they had in contraband goods; but they did only determine the first reason, and found it relevant to infer that the Lubeckers was *in bona fide* to continue the commerce, having loosed within so few days of the King's *manifesto*; and that no other acts of hostility before, were to be presumed to have come to the knowledge of Lubeck, or that thereby they were obliged to know that there was an actual war, unless these strangers knowledge were instructed by their own oaths, or that it was the common fame notour at Lubeck before they loosed, that there was war betwixt the King and Denmark, and the defender offering to prove the same.

THE LORDS granted commission to the King's resident at Hamburgh, to receive witnesses above exception, and in the meantime ordains the strangers' ship and goods to the inventoried, and estimated, and delivered again to the strangers, upon caution to make the same or price forthcoming, in case the defender proved, and prevailed, and with the lurden of the strangers' damage and expenses, if they betook themselves to this manner of probation, and not to the oaths of the strangers who were present, reserving to the LORDS the remanent points to be decided, if the strangers' knowledge of the war were known.

In this process the LORDS found also, That competent and emitted before the Admiral, could not operate against these strangers, *qui utuntur communi jure gentium.*

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*Fol. Dic. v. 2. p. 209. Stair, v. 1. p. 477.*

1671. February 4. STRACHAN against JAMES DRYSDALE and JANET HART.

STRACHAN having obtained decret before the Commissaries of Edinburgh, against Drysdale and Hart, as vitious intromitters, upon a bill of suspension presented, the LORDS did hear both parties upon this reason, That the defender having founded a defence upon a disposition made by the defunct, the charger did reply upon further intromission than what was contained in the disposition, and condescended upon an aquavitæ pot; whereupon the decret was given; whereas if the petitioners had been present to inform their procurators, who had no mandate from them, they would have alleged, likeas they now *allege*, and offer to prove, That the said aquavitæ pot did not belong to the defunct, but to another person from whom he had hired the same, and that the petitioners had meddled therewith, upon his order and consent. It was *answered*, That the decret was opposed, being *in foro contradictorio*, wherein that allegiance was never proponed, and could not be now received, which were a dangerous preparative to frustrate lawful creditors after they have done exact diligence; and that it was sufficient that they acknowledged that the aquavitæ pot was in the defunct's possession when he died, *quo casu* they were not *in bona fide* without a title *immiscere se bonis defuncti*; and the charger being a lawful creditor, is not necessitated to dispute the defunct's right, but it is enough to say he possessed. THE LORDS notwithstanding did pass the bill, and found, that the title of vitious intromitter being of so great importance as to make one liable for the whole debt, albeit their intromission was not considerable, that they might be reponed against a defence omitted by a procurator before any inferior court.

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Competent and omitted in an inferior court, in matters not ordinarily understood there, is not relevant to bar suspension or reduction.

*Fol. Dic. v. 2. p. 209. Gosford, MS. No 329. p. 149.*

\* \* Similar decisions were pronounced, 12th November 1664, Neilson against Murray, No 123. p. 5921., *voce* HUSBAND and WIFE, and 31st January 1677, Garden against Pearson, No 73. p. 6664., *voce* IMPROBATION.

1672. February 9. WOOD against ROBERTSON.

THOMAS ROBERTSON having obtained a decret against Thomas Sinclair for L. 93, and L. 5 of expenses of plea, he pursued William Wood before the

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A promise was found proba-