

THE LORDS sustained the sentence, unless the pursuer would qualify force and violence, and that the depositions were extorted.

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Clerk, Hay.

Dirleton, No 49. p. 120.

1668. January 14. PARKMAN against Captain ALLAN.

CAPTAIN ALLAN having obtained a decret against Parkman, a Swede, adjudging his ship prize upon these grounds, that she was sailed with three persons of her company, being Hollanders and Danes, being then the King's enemies, and because she had carried off the enemy's goods from Bergen in Norway to Amsterdam, from whence, having gone to France with ballast, and being loaden there with salt, she did also carry into France six barrels of tar, which were sold in France, as appears by an account betwixt the skipper and his factor in France, bearing so much to be paid of the King's and town's custom of the tar, which necessarily imports that it was sold there; likewise she carried in stock-fish, being *commeatus*, and contraband goods, so that having sold several lasts of tar in Holland, and these barrels, and stock-fish, in France, which are clearly contraband goods, and being taken in her return from France, having in her the product of these contraband goods, whereupon she was justly declared prize, conform to the Lord Admiral's commission, ordaining ships of allies to be taken, having in enemies goods, or contraband goods, or the return of contraband goods; Parkman raised a reduction of this decret, on these reasons; *1st*, That the crown of Sweden, not only being an ally to the King, but having a solemn treaty with him, in the second article whereof it is specially agreed, that the subjects of Sweden having passes from the governor of the city, or province where they reside, or from the college of trade, bearing that faith had been made, that the ship, men, and goods, did belong to the Swede, and none other, and that they had therein no prohibited goods; that such a pass being shown in any ship, there should be no further search or inquiry in the men or goods, the like whereof is granted to the King's subjects, either King trusting the governors of the other in that matter; by which treaty also, contraband goods are determined, amongst which, tar or stock-fish are no particulars; *ita est*, Parkman had a pass when he departed from Sweden, conform to the treaty, like as there is a second pass sent over-land to him, when he departed from Amsterdam to France, which being shown to Captain Allan at the seizure, he ought not to have taken him, or enquired any further, nor can he now make it appear that Parkman hath transgressed the treaty; and as to the three men of his company, one was hired in Denmark, and two in Holland, upon necessity, so many being wanting of his necessary company by death, or absence there, so that what he did of necessity, and not to advance

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When by treaty particular goods are enumerated as contraband, are goods contraband *jure commune*, to be considered as subjecting the ship to seizure?

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the interest of the King's enemies, can be no delinquency; *3dly*, Whatever might have been alleged against him, if he had been taken with enemies' goods aboard, or with contraband goods, which are such by the Swedish treaty, yet he was seized, having none of the goods aboard, nor the product thereof, but of his freight, and upon the account of his owners in Sweden, he could not be prize, because there is nothing in the treaty bearing that ships should be prize not having actually in them enemies' goods, nor contraband goods, but the product, or return thereof; neither doth it appear that he sold any tar in France, for the entering of the tar, or paying custom, will not necessarily import it was sold, but his factor might have unwarrantably put up that article, which being wholly inconsiderable he did not controvert; and by the same papers taken aboard, it did appear, that at his departing from France he had the same quantity of tar, which was inconsiderable, and necessary for the use of his ship, being an old ship, and two barrels were found aboard when she was taken; and some part behoved to be allowed for the use of the ship, so that at most there could be but one or two small barrels of tar sold, which is inconsiderable, and could be no ground for declaring an ally prize, *nam de minimis non curat lex*; and as to the stock-fish, or any *commeatus*, or provision, *quæ habent promiscuum usum in bello & pace*, they are only contraband when they are carried in to relieve a besieged place, or to those that could not subsist without them, according to the reason and opinion of Grotius de jure belli, lib. 2. cap. De his quæ in bello licent.

It was *answered* for Captain Allan, that the reasons of reduction ought to be repelled, because albeit Parkman got a pass from Sweden, conform to the treaty, and according thereto came from Sweden, to Denmark, in which passage he was not challenged; but having engaged in Denmark to serve the Danes, then the King's enemies, he did unquestionably carry *merces hostium* from Denmark to Holland, and eight or nine last of tar, which is contraband, beside the six barrels of tar carried from Holland to France, and entered and sold there, and the stock-fish; and albeit tar be not enumerated as contraband in the Swedish treaty, yet it is comprehended in the general clause of *alia instrumenta bellica*, for there is no more eminent instrument of war, not only for shipping, but for all engines of war; and suppose that (by the Swedish treaty) tar were not contraband, yet that treaty can be only extended to the subjects of Sweden, trading to and from Sweden, but not to warrant them to carry these things (which, *de jure communi*, are contraband) from any other country than their own, to the King's enemies, so to partake with the King's enemies to his detriment. And as to the second pass sent to Holland, it is no ways conform to the treaty, but is most gross and inconsistent, bearing not only the ship to belong to the Swedes, but also all the goods in-put, or to be in-put to her, to belong to them, and to be free goods, without expressing any particular. As to the return of enemies goods, or contraband goods, that it is a ground of seizure, being the immediate return, and the Captain's commission granted by

the Admiral, bearing so much expressly, and the instructions given by the Council in a former war, *anno* 1624, which were sufficient warrant for the Captain to seize, and are founded upon evident reason, viz. That the King's allies are neutrals having assisted his enemies with contraband goods, it is a delinquency deserving that the delinquent should be seized as an enemy at any time; and yet the King's commission hath mitigated it, only to be in return of that same voyage, wherein the contraband goods were carried; for if an ally's ship, having contraband aboard, were taken in her voyage to an enemy's port, she might more reasonably pretend that intention was alterable, and no crime, until actually she had disloaded in the enemy's port, but could have no pretence if she were waited till immediately after she came out of the port, although then the enemy's goods, or contraband goods, were not aboard.

THE LORDS, upon a part of this debate, having formerly written to my Lord Secretary, to know the King's mind, whether the Swedes, by their treaty, might carry from other countries that which was *de jure communi* contraband, albeit not contraband by their treaty, his Majesty's answer was negative; whereupon the LORDS proceeded to consider whether tar was contraband, *de jure communi*; they found it was, but did not find the stock-fish contraband, except in the case of a siege, to which point Secretary Morish's letter was produced, in relation to the custom of England; and having also considered the proclamation of war, in which there is no mention of returns, but only a warrant to seize ships belonging to enemies, having in them enemies goods, or contraband goods; and having also considered the Admiral's commission, which extends only to the return of contraband goods, and not to the return of enemies' goods; and it being offered to be proved positively, that, by the custom of England, no seizure is sustained upon returns, but only when enemies' goods, or contraband, are actually taken aboard; they were unclear whether seizure should be sustained in any other case upon returns, and therefore ordered another letter to be written to the secretary, to know the King's mind, and the custom of England in that point before answer; and ordained the opinion of some merchants to be taken, whether Parkman's ship, freighted in Norway to Holland, and disloaded there, and thence going to France with ballast, not upon account of the former freight, but the owners, if it should be counted one voyage, or two, so that the return from France might be accounted the immediate return of the voyage to Holland.

In this process the LORDS, by a former interlocutor, had found the taking on of the men, as they were qualified and proven, to be no ground of seizure.

1668. February 21.

CAPTAIN ALLAN, a privateer, having taken Bartholomew Parkman, a Swede, he obtained him to be declared prize by the Admiral, upon this ground, mainly, that he had carried tar, being contraband goods, from Norway to Holland, then in enmity with the King, and from thence carried ballast to France, and re-

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turning with a loading of salt, was taken; because, by the Captain's commission from the Admiral, he was warranted to take ships carrying contraband goods, or to take the said ships in their immediate return, after they have carried contraband goods to the King's enemies, which had always been the custom of Scotland, as appears by commissions granted by the Admiral, *anno* 1627, of the same tenor, and by a decret of the Admiral at that time, finding the libel relevant, bearing that a ship was taken in her return, having taken in contraband to the enemy in that voyage; which is founded upon evident reason, because that while ships are going towards the enemy, it is but an intention of delinquence against the King, and assisting his enemies; but when they have actually gone in, and sold the contraband, it is *delictum commissum*; and though it might infer a quarrel against the delinquent, whenever he could be found, yet the law of nations hath, for the freedom of trade, abridged it to the immediate return of the same voyage, because quarrels would be multiplied, upon pretence of any former voyage. Parkman having raised reduction of the Admiral's decret, insists on these grounds, *1mo*, That, by the King's proclamation denouncing the war, it is evident that the King gives only command to seize upon ships having in them enemy's goods, or contraband goods, without any mention of seizing them in their return, which would destroy the freedom of all trade; for upon that pretence, every ship that were met with at sea might be brought up, and therefore the King's proclamation did justly and humanely warrant the seizure of ships only when the enemy's goods, or contraband goods are found aboard, in which case, for most part, the cause of seizure is sensible to the eye; wherewith there was also produced a testificate from Judge Jenkins, Judge of the Admiralty Court of England, by the King's warrant upon the petition of the King's resident of Sweden, wherein he having advised with the King's Advocate-General, who daily attended that Court, declareth that none of them remembers that in this war any neuters were made prize in their return, with the product of enemy's goods, and that he knew no law nor custom for the same. *2do*, There were produced the treaties betwixt the King and the crown of Sweden, bearing that the Swedes should be made prize, carrying enemy's goods, or contraband goods, *si deprehendantur*. It was also *answered* to the reasons of adjudication, That the style of a commission, not granted by the King immediately, but by the Admiral, could be no ground of adjudication of friends and allies, who were not obliged to know the same, or what was the tenor of the Admiral of Scotland's commissions, but were only obliged to take notice of the law and custom of nations, and of the King's proclamations of war; and as to the Admiral's commission, and decret thereupon, *in anno* 1627, it could not evidence the custom of Scotland, being but a decret in absence, and upon a libel, bearing not only the carrying of contraband before in that voyage, but having actually aboard enemies' goods the time of the seizure, which libel is found relevant by the Admiral; but it appears not that he would have found it relevant alone, upon the product of contraband, much less that it was prov-

ed; and in decreets in absence the LORDS themselves suffer decreets to pass with far less consideration, and oft-times of course; so that it were strange to fortify the Admiral's decreets, that are now quarrelled after full hearing, upon a decret of the Admiral's in absence. It was *answered* for Captain Allan, That the pursuer could not enjoy the benefit of the Swedish treaty, because he had transgressed the treaty, and served the King's enemies; and as to the testificate of Judge Jenkins, or custom of England, this being a distinct kingdom, is not ruled by the custom of England, and Judge Jenkin's testificate was impetrate by the pursuer, and not upon any commission, or proposal made by the Lords, and the case therein mentioned is only anent the seizures in the return, with the product of enemies goods, and says only that they do not remember that ever the case was decided there, but says not that the courts of admiralty had found, that upon any plea or dispute, ships could not be taken, unless they had aboard contraband, or enemies' goods.

THE LORDS having formerly, in this cause, desired to know the King's pleasure, whether by the Swedish treaty, which maketh far fewer things contraband than what are such by the law of nations, and by which tar is not contraband, the Swedes might loaden tar in Norway, not being their own growth, and carry it to the King's enemies; the King returned answer negative, in which the LORDS acquiesced; and as to the present dispute,

THE LORDS did not find the grounds alleged for the privateer relevant, or sufficient to instruct the custom of Scotland, or the rule of the war, and had little respect to Judge Jenkins's testimony, and therefore were not clear to approve the adjudication; but before answer, did declare that the LORDS, by their own commission, would inquire into the custom of nations, concerning the return of contraband, or enemies' goods, both by commissions direct to England and other places.

1668. July 9.

CAPTAIN ALLAN having taken Bartholomew Parkman, and obtained him to be declared prize; Parkman raises reduction, and for fortification of the Admiral's decret of adjudication, these grounds were *alleged*; *first*, That by the testimonies of the steersman and company, it was proved that three of the company were the King's enemies; and so, conform to the King's declaration of war, ordaining all ships to be seized wherein there were any number of men belonging to the King's enemies; this ship was prize, as was lately found in the case of the ship called The Castle of Riga, No 4. p. 11860.; and albeit, by a former interlocutor, the LORDS had not found three men to be a number sufficient for confiscation, yet it was not then considered that the whole company consisted but of eight, so that near the third of the sailors were the King's enemies, and one of them the steersman, which is a considerable proportion; *2dly*, This ship, though pretended to belong to the Swedes, yet she had served the King's enemies, the Danes and Hollanders, two years; and by the Swedish

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treaty it is provided, quod naves nullo modo accommodentur utriusq. foederati inimicis; 3dly, It is also proved, that this ship carried contraband goods, viz. tar, which was not the product of Sweden, but carried from Denmark to Holland, and that she was taken in her return, having in a loading of salt from France; so that albeit the ship had been empty, she might have been taken prize in that same voyage in which she did partake with the King's enemies, or being taken in the same voyage in which she had carried *bona hostium*; and lastly, It was also instructed, that the cargo with which she was taken was the product of the contraband goods, and so in the same case as if the contraband goods had been actually in her, the product being surrogatum quod sapit naturam surrogati. It was answered for Parkman, to the first ground, That he opposed the Lords' interlocutor, finding three sailors no sufficient number for confiscation; and in the case of The Castle of Riga, the major part, at least the half, were the King's enemies. To the second ground it was answered, That the King's allies making use of their ships for freight, was no way a lending of them to the King's enemies; and as for the remaining goods, by the King's declaration of war, there is only given warrant to seize ships having in them contraband goods, or enemies goods, and the Swedish treaty bears expressly *si deprehendantur*; so that this ship having in her, when she was taken, no contraband nor enemies goods, is free. It was answered, That the King's declaration, although it mention some cases of seizure, is not full or exclusive, but the law of nations must take place, or the custom of Scotland in cases not expressed in the King's declaration; and as for the Swedish treaty, it cannot be pleaded, unless Parkman had a pass from Sweden in all points conform to the treaty; but their passes were in several things disconform, as being granted when the ship was in Holland and sent over land; and as for the custom in Scotland to take ships in the return of that voyage in which they carried contraband or prohibited goods, it appeareth by the Captain's commission and former commissions in anno 1628, and by a decret declaring a prize, wherein the same ground was libelled, that she was taken in the return of that same voyage in which she had carried contraband. And the Lords having written to my Lord Secretary, his letter in return bears, "That the Lords should decide according to the law of Scotland." It was answered for the Stranger, That the particular custom of Scotland can be no rule for the Swedes, but only the law and custom of nations; and that England, nor no other nation hath that custom, to make seizure but *in delicto*, otherwise all trade and commerce would be destroyed, unless seizure were only upon what was visibly aboard, and not upon the pretence of what had been aboard; and, albeit a delinquence once committed, by partaking with the King's enemies, might endure for a longer time; yet the custom of nations for the utility of trade, hath abridged it to actual seizure *in delicto*; and accordingly, Judge Jenkins, Judge of the Admiralty in England, hath attested, that during this war, after search of the records, and conference with other Judges, he knows not of any prize declared.

but when the contraband goods or enemies' goods were taken actually in them. And for the decret alleged, albeit that ground be in the libel, yet other grounds are also therein, and there is no debate as to that particular point; neither doth the probation mentioned in the decret clear that that point was proved. And as to the tenor of the commissions, albeit they might excuse the Captain from fine or damages, yet strangers did not, nor were not obliged to know the same; but the law and custom of nations, and the King's public declaration, and their treaties.

THE LORDS having considered the debate, and that the several points were of importance and preparatives, they resolved to take the grounds jointly, and so found the ship prize, as having so considerable a proportion of her company the King's enemies. Some also were of the opinion, that she having been taken in the return was sufficient, especially not having a sufficient Swedish pass; but the plurality waved these points, whether the returns of enemies' goods or contraband, or whether the product or not product thereof, were sufficient grounds of seizure, seeing it did not so appear by the custom of nations or the King's declaration of war; but by the former debate it appeared that she had aboard, when taken, a small parcel of tar.

*Stair, v. 1. p. 502. 529. & 550.*

\*.\* Gosford reports this case :

In a reduction of a decret of the Admiralty, adjudging a ship, whereof Parkman was master, to be lawful prize, against Captain Allan and his owners, the defenders were assoilzied from the reduction, because the LORDS found, That it was sufficiently proved that the ship had aboard three Hollanders, and one Dane, who were mariners, whereas the declaration of war prohibits to have any number of the King's enemies; as likewise that the said ship had carried tar and stock-fish, which belonged to the Danes, from Norway to Amsterdam, and from thence to France, and was taken in her return, loaded with salt, which they found to be one and the same voyage, there being no sufficient pass according to the articles of treaty with Sweden; albeit the witnesses deponed, she was going to Sweden with the salt; because by the instructions, decreets of the Admiralty, and commissions *anno* 1628, when the war was declared with Spain, and the commission granted to this privateer, ships taken with contraband goods, in there return, as well as going, were declared to be lawful prize, albeit they were not actually carrying contraband.

*Gosford, MS. No 27. p. 10.*

\*.\* Dirleton reports this case :

1668. *January 15.*—IN the late betwixt his Majesty and Holland and Denmark, a Swedish ship being taken by a Scots skipper, and adjudged prize,

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a reduction of the Admiral's decret was pursued, upon divers reasons, and in special this, That, by the treaty betwixt his Majesty and the Crown of Sweden, the subjects of Sweden may traffic with their allies, though enemies to his Majesty, with freedom; and carry in their ships contraband goods, except such as are contained in an article of the said treaty, being for the most part arms, and *instrumenta bellica*, and that the goods in question, which they had carried in their ships to Holland, viz. tar and stock-fish, were not of that nature; 2do, That when the said ship was taken, there were none of the said goods aboard; and that it could not be declared prize upon pretence that immediately before they had carried the said goods to Holland, seeing it is not unlawful, nor a breach of treaty betwixt his Majesty and Sweden, that the subjects of Sweden should continue the same intercourse and freedom of trade they had formerly with their friends, though now the King's enemies; and, if they carry contraband goods, the only hazard is that if they be deprehended carrying the same, they may be confiscated, conform to the treaty with Sweden, bearing *si deprehendantur*, which is consonant to the custom of all nations, and of the Admiralty of England. It was *alleged*, That the ship in question should not have the benefit of the treaty, having served the Danes, the King's enemies, and being freighted and loaded with tar from Norway, upon the account of Danish merchants, and with stock-fish which they had carried to Amsterdam: That it was expressly provided by the treaty with Sweden, that they should not carry *bona hostium*; and that though the Danes were not the King's enemies, yet tar and stock-fish are contraband, tar being a material so useful and necessary for a naval war; and that by the treaty *commeatus* is contraband, and stock-fish falleth under the notion of *commeatus*; and that by the commission given by the Admiral to the skippers, they are empowered expressly to seize on ships, not only while they have contraband goods carrying to his Majesty's enemies, but upon the return, having sold and disposed upon the same. It was *replied*, *imo*, That by the law of nations (which is clear from Grotius, *De Jure Belli*) goods that are *usus promiscui*, both in war and peace, are not *vetita* and contraband; and two nations being engaged in war with others that are at friendship with both are allowed liberty of trade with either as to such goods; and that tar is of that same nature, and *commeatus*, except in the case of *portus clausus*, or *eivitas obsessa*, and from which *deditio* may be expected, if not supplied; 2do, His Majesty's declaration of war with Holland, bears, that ships carrying contraband to Holland, if they be met with carrying the same, may be seized; and that his Majesty's declaration, emitted of purpose in relation to other nations, should be considered as *lex belli*, and not a private and unwarrantable style of commission given *periculo petentis*.

In this, many points being debated, it was found by the LORDS, that tar is contraband. 2do, As to that point, whether a ship having carried contraband goods to enemies, may be seized upon in her return homeward, having sold and vendd the same to the enemies, and not deprehended carrying the same;



They thought fit to know his Majesty's pleasure, and the custom of England, and a letter was written to my Lord Secretary to that purpose. *3<sup>to</sup>*, The ship in question having carried contraband goods to Holland, and having thereafter made a voyage to France, and there having taken a new loading of salt upon the account of the owners, and being taken upon her coming from France, if it should be found that she might have been seized upon pretence that they had carried the said goods to Holland; it was debated, whether the return should be understood of the immediate voyage from Holland to France, or until they should return to Sweden? And as to this part, the LORDS thought good to take advice of merchants. *In præsentia.*

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Act. Lockhart &amp; Wedderburn.

Alt. Wallace.

1668. February 4.—THE LORDS found, that in the case mentioned 15th January 1668, until the ship should return to Sweden, it should be esteemed a voyage, *quoad* the effect and point in question.

Dirleton, No 132. p. 55. &amp; No 153. p. 61.

1668. February 7. Captain CONINGSBY against Captain MASTERTOUN.

CAPTAIN Coningsby, captain of a privateer, pursues Captain Mastertoun for his share of two prizes, taken upon the 5th of August 1666, upon two grounds; *imo*, Upon concurrence, because both these privateers being in view of the first prize, did both make up to her, Coningsby being nearest, and that when they came to near distance, within half a mile, Coningsby fired the first gun, Mastertoun the second, and Coningsby the third; at the firing of which, the prize struck sail, which signified her surrender, without more resistance; and albeit Mastertoun being to the windward, came first aboard, yet it was without resistance, the prize having rendered before, by striking sail; Coningsby being within a small distance, came presently up, and demanded his share, according to the proportion of the men and guns of both frigates, being the ordinary rule of division of prizes betwixt concurring frigates. *2do*, Upon the ground of consortship, or society made up betwixt the two Captains, after taking of the first prize, and, by the same consortship, craved the share of a second prize, taken that same day, it having been agreed that both should be sharers in all prizes that should be taken by either, till their victuals were spent. The defender Mastertoun, and his owners, *alleged*, Absolvitor from both these grounds; for, as to the concurrence, it is not relevant, unless the pursuer had alleged that he had a real influence upon the capture; for, as to any guns he shot, they were without a mile's distance, and Mastertoun's frigate, being much lighter and swifter, did oversail Coningsby; and when the prize struck sail, Coningsby was a mile behind, and at the same distance when she was taken; and therefore was nei-

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Case in which  
a common  
concern in  
prize was  
ascertained.