

1764. July 6.

ROBERT HUNTER, of London, Merchant, *against* His Excellency AUGUSTUS BARON COUNT DE BOTHMER, Ambassador of his Majesty the King of Denmark, for and on behalf of his Danish Majesty, and the Hon. Captain KEITH STEWART, and others.

IN 1761, the *Maria*, a British vessel, Andrew Sinclair master, sailed from Quebec with a cargo for London.

The ship and cargo were the property of Robert Hunter, merchant in London, and were insured, to the amount of L. 1800, by the Royal Exchange Company of Insurers, London.

This vessel, while proceeding on her voyage, was taken by a French privateer, called *La Malice*, upon the 1st November 1761, and carried into Scarbour, a port in Norway,

Captain Keith Stewart, then commander of his Majesty's ship the *Lynx*, being on a cruise off the coast of Norway, entered the Danish port with his long-boat, retook the *Maria*, after she had been seven days in possession of the French, and brought her into the port of Leith.

Captain Stewart brought his action in the High Court of Admiralty for having it found, that the recapture was a lawful prize; and a proof being led, the Judge-Admiral "found it proved, that the ship *La Malice*, of Dunkirk, Captain Pierre Stourabout, commander, did, upon the 23d of October last, sail from the port of Dunkirk, to make war upon the King of Britain and his subjects, in virtue of a commission from the French King; and that the said privateer, when in prosecution of that purpose, did, upon the 1st of November current, two or three leagues off the Orkneys, make prize of the ship libelled, the *Mary*, of London, Captain Sinclair master, bound from Quebec to London, loaded with whale-oil and whale-bone; and that, upon her capture, the privateer sent on board of her *Elienne de Blois*, second captain, and six more of the Frenchmen, in order to take possession of the said ship *Mary*, which they accordingly did, and continued in possession of said ship for seven days; and that, upon the 7th or 8th day of November current, the pursuer, Captain Keith Stewart, did take and make prize of the said ship the *Mary* and her cargo, off the coast of Norway; and that he then found her in the possession of the said Frenchmen; therefore adjudged and declared one eighth part of the said ship and cargo to belong to the said Captain Stewart, as lawful prize made by him, to be disposed of conform to his commission and instructions, and agreeable to the laws and acts of Parliament."

Captain Stewart, upon obtaining this decree, appointed David Loch and Alexander Ogilvie, merchants in Leith, to be agents for the prize; who accordingly disposed of the ship and cargo.

The King of Denmark having complained of the recapture, as a violation of the neutrality subsisting between the two kingdoms, Captain Stewart, after

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A British ship having been recaptured within the limits of a neutral port, was ordered to be restored to the neutral power, on being sold, her value.

No 52. being called upon to answer for his conduct, was dismissed from his Majesty's service; but was soon thereafter restored to his employment, at the desire of his Danish Majesty, who, by his ambassador, declared that he was satisfied with respect to the insult, by the dismissal of Captain Stewart.

Robert Hunter, for himself, and as trustee for the Royal Exchange Insurance Company, brought his action in the High Court of Admiralty against Captain Stewart and Messrs Loch and Ogilvie, for recovery of seven eighth parts of the produce of the cargo; but Captain Stewart, being desirous of making every reparation in his power, represented the illegality of the capture, in violation of the territorial jurisdiction of the King of Denmark; and therefore insisted, that Robert Hunter could have no right to recover any part of the cargo.

This plea notwithstanding, the Judge-Admiral "found David Loch and Alexander Ogilvy liable, jointly and severally, in payment to the pursuer, or his tutors, for seven eighth parts of the balance of the ship and cargo in their hands, amounting to L. 2020 : 8 : 11½ Sterling, with interest thereof from the time that they got payment of the price from the purchasers, until payment; the pursuer, before extracting, finding caution to repeat the said sum to the defenders, in case the said ship or cargo, or their value, should be evicted from them by any future claim."

Captain Stewart and Messrs Loch and Ogilvy brought a reduction of the two decrees of the Judge-Admiral, and likewise an action of multipointing, in which they called all parties having interest, particularly his Majesty the King of Denmark, the Officers and Mariners of the French privateer, Robert Hunter, and the Directors and Company of the Royal Exchange Insurance.

These actions having been conjoined *ob contingentiam*, it was *pleaded* for Baron Count de Bothmar, on behalf of his Danish Majesty, That the recapture being illegal, because contrary to the law of nations. and the particular rights and privileges of the Crown of Denmark, no right could possibly accrue from that act, either to the former owners, or to those by whom she was retaken. That the decrees of the Court of Admiralty ought therefore to be set aside, and the value of the ship and cargo restored to the King of Denmark, from under whose protection they had been thus illegally removed.

*Answered* for Robert Hunter, *imo*, Supposing the ship and cargo had been a lawful prize in possession of the French privateer, and under the protection of the King of Denmark, yet, when this ship and cargo were brought to Great Britain, the owners had a *rei vindicatio*, and might recover their property, because the owners of the French privateer, being enemies, could not appear to claim any right; and the King of Denmark, having received satisfaction for the insult committed by Captain Keith Stewart, had no further interest in the matter.

*2do*, Although the King of Denmark might have been entitled to complain of the insult committed against his crown and dignity by Captain Stewart's

taking, within his dominions..a ship belonging to a subject of the French King, then at war with Britain, yet he can have no title, now that peace is restored, and a definitive treaty has been ratified, without any mention being therein made of this prize, or the property thereof, to insist, that the ship and cargo, or the value thereof, should be delivered up to him.

*Replied,* The condemnation of the ship and cargo was illegal, because the capture was made in a harbour belonging to the King of Denmark; and unless the proprietors can justify that capture, they can in no event recover any part of the value; and although his Danish Majesty had received satisfaction in so far as regarded Captain Stewart personally, he was still entitled to have the ship and cargo restored, as having been illegally seized within his jurisdiction.

*2do,* The King of Denmark not being a party to the definitive treaty of peace concluded with France in 1763, his right of restitution could not in any degree be affected by that treaty. If Captain Stewart's seizure of the ship in a Danish port, in 1761, was illegal and unwarrantable, it cannot be justified by the treaty of peace made two years after.

"THE LORDS reduced both the decrees of the Judge-Admiral, and preferred Baron Count de Bothmar, as minister of the King of Denmark, to the sums in the hands of the raisers of the multiplepointing."

*A. W.*

*Fol. Dic. v. 4. p. 145. Fac. Col. No 139. p. 312.*

This case was appealed:

\*\* The House of Lords Ordered and Adjudged, that the appeal be dismissed, and the interlocutors complained of affirmed.

1781. *January 30.*

VOLKERT HENDRICKS *against* WILLIAM CUNNINGHAM and others.

THE ship Catharina, of Holland, Volkert Hendricks master, having been loaded at St Domingo with the produce of that island, was, in her voyage to Texel, seized by the Bellona, a private ship of war, belonging to William Cunningham and others, and carried into Clyde.

An action having been brought by the captors before the High Court of Admiralty in Scotland, for having the ship and cargo condemned as lawful prize, a judicial acknowledgement was emitted by Mr Hendricks, that the cargo was the produce of St Domingo; and on that account sentence of condemnation was passed. This action was removed into the Court of Session; which sustained the Admiral's judgment.

Lord Ordinary, *Braxfield.*

For Hendricks, *Maclaurin, Morthland.*

Alt. *Lord Advocate.*

*C.*

*Fol. Dic. v. 4. p. 145. Fac. Col. No. 85. p. 141.*

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No 53.

A neutral ship, carrying the produce of an island at war with Britain, considered as the ship of the enemy. Reversed on appeal.