1761. *July* 23.

ROBERT BENTON, Merchant in Newcastle, for Himself and other Owners of the Ship John and Robert of Newcastle, and ANDREW FOWLER, Merchant in Aberdeen, his Agent, *against* JOHN MATTHIAS BRINK, Master of the Ship Joanna Catharina of Christiansands, formerly called the John and Robert of Newcastle.

No 51.

1. If *deductio intra præsidia* be necessary to transfer the property of a ship to the captor? 2. Supposing the property not transferred to the captor without such *deductio*, will a purchase made *bona fide* by the subject of a neutral state, at a public sale within the territory of his own sovereign, transfer the property to him, so as to bar a *rei vindicatio* at the instance of the original owners?

THE ship the John and Robert of Newcastle, Robert Benton master, being taken upon the Danish coast by a French privateer, she was carried into the port of Christiansands; and, upon the 15th of October 1757, sentence of condemnation passed against her by decree of the Duke de Penthievre, high admiral of France; a certificate of which condemnation was transmitted to Denmark as an authority to the captor to proceed according to the forms of that kingdom in bringing the vessel to sale.

The Britissh commander, apprehending that the capture was not legal, applied to the court at Christiansands; and having produced witnesses as to the distance of the vessel from the Danish coast when she was taken, the judge found that she was seized within the limits of the port, and ordered her to be restored. This sentence, however, upon an appeal to the superior court, was reversed; and the judgment of the court of appeal having been transmitted to the King of Denmark, his Majesty ordered the arrestment under which she then lay to be taken off, and the captor to be allowed to dispose of her.

In consequence of this rescript the vessel was sold by public auction, and was purchased by Christian Severine Balle, merchant in Christiansands, who gave her a new name, to wit, the Joanna, and sent her a voyage to Aberdeen, under the command of John Mathias Brink.

The British owners having got notice of her arrival at Aberdeen, they applied to the Magistrates of that city as admiral-deputes, and obtained from them a precept, in virtue of which she was arrested and dismantled.

Brink reclaimed the ship as his property, and produced the certificate of the condemnation by the Duke de Penthievre, and a certified copy of the proceedings in the Danish courts, and of the edicts which issued from the King of Denmark, relative to the rules to be observed upon any question that might emerge, touching the legality of captures of ships brought into his ports by the British or French, during the subsistence of the war in which the two crowns were then engaged.

The first of these edicts, addressed to the governor of Christiansands, and dated 7th May 1756, was of the following tenor: "Te certiorem facimus, hanc esse nostram voluntatem, quod universis Galicis vel Anglicis navibus piratis, et navigiis eorum, in libero mari captis, concessum sit, sine ulla molestia, intrare in portus nostros et stationes, ac ex illis exire; similiter permittimus illas naves suas captas in portibus nostris relinquere, vel illas una cum mercimoniis quibus sunt onustæ vendere, &c.; hac tamen expressa conditione, quod istarum navi-

No 51. um vel mercium emptio non concedatur, antequam pirata, sententia, quos dominus illius constituit, dicta, probaverit navem illam juste esse captam." And, by another edict, dated 30th July 1756, the subjects of Denmark were prohibited to buy any ship belonging to either of the states at war: "Exceptis navigiis a potestatibus belligerentibus, virtute bellicæ declarationis captis, et juste condemnatis, quas, uti moris est, in regionibus vel locis ubi inveniuntur, publica auctione comparari cuique permittimus."

The Magistrates of Aberdeen thinking this question of too great importance to be determined by them, the cause was removed to the high Court of Admiralty; and the Judge Admiral having given sentence in favour of the British owners, the Dane brought this judgment under review of the Court of Session, by a suspension, where the debate turned chiefly upon the following points: 1*mo*, Whether the property of the ship was transferred to the French privateer, according to the rules of the law of nations; 2*do*, Supposing it not transferred *jure belli*, whether the purchase made by the suspender, or his constituent, Christian Severine Balle, *bona fide*, at a public sale at Christiansands, was effectual to transfer to him the property, and to bar the charger's claim of restitution, or *rei vindicatio*, brought at their instance.

Pleaded by the chargers, upon the *first* point, Though it has been an established rule among nations, that success in war, when ultimately completed, should be effectual to transfer property; yet this rule, which arises from necessity, is tempered by reason as well as expediency, so as not to take place in every transitory possession, casually acquired by an enemy, who is not able to hold it. The law requires a firm possession, and supposes the property to remain with the former owner as long as there is any probable expectation of recovering it; and without this temperament, great injustice, as well as inconvenience would daily happen.

Upon this account, all nations, both ancient and modern, have been moved to agree upon some certain criterion, founded in nature and reason, by which the effect of possession, in transferring property *jure belli*, should be determined; and the natural rule which occurred, was, that the property should be understood to be vested in the captor, as soon as he had brought the prize *intra præsidia* of the state to which he belonged.

Thus, amongst the Romans, the property was never understood to be acquired by the enemy, "Donec res intra præsidia hostium deducta fuerit," L. 5. De Capt. et postlim. reversis.

The same rule is also laid down by Grotius, Lib. 3. cap. 6. "De jure acquirendi bello capta;" and though, at the end of the passage, he adds these words: "Sed recentiori jure gentium inter Europæos populos introductum videmus, ut talia capta censeantur ubi per horas viginti quatuor in postestate hostium fuerint;" yet it cannot be supposed that he meant by this to say, that the property was transferred in twenty four hours after the seizure, without a *deductio intra præsidia*. On the contrary, it appears from the authority to which refe-

rence is made in the notes for this modern custom, viz. Albericus, that the twenty-four hours here mentioned, were not intended to abrogate the old rule, established by the civil law and the law of nations, but rather to confirm it, by requiring a continued possession, at least for that space of time, after the capture is brought within the full power of the enemy, or *intra ejus præsidia*, as the law speaks; and this is further proved from what Grotius lays down in a subsequent chapter, Lib. 3. cap. 9. § 16. " Hac vero res quæ intra præsidia perducta nondum sunt, quanquam ab hostibus occupatæ, ideo postliminii non egent, quia dominum nondum mutarunt ex gentium jure." No 51.

The doctrine is also maintained by a celebrated author and eminent judge, Cornelius Van Bynkershoek, in his *Questiones juris publici*, l. 1. c. 4, where, after showing that there is no foundation in reason for supposing the property to be transferred by 24 hours possession, he proceeds to lay down the general rule on which the transference depends, in these words: " Aliter rem hostis factam non videri, nisi ita facta sit, ut eam retinere et defedere possit.' And afterwards, " Quando autem ita adepti videamur possessionem, ut retinere vel non retinere possimis, causarum, ut dixi, varietas definiri non permittit; tunc tamen retinere videmur posse, ubi rem hostilem, ut jus Romanum loquitur, intra præsidia deduximus; præsidiorum autom nomine, et castra, et portus, et urbes, et classes, intelligimus; eorum enim omnium eadem causa est in tuta defensione rei occupatæ ".

The same author, in cap. 5, gives further illustrations and proofs of his position: He observes, that after the property is transferred to the enemy, being *deducta intra ejus præsidia*, the ship, if re-taken, must belong to the captors; but, that if it be re-taken before such deduction, the property remains, and may be claimed by the former owner. And he refers to a treaty betwixt King William III. and the States of Holland in 1689, in which this is supposed to be the law, and to a decision of the States-General in 1676, in the case of two Hamburgh ships loaded with goods belonging to the merchants of Amsterdam, which, after being taken by the French and carried into Hull, were condemned at Dunkirk; but being afterwards re-taken by the Zealanders in their passage from Hull to Dunkirk, were judged to belong to the former owners.

Nor is this doctrine peculiar to foreign lawyers. Molloy, in his treatise *De jure maritimo et navali*, when he mentions the opinion, that the property is transferred by twenty-four hours possession, adds: " But this is a new law, so it is conceived to be against the ancient judgments of the civil law, as well as the modern practice of the common law;" Book 1. chap. 1. § 13. And, in § 14, he states the case of a Dunkirker who had seized a French vessel upon the sea, and sold her at Weymouth, without ever bringing her *intra præsidia Hispaniæ*, in which it was resolved by all the judges of England, " That if there be a capture by letters of marque, or by piracy, and the vessel or goods are not brought *intra præsidia* of that prince or state by whose sub-

No 51. ject the same was taken, the same rule will not divest the property out of the owner."

Upon the same principles, many other cases have been adjudged in England. The last-mentioned author observes one, book 1. chap. 4, § 15. p. 62., where the ship Diamond, taken by a Dutchman, and carried into the dominions of Savoy, and there condemned and sold, was thereafter, upon being seized in England, adjudged to belong to the original proprietors, as never having been carried *intra præsidia* of the states of Holland. Another instance is also to be found in a late book, entitled, The law of bills of exchange and insurances, p. 232.

Answered for the suspender upon this point; It seems a fundamental principle, that the dominion or property of goods taken from the enemy *vi et armis* is transferred by the single act of capture. This matter is treated by the doctors of the civil law, under the title *De acquirendo rerum dominio*, where they are considered to be in the same state with the *res nullius quæ fiunt primo occupantium*; and the doctrine is established by numberless texts of the law itself; *Inst. lib.* 2. *tit.* 1. § 17. *l.* 5. § 7. *D. De acquir. possess.* Grotius also lays down the same rule, *lib.* 3. *cap.* 6. § 2, and requires no more for the *acquisitio dominii* than that the goods be *erepta ab hostibus*; after which, not only the captor, but those who derive right from him, *tuendi sunt a gentibus in possessione rerum talium.* And Puffendorf, in his treatise on the public law, expresses himself in the same manner.

From these and many other authorities, it is clear, that the capture of goods *in bello publico* was considered to transfer the property *statim*; and the question which arose was, by what act, or from what period of time, the goods should be understood to be so *capta et erepta*, that the property should from thence forward be deemed to be lost to the former owner, and transferred to the captor.

The solution of this question, upon the principles of common sense, as well as of law, is extremely obvious. A momentary, transient, or precarious possession, such as may be figured of ships taken and re-taken *ex incontinenti*, ought not, perhaps, to be deemed sufficient to infer so many consecutive transfers of the property; but whenever the possession is such as renders the enemy master of the prize, and in condition to retain it, the capture is thereby completed, and the property transferred.

The application of this to the present case, is obvious. The ship in question was about two years in the possession of the captor; she was condemned in the courts of France; she was found to be a lawful capture by judgment of the Danish court, and as such, was authorised to be sold; after which, it is impossible to maintain, that the captor had not thereby acquired a firm possession, or that the former owners could have any hope or expectation of recovering their property *vi et armis*, so as to retain their possession even *animo*.

It is true, indeed, that some lawyers of character, misled by analogy from that fiction of the Roman law, the *jus postliminii*, have maintained the necessity of the goods being brought *intra præsidia*; but the later practice of nations has fixed this matter by limiting a determined space of time, viz. twenty-four hours, for ascertaining to the captor the property of goods taken from the enemy. No 51.

To this purpose, Grotius, *lib.* 3. *cap.* 6. § 4.; "Sed recentiori jure gentium intra Europæos populos introductum videmus, ut talia capta censeantur ubi per horas 24 in potestate hostium fuerint." And this he confirms by reference to the treatise *De consulatu maris*, *c.* 283. *et* 287.; and to the *Constitut. Gallic. lib.* 20. *tit.* 13. *art.* 124.

The same doctrine is laid down by *Luximius De jure maritimo*, *lib.* 2. *cap.* 4. § 8. *et* 14.; and *Zouchæus De jure feciali*, *part.* 2. § 8. *et* 21.: *Simon Groenwegen*, likewise, *lib.* 49. *tit.* 15. *De captivis*, *&c.* proves, that the law requiring a ship to be brought *intra præsidia* was abrogated, and states it as such in his treatise, *De legibus abrogatis et inusitatis in Holandia vicinisque regionibus.*

Agreeably to this, it was established by the marine laws of France, in 1681, cap. 34. § 8. "Si aucune navire de nos sujets est repris sur nos ennemis, apres qu'il aura demeure entre leur mains pendant 24 heures, la prise en sera bonne; et, si elle est fait avant les 24 heures, il sera restitue au proprietaire;" a plain admission, that the original property was held to be transferred to the first captor, after the prize had been 24 hours in his possession.

But what is still stronger than a thousand opinions of lawyers or doctors, the general practice both of the British and French nations in the course of the present war, is entirely agreeable to the suspender's doctrine; and, in confirmation of this, there is produced a certificate under the seal and subscription of William Fuller, Esq; procurator-general in the High Court of Admiralty in England, and of his Majesty's High Court of Appeal for prizes, certifying the condemnation of several vessels in the said High Court of Admiralty, which had been carried by the captors, British privateers, into different ports of the Mediterranean.

The authority of Albericus Gentilis and Bynkershoek, resorted to by the charger, can have no influence against this general later practice of nations. The first of these authors is not of the number of those distinguished practical writers generally referred to in questions of this kind; and it is to be observed, that in the title quoted upon this occasion, he only states the heads of an argument, *pro et con*, that was maintained in a disputation between him and Antonius Gama, upon this question, in which he supported the negative opinion; and it must be owned indeed, that some of his arguments are very extraordinary. Bynkershoek, it is true, maintains, that no length of time is by itself sufficient to infer the transference of property; that the possession must be such as to enable the captor to retain it; and that as this cannot be determined by any general rule, ever case ought to be judged according to its pe-

No 51. culiar circumstances. But this doctrine is noways opposite to the suspender's plea; and this author, after remarking sundry ordinances of the States-General in 1630 and 1666, expresses himself thus: "Cæterum, ex iis decretis id tamen constare existimares, ea quæ ab hostibus nostris amici nostri compararunt, iis eripi non posse, si simel in portum amicum fuerint deducta, cum aiunt recte publicari." He indeed suggests it to be matter of doubt, whether these *constitutiones Belgicæ* were right in this particular, and seems to repel every general rule; but, at the same time, when he comes afterwards to declare his opinion, that there can be no doubt of the property being transferred when the goods are brought *ad fines et portus capientis*, he subjoins, "Tantundem dicerem, si vel in portum amici vel socii deduxerit."

As to the two cases mentioned by Molloy, the first can by no means apply to the present question; seeing that the Dunkirker which had taken the French privateer was neither a ship of war belonging to the King of Spain, nor a privateer. The only authority which this Dunkirker was vested with, was what is called letters of marque, or reprisals, which were in use to be granted to private persons, in respect of damage they had sustained in their properties by the subjects of another state, for which satisfaction had been demanded, and refused; and it appears evident, not only from Jacob's Law Dictionary, *voce* MARQUE and REPRISALS, but also from the opinion of the Judges in this very case, as stated by Molloy, and from the book called the Laws of the Admiralty, p. 219, that there is a material difference between captures by ships of war, and those by letters of marque and reprisals; which last must be brought *intra præsidia*. At the same time, there is an annotation subjoined to the passage now quoted in the Laws of the Admiralty, observing, that this rule does not seem agreeable to modern practice.

The other case stated by Molloy, b. 1. cap. 4. § 15. fol. 62. was also of a capture by letters of marque; besides, an appeal was taken against the sentence; and there the matter stopt.

Neither can the reference to the law of bills of exchange and insurance aid the chargers; for all that is to be found in the page quoted, is mention made of a pleading of Dr Floyer, in the course of which he cited a case in which judgment was said to have been given, finding that the property was not altered in that particular case.

Pleaded for the charger, upon the *second* point; The purchase at the voluntary roup in Denmark, though made *bona fide*, could not vest in the suspender a property which never was transferred *jure belli* to the captor. A *bona fide* purchase and possession is allowed, in some cases, to secure the purchaser from repetition of the fruits, &c.; but by no law is it allowed to transfer the property of a subject that did not belong to the seller. In all such cases, the rule of reason must take place,—Nemo potest plus juris in alium transferre quam ipse habet.

Nor can the condemnation in France, supposing it clearly authenticated, have any influence in this case; for, 1*mo*, If a *deductio intra præsidia* was necessary to vest the prize in the captor, the sentence of a French court, contrary to the law of nations, cannot divest British subjects of their property; 2*do*, The proceedings had by the French High Admiral were carried on without any regard to the regulations of their own country; none of the writings or papers belonging to the vessel being produced, nor any of the crew being brought to give evidence of the capture; 3*tio*, The proceedings of this French court were void, seeing the ship was not brought within the dominions of France, nor within the power of any fleet or navy belonging to the Crown of France; and therefore could, in no view, be said to be subject to the jurisdiction of the courts of that kingdom. No 51.

Neither can the suspender's plea be aided by the proceedings in Denmark. The only question that could be tried in that kingdom was, Whether or no the ship had been taken within the limits of the port? A neutral state has no power or jurisdiction over the property of the subjects of either of the belligerent powers. The province of the courts in such state, is only to try whether or no the peace of the port has been violated by the capture. If that has been the case, they ordain him to restore the possession; if not, they leave it as they found it; but the property remains precisely in the same situation as before. A sale, therefore, made to a third party by the captor, whether by private bargain or voluntary roup, can have no effect to deprive the owner of his property. It is true indeed, that, by the King of Denmark's rescript, the captor was allowed to dispose of the ship; but the intent of this rescript was plainly no more than to take off the inhibition or arrestment under which the vessel had been laid during the proceedings in the Danish courts; the consequence of which was, that he might either carry her off, or dispose of her to third parties, without any impediment from the neutral port, which had no interest after the question of possession, of which only they could judge, was determined. This was the sole purpose of the rescript; and it cannot be pretended, that the King of Denmark, by this, either authorised or confirmed the sale.

Answered by the suspender; Though, upon the strict principles of law, the decrees of one country cannot operate *extra territorium* of that country, the *comitas gentium*, founded upon public utility, has found it expedient to relax from the rigour of these general principles so far, that after a matter has been fairly *deducta in judicium* before a competent court, and a final judgment has been pronounced, such judgment ought to be available to that party in whose favour it is given in the courts of any other country, where the question is again endeavoured to be brought to trial.

It may indeed be admitted, that where a foreign decree has not received execution, the judges of another country, when asked to give their aid and concurrence in executing such decree, may examine the justice of it; and if

No 51. it shall appear unjust and unequitable, are not bound to interpose their authority to render it effectual. But where a foreign decree has already received execution, it is not competent to the judges of another country to overturn it, whatever opinions they may entertain of its injustice. And so it was expressly found, in the noted case of Captain Hamilton *contra* the Dutch East India Company, July 24th 1731, *see* APPENDIX, That Captain Hamilton's ship and cargo had been condemned and confiscated in the Council of Justice of Molucca, and that this sentence was confirmed, upon Captain Hamilton's appeal, by the Council of Justice at Batavia, was sustained.

This applies directly to the present case. The ship in question was condemned in the courts of France; and, after the former proprietor had applied to the courts in Denmark, she was found to be a legal capture, and a rescript issued from the King of Denmark, recalling the inhibition, and authorising her to be sold; upon this, she was sold accordingly, at a public roup; whereby the decree of the Danish courts received full execution; and the suspender is entitled to plead upon this decree and sale as an absolute bar to all future inquiry with respect to the legality of the capture.

The charger indeed very artfully supposes, that the subject matter of trial in the courts of Denmark was not the legality of the capture, but solely whether he had been unlawfully dispossessed of his ship; and, consequently, whether that possession ought not to be restored; and would have it believed, that the action maintained in Denmark was a possessory, not a petitory action. But this distinction is manifestly disproved by the certificate of the proceedings in the course of that trial. The vessel had been seized as a lawful prize, and condemned as such in the court of Admiralty in France. When she was about to be sold, the charger maintained, that she was not a lawful prize, because seized within the limits of the port of Christiansands; and this was his only ground of complaint; for he had not then learned that a *deductio intra præsidia* of the French King was necessary before the property could be transferred, or the ship condemned and sold. Upon this averment, he procured an inhibition to stop the sale, and brought the question to trial; and a proof being led, that she was taken a German mile from the shore, the inhibition was recalled, and the captor was allowed to dispose of her agreeably to the edicts of the King of Denmark. How this can be characterized a possessory judgment only, is submitted.

" THE LORDS found, That the property of the ship was regularly transferred to, and vested in the person of the suspender; and therefore sustained the reasons of suspension.

For the Charger, *Rae, Ferguson.* For the Suspender, *Lockhart.* Clerk, *Gibson.*

A. W. *Fol. Dic. v. 4. p. 143. Fac. Col. No. 49. p. 104.*