

Case 32.
Fountain-
hall 27 Dec.
1711.
Forbes,
13 Feb.
1713.

William Collier, Captain of his Majesty's
Ship the Mermaid, - - - - - *Appellant* ;
Robert Stewart, Provost of Aberdeen, and
Company, Owners and Freighters, and
Alexander Inglis, Master of the Ship
Joanna of Aberdeen, - - - - - *Respondents.*

8th July 1715.

Prize.—A French privateer having captured a Scots ship, took a quantity of goods out of her, and some money from the ship-master, and upon payment of a ransom agreed upon, allowed the ship to depart with a ransom brief; the privateer having continued upon the coast, and being there captured by a British ship of war the money and goods taken by force, as well as the ransom, were to be restored by the captors.

THE ship Joanna of Aberdeen, was upon the 17th of May 1711, in her voyage to Virginia, captured off the Orkney Islands, by the Pontchartrain a French Privateer; and upon the capture, four bales and two casks of goods, parcel of the cargo, were taken out of the prize, and also 26 guineas out of the pocket of the respondent Inglis the Master.

The Pontchartrain with her prize brought up before Aberdeen, and a ransom of 200 guineas and 5*l.* being agreed upon, the same was paid by the respondents to the Captors upon the 22d of May. The Pontchartrain thereupon delivered to the Joanna a ransom-brief for her protection, and she proceeded on her voyage.

Upon the 28th of the same month of May, the privateer was taken upon the Scotch coast by the appellant, and in it were found the said four bales, and two casks of goods taken out of the Joanna, and money to the amount of the 26 guineas taken from the respondent Inglis, with the 200 guineas and 5*l.* paid for ransom.

The appellant having brought the privateer to Leith, it was, on the 12th day of June thereafter, adjudged and condemned as lawful prize by the Court of Admiralty there. The prize, with the goods on board, and money, were delivered to an agent for prizes, chosen as directed by the act 6 Ann. c. 13. intituled, “an act for the better security of the trade of this kingdom, by “cruizers and convoys,” and for the ends and purposes recited in the said act. The bales and casks of goods being put on board the ship Greyhound, by the agent, in order to a sale, the Greyhound with these goods, was cast away, and these goods were lost.

The Mermaid being in the Frith of Forth, and the appellant at Leith, the respondents brought an action against him before the Court of Admiralty in Scotland, for recovering the said 26 guineas and parcels of goods, and the said 200 guineas and 5*l.* ransom money, upon the ground, that since the privateer still continued

continued upon the coast of Scotland, and had not carried the goods and effects of the respondents *infra presidia hostium* the property of the same was not vested in the privateer, but continued with the respondents, in the same manner as the ship would have done if not ransomed; and this the rather, as the capture of a privateer was by a British ship sent purposely to cruize upon the coast for the protection of trade. The appellant did not make appearance to this action, and decree in absence passed against him on the 25th day of August thereafter.

In January 1712, the appellant brought a bill of suspension before the Court of Session, of the said decree of the Court of Admiralty, in regard that the same was pronounced while he was *absens reipublicæ causa*. The Court reponed the appellant against the said decree, and turned the same into a libel; and after various proceedings, the Court, on the 13th of February 1713, “ Found that the property of the money and goods which were
“ taken from the respondents by the said privateer, and not con-
“ tained in the ransom bill, remained still with the respondents,
“ and therefore, that the privateer having continued upon the
“ coast of the kingdom, and being taken there by the appellant
“ as commander of one of her majesty’s ships of war, within the
“ bounds of his cruize, he ought to restore such money and
“ goods to the respondents, and declared they would advise the
“ debate as to the contents of the ransom bill on Wednesday
“ (then) next.” Accordingly, on the 16th of February there-
after, the Court “ Found that the 200 guineas and 5/, remained
“ still to the respondents, and repelled the allegation that the
“ ransom was *bona fide* received by the agent, in respect of the
“ citation before the Admiral prior to the receipt, and remitted
“ to the Lord Ordinary to hear parties on the import of the other
“ receipt granted to the said agent prior to the citation before the
“ admiral.”

The appeal was brought from “ two interlocutory decrees or
“ sentences of the Lords of Session of the 13th of February
“ 1713, and 16th of February 1714 (a)”

Entered
6 May,
1715.

Heads of the Argument of the Appellant.

4. The contract between the ransomers and the French was free, voluntary, mutual, and absolute; they re-delivering the ship, and the ransomer paying the 200 guineas and 5/. The ransom was a fair transaction according to the laws of war, whereby the ship Joanna purchased her freedom, and obtained a ransom-brief for protection from other privateers during the voyage; and the privateer having got the ransom money, *ex contractu*, the same must be considered as purchase money, and the property belongs to the privateer, and is transmitted to the appellant, and returns not to the first owner.

By the ransom-brief the ship and goods were protected against all other French ships, during her intended voyage, had she met

(a) It appears from the Cases that this is a mistake for 1713.

with ever so many before she had fully completed the same: And it is not reasonable, that the respondents, whose ship has finished her voyage and unladed her cargo safely in port, should now reclaim the ransom-money, on pretence that the privateer was chased and taken before she could get home to her own port, with the ransom money given for such protection.

As to the 200 guineas and 5*l.* *non constat* whether it was the same identical money so paid by the ransomers, for there passed six days from such payment, before the privateer was taken by the appellant; and the privateer in that time might have sent home the species of money received for ransom, or otherwise alienated and disposed of the same, and other like species of money might have been on board.

Admitting that there should be a difference between the specific 26 guineas, and the 4 bales and 2 casks of goods, and the ransom price the 200 guineas and 5*l.*, which the appellant contends there is not; yet the 26 guineas and goods were taken by force, and therefore, though the respondents should insist upon a restitution for them, yet the ransom-money was voluntarily given, and the ship re-delivered for the common benefit of both parties, which gives a full and irrevocable property as to it.

And further the said 26 guineas, and the goods were taken before the ransom was agreed to, and must be presumed to have been thrown into the ransom, and quitted and given up accordingly, by the master's subsequent acceptance of the ransom-brief for his whole ship and cargo, and acquiescence therein.

Heads of the Respondents' Argument.

By the common and universal opinion of the best lawyers of all nations, the goods and effects taken on board any ship by an enemy, do not become the enemy's property unless they be carried *infra præsidia hostium*. Grotius's words are very express, "Hæ
" vero res, quæ infra præsidia perductæ nondum sunt, quanquam
" ab hostibus occupatæ, ideo postliminii non egent, quia Domi-
" nium nondum mutârunt ex gentium jure." And so are the opinions of other authors who write upon that subject. Till the effects are brought *infra præsidia hostium*, there are hopes of recovery of these goods from the enemy by the subjects or allies of the state from which they were taken.

This doctrine applies also to the 26 guineas taken out of the respondent Inglis's pocket, and to the four bales and two casks of goods which had been taken *vi majore* before the ransom was agreed upon, and which form no part of the ransom-bill. But, further, even the 200 guineas and 5*l.* for the ransom must be accounted for to the respondents, since the property was not changed; for, supposing no ransom had been given, but that the ship and goods had continued in the possession of the privateer, there is no question, but they would have been restored upon the re-capture, and so ought the ransom which came in place of those. Or, supposing that the ransom-money had not been paid, but that the master of the ship had been detained as an hostage till the ransom money

money had been paid, there is no question but upon the re-capture the hostage would have been released, and the re-captor would have had no pretence to the ransom-money for which the hostage was kept. Indeed all agreements of this kind are involuntary, and are only gone into to prevent a greater evil, and therefore tacitly include the hope of a recovery by a subsequent capture of the enemy.

With regard to the identity of the money, the ship was taken the 17th of May, and brought up before Aberdeen to receive the ransom-money on the 22d, and upon the 28th she was taken by the appellant, a plain evidence that the same money was still there, since the privateer had been all that time upon the coast: And as it is not pretended, but the goods were on board the privateer at the re-capture, so the very sum of 226 guineas was found on board the said privateer, and no more gold, as appeared by the receipt of the agent, to whom the appellant delivered the same.

The appellant founded upon the act of parliament 6 Ann. c. 13. 6 Ann. c. 13. by which it is enacted, that if any privateer shall be taken as a prize by any of her majesty's ships of war, and adjudged as prize in any of her majesty's Courts of Admiralty, the commander, officers, and seamen who shall be on board such ships of war, shall, after such condemnation, have the sole interest and property in such prize so taken and adjudged to their own use, without further account to be given for the same. But this act only gave the officers and seamen the shares of prizes formerly belonging to the crown or admiral; but it does not concern the ships or goods belonging to British subjects or their allies retaken from the enemy, and therefore does not affect this case, the law being left as formerly. And if the appellant have paid the money, and delivered the goods belonging to the British subjects to the agent, he must blame himself, since the respondents commenced an action against him for recovery of the effects in question, before they were delivered to the said agent, as appeared by his receipt.

After hearing counsel, *It is ordered and adjudged, that the said petition and appeal be dismissed, and that the interlocutory decrees or sentences therein complained of be affirmed.*

Judgment,
8 July 1715.

For Appellant, Nath. Lloyd.
For Respondents, Edw. Northey, Will. Hamilton.