Captures of Land

for Forbeare or the like to his Advantage; In any of those cases, whatsoever was the Enemies seems to be transferred to the Conqueror. persons or Goods taken without the Territories of those princes or people that are at War against each other, becomes theirs that take them: Seeing no place can give an Enemy protection. But yet he that hath the Supreme power in that place, may at his pleasure prohibit the prosecution of an Enemy within his own Dominions, and in case of disobedience may, require Satisfaction as for an Injury done to himself, H. Grot. Lib. 3 cap. 6. §26.

In determining the Question to whom Spoils taken in a solemn War belong, the Lawyers are of very different Sentiments. Some are of opinion, that he who first apprehends them hath the best Title to them, whether they be mobable or Immobable, and whether taken by publick or private Acts of war. Others affirm mobable Things taken in war to be primarily, and by original Right theirs that take them; but that they are notwithstanding to be brought to the General, who may distribute them among the Souldiers according to their Quality and Merit Cobarrub. ad c. peccatum de Reg. Jur in 6. §11. part. 2. Which distinction doth not go down with a third sort of Lawyers, who make all Things, without distinction of Moboable or Immobable, to be acquired to the Soveraign or State that gives Authority to the War, and bears the Charge of it, H. Donellus a Lawyer of some figure affirms, that all Things taken from the Enemy by private persons become directly theirs who take them §17 Inst. de Rer. dv. junct. L. 51 ff. de Acquir. Rer. dom. But that Lands, and the prey or Things taken after the Enemy is defeated can be taken only by the General of the war, and that what he taketh goes to the Fisk, or Common Wealth. But this opinion justly displeaseth Zoglerus: Because, it makes the General's worse, than that of any common Souldier. The more probable opinion is, that all Things taken, whether moballe or immobile, are first acquired to the State or Soveraign, whatsoever Hands they first fell into, whether mercenary Souldiers or Subjects obliged to military Services, upon Summons without recompending pay. For what private Souldiers take in the War, may be said to be taken by the prince or State that employs them: According to the Rule, Qui facit per alium, ipse facere videtur. And when sometimes private Souldiers are allowed a Share of the Booty, that is a Matter of mere Bounty, or perhaps Reward for their good Services, or Encouragement to their valour, puffend. L. 8. cap. 6 §21. Vide Mouton Comm. in Grot. Lib. 3. cap. 6. §98 & §99. However at this day, it is almost every where observed, That each man keeps what Moboables he can seize on by plundering in Towns or Battles: And what is got by the Skirmishing of parties, is divided to each person according to his post and Station, Woods Instit. of the Imper. Law page 165. As to Things immobable a distinction is commonly made betwixt those in the dominions and property of the Conquered prince or State, and such as belong in property to private persons residing there. When a City or Fort is taken, the victor prince or State acquires Jurisdiction over the place itself and the Territory it commands, implying a power to impose Taxes &c, and acquires the property of all Lands formerly pertaining in property to the Vanquish'd prince or State. But all private mens possessions are generally restored to them as before upon their swearing Allegiance, and paying Taxes to the Conqueror. Sometimes the Governours of besieged Towns capitulate with the besieger upon surrendring the place for Liberty to the Inhabitants within a certain Time to make sale of their Lands, Houses &c. and remove themselves with their effects elsewhere, Jo. Boot de Jure Militari, cap. 5. n. 17. Where Moboable Goods are taken from the Enemy, by a party led on by an officer who only knows the design, all fall to the publick and the Souldiers get no Share. But moboables in Excursions or fires Adventures and Skirmishes belong to the Takers, H. Grot. de J. B. & P. Lib. 3 cap. 6. §12. Ja. Boot. ibid. n. 19. Groenwig. de Leg. Abrog. ad §17 Inst. de Rer. div. By our Border Law, Goods taken from the English when at War with Scotland, were to be divided act 52 par. 12. J. 2. whereof one third belong'd to the King, another to the Warden or Chieftan of the Marches, and a third to the Apprehenders, Mckenzie's observations

act 52. Goods taken from the Enemy in private Skirmishes are in Holland divided thus: If the party of Souldiers who took the Booty exceed 50 the Captain gets a Tenth, the Lieutenant a Fifth, the Ensign a Third, the Master Master a double portion, the Sergeant or Corporal a half, and each Souldier a Small Share. But Horsmen still get double of what is given to Footmen, Jo. Boot Ibid.

The Main private Interest in publick war is, that which accrues to the privateers or Capers, by virtue of Commissions from the Admiral, Ships and Goods of the Enemy, and such as partake in the War or carry not themselves as neuters to the princes and States engaged therein. By the custom of Scotland, the prizes or forfeitures belong to the privateers who make them, with the Burden of paying a fifteenth part to the King and a Tenth to the Admiral Stair Inst. Lib. 2. Tit. 2 §4. 29 January 1675, Stewart contra Executors of D. Lennox. Both which are very unreasonable. The ordinary Rule of dividing prizes between officers or seamen concurring in a forfeiture is according to the proportion of Men & Guns in each of them. But a Ship attacked by two privateers was divided equally without regard to the proportion of Men and Guns. In Regard the smallest and lightest of the privateers did actually force the prize, when the other concurring in the Action was at a considerable distance, and it was agreed by a binding compromise between them, made in presentibus Bailli & in ipso Stari, that without Commission from the owners, the Captain should share in all prizes to be taken by either, 7 Feb. 1668 Comingsby contra Blackstone. In a composition of privateers for the Right of an prize, it was made very, that ought to be Judged to the first Attacker, and not to the Captain who first boarded her, if so disabled by the former that she could not have escaped from falling into his Hands, tho the Latter had not afterwards interposed. Therefore in the War between Britain and Holland, an English Frigot having attacked a Dutch privateer possess'd of a prize Ship, and a Scottish Shiro having attack'd the English Frigot two days in view and prosecution within Gun shot of the prize, attacked that prize, made her strike sail, and boarded her before the Scots had even boarded her Liberly: The Scottish privateers capture and possession, otherwise than to assist the English Frigot, was found to have been injurious; unless it were proved that the prize would have escaped, had it not been forced to strike sale to the Scottish privateer. Kings Advocate contra Rankin Bascuit Jure Belli quæ abrito possidentur, cedunt victori. For it is not every occupancy and possession that makes property, but such as is lawful and not Injurious. And albeit if an Army or Fleet were defeated, the first prosecution would not make a posterior prosecution unwarrantable, so as to oblige the last prosecutor to restore to the first what he takes from the common Enemy: Because in such a case of a general Engagement with a routed Army or Fleet, all are allowed to prevent or outdo another; yet it is not so in particular prizes, which may be rescued and forc'd by the particular Attackers. Ibid. Infra pag. 492. When any ship is taken either of an Enemy in open war or of others carrying Contraband Goods to the Enemy, or of pirates who wage a continual War with all Nations; the Ship so taken cannot be Legally disposed of or sold till she be adjudged Lawful prize: Seeing it were dangerous to leave the determination of that Matter to the captors discretion. The Admiral is the sole Judge of all prizes taken at Sea. But the Lords of Session (who are the Kings great court of Admiralty) may determine therein in the Second Instance by suspending and reducing the Admirals decreets. And till Abrogation of Maritim Causes from the Admiral were discharged (act 16 par. 3. Ch. 2.) the Lords used to advocate to themselves adjudication of prizes from his court in case of Iniquity committed by him, 12 June & 19 July 1673 Gillers contra owners of the Boundre. 17 december 1673 Stuart contra owners of the Seal Fish. So the commissioners of Admiralty in England are Judges in the Second Instance of prizes brought before the Admiral of England. The Lords of Session in determining Questions concerning prizes observe the Law of Nations, except where the same is altered by Treaties between the King and his Allies, conform to which their Causes are to be decided, Stair Inst. Lib. 2. Tit. 2 §6. So that competent and omitted in the first Instance is no Ground to exclude the defences of Strangers, 23 July 1667 Jurgan contra Captain Logan. Nor is the Honor of the privateering commission from the Admiral regarded, if inconsistent with the Law of Nations 21 Feb. 1668.