

No 5.

dled with the ship and loading, *brevi manu*, for the use of the garrison; Balwhilly pursues a spuilzie before the Admiral: Colonel Seatoun gives in a bill of advocation on this reason, that Balwhilly having no commission, albeit he did seize upon the ship, yet it belongs to the King, and the Colonel had a warrant from the Lord Commissioner to intromit therewith, for the garrison's use; and therefore, in the cause concerning the King, his Majesty's Advocate and officers were not obliged to answer before the Admiral, nor could they attend there, and therefore the advocation ought to be past. It was *answered*, That the reason was *in causa*, and not relevant, for the advocate ought to have a depute before the Admiral, which is a supreme court; and process maritime, in the first instance, ought not to be sustained before the LORDS, and that whatever they pretended in the point of right, *Spoliatus est ante omnia restituendus*.

THE LORDS having heard the parties upon the bill, *in præsentia*, ordained the same to be past.

It was then desired, that as, before the Admiral, the Colonel behoved to find caution, not only *judicio sisti*, but also *judicatum solvi*, that he may be ordained to do the same before the Lords.

Which the LORDS refused, but granted the advocation in common form.

*Stair, v. 1. p. 487.*

No 6.

Does the declaration of the shipmaster preclude the owners from bringing contrary evidence?

1667. December 13. RANDOLPH DAVIDSON *against* RICHARDSON.

A SHIP being declared prize, because the loading of salt belonged to a Frenchman, the skipper and steersman having declared upon oath, that the loading was taken in at the Rotchel upon the account of the said person; the adjudication was quarrelled by a reduction, upon diverse reasons; and in special these, that the deposition of the skipper and steersman were forced and extorted from them; and it was offered to be proved that it did appear by diverse letters, certificates, and documents produced, that the loading did belong to the owners of the ship, who were citizens of Dantzic and Hamburgh, and were not the King's enemies.

THE LORDS, in this process, found, that the owners may be heard to reduce the sentence upon reasons omitted by the skipper. *2do*, It being debated amongst the Lords, whether the skipper's declaration should so prejudice and conclude the owners that they should not be heard thereafter to prove that the loading belonged to them, some thought it hard that the skipper's fraud or mistake should prejudice the owners; but because, in the case, there was no ground to presume that the skipper and steersman did intend to prejudice or wrong the owners, and the writs and certificates produced were all after the seizure; and the letters, which were of anterior dates, might have been made up, and were all from persons concerned; and there were no documents found in the ship that could clear that the loading did belong to the owners

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

No 6.

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

No 7.

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