

rance, there is no relevant ground of confiscation, nor any presumption, that the goods belonged to Hollanders, because merchants insure where they can cheapest; and by the insurance, it appears, that this is a very cheap insurance at Amsterdam; and insurance being a lawful contract of commerce, undertaking hazard for a certain sum, it may well consist between the King's allies and his enemies, as well as other commerce, and it doth not transmit the property of the goods to the King's enemies, but on the contrary, is undergone for securing thereof; and the King, nor any having warrant from him, cannot, upon the account of advantage to himself, or disadvantage to his enemies, crave confiscation, unless it were a just advantage.

THE LORDS superseded to give answer, anent the insurance, till the conclusion of the cause; that both parties might produce testificates of other Admirals as to that point; and found, that the skipper's oath, comptrolling the pass, did derogate from the faith thereof, and from the benefit of the treaty, but being but a presumptive probation, either as to the false pass, or double documents, they found, that the stranger might prove the property of the goods, to belong to freemen, and admitted the other party to adduce any probation, that they belonged to enemies, and as an evidence thereof, ordained the witnesses to be examined concerning the skippers throwing papers over-board.

*Stair, v. 2. p. 142.*

1673. January 21.

ANDERSON against DOUGLAS.

CAPTAIN DOUGLAS, a privateer, having brought up a ship, called The Sun of Dantzick, and obtained her to be adjudged prize by the Admiral, the Stranger raised reduction of the Admiral's decret before the Lords, and the Captain, in fortification of the adjudication, insisted upon these grounds; *imo*, That, by the documents taken aboard of the ship, there is no sufficient evidence that the ship and loading belongs to Dantzickers, or any free persons, and therefore must be presumed to belong to the King's enemies, and be prize, in so far as there was only found aboard a pass by the town of Dantzick, which did not express the port to which the ship was directed; neither was there any bill of loading, charter-party, nor docquet, neither is the pass conform to the *formula* of passes prescribed by any of his Majesty's treaties with his allies. It was answered for the Strangers, That these allegiances cannot import adjudication, for neither the law of nations, nor any treaty, requires bills of loading, or docquets, but only passes; and for charter-parties, they are only in the case where the loading belongs not to the owners of the ship, but to others who freighted the ship: Neither does any treaty declare, that ships wanting passes in such a *formula* are prize, but only when they have such a *formula*, they are secured, and cannot be brought up; and the only treaty these Strangers found

No 16.

No 17.

A prize was not inferred by a ship wanting a pass conform to the formalities of a treaty existing before the war.

No 17.

on, is the treaty at Breda, *in anno* 1667, between the King, the French, and the Dutch, at the pacification of the last war, whereby it is provided, that such allies as will take the benefit of the treaty, should be comprehended therein; and it bears expressly, that the passes should be given by other allies according to their custom.

THE LORDS found that this ground founded upon the documents, was no sufficient reason of adjudication.

The Captain did then insist upon the second ground, viz. That this ship was navigated by a number of the King's enemies, the skipper and company by their oaths having acknowledged that their wives and families did remain in Omland, which is under the jurisdiction of the States-General, and contributes to the war. And by the King's declaration of the former war, it was expressly declared, That the having aboard any of the King's enemies should be a ground of seizure and prize: And the King, in the declaration of this war, having expressed no grounds of prize, but being only general, it must be understood that the same grounds of prize, declared in the former war, continues in this; according to which the LORDS did declare several ships prize, upon having aboard two or three Hollanders; and albeit this declaration was published to the world, and that by the treaty of pacification at Breda there be many alterations as to former practices, yet there is no alteration as to this. It was *answered* for the Strangers, That this matter ought to be judged by the law of nations, and by the treaties, and not by the King's declarations or instructions; and it cannot be instructed by the law or custom of nations, that ships are made prize for having aboard some few of the parties of the war; for neuters and allies ought not to be hindered in their free trade by either party in the war, unless they partake with either party, and assist them by carrying to them arms, ammunition, or other contraband goods; but neuters are not otherwise hindered to make any lawful contract, and so may conduce the subjects of either party to be their servants. *2do*, By the treaty at Breda, it is declared, That even enemies goods, or contraband goods, shall not make the ship and loading prize, but only these goods, much less can a few of the enemy, being taken in service as seamen, do the same. *3tio*, Whatever the LORDS decided in the former war upon this account, in respect of the King's express declaration, yet the King having not so declared now, the LORDS ought to proceed according to the law of nations, and the treaties, especially seeing it is the King's interest and intention to invite all Hollanders to reside in his kingdoms, as appears by his declaration of war; and by another declaration, He hath warranted all his subjects to make use of strangers for seamen, and declared that he would not press the strangers to serve in his own ships, and without exception of Hollanders or any other; and it is much the King's interest to withdraw and divert the Hollanders from serving of their own state, whereas if they can serve no other, they must all of necessity serve at home, neither is there any specialty of hyring a skipper or steersman more than any other seaman. It was *replied* for the Captain, That the King must ever be

understood to continue in the same mind in a war, so late and recent with the same enemy, nor doth his declarations import any alteration; because albeit it be his Majesty's intention and interest to withdraw the Hollanders, by changing their domicile and habitation, neither is, or was there ever any ground of prize, because the seaman is, or was, by nation a Hollander, unless he was an actual residenter there, and contributed to the war, which only makes him an enemy; but the employing of such as are in actual enmity, and have not changed their residence, is a partaking with the King's enemies; or wherever such persons are, they will always be as spies, and give intelligence to the King's disadvantage of the condition of his ships, or those of his subjects in any part where they trade, and while they contribute with Holland, a placade there will soon recall them home to that service, so long as their families are there; and the King's permission to his subjects to make use of seamen strangers is only in respect of the act of navigation, declaring, That two third parts of the seamen must be English; but the general freedom to strangers can never be extended to enemies, unless they quit their residence and enmity. 2do, The skipper being one of the Hollanders, it is a great specialty, because the skipper being master of the ship, the ship and goods are in his possession, and at his disposal, and he may make use thereof upon any opportunity against the King; and as possession presumes property in all moveables, so doth the skipper's possession presume that the ship was his own, and that any documents to the contrary are but contrivances. Likeas it is the common custom of nations, that when the skipper is an enemy, to declare the ship prize, and therefore the skippers do always pretend by their oaths or certificates, that they are citizens in a neutral country. And by the treaty betwixt the King and the Swedes, whereby the King allows the Swedes to make use of Hollander skippers, yet it is with express provision, That he change his domicile and become an inhabitant of Sweden. As to this point, the parties having been contrary in their allegiances of fact, the Stranger *alleging* that Omland, where the skipper and the other three persons had resided, was a neuter place, and within the empire, and the privateer alleging that it was within the jurisdiction of the States-General, and did contribute to the war,

Therefore the LORDS, that they may give neither party the sole benefit of probation, did allow them probation on either parts, whether Omland was free, or under the jurisdiction of Holland; they did also allow either party to adduce such testificates and evidences, as they could, of the custom of nations, in their several admiralties, whether a skipper residing in, and being of the enemy's country was a sufficient ground of prize, or whether any number of seamen so residing were ground of prize, and the LORDS resolved to inform themselves by the Lord Secretary, of the custom of the admiralty of England in these points.

3tio, The Captain *insisted* upon this ground, That the ship was loaded with corns bound for Amsterdam, which being contraband, made the ship prize; and, for evidence of her being directed to Amsterdam, made use of several let-

No 17.

ters found aboard, and because the pass mentioned not the port to which she was directed. It was *answered* for the Strangers, *imo* That they produced a certificate, bearing, the ship was bound for Ostend, and that any such letters, not being by the skipper or owners, but other parties that might be mistaken, could not prove against them. *2do*, Though the ship had been direct for Amsterdam with grain, yet, by the law of nations, grain is not contraband, except when it is carried to a city besieged. *3tio*, By the treaty at Breda extended to Dantzick, by the King's special concession, it is expressly provided, That victual shall only be accounted contraband when carried to a place besieged. It was *replied* for the Captain, That the Strangers could not crave the benefit of the treaty at Breda, *imo*, because that treaty was become evacuate and void by a war, and being void as to the principal parties treaters, and accessory parties taking the benefit thereof, could not further found upon that which was not. *2do*, The King by express instructions, by advice of his council, given to the judges of the admiralty of England, appoints the carrying of corns to Holland, or any place in their jurisdiction, to be ground of confiscation; which shows evidently, that the King did not look upon the treaty at Breda as in force, which treaty hath not only the foresaid article, but doth bear expressly, that contraband goods, or enemies goods, shall only confiscate the goods themselves, and not the ship or loading, contrary to the custom of nations, that those who so partake with the enemy should not be prize, which is neither observed in England nor Holland. It was *duplied* for the Strangers, That the LORDS ought not to proceed by the King's private instructions, but by his public treaties confirmed by oath, and that the breach of one party could not infringe the treaty as to other allies, especially seeing the treaty relates to any future war that should happen; and after this war the King upon that treaty dismissed all the Holland ships, it being provided, that all ships in the harbours of either party, for six months after the treaty broke up, should be dismissed.

THE LORDS did allow probation to either party, for instructing the true port to which the ship was directed, and resolved to communicate this point to the King, by the Lord Secretary, to know his Majesty's pleasure, and the custom of the Admiralty of England therein.

*Stair, v. 2. p. 154.*

1673. *January 23.*

The OWNERS of the Ship called The CROWN OF DANTZICK *against* Captain LYON.

CAPTAIN LYON having taken a ship called the Crown of Dantzick, obtained adjudication of her as a prize. The strangers raiseth reduction; whereupon, the LORDS having heard the cause, they found, That the evidences adduced for

No 18.

A prize was  
tained, be-  
cause the pass  
did not men-  
tion to what  
part.