

No 47.

it was found, That the prize belonged to Captain Rankin and his owners, as having the King's commission, and first apprehending the prize in question, which might have escaped; but it being objected against Rankin's witnesses, that most of them were his own men, under his pay, and so might win or lose in the cause; for which it being answered, that at the time of their deponing they were out of his service, and were hired by other shippers, and were fully paid of their wages, having no interest in any prize that should be taken; the LORDS, before sentence to be extracted, ordained a mutual probation.

Gosford, MS. No 966. p. 640.

1705. February 23.

The OWNERS of the Ship, The CATHARINE of Rotterdam, and GILBERT STEWART, their Factor, *against* CAPTAIN GORDON and The Officers of State.

No 48.

A ship loaded in an enemy's dominions, and having double documents aboard, though the property of the goods belonged to the subjects of allies, adjudged prize by the Admiral's decree.

CAPTAIN GORDON, commander of one of her Majesty's frigates, having seized the Catharine of Rotterdam, obtained a decret of the High Court of Admiralty, adjudging the same as prize; and the words of the interlocutor, after admitting probation, are these: "The Judge found it proven, that the ship and cargo libelled, belonged to the subjects of the United Provinces; that the cargo was put aboard in the dominions belonging to Spain, (which is at present at war with this kingdom); and also found it proven, that double documents were granted in favours of the ship and cargo, and found aboard, and therefore adjudged the ship and cargo to be lawful prize."

The owners having raised reduction of the Admiral's decret, upon iniquity, they insist on these grounds; *1mo*, The ship and cargo are found to belong to the subjects of the United Provinces, her Majesty's allies; *2do*, Double documents may presume a covered trade by enemies; but where the property is clear, the presumption is taken off; and more especially where the double documents are not for covering and disguising the property of the ship and cargo, but only of the port to which her course is directed; as in this case the skipper was instructed with documents, as if the ship had been outward bound to Lisbon, and other documents as if she were bound to the Canaries; and so, in her return, she is instructed with bills of loading as from the Madeiras, and also with other bills of loading as from the Canaries, which were to secure her from trouble from the allies, in the war, which is lawful and necessary, and practised by all that are engaged in the war; and whatever may be the effect of double documents in neuters, who need not colour their trade, yet nothing can be founded on double documents, in favours of allies, where the property is acknowledged; *3tio*, Neither was it relevant that the loading was put aboard at the Canaries, belonging to Spain, because her Majesty is in alliance with King Charles of Spain; and though the Duke of Anjou assumes that title, and has seized and possessed the dominions, that ought not to prejudice private persons in the do-

minions of Spain, who have no accession to the usurpation, and have no commission from King Philip, nor owned nor recognized him; and it is most certain that all declarations of war are against Sovereigns; *2do*, And further, although the Dutch be in the confederacy for the common interest of Europe, yet it is well known that the States General do allow their subjects a free trade with Spain, and, consequently, cannot be under any seizure or confiscation by the sentence of any judicature within her Majesty's dominions.

It was *answered*, That the Admiral's interlocutor does fairly sum up the probation, and justly adjudges the ship and cargo, notwithstanding the property did belong to the subjects of the State's General, her Majesty's allies, chiefly on this ground, that the voyage was directly to the Canaries belonging to Spain, and the cargo from thence. And as to the double documents, there were instructions to the Admiralties, both of Scotland and England, in the year 1680, after the cases that had happened in the Dutch war had been determined; but in this case the interlocutor of the Admiral is principally founded upon trading with enemies; and her Majesty's alliance with King Charles of Spain can afford no pretence to cover their trade; for the proclamation of war is against France and Spain, and all the subjects and dominions thereof, and founded on her Majesty's alliance with the Emperor, and in regard of the duke of Anjou's seizing and possessing himself of the crown and dominions of Spain; and whensoever King Charles shall obtain possession, as well as the title, the war would be at an end; *2do*, It neither appears that there is any treaty for a free trade betwixt the United Provinces and Spain prior to the capture; nor is it relevant, though there were; because the proclamation of war does by necessary consequence import the shutting up of all commerce; and if any of the confederates, who are *socii belli*, should, by private treaties, agree to trade, such pactions would stand good for a regulation within their own dominions, or with the Princes with whom and by whose consent they trade, but can import nothing in this case, unless the treaty were consented to by her Majesty, which cannot be pretended.

“THE LORDS repelled the reasons of reduction.”

Dalrymple, No. 62. p. 78.

* * * Fountainhall reports this case :

1705. February 22.—THE owners of the ship, called the Catharine of Rotterdam, and Gilbert Stewart, their Factor, against the Officers of State, and Captain Thomas Gordon. The said ship being brought up by the Mary yacht, commanded by Captain Gordon, as returning from the Canary islands, belonging to the Crown of Spain, with whom we are presently at war, and being declared prize by the Admiral, as trading in our enemy's country; the skipper and owners raise a reduction of the Admiral's decret of adjudication, on these grounds of iniquity; *1mo*, That he had sustained the having double documents

No 48.

aboard, as a sufficient reason of confiscation, whereas many things may be a cause for capture, and bringing up, which are not relevant to adjudge and condemn; and it has been always sufficient to warrant and excuse seizure, that they carried double documents; but in the case of neutrals, and much more of allies, it had not been found a sufficient ground of adjudication, seeing it is both usual and necessary to have such double documents to cover their trade from the common enemy by this blind; and none but enemies' ships should be condemned, or such allies or neutrals as are found carrying contraband goods, which strengthen and fortify the hands of their enemies to carry on the war by such supplies; but here it was evident both the ship and loading belonged to free persons, our allies, subjects of the States of Holland; and by the decisions, 26th February 1673, Master of the Rostock *contra* Brown, No 24. p. 11901.; 14th November 1673, the Master of the Liveday *contra* Middleton, No 44. p. 11925.; and 19th February 1673, Owners of the Palm-tree and Patience *contra* Captain Aitchison, No 20. p. 11894; double documents were found a presumptive ground for confiscation, but so as might admit a contrary probation, that the property belonged to neutrals or allies; and here it is evident the ship and cargo do both belong to the Hollanders, our allies; and even false passes have not been sustained to confiscate ships belonging to our friends; and few generals of armies at land but at some times have the enemy's pass. *Answered*, There was neither law nor reason to distinguish neutrals and allies; for, if you be my confederates in the war, *et socii belli*, it is so much the worse in you to be carrying on a clandestine trade with the common enemy; and double documents should never meet with encouragement, they being a plain fraud and deceit, calculated to impose upon innocent people, and to supply the enemy; and there is nothing more ordinary in England, and elsewhere, than to adjudge and condemn our ships if they be trading to the enemies country, as they have lately done with Tait's ship going to France, though his passes were for Lisbon. See 29th June 1671, Burnmeister *contra* Dishington, No 15. p. 11886. And the LORDS having advised with King Charles II. for instructions in this case, he, by his letter, and his brother, King James after him, declared it was a sufficient ground of confiscation, to be found carrying double documents, which the LORDS followed in several cases; and here their documents were concealed in the bottom of a water cask, wrapt about with a cerecloth to keep out the wetness, and sunk to the bottom with a lead bullet, which unwarrantable caution evidently demonstrates fraud; and allies have no privilege beyond neutrals, neither is there any ground for the distinction; and though it be pretended, that the advising with the King how to decide in cases, is against the claim of right discharging any such letters to be wrote to judicatures, yet these cases depending on the *jus publicum*, declarations of war and alliances, wherein we have no fixed law, it was no arbitrary imposition to consult and try what was the law of nations in such cases. The second reason of reduction was, That the Admiral had committed this farther iniquity, to find the Canaries to be our enemy's country, seeing our Queen is in

a league and confederacy with Charles, the true King of Spain, and, consequently, with his subjects; and unless it could be proven, that the subjects in the Canary islands, with whom the owners of this Dutch ship traded, had owned Philip of Anjou as king of Spain, by accepting some office under him, or swearing allegiance to him, they cannot be reputed enemies, nor correspondence and trading with them be criminal. It is true, the Governors of these islands have owned King Philip for their sovereign, and have not submitted to King Charles; but what is that to the inhabitants and merchants with whom this Dutch ship traded? They cannot be reputed the Queen's enemies, seeing they only hold their peace, not being able to resist the King in possession, no more than the isle of Britain was, when Oliver Cromwell usurped the government; and put the case, an ally should trade with that part of Poland which presently obeys King Stanislaus, ought their goods to be forfeited and confiscated by King Augustus, who is in the confederacy and alliance with us? *nullo modo.* Answered, This argument would prove too much; for, at this rate, no ship belonging to Spain can be taken or confiscated, because they belong to subjects, who, *de jure*, ought to acknowledge Charles to be their lawful King, and that they are only impeded by the King in possession; neither are subjects, so circumstantiated, obliged to flit and desert their habitations, and cannot be reputed enemies for staying still and yet their ships and cargo may be seized; for the proclamation of war is against the Spanish dominions, and their inhabitants; and all trading and corresponding with them is criminal; and the treaty with Charles, Archduke of Austria, the nominal King of Spain, can never hinder us from seizing the Spanish ships with whom we are actually engaged in war; and there seems no reason for that distinction, whether the ships belong to enemies or to neutrals, or to allies in the war. And put the case, the French privateers should bring in a Scots or English ship to their ports, and the owners should plead, that it cannot be declared prize, because we are subjects to the Prince of Wales, King James VIII. whom you have asserted and owned to be the true and lawful king of England; and though ye have declared war against King William and Queen Anne, yet ye have no war with the subjects, except those who have sworn to Queen Anne; and though the Prince of Wales should intercede for them, as his subjects, yet how would this be treated as a downright mockery and scorn? and the ships would be confiscated notwithstanding any such allegiance. THE LORDS thought double documents, used by allies, might not be a sufficient ground alone of adjudging ships, seeing it is a usual stratagem to cover their trade; but being conjoined with their trading to the enemy's country, it was a legal ground of adjudication; and that the Canaries were as much a part of the dominions of Spain as Castille or Arragon, though remoter; and though they were not in actual war against King Charles III. yet they obeyed Philip of Anjou and his governor; and the tolls and customs of these islands went to carry on the war against King Charles, and the English, his confederates and allies;

No 48.

and might be employed even in the very retaking of Gibraltar at this present juncture of affairs.

On the 27th February current, an appeal was entered by the owners of the Catharine against the above sentence.

Fountainball, v. 2. p. 271.

1713. February 13.

ROBERT STUART, Merchant in Aberdeen, and Others, *against* Captain WILLIAM COLLIER, Commander of Her Majesty's Ship the Mermaid.

No 49.

Found, that the property of money and goods taken by a privateer, and not contained in the ransom-bill, remained still with the original proprietor.

THE ship the Joanna of Aberdeen being taken in her voyage to Virginia, 17th May 1710, by the Pontchertrain, a French privateer, who took four bales and two casks of goods out of her, and 26 guineas out of the skipper's pocket, and detained him prisoner till an agreed ransom of 200 guineas was paid; May 28th, the privateer was taken, as she was still hovering upon the Scottish coast, by Captain Collier, and adjudged prize. Robert Stuart and Company, freighters, and Mr Alexander Inglis, master of the Joanna, pursued Captain Collier, for restitution of the goods and the 26 guineas, with the 200 of ransom found by him on board the privateer; in respect, the privateer had not attained to the absolute property of the money and goods, being re-taken with them before he returned *intra præsidia hostium*, that is, the French ports and harbours, or their fleet, where the captor is reckoned in security, without danger of having the goods recovered from him, *Grotius de Jure Belli et Pacis, Lib. 3. C. 6. § 3. C. 9. § 16. Voet. de Jure militari, C. 5. § 23. Molloy de Jure maritimo, tit. 1. of Ships of War, § 7.*

Alleged for the defender; *imo*, There is a difference between goods found aboard a privateer, and money; for money being a fungible, it is impossible to distinguish what species belonged to the privateer, and what to the pursuers. Besides, even as to the change of the property of goods, the pursuers have not only the express words of the civil law against them, *Res ab Hostibus captæ statim fiunt capientium*, § 17. *Instit. De Rerum Divisi.*, but even the authors whom they cite, *sed recentiore jure gentium, inter Europæos populos introductum videmus, ut talia captæ censeantur ubi per horas 24 in potestate hostium fuerint, Grotius, Lib. 3. C. 6. § 3. in fine.* And Zieglerus, in his observations upon that place of Grotius, confutes the opinion, That the dominion of the goods was not changed till they were carried *intra præsidia*. What Grotius says, cap. 9. § 16., is to be understood with consistency to what he advanceth in the fore-cited place, where he treats the subject expressly, *viz. De jure acquirendi bello captæ*, and so doth *Voet. De jure militari, cap. 5. § 23.*, take the matter, joining these two places of Grotius together. A little after, he says, The Dutch made a special regulation different from the common rule, but that doth not alter the general rule. So the naval laws of France provide, That any of their subjects' goods re-taken from their enemies, after having been 24 hours in their hands, shall be good prize. The authority of Molloy