

King's commission, unless it were alleged, the Captain was *in culpa* in the loss of the ship, or misprising the goods.

No 10.

Stair, v. 1. p. 533.

1668. June 30.

PETERSON *against* Captain ANDERSON.

No 11.

Prize adjudged because sailors aboard consisted partly of enemies.

CAPTAIN ANDERSON having taken a ship, whereof Peter Peterson was master, and obtained the same declared prize by the Admiral upon two grounds; one that the ship was sailed, a great part of the company being Hollanders, then the King's enemies; the other, that albeit it was pretended that the ship belonged to Swedes, yet by several presumptions and evidences, it appeared that it was but a conveyance, and that the ship truly belonged to Hollanders; there is now a reduction raised of the decret, and the first ground thereupon debated and decided. It was *alleged* for the Strangers, That they being Swedes, their case was only to be ruled by the treaty betwixt the King and the Crown of Sweden, by which it expressly provided, that the subjects of Sweden having such passes as are expressed in the articles, shall not be seized or brought up, and particularly in *bona et homines nullo modo inquiratur*, viz. where such a pass is found aboard; and the said pass being here found aboard, the ship was unwarrantably seized and unwarrantably declared prize upon pretence of being sailed with Hollanders; because that article takes away all question about the men, and so gives liberty to the Swedes to make use of any mariners they please. It was *answered*, That the reason of adjudication was most just; and this reason of reduction ought to be repelled, because the King's proclamation, denouncing the war, gives express warrant to seize all such ships as had any number of Hollanders therein, which must stand as the rule unless the Swedes had, by their treaty, a particular exception derogating from that rule, which they have not; but on the contrary, the treaty contains an express provision, that they may make use of a Holland's master, and not unless he became a Citizen of some city of Sweden, and be sworn burgess thereof; but upon the former ground, there needed no such article for masters, and all might thereby be Hollanders. And as to the article of the treaty concerning no further inquiry, there is subjoined, *quod si gravis aliqua suspitio subsit*; in which case, notwithstanding of the pass, seizure might be made; but here there was *gravis suspitio*, that the ship or goods belonged to the Hollanders, the master and major part of the company being Hollanders, and the pass mentioning a ship of an hundred ton, whereas this ship was two hundred tons. It was *answered* for the Strangers, That the King's proclamation could be no rule to the subjects of any other free prince; but the law of nations, or their own treaties, behoved to be the rule; and, by the law of nations, the King could not hinder his allies of any commerce or trade with his enemies which they were accustomed or free

No 11. to do before the war, except such acts only wherein they partook with his enemies, by furnishing provisions of war or contraband goods; and so the King, by no proclamation, could hinder the Swedes to hire and make use of Hollanders, which rather weakened than strengthened his enemies; and in this case, the making use of Hollanders was necessary, because other sailors could not be had when the ship was bought, and that article of the proclamation ought to be benignly interpreted, that when any ship carries Hollanders as passengers the same should be seized, but not when these were servants and mariners to other nations. It was *answered* for the Captain, That the King's proclamation behoved to be a rule to the King's Judges, and that it was most consonant to the law of nations, and it was impossible without the same to know what ships did truly belong to allies; and that in the Spanish treaty with the King, that privilege was specially indulged to the Flandrians, not to be quarrelled upon the account of Hollanders, because of the identity of their language, which would have been unnecessary, if by the law of nations, all might have so done.

THE LORDS repelled the reason of the reduction, and found that ground of the adjudication, that the ship was sailed with a great part of the company being Hollanders, relevant alone, and that the same was sufficiently proved by the testimony of the steersman and another witness of the company; and therefore assoilzied from the reduction.

Stair, v. 1. p. 544.

* * * Gosford reports this case :

IN a reduction of a decret of the Admiralty, adjudging the Yellow Sun to be lawful prize at the instance of the master of the ship and his owners against Captain Anderson, upon these two reasons; *first*, That the said ship being taken by English privateers, she was declared free by a decret of the Admiralty of England; *2do*, By the articles of the treaty of Sweden, she was not prohibited to make use of Holland sailors; the sereasons were not found relevant; because the decret of the Admiralty of England not bearing any grounds or reasons, the LORDS found that it could not be the ground of a defence before the Admiral here, unless it had been *super eisdem deductis*; and the articles with Sweden giving only liberty to make use of a Holland skipper, whereas this ship had aboard the greatest number of her sailors who were Hollanders, which was expressly prohibited by the King's declaration of the war; it was found, That the articles being posterior, and giving no liberty as to sailors, did not derogate therefrom, quia exceptio firmat regulam in casibus non exceptis.

Gosford, MS. No 14. p. 6.