

the Captain did sufficiently prove that the ship and goods were not free, but belonged to the King's enemies, in so far as the pass did not mention the port to which she was direct; and a tole-brief found in her exprest the port to be Bream, and the skipper's oath acknowledged that the port was Amsterdam, which was concealed in all the documents; and the skipper's oath did redargue the truth of the pass, which bore the skipper to be a burgess of Dantzic, and exprest the names of the owners; but the skipper, by his oath, did acknowledge that he was a Hollander, residing in Holland, except when he was on his voyages, and that the owners were other persons than those who were in the pass, and that he knew no other owners beside them; and so knew not but the King's enemies might be part owners; and that the steersman was by nation a Hollander, and one of the seamen; and that their port was Amsterdam, where the skipper was to receive his freight from the merchants to whom he was to deliver his goods; and that she neither had charter-party nor cocquet.

No 18.

Which the LORDS found so pregnant evidences, that they would not admit of contrary probation; but they did forbear to determine whether the skipper's being a Hollander, residenting there, was a sufficient cause alone, or whether the carrying victual, as contraband, to Holland, was a sufficient cause of adjudication, having by their former interloeuor, in the case of the Sun, (*supra*) resolved to inquire further as to these points.

Stair, v. 2. p. 160.

1673. February 11.

Earl of KINCARDINE *against* The MASTER of the Ship called the ST ANDREW.

THE St Andrew being brought up as a prize by a frigate of the King's, she was gifted by the King to the Earl of Kincardine; and being tried by the Admiral, was absolved. Kincardine raised reduction of the absolvitor; which being this day disputed, and the whole documents taken aboard the ship and the whole testimonies of the company being considered by the Lords, and the parties heard thereupon, the sum whereof amounted to this, that the ship, belonging to Lubec, had a pass to Lisbon *in anno* 1670; that, from thence she made a voyage to America, and returned to Lisbon; and she loosed from Lisbon the 12th day of April, N. S. 1672; and, both by letters aboard and the oaths of the company, it did appear, that the rumour of the war did come to Lisbon before they loosed, which was broke up by Captain Holm's engagement of the Smirna fleet, in the beginning of March, and the declaration, showing the causes some few days after: The letters also bore, that the Hollanders behoved to manage their trade, and go about by the north passage; and that this ship went that passage, to shun privateers, appears by the testimonies; the ship was

No 19.
Although the goods were confiscated, as belonging to enemies, the ship was freed, being neutral, and having received the goods *bona fide*, before the war was known of.

No 19.

loaded with salt, sugar, and tobacco, for which there were thirty-six bills of loading, ten of them belonging to Hieronimus Acosta, and his brethren, whom the company, by their depositions, declared to be a new merchant of Amsterdam, and that he did the King of Portugal's business at Amsterdam; and for the rest of the bills, some of them were blank; and the skipper deponed, that he knew none of the owners: There were also produced some certificates from Hamburgh, which Sir William Swan, his Majesty's Resident there, obtained since the capture; and first decret, bearing some persons to have deponed that some part of the loading did belong to them; the scrivener and three or four more were Dutchmen; and this scrivener had the charge of the cargo, before the skipper was input; and it was proved, by three of the company, that they heard the scrivener say, to the rest of the Dutch aboard, being alone with him in the ship after she was taken, that the ship would be free, as belonging to Lubec, but that the loading would be prize; yet the scrivener, by his testimony, deponed, that he said only that in relation to some Jews' goods;

Upon all which, the LORDS found, That a great part of the loading being positively proved to belong to Acosta, who was a citizen and merchant in Amsterdam, and who did not reside there but only as a public Minister of the King of Portugal's; and that there was nothing to instruct that the property belonged to free persons; and that the skipper (whose oath can be the only means of clearing thereof) deponed, that he knew none of them, nor where they dwelt; therefore, the whole loading was found prize. But the ship belonging to Lubecers, having loosed before that it did appear that the war was known to be actually broken out, and so was not in the fault to take in Holland goods; therefore, the ship was free: without determining that general point, whether, in other cases, enemies goods were only confiscated themselves, and did not confiscate a free bottom or not.

Stair, v. 2. p. 171.

1673. February 10.

The OWNERS of the two Ships called the PALM TREE and PATIENCE
against Captain ACHESON.

No 20.

The want of a pass conform to the formula appointed by the treaty, throws the *onus probandi* on the owners of the ship taken.

CAPTAIN ACHESON having brought up two Danish ships, obtained them to be adjudged as prize by the Admiral. The strangers having raised reduction of the Admiral's decret, the Captain insisted to maintain the decret of adjudication, on these grounds; *imo*, That these ships were not instructed with sufficient passes, according to the *formula* contained in the treaty betwixt the King and the King of Denmark *in anno* 1670, by which it is agreed, that where such passes are found aboard, the ship shall go free on their voyage, without search or inquiry, and are not at all to be molested, unless either the pass be wanting, or