

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

that there be another great ground of suspicion ; which being so great a favour, that the sole oath of the skipper and owners mentioned in a pass should clear the property of the ship and loading, it cannot be thought but where that remedy is neglected, it must be a cover to unfree goods, and so must infer the ship to be prize ; but these ships have only a general pass, before the war, for coming and going, without relation to any particular loading or voyage ; and it being clear, by the oath of the skipper, that the ship loosed long after the war began, and was known, the want of the pass alone is sufficient ground of adjudication. It was *answered*, That the treaty did bear no such certification, that the want of such a pass should make prize ; but only, that through the want thereof, the ship might be searched and brought to trial ; but if, in the trial, there were no other ground of adjudication, that could be no ground, seeing the treaty expressly bears, that in case of want of the pass, search and trial should be made ; whereas, if the want of the pass did confiscate, there needed no further search.

THE LORDS found, That this ship having loosed from Norway after the knowledge of the war, without a pass, conform to the treaty, that the want thereof did not simply confiscate, but that it did put the burden of probation upon the strangers to prove, by sufficient documents, or witnesses above exception, that the ship and loading did belong to the King of Denmark's subjects, the King's allies ; and that the oath of the skipper or owners could not now instruct the same, as they would have done, if they had taken a pass in due time.

The Captain insisted further, on these grounds, That albeit the want of a sufficient pass did not exclude a contrary probation, yet it is a great ground of suspicion ; and being joined with the grounds following, did make up a sufficient probation of a contrivance of enemies goods, under the pretence of Danish goods, in so far as the skipper had aboard a freight-breif, bearing the ship to be direct for London, and in case she were carried up to Holland, bearing a greater freight to be paid there, upon safe delivery of the goods ; which evidently shows that the true design was for Holland ; for if the case of seizure had been understood, there could neither a freight have been expected in Holland, nor could the skipper be in capacity to deliver the goods ; which document was denied, and concealed by the skipper, and found by the company hid in the ship, apart from the rest of the documents ; which could not be to conceal it from the Dutch ; because the other documents bearing London to be the port, and the loading being deals, which, in the Dutch account, are contraband, the ship and loading would have been prize. It was *answered*, That the skipper did only deny that there was a charter-party aboard ; and this freight-breif is not a charter-party ; and there was found aboard a receipt for the remainder of the last freight of this ship, due by the merchants at London ; and, likewise, there was a letter found aboard, of the White Lilly, which loosed from the same port, bound for London, making mention,

No 20. that this ship had made sail for London before. It was *replied*, That this letter might well be a contrivance, in case either of the ships had been taken at sea.

THE LORDS found, That there was sufficient presumptive probation to infer a contrivance; yet such as admitted a contrary positive probation, that the ship and whole loading belonged to free persons; and ordained commission to be granted, to both Denmark and England, for that purpose, and also to examine witnesses for the privateer, to prove that any part of the ship or goods belonged to Hollanders.

The Captain did further insist, on this ground, That seeing, by the freight-brief, it did appear that the ship was truly bound for Holland, that her loading being double deals or planks, fit for the building of ships, the same is contraband, and makes the ship and goods prize; and that such deals are contraband in the Hollanders' account and esteem, is cleared by their placard, declaring all materials for shipping, none excepted, to be contraband. It was *answered*, That no fir deals, of whatsoever kind, were materials for shipping, but have a common use for any other work; and that, by the custom of England, they were never found contraband.

THE LORDS found, That seeing the freight-brief and evidences made it appear that the voyage was truly for Holland, that if it should be proved, by the custom of England or Holland, that such deals are contraband, that the same should be just ground of confiscation.

*Stair, v. 2. p. 173.*

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1673. *February 21.*

The OWNERS of the Ship called the WHITE-HORSE, and the MARGARET,  
*against* Captain SMEITOUN.

No 21.

Two Danish ships being brought up by Captain Smeitoun, and declared prize by the Admiral, they raised reduction; and the debate was upon the pass not being conform to the Danish treaty, and upon other evidences, that it was a contrivance to palliate enemies goods.

THE LORDS found, That the passes not being conform to the Danish treaty, did put the burden of probation upon the strangers that the ship and loading belonged to the Danish subjects express in the documents produced, and that the approbation be by writ, or witnesses above exception, to be taken by the Lords commission; but found not the evidences sufficient to exclude the said probation.

*Stair, v. 2. p. 177.*