

No 22. before she touched ground out of Holland dominions, where she was bought, but that a true delivery there, was sufficient.

1673. *February 25.*—IN a reduction of the adjudication of the ship called the Prince of East-Freesland, the LORDS admitted a contrary probation for the strangers, that the ship, being taken light, did truly belong to the subjects of East-Freesland, which is a free principality; but would grant no commission to that place, being close by Holland; but ordained witnesses, above exception, to be adduced here, provided they brought certificates, under the seal of the Magistrates where they reside, that they were persons of means and fame, nor near related to the reducers.

Stair, v. 2. p. 177. 179.

1673. *February 25.*

The OWNERS of the Ship called the CALMAR *against* Captain SMEITON.

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A ship declared free, in consequence of the King's warrant, although contrary to decree condemnatory.

THE ship called the Calmar being brought up by Captain Smeiton, and declared prize, there was a reduction raised by the owners as to the ship, and, at the instance of William Strange, at London, and Sutton, an Englishman, residing at Stockholm, as to the loading; wherein there was a litigious debate, and a multitude of presumptions adduced for either party; whereupon the LORDS adhered to the decret of adjudication; especially upon the falsehood of the documents, which, being Swedish passes, did bear the loading to belong to one of the Tar Company at Stockholm, whereas the skipper, by his oath, deponed that they belonged to Samuel Sutton, an Englishman, residing there, and was direct for London, to be consigned to William Strange; whose oath was obtained, after the capture, bearing, that the loading did belong to Sutton; another Englishman, at London, did depone, that a parcel of brass wire did belong to him; but nothing having been shown that Sutton, though by nation an Englishman, did but remain at Stockholm as factor for the English, and did not trade there himself;

THE LORDS found, That this was but a contrivance for a Dutch trade, with whom Sutton did only trade; and in respect that the wire was not in the pass, conform to the treaty, they would not admit a contrary probation to free it, as if it belonged to a resider at London; but, thereafter, commission was granted to prove the property of the wire to belong to an Englishman residing at London.

1678. *February 6.*—CAPTAIN SMEITON having seized the ship called the Calmar, in August 1672, she was found prize by the Admiral. The strangers having raised reduction of the Admiral's decret, on these reasons, that by the Swedish treaty, it is agreed upon the *formula* of the Swedish pass, which being

found, there shall be no further inquiry; and it being *answered*, That the Swedish treaty bears also an exception, in case there be any great ground of suspicion; and none could be greater than here, where the master and company were *Hollanders*; in this reduction, the *LORDS* found, That the pass was false, and cancelled by the master's oath, though it bear that it proceeded upon oath, yet he depones, that Samuel Sutton delivered the pass to him, and that there was no oath made; and depones, that the owners of the ship mentioned in the ship, were not the true owners; but that himself, who was not *express*, was an eighth part owner, and that the loading, being pitch and tar, pertained to Sutton, an *Englishman*, residing in *Stockholm*, except a parcel of brass wire, which belonged to Sir Samuel Clerk, residing at *London*. "Whereupon the *LORDS* found, That the pass being false, without oath, and the master an eighth part owner, and that, upon probation on either part, anent his true domicile, that it was found to be in *Holland*, the time of the capture; that, therefore, Samuel Sutton, who had hired the ship, and the other *Swedes*, partners, had partaken with the enemy in covering the interest of an enemy in the ship; that therefore the ship and loading were prize." The strangers have raised a new reduction, and *allege*, That though the master was an eighth part owner, and then an enemy, it could only make his own share prize, but not the ship, much less the loading, which belonged to Sutton, his Majesty's subject, who resided in *Sweden* but as an *English* factor, and that participation with the enemy could not confiscate, but where it was known; therefore, Clerk's brass wire was freed by the *Lords*, because he, residing in *England*, could not know the interest of an enemy in the ship; and, for the same reason, the loading, belonging to Sutton, should be free, because he could not know that the master's true domicile was in *Holland*, having seen four passes by which the same master sailed with the said ship, as a citizen of *Calmar*, in the former war, and saw testificates from the city of *Calmar* that he was there burgesse. "Both these reasons were repelled; and it was found, that Sutton having given the pass without oath, and concealing the master to be an owner, that he was not in the condition of Clerk; but that he did or might know if the master had given his oath, conform to the Swedish treaty, that he was an owner; and that albeit he was called to be a master for *Sweden*, in a former war, and had then passes, yet, after that war, he had gone home to *Holland*, and had his domicile with his mother, in *Hem*, in *Holland*, and had resided there the winter before the capture; and though he was called again of new to be a master in the Swedish service, in this war, yet he had not again changed his domicile; which is by burgesse-briefes, and paying of scot and lot, without which none can be burgesse in these countries; and which, therefore, was ordinarily in several places, yet his true domicile could be but in one place, and which was found to be in *Holland*." The strangers insisted further, on this reason, That, by warrant of the King's Ambassador, *Coventry*, Sutton had bargained with the *Tar* Company in *Sweden*, that they should carry no pitch or tar to *England*.

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nor he to Holland; but that he should furnish the King's stores with pitch and tar; which, therefore, he inloaded in the name of the Tar company, lest his name, being English, should make the ship to be carried to Holland; and that he was warranted to employ any ship, free or unfree, to furnish the King's stores; and that this loading was embarked for that use, and bound for London. "Which being found relevant by the Lords' act in this reduction," there was now produced, for probation, a letter of the King's, bearing, 'That Coventry, then his Majesty's Ambassador in Sweden, had agreed with Sutton to furnish the King's stores, and to employ any ship he pleased, free or unfree, for that end; and that several ships have been accordingly employed, and that they were delivered in to the King's stores, except this ship, and the Fortune of Trail Sound, which were seized by Smeiton in their voyage.' The Lords had also found, that strangers were not excluded from using several reductions, upon our municipal custom, that where parties compear, they cannot, in the second instance, propone what was competent and omitted in the first. Likeas the King's letter did bear, that where a pass was found aboard, conform to the treaty, the ship should not have been seized, and that the King found that this pass was conform. It was *answered* for the privateer, That the points in the act were not proved by the letter, especially this necessary point, that the loading of this ship was directed for the King's stores; but, on the contrary, that being the most obvious and favourable point, for which Sutton had a former letter from the King, he did lay small weight on it, and insisted upon other grounds, as appears by the decret. *2do*, David Strange, whose oath is produced, taken by Sutton, without warrant, depones, that this ship was bound for London, to be consigned to him; but though his oath be a year after the capture, he doth not pretend that the same was for his Majesty's stores. *3tio*, The King's letter doth approve what the Lords have already done, and desires the parties only to be heard on new matters; and here is no new matter, the same point being proponed, and repelled, in the former decret.

THE LORDS found the King's letter proved that the Ambassador had agreed with Sutton to furnish the King's stores, and that several loadings had been delivered accordingly; and that this ship was bound for London; and that, therefore, it was presumed to be sent for the King's use, unless it were proved, by Sutton's oath, that this loading was not sent for the King's use, but to be sold indifferently to any that would buy it; in which case, the Lords found, as before, that both ship and loading were prize. The Lords did also find it proved, by the King's letter, that Sutton had power to employ any ship, free or unfree, and therefore found, that if, by Sutton's oath, it would appear that he had agreed with this Holland master, to secure him, that though he should be found an enemy, he should be free, that therefore the skipper's eighth part should be free, otherwise, that the same should be confiscated; but, however, that the Swedish share should be free, in respect of the King's warrant; but if the loading was not upon the King's account, that both ship and loading should be prize. Likeas, the Lords

found, that the King's letter bore the pass to be conform to the Swedish treaty, yet that the ship was warrantably brought up, in respect of the ground of suspicion aforesaid, and that she was warrantably adjudged upon the grounds aforesaid for any thing was then said. The Lords did also find, that the reason now insisted on, though it was mentioned in the former decret, and a letter of the King's, for verifying thereof, then produced, yet, that it was not insisted on as relevant, and proved by the King's letter, but the debate was upon other grounds, and no particular interlocutor as to this point, and therefore that it was not excluded, as proponed and repelled, albeit, in decreets amongst natives, interlocutors, though they do not specially mention all that is proponed, but those things which are insisted on, and most material, yet, in the second instance, all that was proponed, is understood to be repelled as not noticed as relevant by the Lords, which is not so to be extended against strangers.

Stair, v. 2. p. 178. § 608.

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1673. February 26.

The MASTER of the Ship called the RUSTOCK *against* Captain BROWN.

CAPTAIN BROWN having obtained the ship called the Rustock to be adjudged prize, the strangers raise reduction, on this reason mainly, That albeit this ship had made use of a Swedish pass, dated *in anno* 1670, to prevent their hazard, if they were met with by the Dutch, and that the oaths in process contradict the pass, and shew both ship and loading to belong to Londoners, his Majesty's subjects, which, as to strangers, might have been a ground of adjudication, yet not as to the King's subjects, who may, and must trade under cover of Swedish, or other free passes, or otherwise can drive no trade considerable; and, by a tract of many documents produced, it appears that the ship and goods belonged to Londoners, especially an act of naturalization of the ship *in anno* 1670, being by the King's warrant bought by Londoners from the Swedes, and the documents, upon oath, of several voyages made by the same ship from London, as belonging to the said Londoners, together with the oaths of the owners and merchants, taken after the capture.

THE LORDS found, That there was just ground for bringing up and trying of his ship, and that notwithstanding of the contrariety of the documents, admitted probation for the King's subjects, that the ship and whole loading belonged to them, by documents and witnesses above exception, but not by the oaths of the parties, taken since the capture, or to be taken.

Stair, v. 2. p. 179.

No 24.
Contrariety of
documents.