

No 37. property ; the Captain gave in a bill of advocation on this ground, that there was sufficient evidences for a present adjudication of the ship and loading.

THE LORDS having advised both the reasons of advocation and the principal cause upon the bill, they did advocate the cause, and adjudged the ship and loading, because the ship was only instructed with a pass, dated in November 1666 ; and by the skipper's oath it is acknowledged, that this pass was not for this ship, but for another ship of the same name, which perished several years ago, and so is a false document ; and because the ship being loaded at Amsterdam, she had no bills of loading ; and the skipper and steersman deponed they knew not to whom the goods belonged, but that they had order from a merchant in Amsterdam to consign the goods in the pack-house of Stockholm, to be delivered to such persons as should bring such marks, which they found to be a clear contrivance to colour the Dutch trade.

*Stair, v. 2. p. 207.*

No 38.

1673. July 10. FRAZER *against* The MASTER of the YOUNG TOBIAS.

IN the bill of advocation mentioned in the above decision, the same reason was alleged as to the ship called the Young Tobias.

THE LORDS did advocate the cause, and adjudged upon this ground, that the skipper, by his oath, acknowledges that he is a sixteenth part owner of the ship, and that he was born in the States' dominions, and that his wife hath ever resided there, and was never in Sweden, albeit he produced her burgess-brief a year before, and deponed that he intended to take his wife to Sweden, seeing, by the King's instructions, a part of a ship belonging to an enemy, confiscates ship and loading, and that the skipper had not changed his domicile before the capture.

*Stair, v. 2. p. 208.*

No 39.

Found not sufficient cause of confiscation, that the master was a Dutchman, (enemy) not being owner of the vessel.

1673. July 16. CAPTAIN LYEL *against* the MASTER of the LEOPARD.

CAPTAIN LYEL having having taken the ship called the Leopard, she was adjudged prize by the Admiral. The Strangers raise reduction. The captain insisted upon these grounds to maintain the adjudication ; *imo*, This ship was sailed by a Holland's master, which alone is a sufficient ground of prize by the law and custom of nations, and especially against the Swedes, seeing by the Swedish treaty in the year 1661, it is provided, " That it shall be free to the English and Swedes to make use of a master of any nation, so that he become a sworn burgess, and inhabitant of one of their towns ;" from whence it is clear, that a Holland's master, not being a sworn burgess and inhabitant of Sweden, doth confiscate the ship and loading ; *2do*, This ship was taken in the return to

Sweden that same voyage in which she had carried in a loading of victual to Holland, which being contraband, and so particularly expressed in the Swedish treaty, it doth confiscate the ship, she remaining in the hands of the same owner that had carried in contraband to the King's enemies, as was found in the last war, in the case betwixt Parkman and Allan, No 7. p. 11865.; *3tio*, This ship hath no pass upon oath for this voyage, and the master and most of the mariners are Dutch; and it is clear by the skipper's oath, that for many voyages he had been only directed by one Pelts a merchant in Amsterdam, all which are pregnant evidences that the ship belongs truly to Hollanders. It was *answered* for the Strangers to the first ground, That the articles of the Swedish treaty do not bear or import, that if the master be of an enemy's country, that thereby the ship shall be prize; but it is clear by the article, that if the ship have a pass, conform to the *formula* in the treaty, albeit the master be of the enemy's country, yet if the pass bear that he is a sworn burgess and inhabitant of the ally's country, there shall be no seizure or further enquiry; so that the consequence can only be, that if an enemy be skipper, the ship may be seized and tried, but if the property of the ship and goods be sufficiently instructed, it will not infer her, upon that alone, to be prize by the Swedish treaty, much less by the law or custom of other nations, for there is nothing alleged to show such a custom of nations; and for the law of nations it can be no other than that of equity, which is the rule of mankind, whereby, when two princes or states enter in war, they cannot justly impede the free trade of the rest of the world, unless they be partakers with the enemies in assisting them to carry on the war, and that is either by furnishing them with men, ammunition, arms, or other goods necessary and proper for the war, which therefore, by the law of nations, are called contraband or prohibited goods, or by carrying on the enemy's trade, by concealing and carrying of their goods; but to hire their men to be master or sailors, is not to assist or fortify them in the wars, but rather to weaken and withdraw them; and though in the former war the King's declaration made the having of any number of the enemy aboard a cause of seizure, yet by the instructions to both Admiralties that is now left out, and nothing mentioned as to the skipper's being an enemy; and the King's letter leaves that point to the Lords, to be judged according to law. And as to the *second* point, albeit the Swedish treaty contain victual as contraband, yet there is produced an extract of a letter of the King's, under the hand of Secretary Moriss, at the desire of the Swedish ambassador, by which that article is explained, that victual or money is only contraband, when carried to a place besieged; neither is there any just ground that the ship should be prize for carrying contraband, if it be not found in her, which is cleared by the treaty of Breda; and the product only of contraband goods can be prize, and there was nothing in this ship, when taken, but ballast. As for the presumptions from the skipper and company, and Mr Pelt's directions, and wanting a pass upon oath for this voyage, they are not relevant, either jointly or severally, especially seeing there is a letter produced by

No 39. the owners, giving warrant to Pelts, as a factor, to direct the trading of the ship.

THE LORDS found that the having a Holland's Master was not a sufficient ground of confiscation, either by the Swedish treaty, or by the law and custom of nations, and found that the carrying of contraband to enemies, was a ground of confiscation, whether the ship was taken having the contraband aboard, or were taken in the return of that same voyage, and belonging to that same owner; and found the explanation of the article, by the King's letter, sufficient to qualify the same: They also found that the evidences that the ship belonged to Hollanders were sufficient to allow the seizure, but were not so pregnant as to exclude a contrary probation of the property of the ship, and therefore allowed a joint probation to either party thereanent.

*Stair, v. 2. p. 213.*

1673. July 17. The MASTER of the GOLDEN FALCON *against* BUCHANAN.

No 40.

A vessel found prize, because the King's enemies were part owners, although the society was contracted before the war.

CAPTAIN BUCHANAN having taken the ship called the Golden Falcon, she was adjudged prize by the Admiral. The Strangers raise reduction. The captain insisted on these grounds, *1mo*, That it was proven by the skipper's oath, that two sixteenth parts, and a half sixteenth part of the ship belonging to merchants in Amsterdam, whereby the whole ship and loading became confiscated; *2do*, It is also proven by his oath, that when the captain pursued to take the ship, one of the company, with other two persons, fled out in a cock-boat with a chest to land, which is an evident presumption, that in or with the chest there were concealed documents carried away, which is much more than the burning or throwing papers overboard; and it must be presumed that there have been enemies' goods in the boat or chest, otherwise these persons would not have fled; *3tio*, The ship was insured in Holland, and so the risk lay upon the King's enemies. It was *answered* for the Strangers, to the *first*, That there was a communion of this ship betwixt the Danes and some merchants in Amsterdam before the war, and that the ship loosed from Bergen in February 1672, towards Amsterdam, and loosed thence in July 1672, and was taken in the return, so that the skipper had no power or warrant from his owners in Norway to dissolve the society; and though a part of a ship belonging to enemies, by a society contracted after the war, could confiscate the whole ship, yet the society being contracted before, there is no obligation, nor was there any opportunity, to dissolve it; and as to the insurance, it doth not change the property, and state it in the insurer, but is only a personal obligation upon him to make up the hazard, upon which pretext the King cannot justly confiscate the property of his allies, because they have taken warrandice of his enemies; and that the allies remain proprietors is clear, that in case of stress of weather they might throw out the loading.