

No 44. ged documents made use of; for by a certificate of Sir William Swan's, resident for the King in Hamburg, it is declared, that the Hamburgers' names were made use of without their knowledge, which behoved to be by forging their names: And by frequent decisions, conform to the King's instructions, the making use of double or false documents, or having no documents, is ground of confiscation. It was *answered*, That now, in the time of war, his Majesty's subjects cannot carry on trade without making use of simulate and colourable documents; so that, albeit the want of documents, or double or false documents, be a sufficient presumptive probation that the ship and goods do not belong to neutrals or allies, who need not have any colour, being free to pass by either party in the war, and so it is presumed to belong to enemies, yet the presumption is not so strong, but that it admits of a contrary probation in favour of the King's subjects, who can trade no other way, though no other can plead the benefit; or otherwise the privateers may watch his Majesty's ports, and seize all his subjects' ships that come in, which never want such colourable documents but when they have conveys, which is very seldom. And to clear the property of this loading, there is produced a certificate from Sir William Swan, bearing him to have examined upon oath the English merchants at Hamburg, that the goods were shipped for the proper use of the merchants in Hull, and if need be, the same was offered further to be positively proved.

THE LORDS found the allegiance relevant for liberating the loading, that it did belong to his Majesty's subjects, residents in his kingdom, and that the same was sufficient to exclude the making use of colourable documents, but did not rest upon the resident's certificate, but granted commission to the Magistrates of Hamburg and Hull, that by them the testimonies might be taken in presence of the other party or their procurators.

*Stair, v. 2. p. 229.*

1673. December 17.

STUART against The OWNER of the Ship called the SEAL-FISH.

No 45.  
The Court of  
Session may  
review the  
Admiral's  
judgment by  
advocation.

CAPTAIN STUART having brought up a Danish ship called the Seal-Fish, insisted before the Admiral to have her adjudged prize upon these grounds, that the skipper acknowledgeth himself by his oath to be a sixteenth part owner, and is a born Hollander; and albeit he pretends to be a burges of Bergen, and that by his first oath he deponed he lived the last year there, yet being re-examined, he acknowledgeth that he had not been in Bergen these three years, and that he was made burges of Bergen, not in Bergen but at Copenhagen, and that *in anno* 1672 he resided in Holland with his wife, having only a hired chamber; that he removed that year from Holland, and brought his wife and plenishing

with him to Denmark, and that she is now dead, and that he hath slept since in his ship; the Admiral did, before answer, appoint the strangers to prove the property of the ship and goods, and the skipper's residence. The Captain gave in a bill of advocation, *alleging*, That the Admiral in this had done iniquity, that he did not presently condemn; and by the general custom of nations, admirals being obliged to judge within two tides, could not protract processes by acts before answer, which are *nobilis officii*, and only done by the Lords when they allow a conjunct probation, which is not allowable in the ordinary form of processes, but *ex nobili officio* only. It was *answered*, That by the Danish treaty it is agreed, that when any Danish ship is brought up, there shall be no meddling with the ship or goods till it be judged in a court of admiralty, and therefore the Lords cannot advocate the cause, but the Admiral must be judge by the treaty; neither hath the Admiral done any iniquity, having only before answer granted commission to try the property, which is *in arbitrio judicis*.

The Lords found, that albeit the Admiral was judge in the first instance, the Lords were judges in the second instance, either by advocation or suspension, upon complaint of iniquity, in which case they are the King's Great Court of Admiralty, as well as his Consistory in matters consistorial, which they cannot begin in the first instance; they found also, that the Admiral had committed no material iniquity, and therefore refused the advocation, but with this quality, that the Admiral should proceed, either to condemn upon the reasons of adjudication, or to find the defence relevant, by eliding the presumptive grounds of adjudication by a contrary positive probation, that the skipper had actually changed his residence, and that the ship and loading belonged all to freemen, and not by an act before answer; and declared, that if the Admiral did not proceed accordingly, they would advocate the cause.

*Stair, v. 2. p. 241.*

1674. December 17. Captain GORDON and LUDOUHARNE *against* \_\_\_\_\_.

CAPTAIN Gordon, a privateer, having taken a ship named the Wine-Grape, and brought the same to Leith, it was found a free ship, and not a prize, by a decret absolutor of the Admiral; in respect it appeared, by the pass and other documents, and the declaration of the company and skipper, that it was a Swedish ship; and albeit the skipper was a Hollander, yet he was received burgess of Stockholm, and, since the war, he had transported his domicile there. This decret being questioned by a reduction before the Lords, upon that reason, that the Admiral had committed iniquity in giving the said absolutor, in regard the said ship was not a free ship; and it did appear, from the declara-

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What constitutes a free ship?