

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 LUDQUHARNE *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-

No 46.

What constitutes a free ship?

No 46. tions of the skipper and company, that the skipper was a Hollander, and a partner of an eighth part of the said ship. And, after a long debate, the LORDS granted a commission to the Magistrates of Stockholm in Sweden to examine such witnesses as either party should desire, for clearing the point of fact, and to examine the Swedes that were alleged to have interest in the said ship and loading, and the skipper's wife, who was then at Stockholm; and divers persons and witnesses being examined upon the said commission, at the instance of the skipper and defenders in the reduction; and a report being returned, and advised; the LORDS, in July last, did find, That the said report was a sufficient presumptive probation that the skipper had fixed his domicile at Stockholm, and that the ship and goods were free, and did not belong to the King's enemies; the Swedes, by the treaty betwixt Sweden and our King, being allowed to make use of Hollanders to be naucleri and skippers, *dummodo sint cives et incolæ*; and therefore decerned; superseding the extracting of the decret until September; and if the pursuers should shew that they had done diligence upon the said commission, the Lords declared they would grant a new commission.

And thereafter, an agent, Matthew Colvil, having gone to Stockholm, in behalf of and for the pursuer the privateer, and having urged, that some witnesses should be examined by the Magistrates there upon the points contained in the former commission, upon that consideration, that no person was present for the privateer when the witnesses were examined at the instance of the defenders, and it was not the pursuer's fault that he was not there himself, or his procurator, seeing the said Mr Colvil going there, and pursuing the said commission, had made shipwreck by the way, and was forced to return back;

The said Magistrates did refuse to proceed upon the said commission to examine the said witnesses, that had been formerly examined, or others, pretending that the commission was executed, and that they had examined both parties and witnesses upon the same; and did write a letter to the Lords, shewing the reasons whereupon they had refused.

This Session, the cause being called *in præsentia*, the pursuers did object against the said report whereupon the foresaid interlocutor had proceeded; and in special, that the depositions of the witnesses examined at Stockholm were not transmitted, and that they were not so much as named in the report; and that the owners had refused to declare upon that interrogatory, viz. whether their name was only borrowed for the use of the King's enemies, to colour and continue their trade? pretending that they had given their oaths already to that purpose, upon their obtaining of the pass; and it was desired for the pursuers, that the Lords would proceed, without respect to the report and interlocutor foresaid, and advise and give their sentence, whether, upon what was before them, the reason of reduction was proved.

Upon debate among the Lords, it was urged, That they had given a decret already, but the extracting was superseded, (as said is) conditionally, in order to the granting a new commission; and the most that the pursuer could desire, in reason, was, that a new commission should be granted; and all that was before the Lords formerly being advised, and a decret given thereupon, and the same standing, there was nothing now to be advised; but the decret ought to be extracted, or, at the most, a new commission should be given to the pursuer.

THE LORDS, notwithstanding, without respect to the said former decret, did proceed to advise and vote, whether there was as much proved, as to condemn the said ship.

It was urged by some of the Lords, That though *res* were *integra*, and there were no decret, there is no ground to adjudge the said ship upon the pretences foresaid; seeing the skipper's oath, being a party, had been taken upon the same, and he had declared, upon oath, that he had changed his domicile, and his residence was at Stockholm; and his oath being taken, they needed no other probation, specially seeing his oath is adminiculated with the depositions of his wife, and others, taken upon the commission foresaid, at Stockholm, being positive, that he had transported his domicile there, and no other probation is adduced to the contrary.

It was farther urged, That the skipper, being a burgess, and being for the time in Sweden, with his wife and his child, the Swedish owners were *in bona fide* to think, that he was such a person as, by the treaty, they might make use of as skipper; and whatever could be pretended against him for his own interest, ought not to militate against them.

It was also urged, That his Majesty had written a letter in favours of the strangers, recommending them to the Lords' favour and justice; and it would be thought a strange return, that the Lords should condemn both the said ship, and the Admiral's decret-absolvitor, and their own former decret.

It was nevertheless voted, and found by plurality, that the ship ought to be adjudged upon the said pretences, that the king's enemy had the interest foresaid, both as skipper and as owner; divers of the Lords dissenting.

1674. December 23.—THE Swedes having given in a bill, desiring that, seeing they offered to prove *positive*, that the skipper had changed his domicile, they might have a commission to what judges the Lords pleased, for proving the said allegiance, some of the Lords were of opinion, That the allegiance, being unquestionably relevant, was yet competent, in respect the Lords had by their interlocutor found, that they had already proved, presumptively, that the ship in question did not belong to the King's enemies; and as long as that interlocutor stood, they needed not prove any farther, the *onus probandi* of the contrary lying

**No 46.** upon the skipper; and the said interlocutor being since reversed and taken away, (as said is) it was neither needful nor competent until now, to offer to prove *positive* the said allegiance.

THE LORDS, notwithstanding, found, by plurality, and by one vote only, That the allegiance not competent; the President being of a contrary opinion, but being carried by one vote before it came to him, he could not vote.

Je me suis estendu trop sur cet arrest, a cause que les plus habiles et scavans des Senateurs opinoyent pour les estrangers, et maistre du navire; et aucuns des ceux qui estoyent de l'autre coste, estoyent parens ou aliez de Luthquharne, qui estoyt partie; et gaignoit par l'arrest 2000 livres Sterl. ou environ; et l'emportoit par une voix seulement.

*Dirleton, No 207. p. 93. & No 208. p. 95.*

1677. February 15. The KING'S ADVOCATE *against* RANKIN.

**No 47.**

A frigate in the King's pay having defeated a privateer which had made prize of a French ship; and another ship in the mean time seizing upon the French ship, it was found that this capture was injurious, otherwise than to assist the first attacker, unless it were proved that the French ship would have escaped, if not thus seized.

THE KING'S fleet being at sea, under the command of Prince Rupert, he commanded out the Nightingale frigate of 36 guns, commanded by Captain Price, and a French galliot, to cruise and wait to discover any of the Dutch fleet, or men of war, and they did rencounter a Dutch privateer sailing towards Holland with three prizes; whereupon the Nightingale gave chace to the Dutch privateer, and, after she fled, took two of the prizes, and while he was pursuing the Dutch privateer, the French galliot pursued the third prize, called the Tortoise, a French ship. In the mean time, Captain Rankin, a Scottish privateer, attacked the Tortoise, and made her strike sail; but because the French galliot was under Dutch colours, he forbare to board the Tortoise till the galliot came up, and discovered that he was not an enemy, and then Rankin boarded the Tortoise, and put aboard thereof part of his crew, and brought the master, imput by the Dutch privateer, with the rest of the Dutch aboard Rankin's frigate; whereupon the Nightingale came up, and was about the distance of a cannon shot, when Rankin boarded the Tortoise, which he brought up to Leith, and consigned the same in the hands of Sir James Stansfield and Hooper, having commission from the commissioners of the Admiralty of England to manage prizes that should be brought up into Scotland, but had not power to determine as judges; as neither had the principal commissioners of prizes, but in the second instance, by review of the sentences of the ordinary Judges of Admiralty. Captain Price left a declaration under his hand, bearing, That while he was in pursuit of the Dutch privateer, having in possession three prizes, Rankin did attack the Tortoise, in prosecution whereof, the French galliot was about two miles distant, but that before Rankin boarded, the captain came up, and was about a gun-shot distant; and because Rankin and the galliot contended for the property, he brought the ship, and men aboard, with some