

No 9.

THE LORDS found, That seeing the pass did not bear the sailors to be the King of Spain's subjects, conform to the articles, that the Captain was *in bona fide* to bring her up, and found him free of any damages, and found him liable for the price of the ship, and fish, as they might have been sold at Peterhead by rousing, as use is, if they had been preserved; and found him obliged to have preserved them; and repelled the allegiance as to the tenth and fifteenth, but prejudice to the Captain and owners to seek repetition thereof; and found no necessity to cite the Admiral, his depute being cited.

*Stair, v. 1. p. 532.*

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1668. February 25. MERCHANTS OF HAMBURGH against Captain DISHINGTON.

No 10.

To what extent captor liable, where probable grounds of seizure?

CAPTAIN DISHINGTON having taken a merchant ship of Hamburg, and obtained her to be declared prize, the Hamburgers raise reduction on this reason, that the only ground of declaring her prize, was, because she carried contraband goods towards the King of Denmark's dominions, being then in enmity with the King, which was no relevant ground, because it is evident the ship was seized a month before the proclamation of war against the Danes. It was *answered* for the Captain, that it is not the proclamation of war that makes the war, for the King's declaration is only to give an account to the world upon what account the King had made war with the Danes; and it is notour that there were frequent acts of hostility, both by the Danes, and against the Danes, before this capture. It was *answered* for the Strangers, That public denunciation makes only a public and lawful war; but whatever might have been done against the Danes, the Hamburgers (being the King's allies and friends) were not obliged to know the same, until such time that the proclamation of war might come to their ears, so that they have done no fault, being *in bona fide* to continue their trade until the war was made public to the world. It was *answered* for the Captain, That he was *in optima fide* to execute the King's commission, bearing expressly to make prize of all carrying contraband goods to the Danes, and therefore he could not be decerned as *prado*, but the most can be decerned against him, (though the pursuer should be found to have been *in bona fide* to trade with the Danes) is to restore *in quantum lucratus est*; but so it is that he made no profit, for after the capture, he being pursued at sea by the enemy, was forced to leave the ship in question, being loaded by him, whereby she was driven ashore and suffered shipwreck.

THE LORDS found that the Hamburgers were *in bona fide* to continue their trade with Denmark, and to carry to them contraband goods at the time of the seizure, and therefore reduced the Admiral's decret, as to the restitution of the ship and goods, or what profit the defender made of them, but for no higher value nor damages, in respect the Captain was *in bona fide* to execute the

King's commission, unless it were alleged, the Captain was *in culpa* in the loss of the ship, or misprising the goods.

No 10.

*Stair, v. 1. p. 533.*

1668. June 30.

PETERSON *against* Captain ANDERSON.

No 11.

Prize adjudged because sailors aboard consisted partly of enemies.

CAPTAIN ANDERSON having taken a ship, whereof Peter Peterson was master, and obtained the same declared prize by the Admiral upon two grounds; one that the ship was sailed, a great part of the company being Hollanders, then the King's enemies; the other, that albeit it was pretended that the ship belonged to Swedes, yet by several presumptions and evidences, it appeared that it was but a conveyance, and that the ship truly belonged to Hollanders; there is now a reduction raised of the decret, and the first ground thereupon debated and decided. It was *alleged* for the Strangers, That they being Swedes, their case was only to be ruled by the treaty betwixt the King and the Crown of Sweden, by which it expressly provided, that the subjects of Sweden having such passes as are expressed in the articles, shall not be seized or brought up, and particularly in *bona et homines nullo modo inquiratur*, viz. where such a pass is found aboard; and the said pass being here found aboard, the ship was unwarrantably seized and unwarrantably declared prize upon pretence of being sailed with Hollanders; because that article takes away all question about the men, and so gives liberty to the Swedes to make use of any mariners they please. It was *answered*, That the reason of adjudication was most just; and this reason of reduction ought to be repelled, because the King's proclamation, denouncing the war, gives express warrant to seize all such ships as had any number of Hollanders therein, which must stand as the rule unless the Swedes had, by their treaty, a particular exception derogating from that rule, which they have not; but on the contrary, the treaty contains an express provision, that they may make use of a Holland's master, and not unless he became a Citizen of some city of Sweden, and be sworn burgess thereof; but upon the former ground, there needed no such article for masters, and all might thereby be Hollanders. And as to the article of the treaty concerning no further inquiry, there is subjoined, *quod si gravis aliqua suspitio subsit*; in which case, notwithstanding of the pass, seizure might be made; but here there was *gravis suspitio*, that the ship or goods belonged to the Hollanders, the master and major part of the company being Hollanders, and the pass mentioning a ship of an hundred ton, whereas this ship was two hundred tons. It was *answered* for the Strangers, That the King's proclamation could be no rule to the subjects of any other free prince; but the law of nations, or their own treaties, behoved to be the rule; and, by the law of nations, the King could not hinder his allies of any commerce or trade with his enemies which they were accustomed or free