

1667. July.

The OWNERS of the Ship called the CASTLE of RIGA *against* Captain SEATON.

No 4.

A prize ship found justly adjudged, as carrying contraband goods, although the ship belonged to Sweden, and by treaty, such goods were allowed to the Swedes.

CAPTAIN Seaton, a privateer, having taken a ship at sea, she was declared prize at Cromarty. The owners pursue reduction of that decret before the Admiral at Leith; who assoilzied from the reduction, and adhered to the decret. The owners now pursue a reduction of both these decreets, upon this ground, That by the treaty betwixt the King and the King of Sweden, it is expressly declared, that if any Swedish ship have a pass from the King's Council, or the College of Trade, or Governor of the province wherefrom she looseth, she shall not be questioned, nor any inquiry anent the goods or men, and that because, by the said treaty, it is agreed, that the said passes shall expressly contain, that the ship, and whole goods, belonging to the subjects of Sweden, contained no contraband goods, and that upon oath, taken at the obtaining of the pass; *ita est*, the Governor of Livonia, wherein Riga lies, hath given a pass, bearing that the owners of the ship called the Castle of Riga, being citizens of Riga, did make faith that that ship, being then at Amsterdam, did truly belong to them, and was loaded with their goods only, and was direct to France, for a loading of salt, to be returned to Riga, and that there is produced an extract out of the Admiralty of France, bearing faith to have been made, that the ship nor goods, nor any part thereof, did belong to the French or Hollanders, and a certificate from the Swedish resident in Holland, registered in the Office of Admiralty in England, bearing this ship to be a ship belonging to the Swedes; and yet she was declared prize, upon this ground only, that the seamen did acknowledge they were inhabitants in, and about Amsterdam, and that some of them deponed, that the ship was a Dutch bottom, and one of them deponed, that they were paid by the skipper, who received the money from a Water Bailie in Amsterdam, without proving that the ship or goods belonged to Hollanders, which could not have been ground, seeing pass and and treaty did exeem them from giving an account, or inquiry, anent the mariners. It was *answered* for the defenders, That all these passes and papers were a mere contrivance, and fall not in the case of the treaty; because the ship loosed not from Riga, but from Amsterdam; and the pass did not contain the particular goods and quantities, according to the conditions of the treaty; and that the testimonies proved, that the ship had on a Dutch flag; that she came not by the Channel, but about the back side of England; and that the company was afraid to meet with Scottish and English privateers; and having met with a ship in their course, asked for the Dutch fleet, calling it their own fleet; all which were strong evidences that the ship belonged to Holland. It was *answered*, That albeit the pass mentioned not the particular goods, which it could not do, the ship being but to be loaden, the certificate did abundantly supply that, expressing the loading; as for the presumptions, they are of no

force, because the skipper, though a Dutchman, yet was sworn a citizen of Riga; and might justly be more afraid of the English and Scots, than of the Dutch; and they might call the Dutch fleet their own fleet, as being of their nation. At last they produced a letter of the King's, bearing, that his Majesty knew, by sufficient information, that this was a ship belonging to Sweden, and, both by it and a former letter, did peremptorily command the delivery thereof, and the goods. It was *answered*, The King's letter was impetrate upon false information; and if his Majesty had known the true state of the case as it now stands in the evidence, he would not have so written; nor doth his Majesty's letter, granted *inaudita parte*, prejudice the private rights of his subjects.

THE LORDS found, That the testimonies of the witnesses did not prove that the ship and goods belonged to any of his Majesty's enemies; and therefore, in respect of the pass, certificate, treaty, and his Majesty's letter, they reduced both the decreets.

1667. July 31.—THIS cause being again debated, it was *alleged*, That the former interlocutor having proceeded mainly upon his Majesty's letter, there was no ground to proceed thereupon, because it was granted *inaudita parte*; and acts of Parliament being done by his Majesty, without consent of Estates, prejudice no party as to their private right, but such as are called, much less letters thus impetrate, upon importunity and groundless representation; and this letter is derogate by a posterior general letter to the Lords, recorded in the sederunt, warranting the Lords to proceed. And as to the Swedish treaty, it can never be understood further than as to contraband goods, which are the native commodity of the Swedish dominions; for albeit some of these be dispensed to the Swedes, because most of the growth of their country is such, yet it cannot be extended to this case, where the Swedes loaded contraband goods in Norway, and carry them to France, both being his Majesty's enemies; neither can the pass be sufficient, except as to such ships as are within Sweden, and where the particular goods, upon oath, are attested, and expressed in the pass; neither of which is in this case. It was *answered*, That they opposed the former interlocutor; and that a solemn treaty, with so considerable an ally as the King of Sweden, is not to be retrenched nor limited, but by the exceptions contained in itself, and in it there is no such exception; but, generally, the pass, as is there qualified, excludes all search or question of men or goods; which is also the King's meaning, which appears expressly by the foresaid letter, which, albeit it could not derogate from a private right, yet may well clear the dubious interpretation of a treaty; and is sufficient in this case, where the King alone *dat leges bello*.

THE LORDS, upon consideration of the last dispute, did ordain the President to state the case, and represent it, by the Secretary, to the King, both as to the meaning of the treaty and the letters; and, specially, whether contraband goods, not being the growth of, nor loaded in Sweden, were privileged to the Swedes thereby.

No 4.

1667. *November 6.*—THE said cause being again called, the President presented the Lord Secretary's letter, bearing the King's answer, that the treaty or letter did not warrant the Swedes to carry contraband goods to the country of his enemies, except their own country commodities, loaded within their own dominions.

Whereupon the Lorps sustained the Admiral's decret, as to the reason of reduction; but gave the parties a time to be further heard, before extract.

1668. *February 25.*—THIS cause being debated the 27th of July last, in which debate Captain Seaton did chiefly insist to maintain the decreets of adjudication, upon the presumptions and evidences that the ship or loading did truly belong to the Hollanders, and that their passes and bills were but contrivances; which the Lords found not sufficiently proved to make her prize: Now, the Captain insists upon another ground, contained in the decreets of adjudication, viz. That she was navigated by Hollanders, the King's enemies; and therefore, by the King's declaration of war, the ship and goods are lawful prize, because the last article of the declaration bears expressly, to take all ships prizes that are sailed by the subjects of the United Provinces; and, by the testimony of the witnesses, taken at Cromarty, it was evident that the whole company were Hollanders, taken on at Amsterdam, and residents there. It was *answered* for the strangers, That there was a solemn treaty perfected betwixt their King and the King of Sweden their Sovereign; that treaty behoved to be the only rule as to the subjects of Sweden; by which there was nothing provided, that a ship should be prize being sailed with Hollanders; but, on the contrary, the pass agreed upon by the treaty, and exprest *verbatim* therein, bears, that oath is to be made that the vessel and loading belong to Swedes; but makes no mention of what country the sailors should be; and bears, that the master of the ship may be of any nation, and therefore, *multo magis* the sailors. It was *answered* for the Captain, That the treaty with the Swedes cannot be the adequate rule in relation to all Swedish prizes, there being multitudes of cases not touched therein; and it cannot be thought the intent of the King, in so short a treaty, to comprehend all the laws of nations at sea, and all the cases *de jure belli* betwixt their subjects; but the treaty doth only clear some most important cases, and grants special privileges to either party; as, that such a pass should be sufficient, and that there should be no search at sea, where such a pass is found, *nisi gravis suspicio subsit*; so that these cases must still be regulated by the law and custom of nations, and especially by the King's declaration of the war; so that these making the rule, the treaty can make but the exception; and therefore, the King, by the declaration of war against the Hollanders, gave an express command to make prize all ships belonging to the Hollanders, or having in them goods belonging to the Hollander, or contraband goods going to the Hollanders, or navigated by any number of the Hollanders; this must stand as the rule, seeing there is nothing in the treaty to alter the same, neither doth the tenor of the pass (not mentioning the sailors) infer any

thing; because the sailors can be known of what nation they are, by their language, and it were unnecessary to cause the Swedes depone, upon oath, that they are Swedes; but cannot be so well known to whom the ship and goods belong, and therefore oath is to be made thereupon; and albeit a pass be found aboard, conform to the treaty, whereby it is provided, *ne quid ulterius inquiratur in navigium, bona aut homines nulla tenus inquiratur*, it immediately follows, *quod si gravis aliqua suspicio subsit*, that there may be seizure even where there is a pass, or if the pass were old or vitiated, or appear not to agree with the hand and seal of the places whence it is directed, seizure might be made; and therefore, in this case, the whole company being Hollanders, as is evident by their language, although there had been no suspicion of the truth of the pass, they might justly have been seized and confiscated, conform to the King's declaration; neither is it a good argument, that because the treaty gives leave to have the master of any nation, that therefore all the sailors may be of any nation: and therefore, if the company might have been of any nation, there needed no such expression for the master, *exceptio firmat regulam in non exceptis*; which is the more clear, that by the treaty betwixt the King and the King of Spain, there is a special privilege to the Flandrians, that they shall not be questioned, as being navigated by Hollanders, in respect of the identity of their language; which would never have been demanded, if, by the law of nations, Hollanders, the King's enemies, might have been made use of by any in amity with him.

THE LORDS found, That this Swedish ship, being navigated by the sailors all, or most part, being Hollanders, residents in or about Amsterdam when they entered this voyage, that the same was a sufficient ground of confiscation, in respect of the King's declaration of war, and that, by the Swedish treaty, there was no privilege granted to the Swedes as to this matter; and therefore assoilzied from the reduction, having found it sufficiently proved by the testimonies at Cromarty. And whereas it was alleged, that these testimonies were extorted, by holding swords and pistols to the company's breasts, both at sea, and after landing, to make them confess that they and goods belonged to Hollanders,

THE LORDS found the allegiance relevant, that, at land, and about the time of their testimony, the witnesses were so threatened; but would not sustain that they were so threatened at sea, when they were taken, unless it were alleged that, at sea, they were forced to swear, or depone upon oath, whereupon it might have been presumed that, by reason thereof, they would adhere to it when they came to land.

Stair, v. 1. p. 481. 483. 484. 534.

1667. November 22. Colonel SEATOUN *against* The LAIRD of BALWHILLY.

THE LAIRD of Balwhilly having seized upon a ship belonging to the Dutch, during the war, Colonel Seatoun, Governor of the Fort at Brassie-sound, med-

No 5.
What warrant
requisite to
make a seiz-
ure?