

1668, *partman contra Allan*. In doubtful cases, the ends use to walk by the Kings Instructions ordinarily given to all his Courts of Admiralty, that an equal use for Rules of Justice to Strangers, Favour to Allies, policy and good sense to all Nations might be kept. *Star ibid.* And sometimes sent to know his Majesties pleasure 21 January 1673 *Anderson contra Douglas*. But the Kings Instructions can not derogate from any publick Treaty with his Allies 18 July 1673 *Wintles contra Owners of the S. Andrew*. Nor was a Treaty with Nations in War, sustained as a Rule to others in an after war with those Nations in the former, *Star ibid.* §10.

Contracted of war.

The first Ground for seizing and confiscating the Goods of Vnderlings & Allies, is the carrying Counterband to the Enemys ports, for which the Law of Nations doth not stule parcels becoming thus accessory to the war as Enemys, by confiscating all their Goods where ever apprehended, but justly restrains the punishment of their offences to confiscation of the ship and Loading by which they concurre to assist the Enemy, *Star Inst. Lib. 2. Tit. 2. §7.* I shall first show what Goods are counterband or prohibited, 2^o At what Time seizure or detention upon the Account of Counterband Goods is. Compositio. 1^o It was debated, but not determined (23 July 1667 *Jurgin contra Logan*) whether victual carried by Luback Merchants to the Danes, than our Kings Enemys should be called Counterband Goods simply in Commerce because of the Lubackers were hindered to Trade in Corn, the only Growth of their Country, they could not trade at all. It was urged on the other side, that Corns are the first necessary in war for victualing Ships, which Norway a barren Country, having little Grain of its own stood most in need of. And a Treaty betwixt our King and the Swedes, allowing the latter to transport Counterband Goods mentions Anoniam as of that kind. By a Treaty at Breda anno 1667 betwixt our King & the French Dutch and Danes at the pacification of the first Dutch war, it was provided, that victual should not be esteemed Counterband, unless when carried to a place besieged. And for victual or Money were found Counterband only in that case, 16 July 1673 *Lyle contra Tho. Masler of the Leopard*. 13 June 1673 *Wintles contra Owners of the S. Andrew*. *quilt and Bar and Gunbor proper for shipping and Maslers* or Timber of promiscuous use furnished in special cases for the peculiar services of the war, are comprehended among Counterband Goods 9 July 1668 *Allan contra partman*. By an article in the first Treaty between our King and the Swedes, it is declared, that in regard most of the materials of the Swedish Trade are quilt, Bar, Masls &c. ordinary Counterband Goods, the Swedes should not be hindered to trade in these. But this was found to extend only to such Counterband Goods as were the natives product of their own Country, *Star Inst. Lib. 2. Tit. 2. §10.* By the second Treaty betwixt our King and the King of Sweden anno 1661 Counterband Goods carried by the Swedes were declared prize, *Je depe ostendatur*. whence it was inferred, that the ship and the rest of the Cargo should be prize 18 July 1673 *Wintles contra Owners of the S. Andrew*. 24 July 1673 *Donaldson contra Masler of the H. David*. and that a ship taken in her Return after she had carried Counterband Goods to the Enemy could not be confiscated, *Ed. de Int. Gode. carrying Soldiers of whatsoever nation to the Enemys Country, if actually engaged in their service, or carrying persons thither who reside there and contribute to the war, is certainly Counterband, and prohibited by the Law of Nations. But the carrying Strangers passengers to the Enemys Country having no other design, than to trade or travel, or the like innocent end, doth not exceed the bounds of neutrality. And the being born in the Enemys Country,*

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or having resided as Citizens there, doth not simply stule men as Enemys, but is only a new supposition that they are such; unless they make it appear that they had removed from thence, and fixed their Residence elsewhere. Nor yet will any Battens imposed on Lands or Houses import their Owners in the war as Enemys. *Star Inst. Lib. 2. Tit. 2. §11 & 12.* In the Time of the war between Britain and Holland, It was ordered, that no Ships belonging to the King of Spains Subjects should be seized for being navigated by Hollanders; and the Smugglers might freely employ'd in Masters for navigating their Ships, provided they Master; had set up their Residence in Sweden and become Citizens there, which concessions gave Reason to doubt whether those of Mass or Vnderlings might not Dutch Masters or forbaids in their Ships? Because if they might not special privilege granted by a Dutch Skipper; they could not a part be forced by Dutch Masters. But this being a great difference abstract common law, money and the Master or Skipper who is in possession of it, interplead with the Ship, and may affect it by his delinquencies and debts of Holloandry contracted by him: Tho' granting a privilege to employ a Dutch Skipper, doth not import a discharge to make use of Dutch Masters not residing in Holland. Our Kings Declaration of the first war against the Dutch commands indeed to seize all Ships as prizes if they are found by any number of Hollanders: And a good reason found for it, for that all or most part of her Company were subjects of the King, and in business regarding their Kingdoms Swedes. Finally there was a permission to the subjects of Sweden, to make use of the Hollanders as Masters of their Ships, without mentioning anything as to the Quality of the Sailors: Foring the Treaty bears an Exception, nisi Grains suspicio subit, and here there was a real and positive supposition, that Ship or Goods belonged to the Dutch men 25 February 1668 The owners of Castle Regie contra Soalon. 30 June 1669 *poter son contra Anderson*. But in the proclamation of the second war against the Dutch, in the Kings Instructions to his Admirals, nothing is mentioned as to Hollanders navigating the Ships of Vnderlings, without changing their Residence: Nor was any Ship declared prize because of Dutch men being aboard such Ships as were barks only, and not upon their own account as Traders or passengers, *Star Inst. Lib. 2. Tit. 2. §13.* Thus it was not sustained as a Ground for seizure, to confiscate a ship or Goods belonging to the Smugglers, that the Skipper and two of the company were Dutch men, and no part owners 24 July 1673 *Captain Bennet contra Masler of the Leopard*. Because having a permission to be Masters and Sailors of Ships doth rather weaken than fortify him in the war; and his more his Majesties Interest to allow his Enemys to withdraw from the Country than to force them to forbear only. But the having one of the Enemys Country to be Master of such a Ship as is not a subject of the King, and Goods till the property were instructed 16 July 1673 *Lyle contra Masler of the Leopard*. Treaties determining the particulars of Counterband Goods, serve generally to obviate Controversies that may be stirred in Times of War concerning what Goods carried to the Enemys ports may be Intercaptes. But where we are not directed by any national Treaty, no certain Rule can be set to the Liberty of Commerce that Nations should enjoy, which is restricted or extended according to the different Faces or Emergencies or Complexion of the Times. There may be a Time when, for Instance, it may tend to promote the design of a Siege, to cut off the Supplies from the Import to them of Things voluntary or for being for pleasure only, as when they have been so effeminately and softly educated, that they cannot endure the want of such Things. Cum voluptate concessa fitur, quam durior labor malit, *Cypriac. Lonicul. de I. lib. 2. p. 1. vander Muler Comm. in Prot. Lib. 3. cap. 1. §2.* In such cases of a Treaty between princes and States engaged in a war, the Formula of passage to be given by Nations or Allies to their Subjects in the Treaty, that the Bottom and Goods belong to the Subjects of that Ally or Nation (whose name must be mentioned) and that no party engaged in the war, hath any concern there, and that they are directed to such a free port *Star Inst. Lib. 2. Tit. 2. §7.*

Neutral ship carrying the cargo of an hostile Nation.

or having resided as Citizens there, doth not simply stule men as Enemys, but is only a new supposition that they are such; unless they make it appear that they had removed from thence, and fixed their Residence elsewhere. Nor yet will any Battens imposed on Lands or Houses import their Owners in the war as Enemys. *Star Inst. Lib. 2. Tit. 2. §11 & 12.* In the Time of the war between Britain and Holland, It was ordered, that no Ships belonging to the King of Spains Subjects should be seized for being navigated by Hollanders; and the Smugglers might freely employ'd in Masters for navigating their Ships, provided they Master; had set up their Residence in Sweden and become Citizens there, which concessions gave Reason to doubt whether those of Mass or Vnderlings might not Dutch Masters or forbaids in their Ships? Because if they might not special privilege granted by a Dutch Skipper; they could not a part be forced by Dutch Masters. But this being a great difference abstract common law, money and the Master or Skipper who is in possession of it, interplead with the Ship, and may affect it by his delinquencies and debts of Holloandry contracted by him: Tho' granting a privilege to employ a Dutch Skipper, doth not import a discharge to make use of Dutch Masters not residing in Holland. Our Kings Declaration of the first war against the Dutch commands indeed to seize all Ships as prizes if they are found by any number of Hollanders: And a good reason found for it, for that all or most part of her Company were subjects of the King, and in business regarding their Kingdoms Swedes. Finally there was a permission to the subjects of Sweden, to make use of the Hollanders as Masters of their Ships, without mentioning anything as to the Quality of the Sailors: Foring the Treaty bears an Exception, nisi Grains suspicio subit, and here there was a real and positive supposition, that Ship or Goods belonged to the Dutch men 25 February 1668 The owners of Castle Regie contra Soalon. 30 June 1669 *poter son contra Anderson*. But in the proclamation of the second war against the Dutch, in the Kings Instructions to his Admirals, nothing is mentioned as to Hollanders navigating the Ships of Vnderlings, without changing their Residence: Nor was any Ship declared prize because of Dutch men being aboard such Ships as were barks only, and not upon their own account as Traders or passengers, *Star Inst. Lib. 2. Tit. 2. §13.* Thus it was not sustained as a Ground for seizure, to confiscate a ship or Goods belonging to the Smugglers, that the Skipper and two of the company were Dutch men, and no part owners 24 July 1673 *Captain Bennet contra Masler of the Leopard*. Because having a permission to be Masters and Sailors of Ships doth rather weaken than fortify him in the war; and his more his Majesties Interest to allow his Enemys to withdraw from the Country than to force them to forbear only. But the having one of the Enemys Country to be Master of such a Ship as is not a subject of the King, and Goods till the property were instructed 16 July 1673 *Lyle contra Masler of the Leopard*. Treaties determining the particulars of Counterband Goods, serve generally to obviate Controversies that may be stirred in Times of War concerning what Goods carried to the Enemys ports may be Intercaptes. But where we are not directed by any national Treaty, no certain Rule can be set to the Liberty of Commerce that Nations should enjoy, which is restricted or extended according to the different Faces or Emergencies or Complexion of the Times. There may be a Time when, for Instance, it may tend to promote the design of a Siege, to cut off the Supplies from the Import to them of Things voluntary or for being for pleasure only, as when they have been so effeminately and softly educated, that they cannot endure the want of such Things. Cum voluptate concessa fitur, quam durior labor malit, *Cypriac. Lonicul. de I. lib. 2. p. 1. vander Muler Comm. in Prot. Lib. 3. cap. 1. §2.* In such cases of a Treaty between princes and States engaged in a war, the Formula of passage to be given by Nations or Allies to their Subjects in the Treaty, that the Bottom and Goods belong to the Subjects of that Ally or Nation (whose name must be mentioned) and that no party engaged in the war, hath any concern there, and that they are directed to such a free port *Star Inst. Lib. 2. Tit. 2. §7.*