

No 12.

enemies, to be sold to them, for assisting of the war; which this loading could not be, because it consisted all of knapple, cut all at three foot and an half length, the proper use whereof is for barrels, and is no ways *instrumentum bellicum*.

THE LORDS having given commission to some of their number, to visit the knapple, and to examine sea-wrights, whereupon they did examine a number, whether this timber in question was useful for war or shipping; and most deponed, that it was not, and some deponed, that it might be made use of to be pins or tubs; but that it was not ordinarily made use of for shipping, but common oak, which was far cheaper.

THE LORDS did also, before answer, ordain either party to adduce such testificates and evidences as they could from the Admiralties of neighbouring nations, what was the custom of nations, whether upon such timber as this the ships of neuters or allies were made prize.

The strangers produced several testificates, one from the Custom-House of Amsterdam, bearing, that such timber was not accounted contraband in Holland, and one from the Spanish Admiralty at Ostend, bearing, that they knew not that, by their custom, and the custom of other Admiralties, such timber was contraband; one from a deputy who served in the French Admiralty at Dunkirk, declaring that, in that Admiralty, such timber was not accounted contraband; one from the King's attorney, and another lawyer, who served in the Court of Admiralty of England, bearing, that, during the war, none had been declared prize upon that account. The privateer produced no testificates; but *alleged*, That there ought no respect to be had to the testificates produced, it being easy to impetrate such, and there should a commission have been directed by the Lords to the several chief Admiralties of the neighbouring nations, to express what was their custom in this point.

Notwithstanding, the LORDS found the ship prize, as carrying this clapboard, being contained in the Admiral's commission; a great part of the most able of the Lords being of the contrary judgment.

Stair, v. 1. p. 626.

1669. June 15.

EVART LOYSON *against* Laird of LUDQUHARN and Captain WILSON.

No 13.

In prize ships competent and omitted as a particular custom of Scotland, was not sustained against strangers.

CAPTAIN WILSON, a privateer, whereof Ludquharn was owner, having taken Evert Loyson and his ship, obtained the same to be adjudged prize by the Admiral, as carrying flax and hards, which were contraband; which decreet the Strangers suspend, and raised reduction upon these reasons, that this ship and goods belonged to one Clepan in Bruges, the King of Spain's subject, and was declared prize upon no other ground but because she carried tow and hards, which are not contraband, but are necessary in some quantity in every ship for

caulking; and by the treaty betwixt the King and the King of Spain, there is an express article, that though contraband be deprehended in Spanish ships, only the contraband shall be prize, and not the ship and goods. It was *answered*, That this allegiance was competent and omitted before the Admiral. It was *answered*, That these cases with strangers are to be ruled by the law of nations, and not by peculiar statutes and customs.

THE LORDS reponed the strangers to their defences, as in the first instance, and also allowed the privateer to insist on any grounds for making of the ship prize which he did not formerly insist on, whereupon the privateer *insisted* upon two grounds; *first*, Because, by the law of nations, and the King's proclamation of war, allies and neutrals must not make use of the King's enemies to sail their ships, and therefore the proclamation of war bears expressly, that all ships shall be seized bearing any number of men of the King's enemies, and this ship had the major part of her company of Hollanders, then the King's enemies, as is evident by their own depositions taken before the Admiral; *2dly*, This ship was not only sailed by Hollanders, but the ship, or major part thereof and the loading belonged to Hollanders, and any pretext that the same belonged to the King of Spain's subjects is a mere contrivance, it being most ordinary the time of the war, for the Hollanders to trade under the name and covert of the Flemish, the King of Spain's subjects, which appears in this case by many evidences; *first*, Both the merchant and major part of the sailors, by their own confession, are Hollanders, and they have adduced nothing to be a sufficient probation that the whole ship and goods belonged to Clepan in Bruges; but on the contrary, the skipper's first testimony at Linlithgow bears, that this ship and goods belongs to Clepan and Revier, which Revier being taken aboard, acknowledges that he was born in Holland, but says that two or three years before the seizure he dwelt in Ghent and Brussels under the King of Spain; and having a diligence granted to prove his domicil the time of the war and capture, all that he proves is, that in March 1667, he hired a house in Brussels and began to set up there, and that some time before he had lived with his mother in Ghent, but proves not how long, or that it was his constant domicil, for that was an ordinary contrivance for Hollanders to hire houses in the Spanish Netherlands, and to pretend to be subjects there; but they being Hollanders at the beginning of the war, concurring and contributing to the war, albeit they had truly removed *tempore belli* they continued to be the King's enemies; much less can their taking houses elsewhere, sufficiently prove that they totally deserted the Hollanders and concurred not with them in the war, it being easy to have domicils in diverse places; *2dly*, The contrivance is yet more evident, in that the goods were shipped by Rivier at Fleck in Holland, and sailing from thence to Copperwil in Norway and was taken, having no pass from the King of Spain for this voyage, but had a pretended pass from the Duke of York; which, albeit it bears relation to the same snip called Charles the Second, yet, by the testimonies of the witnesses, it is evident to

No 13. to have been granted two years before this ship was built, which is an evident cheat; and, for the pass from the Governor of the Netherlands, it bears but to last for a year, and was expired before this voyage; and as for the pass from the Chamber of Commerce, it was granted for a former voyage from Ostend to France, which is clear by the testimonies, which bear also that there could be no pass gotten for this voyage, because this ship was lying in Fleck and not in the King of Spain's ports, and so the loading could not be there lying, and wanted oath taken thereupon that it belonged not to the King's enemies, as is requisite in such cases. It was *answered* for the Strangers, to the *first* ground of adjudication, That it was no way sufficient; *first*, Because the King of Spain being an ally by a perpetual league, his subjects were not to be regulated by the King's proclamations, but by the solemn treaties betwixt both Kings, which setting down the causes of seizure, must necessarily import that seizure should be for no other cause than is therein expressed; *2dly*, The articles bear expressly, that any of the Spanish subjects having a pass conform to the *formula* set down in the articles, should be no further troubled, which *formula* requires nothing as to what country the sailors are of, and therefore there can be no seizure upon the account of the sailors; for, albeit by the Swedish treaty, the Swedes are allowed to have a Dutch skipper, he becoming a sworn burgess of some town in Sewden and he residing there, from whence the Lords have inferred that the Swedes may not sail with Hollanders, and have declared some of them prize upon that account, yet this cannot be extended to the Spanish subjects, in whose treaty there is no such thing; *3dly*, By an act of the Council of England produced, it appears that his Majesty gave order that all Flandrian ships that were taken should be dismissed, if there were no other ground of seizure, but that they were sailed by Hollanders, until his Majesty review the Flandrian concessions and give further order; and there is a particular concession to the Flandrians beside this treaty, in regard their language and the Hollanders is one, they should not be seized upon the account of being sailed with Hollanders; and as to the other ground, the passes and testimonies prove sufficiently that the goods belonged to Clepan in Bruges; and there is but one testimony of the skipper, that Revier is owner, which testimony was taken at Linlithgow, the clerk or interpreter having interest in the caper; and the skipper's testimony being again taken by the Admiral at Leith, says nothing of Revier; and albeit it did, he is but one witness, and any Hollander deserting Holland the time of the war ceases to be an enemy, because the King invited such as would desert his enemies to come and live in England, so that it is both his Majesty's interest and intention in any way to weaken his enemies by causing their subjects desert them. It was *answered* for the Privateer, That the strangers could not pretend right to the Spanish treaty, seeing they wanted a pass conform thereto, and that it could not be inferred *negative* from the Spanish treaty, that seizures should only be for the causes therein expressed, there being no such article in the treaty; and the law of nations and the King's pro-

clamation being the rule of war, the treaties with allies do only explain or restrain the same, and give exceptions from the rules; for instance, the Spanish treaty makes contraband not to infer seizure of the ship and goods, which is valid, though a privilege derogatory to the law of nations, but speaks nothing whether the carrying of enemy's goods shall make the ship prize, so that that privilege not being granted by the articles, the law of nations takes place, and the ship may be declared prize; likeas, in the case of Overvail's ship, decided in the last session, all that is there alleged being here alleged, Overvail not instructing any Flandrian concession to sail with Hollanders, his ship was declared prize upon that very same ground; and the testimony of the skipper at Linlithgow is most unsuspected, it being taken before the skipper was otherwise prompted to depone; neither had the clerk any interest, but the most that can be pretended is, that he had relation to some of the owners which signifies nothing, and the skipper by his office being the person commissioned by the owners, who by his office may sell or burden the ship without a special commission, his oath makes a full probation against the owners who entrusted him, especially here where the merchant and most part of the company, by their own confession, are Hollanders, which proves sufficiently for the privateer, unless they instruct that the ship and goods belonged to free men, and them only, which they have not done evidently and surely by all that they have produced, but the skipper (who is the main man to be trusted) is contrary; therefore it may be, and is presumed to be a contrivance, to carry on the trade of de Rivier a Hollander under the name of Clepan in Bruges his brother-in-law.

THE LORDS upon the whole matter declared the ship and goods prize, but found not that the want of a pass alone was sufficient, neither did they put it to the vote by itself, whether the sailing by Hollanders alone would have been sufficient, notwithstanding of the treaty and the King's order extracted out of the Council of England, which, though it related not to Scotland, some of the Lords thought it was sufficient, unless it did appear that the King had given contrary order; others thought not, unless that concession could be otherwise shown. Thereafter the Strangers offered to prove positively that there was a concession, which the Lords would not sustain, in regard that the last session, the first of June, was given (before answer) to prove the concession, and the term was now circumduced for not proving thereof.

Stair, v. 1. p. 617.

.. Gosford reports this case :

In the reduction, at the Dutchman's instance, of a decret of Admiralty founded upon the King's concessions as to Flandrians, giving them liberty during the war to sail their ships with Hollanders; for proving whereof, there was produced an act of Council in England, only grounded upon a report of

No 13. Judge Jenkins; by which act it was declared, that Flandrian ships should not be confiscated upon that ground, that they were sailed by Hollanders; which act was declared to endure only until further orders, and that the records of the King's concessions and declarations of war should be searched into; the LORDS, notwithstanding, did assoilzie from the reduction, seeing there could be no extract of the said article of concession produced under the King's secretary's hand, or the clerk of these records; neither could it be made appear, that ever the same was intimated to the Admiral here or his deputes. Thereafter it being *alleged* positively, That there were such concessions granted by the King, for which a term was craved for proving thereof; the LORDS notwithstanding adhered to their decret, and refused to grant any further term, in respect certification was already granted for not production thereof in this same process, notwithstanding that the ordinance to produce was only before answer, and that no litiscontestation was made upon any allegiance founded thereupon by the pursuer. This was done *me reclamante*, it being against all form.

Gosford, MS. No 133. p. 51.

1669. July 13.

CAPTAIN WOOD *contra* BOYNEILSON.

No 14.
Effect of a
pass.

CAPTAIN WOOD having taken a ship of Norway, whereof Boyneilson was master, called the Raphael Prize, she was adjudged by the Admiral, and there is now reduction intended of the decret of adjudication, in fortification whereof the privateer insists upon two grounds; *first*, That this ship belongs to the King's enemies with a considerable part of the loading, viz. 1500 dails, as is acknowledged by the skippers' deposition; *2dty*, Whereas she pretends to have been bound for London, upon the King's proclamation, giving liberty to all his subjects to import timber from Sweden and Denmark, by the ships and mariners in these countries, though then in enmity, yet the said proclamation requires that all such ships shall find caution at the custom-house to return straight to England, without going aside into an enemy's country, and requires the Lord Admiral's pass; but this ship, at the time of the adjudication, did not pretend to the Duke of York's pass, but only to the Duke of Richmond's pass, as Admiral of Scotland, whereas the proclamation warrants only the duke of York to give such passes, neither doth he produce now any pass from the Duke, or any extract of a pass from him. It was *answered* for the strangers, and for John Dyson, citizen of London, That they having contracted, conform to the King's proclamation, for importing timber, and having found caution, and obtained a pass, conform to the proclamation, the ship and loading cannot be made prize upon the skipper's oath, that they had aboard 1500 dales belonging to him and the company; *imo*, Because the skipper is *testis singularis*; *2do*, By the constant custom, sailors have portage deals allowed; *3tio*, The number of the deals is inserted but with figures, and might easily have been altered after the