

July 15.—IN the reduction of the adjudication of the ship called the White Dove, being disputed the last session, the LORDS granted a joint probation for clearing the property of the ship and loading, which was iron and masts, and what was the true port to which the ship was direct, whether to London, or Amsterdam, and whether the policy of insurance, whereby the loading was insured, as belonging to Swedish owners, was real or simulate. The strangers did return a report, in which, both by the oaths of the parties, and very many witnesses taken in Sweden and at London, the property of the ship and loading was proved to belong to the Swedes, contained in the documents, and that the true port was London, and that the policy of insurance was without simulation.

Whereupon the LORDS declared the ship and loading free, albeit the casting of papers overboard was acknowledged by the testimony of the boatsman and a boy, the skipper's son, whose testimonies were not found to prove sufficiently, the boy being pupil, and the boatsman, at his first examination, having deponed nothing as to his casting papers overboard, and that before his second examination, the privateer had given him his clothes and wages, and albeit it did appear, that the ship, when she came in to Sweden, had up Dutch flags.

*Stair, v. 2. p. 183. & 213.*

1673. June 12.

GILLIES against The OWNERS of the BOUNDER.

CAPTAIN GILLIES having brought up a ship called the Bounder, and pursued adjudication of her before the Admiral, upon these grounds, that her pass was false; for, albeit it did bear that the skipper made faith that the ship belonged to a subject of Sweden, and that the intended port was Hamburgh; yet the skipper by his oath acknowledges that he did not make faith, but yet depones that the owner expressed was the true owner, and a Swede; and albeit the pass bore Hamburgh to be the intended port, yet their not going thither, but to Amsterdam, was through contrariety of winds; and yet the steersman and boatsman deponed that the wind was fair for Hamburgh when they went to Amsterdam, which hath been of purpose concealed, because a great part of the loading was pitch and tar, which is contraband; so that the pass being false in these two material points prescribed by the treaty and formula, and the skipper's oath being the only mean to secure the King against enemies trading under other names, the same alone is a clear ground of confiscation, and is so expressed by his Majesty's instructions to the Admiral of England; *2do*, It is proved by the testimony of the steersman, that at the seizure he threw papers overboard, which by the same instructions is a sufficient cause of prize; and, albeit the skipper depones that he knew nothing of papers thrown overboard, the steersman is sufficient, he being entrusted with the loading, and not as a common seaman or passenger; and as the skipper's oath, who is trusted with

No 31.

A prize adjudged by the Lords on advocacy, because the pass bore faith to have been made, and the skipper acknowledged the contrary on oath, and because papers had been thrown overboard.

General rules as to cases of prize p. 11911.

No 31.

the ship, is sufficient to confiscate the loading, so must the steersman's oath, who is entrusted with the loading, be sufficient to confiscate the ship; nor can there be expected a full probation in these secret contrivances. And it being answered by the Strangers; That the want of a pass, or errors of the pass, and even the throwing of papers overboard, though it were sufficiently proved, are but presumptive probations, the skipper being by nation a Dutchman, though they may give ground of suspicion and seizure, yet they cannot exclude a positive contrary probation that the ship belongs solely to a Swedish owner, and that the skipper hath long been a burgess in Stockholm, and hath borne all burdens there and not in Holland; and that the oath of the skipper is not sufficient alone, much less the oath of the steersman, they being but *singulares testes*. The Admiral, upon this debate, did allow probation *hinc inde*, for clearing the property of the ship, and did confiscate that part of the loading belonging to the skipper, being a Dutchman having his wife living in Holland; and as the rest of the loading, the skipper having deponed that he knew not to whom it belonged, and having no bills of loading, but being directed to deliver the loading to any who should show such marks, the Admiral allowed any party to claim and instruct their interest in the goods. The Captain raised advocacy of the process from the Admiral to the Lords upon iniquity, that the Admiral had granted a conjunct probation, and had not sustained so clear evidences of confiscation. It was *alleged* for the Admiral, *1mo*, That the Admiralty is a sovereign court in maritime matters, and that the Lords cannot in the first instance be Judges to confiscation of ships, and so cannot advocate the cause to themselves, albeit they have been in use to rectify any iniquity by reduction; *2do*, That there is here no iniquity nor any sentence *in meritis causa*, but only a preparatory interlocutor for clearing the Admiral before answer; and those things that are *in arbitrio judicis*, albeit they be not so done as the Lords would think fit, yet can be no ground to incapacitate the Judge to proceed as having committed iniquity; and it cannot be shown that ever the Lords have advocated a cause from the Admiral in matter of prizes, which is his proper jurisdiction; and as the Lords, upon complaint of iniquity by the Commissaries in confirming testaments, or of the Sheriff in serving brieves, or upon personal objections against either, could not advocate the confirmation or service to themselves, because they can neither confirm nor serve; so that though they advocate from these inferior judges, it is only to the effect they may remit it to others; so that if the Lords could advocate from the Admiral, it could not be to themselves.

THE LORDS found that they might advocate from the Admiral, and that where there was but one Judge in the Admiralty, and another could not be speedily constituted, through the High Admiral and Vice-Admiral's absence, they would advocate to themselves. But as to this particular case, they found the reasons of advocacy not relevant, being only *in præparatoriis judicii*, and remitted the cause to the Admiral, and recommended to him to proceed to a

definitive sentence without any foreign probation before answer; and some were of opinion, that such probations being *ex nobili officio*, were only competent to the Lords; but others thought that a conjunct probation was in cases very doubtful, competent to the Admiral; but the ground of recommendation was, that generally the Lords thought the grounds of adjudication so strong, that they admitted no contrary probation.

1673. July 9.—Captain Gillies having pursued adjudication of the ship called the Bounder, the Admiral did, before answer, grant commission for proving the property. The Captain gave in a bill of advocacy upon iniquity, in so far as there were clear grounds of adjudication.

THE LORDS, upon consideration of the reasons of adjudication, found there was ground to proceed without this delay, and did at first remit the process to the Admiral, and recommended to him to proceed to a present decision; and he not having proceeded, enjoined him to proceed; and he having adhered to his former interlocutor, they, upon his contumacy, advocated the cause and now did advise the reasons of adjudication, and declared the ship prize upon these two grounds, That the pass did bear that the skipper made faith, and that the skipper by his oath deponed that he did not make faith, and that the steersman by his oath deponed that he threw papers overboard the time of the capture, albeit there was no other that deponed so, but the skipper deponed that there was none thrown overboard at all.

*Stair, v. 2. p. 185. & 207.*

\* \* \* Gosford reports this case :

1673. June 11.—THERE being an adjudication bearing a declarator of the ship called the Bounder, pursued at the instance of the Captain, for declaring of the said ship lawful prize, upon these grounds, That the passes were not only vitiated, and contrary to the *formula* set down in the treaties betwixt the King and the Hollanders at Breda before the late war, but were also by the skipper's oath declared to be false, in so far as they make the skipper to have compeared and made faith before the Admirals and College of Commerce, and that he was a citizen of Sweden, whereas that he confessed that his wife and family were residing in Holland; as also, that the boatsmen and others of the servants had declared upon oath, that he went into Amsterdam with the loading, the wind being fair for Hamburgh, which is the designed port in the pass; and farther, that the boatsmen that was entrusted with the loading, did, upon the approach of the privateer, throw overboard several writs and papers, which he declared upon oath; notwithstanding whereof, the Admiral-depute having refused to give his sentence in the cause, did grant commission for Sweden to examine several persons concerning the property of the goods and loading; whereupon the privateer and his owners craved an advocacy upon ini-

No 31.

quity; which being called, it was *alleged* for the skipper of the prize-ship, and for the Admiral-depute, That there could be no advocacy, because the Admiral was supreme and only judge *in prima instantia* in the adjudication of ships taken as lawful prizes, it being a sovereign court; *2do*, There was no iniquity committed; because all that the judge had done, was, before answer, to grant commissions to examine parties and witnesses, as to the property of the goods, if they did truly belong to the King's allies or enemies, which being but an act before answer, and such as is ordinary to the Lords of Session to grant; in difficult cases, could not be the ground whereupon to infer iniquity. It was *replied* to the *first*, That albeit the Lords of Session could not advocate any maritime cause upon incompetency, yet they might do upon iniquity, seeing they may reduce their decreets upon that ground, which is a far greater privilege, and if this were not granted, there could be no remedy when the Admiral or his deutes should judge against law. To the *second* it was *replied*, That the grounds of the adjudication being so pregnant and unanswerable, and the general custom of all nations being to grant summary process, and to give sentence condemnator or absolvitor within three tides of ebbing or flowing of the sea, because that the goods and loading may suffer great prejudice by delay, and the skippers and sailors be at a great loss, being interrupted in their voyages; therefore, the Admiral not having proceeded in a case so clear, it was upon iniquity. THE LORDS having seriously considered this case, and the great inconveniencies which might arise by the present constitution of the Admiral-court, the Duke of York being High Admiral, and the Earl of Kincardine his depute, who were both in England, and that they had none other to judge under them but one person, who was complained upon; therefore they found that in the general, causes might be advocated from an Admiral-depute upon iniquity, but so that if there was any other depute, either principal or by commission from him, the LORDS should remit the cause to them who had not sat in that judgment; but, if there were no such person, that the LORDS might advocate the cause to themselves, as being the most sovereign and competent Judges where the grounds of law are questioned; yet, as to the second part, if in this case iniquity was committed, they did find, that it being only an act before answer, albeit that prejudice might ensue thereupon, there being no decision in point of law, they did remit the cause to the Judge-Admiral, with express recommendation, that without delay he should proceed to give a final sentence in the said matter, as being conform to the maritime law of all nations; and that there was a great difference betwixt that court and the Lords of Session, who, before answer, might admit conjunct probations for trying matters of fact where both parties were alike pregnant; whereas, in the Court of Admiralty, they have their instructions and rules whereupon they may immediately proceed and determine in all points before them. Seeing there have been many processes before the Lords by reduction of Admiral decreets, or craving advocations upon in eributors, which, for the most part, are upon coincident reasons, we con-

ceive it not fit to set down many particular cases, but in general to represent the grounds whereupon the Lords have, and are resolved to proceed and give their sentence.

1<sup>mo</sup>, That where the prize-ship hath a pass, and yet not conform to the *formula* in the treaty, that, albeit it may be a warrant for a privateer to bring up that ship to be tried, yet it shall not be a sufficient ground of an adjudication; but in that case, commission shall be granted to both parties to prove to whom the property of the ship and goods, or loading, belongeth, whether to allies or enemies.

2<sup>do</sup>, If the skipper, upon oath, contradict the pass as to the owners of the ship, goods, or that there be no pass at all, but they are destroyed or thrown overboard, that they shall be sufficient grounds whereupon to pronounce sentence.

3<sup>tio</sup>, If it be proved that the loadings are contraband, and going to an enemy, or if they be in the return with the product of contraband goods, then if the ship and goods belong to States or Hans Towns, which have the benefit of the King's treaties at Breda, or any other before the last war with Holland and France; the Lords have written for advice what is the practice of the Admiralty of England, that there may be no difference betwixt our procedure and theirs, and if they may be lawfully adjudged prize; but if they were not included in the treaty, albeit they be no enemies, they may be lawfully adjudged: And, as to the nature of contraband, if they be such as are promiscuous, and such as may be fit for shipping or war, or other employments, they find that these are not contraband; but if they be properly and only useful *ad instrumenta bellica*, that then they are contraband; but as to money or corns which are the product of the country belonging to allies or are not enemies', the Lords likewise delayed to give judgment, until they know the practice of England. But, upon the 19<sup>th</sup> of July 1673, the Lords having considered the treaty at Breda, with the additional articles, find, That victual or other goods being carried to Amsterdam, are not contraband, which is conform to the maritime law, making them only contraband where they are carried to a besieged town or castle.

4<sup>to</sup>, As to the loading, they find, That albeit there be goods belonging to enemies which are lawful prize, yet that is no ground to confiscate any other parcel of goods belonging to the King's friends; but if the ship itself belong to enemies, then if that be a ground to adjudge the whole loading belonging to friends, is not yet decided.

5<sup>to</sup>, In the case of the *Mary*, they find, That for proving a contrivance, several particulars may be made use of, which being conjoined, may evince the same, albeit every one is not relevant *per se*; and that a pass, bearing the skipper to be a co-partner, who, by the depositions of the sailors, and by writ, is proved to be a residenter in Holland, it is sufficient to make the whole ship and loading prize, albeit some of the co-partners were friends, and yet did

No 31. know the skipper to be a Hollander. In the case of the *Venus*, they found, That double documents being got aboard, which were contrary to one another, were a ground of adjudication.

*Gosford, p. 334.*

1673. June 13.

WINCHESTER *against* The OWNERS of the *St Andrew*.

No 32.

Prize not sustained, because of the contrariety of two passes, or suppressing of that which, if expressed, would not make the ship prize.

THE Admiral having assoilzied a Swedish ship called the *St Andrew*, as to the ship and whole loading, except twelve last of pitch, Captain Winchester who took her, raised reduction of the Admiral's decret, upon iniquity, he having proponed sufficient reasons of adjudication, viz. that the pass granted by the King of Sweden was false and vitiated, the name of the skipper being scored out, and this skipper interlined; and there being two passes produced, the one contradicted the other as to the return of the skipper; *2do*, The ship was taken with contraband, viz. monies, silver and copper, to the value of L. 50 Sterling, which by the Swedish treaty is enumerated as contraband, and with a quantity of iron and deal-boards which is also contraband, and with twelve last of pitch which is likewise contraband. It was *answered* for the Strangers, That the Admiral's decret was just, for they had produced a pass from the College of Commerce exactly conform to the Swedish treaty, albeit *ex superabundante* they had also produced the King of Sweden's own pass, in which the name of the skipper was altered; but they rested on the pass from the College of Commerce wherein the skipper's name stands clear *ab initio*; and for any contrariety, it is not in relation to any thing that is material that the expressing thereof could make the ship prize; and as for the money it is inconsiderable, only necessary for the ship's present use; and, though the Swedish treaty number money as contraband, yet, by a posterior explanatory article by the King, it is declared that money and victual are only contraband when they are carried in relief to a place besieged; and as for iron and deals, they are *promiscui usus* and are not contraband; and as to the pitch the Admiral did no wrong, for the King having, by a concession, in the former war, declared, that the Swedes carrying the native product of their own country should not be quarrelled as being contraband; and it being debated, whether that concession could only extend to that war, or if it did continue in this war; the Admiral did only appoint it to be instructed, that the Admiralty of England, where the King is present, did not condemn pitch carried by the Swedes from their own country to Holland; but hath neither condemned nor assoilzied the pitch till probation thereof be returned;

THE LORDS adhered to the Admiral's decret, and assoilzied from the reduction.