

1673. *January 7.*SIMPSON *against* LUDKE.

No 16.

Presumption
of fraud, as
to the docu-
ments. What
evidence?

THERE being a ship, called the Fortune of Trailsound, brought up prize by Captain Simpson, she was absolved by the Admiral; the Captain gave in a bill of suspension. THE LORDS, to dispatch the stranger, ordained the cause to be heard in their presence upon the bill. The Captain *alleged*, That the Admiral's decret absolutor was unjust, and that there were sufficient grounds alleged to have declared the ship prize; *1mo*, That the skipper being a Swede, produced a pass, bearing, that he had made faith, that the ship belonged to Swedes, and that the loading belonged to the Tar-Company of Stockholm, and yet she was bound for the port of London, loaded with pitch, tar, and iron, whereas the skipper, by his oath, acknowledgeth, that the loading belonged to Sutton, factor in Stockholm, for the English East India Company, and to shun the Dutch privateers, the name of the Tar-Company was made use of, who sold the same; and albeit it be pretended, that by the Swedish treaty with the King, there is a formula of a pass prescribed, which being shown, there is no further enquiry to be made as to the shipmen and goods, yet the same treaty bears, That if there be any great ground of suspicion, she may be brought up, and there can be no greater than the skipper's canvelling the faith of the pass, which shows, that either he made no faith, or that he swore falsely, which is a clear and ordinary ground of confiscation, as evidently presuming a contrivance, and that the goods belong to the enemy. *2do*, A Swedish Baron, who was a passenger, hath deponed, that the skipper threw his papers over-board, which clearly infers, that there were double documents, and which doth also necessarily infer a contrivance, that the ship and goods were not free; and though that Baron be but one witness, yet he is above exception, and his concurring with the first presumption, is sufficient probation; and in fortification of all, it is offered to be proved, that the skipper hath acknowledged, that he threw over papers. *3tio*, There is produced an evidence of insurance of the ship and goods in Holland, albeit there be an insurance-office in Stockholm, which is a great presumption she belonged to Hollanders, and however, the loss will fall upon the King's enemies, albeit she were declared prize. It was *answered* for the stranger, That none of these was sufficient for declaring the ship prize; for as to the first, If the skipper's oath be made use of for proving, it must be taken as it stands, that albeit the goods were sold by the Tar-Company to Sutton, yet Sutton being the King's subject, the goods are free. And as to the second reason, No single witness is sufficient, nor can an extrajudicial confession operate any thing; and albeit either of these reasons were verified, it is but a presumptive probation that the ship or goods belonged to unfreemen, which presumption *cedit veritati*; and it is positively offered to be proved, that the goods was truly bought from the Tar-Company by Sutton, and were to be consigned for his use at London. And as to the insu-

rance, there is no relevant ground of confiscation, nor any presumption, that the goods belonged to Hollanders, because merchants insure where they can cheapest; and by the insurance, it appears, that this is a very cheap insurance at Amsterdam; and insurance being a lawful contract of commerce, undertaking hazard for a certain sum, it may well consist between the King's allies and his enemies, as well as other commerce, and it doth not transmit the property of the goods to the King's enemies, but on the contrary, is undergone for securing thereof; and the King, nor any having warrant from him, cannot, upon the account of advantage to himself, or disadvantage to his enemies, crave confiscation, unless it were a just advantage.

THE LORDS superseded to give answer, anent the insurance, till the conclusion of the cause; that both parties might produce testificates of other Admirals as to that point; and found, that the skipper's oath, comptrolling the pass, did derogate from the faith thereof, and from the benefit of the treaty, but being but a presumptive probation, either as to the false pass, or double documents, they found, that the stranger might prove the property of the goods, to belong to freemen, and admitted the other party to adduce any probation, that they belonged to enemies, and as an evidence thereof, ordained the witnesses to be examined concerning the skippers throwing papers over-board.

Stair, v. 2. p. 142.

1673. January 21.

ANDERSON against DOUGLAS.

CAPTAIN DOUGLAS, a privateer, having brought up a ship, called The Sun of Dantzick, and obtained her to be adjudged prize by the Admiral, the Stranger raised reduction of the Admiral's decret before the Lords, and the Captain, in fortification of the adjudication, insisted upon these grounds; *imo*, That, by the documents taken aboard of the ship, there is no sufficient evidence that the ship and loading belongs to Dantzickers, or any free persons, and therefore must be presumed to belong to the King's enemies, and be prize, in so far as there was only found aboard a pass by the town of Dantzick, which did not express the port to which the ship was directed; neither was there any bill of loading, charter-party, nor docquet, neither is the pass conform to the *formula* of passes prescribed by any of his Majesty's treaties with his allies. It was answered for the Strangers, That these allegiances cannot import adjudication, for neither the law of nations, nor any treaty, requires bills of loading, or docquets, but only passes; and for charter-parties, they are only in the case where the loading belongs not to the owners of the ship, but to others who freighted the ship: Neither does any treaty declare, that ships wanting passes in such a *formula* are prize, but only when they have such a *formula*, they are secured, and cannot be brought up; and the only treaty these Strangers found

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A prize was not inferred by a ship wanting a pass conform to the formalities of a treaty existing before the war.