

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

testimony, from 500, by adding one, and from 150, by adding a cypher, neither of which would have been sufficient to infer confiscation; *4to*, John Dyson, citizen of London, having *bona fide* contracted with the stranger for importing 6000 deals, albeit the skipper had foisted in some more, it cannot infer a confiscation of a loading belonging to him the King's subject, contracting *bona fide*, whatever it may infer as to the stranger's ship and his own deals. As to the second point, anent the wanting the Duke of York's pass, there is produced a testificate of the Duke's secretaries, and the ship having been bought from the privateer by Captain Lye, who carried her to London, the Duke gave her a pass to return from London to Norway, bearing, that he had given her a former pass to come into England; there is also produced his Majesty's letter, that he is sufficiently informed, that the ship is authorised by a sufficient pass, and therefore ordering her to be restored, with testificates from the customers, that caution was found there, and the testimony of the skipper and a seaman taken at London, bearing, that Captain Lye having bought the ship from a privateer, desired the skipper (then in prison) to show him the Duke of York's pass, which, when he shewed him, he pulled it out of his hand to secure the ship. Against all which it was *objected*, That all these were impetrated after the ship was declared prize, and that it is the more suspicious, that at the time of the adjudication, there was not so much as mention made of the Duke of York's pass, though the Duke of Richmond's pass was rejected, as not sufficient without the Duke of York's, and that as yet, there is no extract of the pass out of any record; and as for his Majesty's letter, it hath been impetrated *suppressa veritate*, and cannot take away a party's private right, but is *salvo jure*, as are all acts of Parliament done by his Majesty and three estates *incitata parte*, much more such a letter, as the LORDS found in the case of the Castle of Riga, No 4. p. 11860; and though there had been a pass from the Duke of York, it is likely not to have been of this date, but of a former voyage.

THE LORDS found the allegiance for the privateer, that there were 1500 dales aboard belonging to the King's enemies relevant to confiscate the ship and deals, but not to confiscate John Dyson's deals, his Majesty's subject, who acted *bona fide*, if he can make out a pass; and, before answer to that point, grants commission to Sir Robert Murray to try if there were a record kept of the Duke's passes, and if therein there was a pass for this voyage, and to send down the duplicate thereof compared with the principal, and signed by Sir Robert, and to try at the records of the custom-house, if caution was found there; and if there was no records of passes, to take the oath of Captain Lye concerning the pass alleged taken by him; and ordained the members of the Court of Admiralty to be examined upon oath, whither the testimonies in figures for 1500 dales were given in figures, as it bears; and found the skipper's testimony alone to prove not only against himself, but the owners, because he was intrusted by them in this affair.

Stair, v. 1. p. 636.

* * * Gosford reports this case :

No 14.

CAPTAIN WOOD, as master of a privateer, having taken a ship called the *Raphael*, whereof *Boy-Nielson* was master, and which belonged to the subjects of the king of Denmark, but was loaded with timber to be brought to England, for *John Dyson*, merchant at London; the said ship was adjudged lawful prize by the Admiral, upon these two grounds, That she had no valid pass from the Duke of York, upon sufficient caution found to the customers for returning with their loading to London; and that the skipper had confessed, that the fourth part of the loading belonged to him and his sailors. There was a reduction raised of the decret, upon these reasons, that conform to a proclamation remitted by the King, upon the burning of London, giving liberty to all his subjects to import east-land commodities, the merchant had found caution, and obtained the Duke of York's pass, for which they produced certificates under the seal of the Admiralty, and the secretaries' hand, and officers of the custom-house, with a letter from the King, ordering the ship to be released, as having such a pass. THE LORDS did notwithstanding sustain the adjudication for the fourth part of the loading the vessel and whole furniture, as belonging to the King's enemies, for which the proclamation gave no warrant; but for the other three parts of the loading, they superseded to give answer, until a commission direct for searching the records at London, if the Duke of York's pass was truly granted to the master of the ship, for that same voyage, should be reported.

Gosford, MS. No 169. p. 67.

No 15.

A ship adjudged, because the pass was fictitious.

1671. June 29. JOACHIM BURNMASTER *against* Captain DISHINGTON.

CAPTAIN DISHINGTON having obtained a decret before the Admiral, adjudging a ship taken by him at sea the time of the late war with Holland, whereof *Joachim Burnmaster* was master, the said *Joachim* raised reduction on the said Admiral's decret, on these reasons, that his ship and whole goods did belong to the subjects of Sweden, his Majesty's allies, and who had a particular treaty with the King, bearing expressly, that no person should be seized who had a Swedish pass, in the terms particularly expressed in the treaty; which pass the pursuer had, and produced when he was taken, and yet he was declared prize, upon pretence, that three of his company were *Hollanders*, albeit the treaty bears expressly, that where such a pass is found *ulterius nihil exigitur, et in bona aut homines nullo modo inquiratur*; and upon pretence that the oaths of the master and company were contrary to the pass, and other goods, viz. 15 hogsheads of wine, and a quantity of wine and brandy-wine, and paper, and that the ship in question was not then bought by the Swedes, nor did not go to or from the parts mentioned in the pass, albeit none of these said