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THE CASE

Treaties

02

*Ph
W. H. L.*

THE LEGAL TENDER,

N. P. 1

ARGUED BEFORE, AND DECIDED BY, THE JUDGE OF
THE VICE-ADMIRALTY COURT AT BERMUDA,

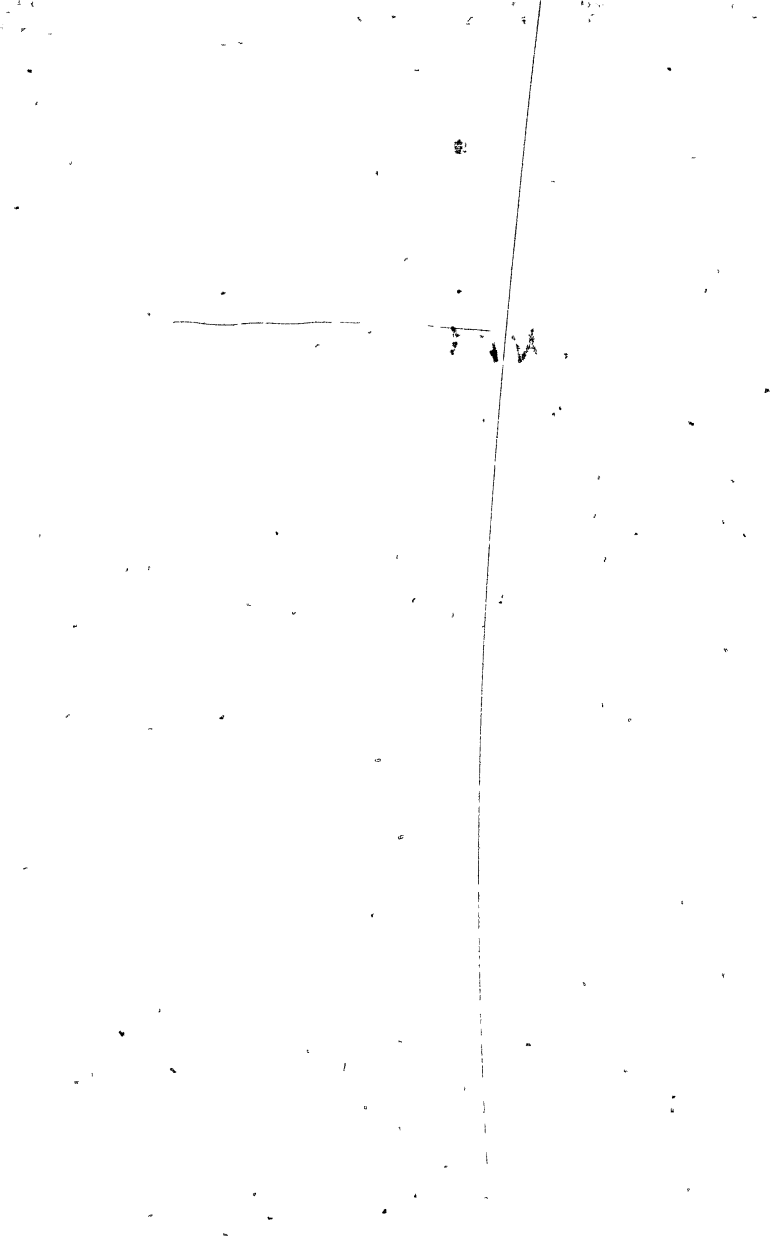
1812,

CHAS. D. W.

FOR A BREACH OF THE REVENUE LAWS.

HALIFAX:

PRINTED BY HOWE AND SON.



THE CASE,

LEGAL TENDER—*ALBOUY, Master.*

IMMEDIATELY on the seizure of this Vessel and Cargo, the King's Advocate, by the orders of the Governor, filed a "Nolle Prosequi." At the Seizure, the Honble. Capt. Gardner, of the Julia, carried on the suit for his part.

On the 5th of June the cause came on to be argued—

The King's Advocate protested against its being argued, on the ground that a "Nolle Prosequi" had been filed on the part of the Crown. The Judge ordered Mr. Butterfield, the Counsel for the King, and Capt. Gardner, to proceed. The Attorney General, (Mr. Cooper) and Mr. Harvey, prayed

that the Governor's evidence might be read. Mr. Butterfield opposed it, as the Governor had refused to be examined on the cross interrogatories. The Judge decided that the Governor's evidence should not be read, as it was incomplete : the argument took up two days.

On the next Court day, 22d June, the Judge, Dr. Territt, gave sentence as follows :

SENTENCE.

The cause of seizure alledged in the Libel is as follows : " That on the 30th March last past the said brigantine Legal Tender, (being a vessel belonging to British Subjects) did illegally *import and bring into these Islands*, from Amelia Island, being an Island in the West-Indies, belonging to a foreign European Power, to wit, the Kingdom of Spain, the following contraband or prohibited Articles, Goods or Commodities, to wit : 83 whole and 56 half tierces of Rice, 25 hhds. and 22 tierces, 2 bbls. and 10 kegs of Tobacco, 59 boxes Candles, 79 boxes of Soap, 3 kegs of Lard, 14 bbls. of Bread, 3 of Crackers, 114 bbls. Pork, 30 half bbls. of Pork, 249 Hams and pieces of Bacon, 5 bbls. Naval Stores, (i. e. Spirits of Turpentine) 22 bags of Oats 6 bbls. and 100 bushels of Corn, 2000 White Oak Staves, 5000 feet of Boards, 3 bbls. of Flour, 1 box Cheese, and 1 bale Blue Plains."

There is a second count for the same Brigantine and Ca'go, from the Island of Amelia, belonging to the Kingdom of Spain, but not a word about the cargo exported.—

The cargo is admitted to be the growth and produce of the United States of America, (indeed it appears by the marks, as I am informed, to be so) but the Claimants insist in their answer that they acted under the authority of the Governor of these Islands, and that the Brig (whilst they were deliberating whether she should come into port or not) was seized at sea by an officer of the Julia, and brought into the port of St. George's, without the consent, and against the judgment of the Master.

Now that all those articles which are prohibited by Stat. 28. G. III. Ch. 6, from being imported directly from America, may be imported indirectly from a small Spanish Island, within a stone's throw from the coast (as it has been contended by the Claimant's Counsel) can never I think be rationally maintained. The Stat. of the 27th of the present King, Ch. 7, which permitted in cases of emergency, the importation of Flour, Lumber, and other Articles, from Foreign West India Islands, is expressly contrary to such a position: the words are these: "*And be it further enacted, by the authority aforesaid, That if any Goods or Commodities what*

ever, of the growth or production of the territories belonging to the said U. States of America, shall be imported into any of the said Islands under the Dominion of His Majesty in the West Indies, other than such as by any Law now in force, or which shall hereafter be in force, or by virtue of this present Act, or by Order of His Majesty in Council, now are or shall hereafter be permitted to be imported into this Island, or if any such Goods or Commodities as aforesaid, shall be imported into the said Islands in any other manner whatever, than such as is, or shall be, allowed by any Law now in force, or which shall hereafter be in force, or by virtue of this present Act, or by Order of His Majesty in Council, the same shall be forfeited, together with the Ship, &c. &c." Now, though this clause does not appear in the 28th of His present Majesty, yet its omission cannot be construed into an authority to import prohibited Goods circuitously; it was omitted merely because it was considered unnecessary and superfluous; nothing, therefore, short of that great necessity which supersedes all Law, could justify the importation of the contraband part of the cargo, and of the existence of such necessity no proof has been produced. The apprehension of an Embargo (which has since been laid on) could make no difference in respect to the prohibited

articles. It was undoubtedly the business of the Inhabitants of this Province to procure a sufficient supply of them from Great-Britain, Ireland, or some other lawful place: and if, in the hope of smuggling, they have neglected so to do, they must take the consequence. The American embargo has done nothing more in this respect than enforce the British Laws. If they are oppressive, a repeal must be sought from the Legislature—not from the Governor. Vain indeed would be the power of Parliament, if every Provincial Governor, taking upon himself to judge of the expediency of an Act, might abrogate it at his pleasure. We come now to the most material question, namely, whether there has been any importation or not? For unless there has been an importation there can be no forfeiture. The words of the Stat. 28. G. III. C. 6. S. 1, are these: “ That no Goods or Commodities whatever shall be imported and brought from any of the Territories belonging to the said United States of America, into any of His Majesty’s West-India Islands, in which the Bahama Islands, Bermuda, or Somers Islands, are included, under the penalty or forfeiture thereof, together with the Ship or Vessel; then follow the exceptions. The same words are used in the 10th section which was most relied on by Counsel for the Seizor.

John Albouy, the master, swears that the vessel was five miles from the land, as nearly as he can judge, at the time she was boarded; that when the officer came on board he demanded the papers, which were given up; the officer then gave orders, and directed the management of the Legal Tender. He, the master, gave no orders after the papers were taken from him. That Richardson & Hayward, two of the owners, were on board when she was boarded, and were on board some time before; that Richardson and Hayward told this Respondent some time before the Julia's boat appeared in sight, that they had not determined on sending the vessel into port; that he told the boarding officer so, who replied, she must go into that port. That the Legal Tender was brought into port wholly against this respondent's consent and judgment, and from what he saw in direct opposition to the wishes and intentions of the owners. The depositions of James Forbes confirm those of the master. He was on board the Legal Tender at the time she was boarded by the Julia's boat. Hayward asked the officer what he meant to do with the vessel; the officer replied that he meant to take her in. The officer of the Julia took command of the canvas the moment he boarded the Legal Tender—she was about five or six miles from the land when the officer of the Julia boarded her.

Lieut. Kilkelly, 98th regt. deposes, that he did board the *Legal Tender* on the evening of the 29th March. She was about a musket shot without Fort Paget; he did see an officer of the *Julia* on board. When this respondent went along-side, the officer came a-midship of the vessel, and told him she was boarded by him, and in his possession, and that he had taken her a league or two off the land.

From all this Testimony then, it appears that the vessel was seized at sea, and brought into port forcibly and against the declarations of the owners and master. I cannot therefore pronounce that she has incurred any forfeiture under the Stat. of the 28. G. III. C. 6, or any other Statute pointed out by the Seizor's Counsel and must therefore restore.

Costs have been demanded on the part of the Claimants, but when I see a paper like that which is called a licence on board, a paper irregular in its form, and illegal in its purport, which shews the outer voyage to be as contrary to law as the return voyage would have been, if completed, I shall certainly refuse costs, and pronounce that there was a justifiable cause for the seizure, though it was prematurely made, What I am most astonished at is, that the Counsel for the Seizors did not proceed against the vessel for an illegal exportation, but this has not-

been done, of course the omission is fatal to the interests of the client.

N. B. The Legal Tender, without the Cargo, was libelled the next day, for a breach of the Statute in her outer voyage.