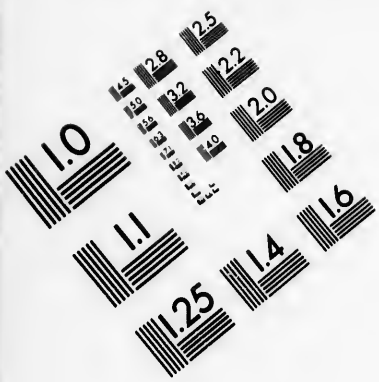

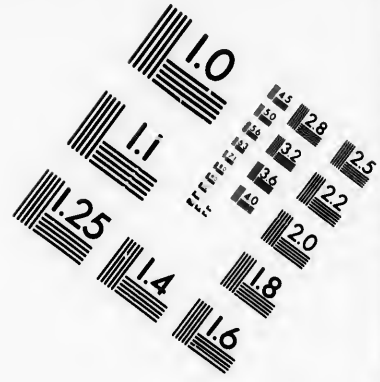

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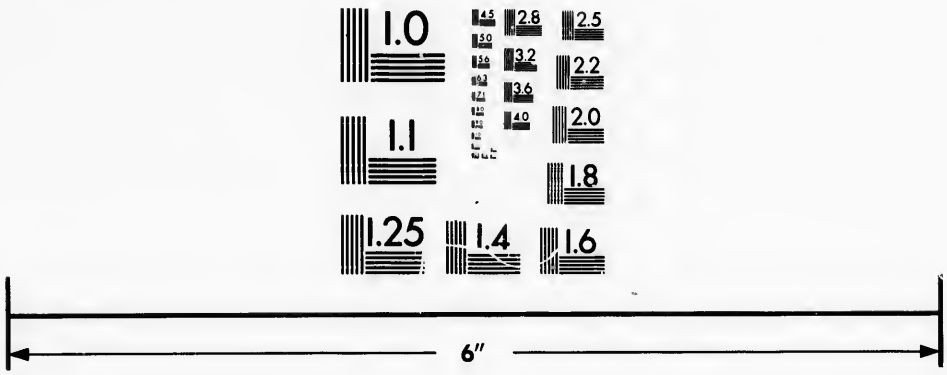

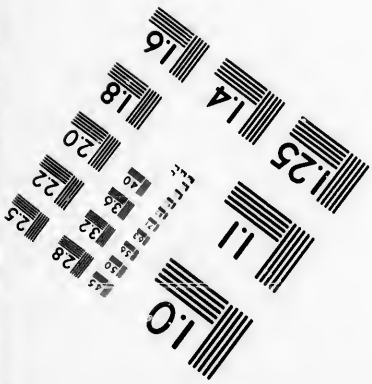

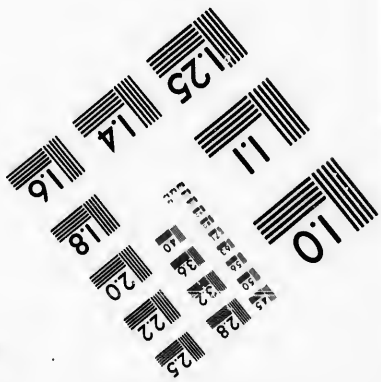

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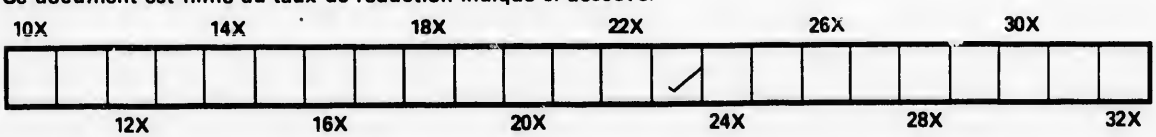

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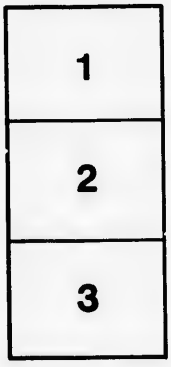

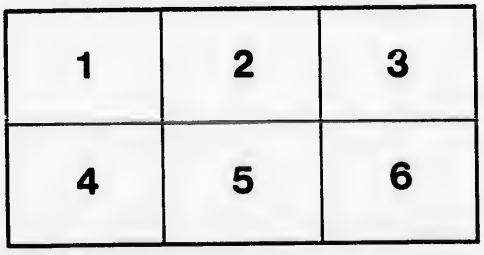

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32X

REPORTS

OF

CASES,

ARGUED AND DETERMINED

IN THE

COURT OF VICE-ADMIRALTY,

AT

HALIFAX, IN NOVA-SCOTIA,

FROM THE COMMENCEMENT OF THE WAR, IN 1803,
TO THE END OF THE YEAR 1813,

IN THE TIME OF

ALEXANDER CROKE, LL.D.

JUDGE OF THAT COURT.

By JAMES STEWART, Esq.

A MEMBER OF HIS MAJESTY'S COUNCIL,

AND SOLICITOR-GENERAL

FOR THE PROVINCE OF NOVA-SCOTIA.

Res Judicata pro Veritate accipitur.

DIG.

LONDON:

PRINTED FOR J. BUTTERWORTH AND SON,
FLEET-STREET.

1814.

TO THE

RIGHT HONOURABLE

ROBERT,

LORD VISCOUNT MELVILLE,

FIRST LORD COMMISSIONER

OF THE ADMIRALTY,

&c. &c. &c.

THIS BOOK IS,

WITH THE UTMOST RESPECT,

MOST HUMBLY INSCRIBED,

BY

THE REPORTER.

PREFACE.

THE following reports of Admiralty cases are published from no other motive, than that of adding to the store of decisions upon national law; which are, as yet, by no means too numerous, and which in these times of lasting warfare, can never come amiss to the profession. It may appear presumptuous in the advocate of a provincial Bar to engage in an undertaking of this sort, when similar publications are daily occupying the abler talents of the mother country, among the important records of high and superior tribunals. But as the Vice-Admiralty courts of the colonies, since the forty-first year of his present Majesty's reign, have been placed upon a truly in-

dependent and respectable footing, and are now filled by men of professional distinction from the parent state; their judgments are become interesting and valuable, not only to the practitioners of their several courts, but, the reporter humbly conceives, to the profession at large within the *British* dominions.

The court, in which these decisions were given, was established upon its present basis in the year 1801. The irregularities which had prevailed in the Vice-Admiralty courts having given occasion for complaint, both at home and abroad, at length drew the attention of His Majesty's Ministers, and of the Legislature. It was thought proper, by lessening their number, by extending their jurisdiction, and, by increasing the salaries of the judges, to give them greater consequence and dignity, and to induce gentlemen acquainted with the law, and the practice of the courts in *England*, and, particularly, some of the advocates of the civil law, to accept of these judicial offices. With this view, His Majesty, by a letter of *Lord Grenville*, dated the 22d day of *January*, 1801, directed the Lords

Commissioners of the Admiralty, to revoke the prize commissions which had been granted to the Vice-Admiralty Courts in the *West Indies*, and in the colonies upon the *American* continent, except *Jamaica* and *Martinico*. An act of parliament was then passed, in *July* 1801, (41 Geo. III. cap. 96.) by which "each and every of the Vice-Admiralty Courts established in any two of the islands in the *West Indies*, and at *Halifax* in *America*, were impowered to issue their process to any other of His Majesty's colonies or territories in the *West Indies* or *America*, including therein the *Bahama's* and *Bermuda* islands, as if such court was established in the island, colony, or territory, within which its functions were to be exercised." His Majesty was authorised to fix salaries for the Judges, not exceeding the sum of Two Thousand Pounds per annum for each Judge, and it was then enacted, "that the profits and emoluments of the said Judges should in no case exceed Two Thousand Pounds each in any one year, over and above their salary." *Martinique* having been given up at the peace in 1801, a Vice-Admiralty

Court was erected at *Barbaboes* in lieu of it. By another act (43 Geo. III. chap. 160.) in 1803, provision was made for the Judges of Vice-Admiralty Courts to be established in the *Bahama* and *Bermuda* islands, and at *Malta*.

In *August* 1801, *Alexander Croke*, LL. D. an advocate of the civil law, and a barrister at law, had the honour of being offered, without solicitation, the first appointment upon this new establishment, with the choice of his station; in which he preferred the severe, yet healthy air of *Nova Scotia*, to the luxuriant but hazardous climate of the *West Indies*, and has presided in it ever since that period.

During this time, and for many previous years, the Author of these Reports has been unremittingly engaged in the practice of that court. This practice has afforded him the opportunity of occasionally taking notes of some of the principal cases. The arguments are not detailed to the extent in which they took place, but the judgments are reported at length, and with strict accuracy as to the chief grounds and substance of them. For this sa-

tisfaction he is much indebted to the kind assistance of the learned judge, to whose minutes he has had welcome access. Many of the following cases have been already published at *Halifax*, at the particular request of the gentlemen of the profession, and other persons interested;—that of the Zodiac by the authority of the governor.

The Author of this work is known merely within his own professional sphere, and that a very humble one, but the Judge whose decrees he has ventured to record, is not so obscurely situated. He has not only distinguished himself as an advocate in Doctor's Commons, but his vindication of our belligerent rights, in his excellent answer to *Schlegel*, and his introduction to the case of *Horner* and *Lydiard*, have brought his talents into that notice which cannot but add a value to his judicial decisions.*

Whether or not these cases may be received

* Dr. *Croke* is the descendant and the representative of the family of Sir *George Croke*, the Reporter, who so ably defended the cause of rational liberty in the cases of the ship money, and *Hambden's* imprisonment. The history

as authorities in other courts, is not for the Reporter to enquire. He begs leave, however, to remark, that the judgments of Vice-Admiralty Courts, are not, in matter of prize, strictly speaking, colonial, and may therefore be considered as more immediately proceeding from the voice of the nation. The great and good man who has prescribed for so many years, in the High Court of Admiralty of

of this family is given in *Ward's* lives of the *Gresham* Professors, and in Sir *Harbottle Grimstone's* preface to the Reports. The latter mentions a curious circumstance which I shall copy in his own words. "This reverend Judge, Sir *George Croke*, was descended of an ancient and illustrious family called *Le Blount*, his ancestor in the time of the civil dissention between *York* and *Lancaster*, being a fautor and assistant unto the house of *Lancaster*, was inforced to subduct and conceal himself under the name of *Croke*, till such time as King *Henry* the Seventh most happily reconciling those different titles, this *our* ancestor (*Grimston*, who was the progenitor of the present peer of that name, married one of Sir *George Croke's* daughters) in his postliminum, assuming his ancient name, wrote himself *Croke*, alias *Blount*, that of *Blount* being altogether omitted by our Judge's father upon the marriage of his son and heir, Sir *John Croke*, with the daughter of Sir *Michael Blount*, of *Maple Durham*, in the county of *Oxford*."

Pref. *Cro. Car.*

England, has raised his own reputation, as well as that of his country, for national justice; to an eminence of which Englishmen may proudly boast. This boon has been acquired by a system of independent, just, and humane principles, which have been followed, it is hoped, with strict attention by the inferior tribunals—among them the Vice-Admiralty Court of *Nova Scotia*, the Reporter may be allowed, without vanity, to assert, is not the least distinguished for an adherence to that admirable system, a system which "all those who entertain the wish of *Esto perpetua!* with respect to the safety, the independence, and the glory of the *British* empire" will ever feel the obligation of adopting.

JAMES STEWART.

Halifax, Nova Scotia,
August 1, 1813.

DATES.

Declaration of Hostilities against *France*, 16th *May*, 1803.

Declaration of War by the *United States*, 18th *June*, 1812.

Order to detain *American* Vessels, 10th *August*.

Order for General Reprizals by the Prince Regent, 13th *October*.

Notification of the Blockade of the *Chesapeake* and *Delaware*, 26th *December*.

THE

COURT OF VICE-ADMIRALTY

AT

HALIFAX, IN NOVA-SCOTIA.

During the time of these Decisions.

The Worshipful ALEXANDER CROKE, LL.D. Judge.
RICHARD JOHN UNIACKE, Esq. Advocate-General.
JAMES STEWART, Esq. Solicitor-General.
RICHARD PARKER, Esq. Registrar.
CHARLES MORRIS, Esq. Deputy.
JAMES PUTNAM, Esq. Marshal.
CHARLES HILL, Esq. Deputy.

ADVOCATES AND PROCTORS.

FOSTER HUTCHINSON, Esq. now one of the Judges of the Supreme Court.

BRENTON HALIBURTON, Esq. now a Judge of the same Court.

JOHN HARVEY TUCKER,
JOSEPH APLIN,
LEWIS M. WILKINS,
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CROFTON UNIACKE,
SAMUEL G. W. ARCHIBALD,
DAVID SHAW CLARKE,
CHARLES FAIRBANKS,
WILLIAM HILL,
ROBERT SKIPSEY MARTINDALE,
} Esquires.

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REPORTS

OF

CASES

ARGUED AND DETERMINED IN THE

COURT OF VICE-ADMIRALTY,

At HALIFAX, *in* NOVA SCOTIA,

&c. &c. &c.

LES TROIS FRERES.

Oct. 12, 1803.

A *Frenchman* settled in *America*, returning to *France*, upon information of war alters his course, and returns to *America*. His *American* domicil not divested.

ON the part of the Captors, the King's Advocate contended.---That this being a *French* ship, and the whole of her cargo *French* property, a condemnation of both must ensue, although the claim of Messrs. *Dennis* might raise a plausible question, respecting the neutral domicil of those gentlemen. This vessel sailed from *Baltimore* for *France*, in ignorance, it is true, of the existing war between *France* and *England*, and, while on her voyage, received the first intelligence of this event. At the instigation of the Claimants, who had property to a considerable amount on board of her, the master consented to return to *Baltimore*, where the Messrs. *Dennis* had been residing several years during the late war. While in the act of returning to *Baltimore*, she was captured, and brought into *Halifax* for adjudica-

The Les Trois Freres.

Oct. 12, 1805.

tion, by a private ship of war, the *Governor Carlton*, owned by *Forsyth, Smith*, and *Co*, of this port, who are clearly entitled to both ship and cargo as the avowed property of the enemy. The claimants may probably assert that, although they had quitted *Baltimore* with a view of returning to *France*, not knowing of the war, they were equally determined when they had heard of the renewal of hostilities, to return to *Baltimore*, and take up their abode again in the neutral country. But this intention not having been carried into complete effect, and the parties having re-assumed their neutral *French* character, they are liable to all the consequences attendant upon it until they are again actually domiciled in *America*. The bare intent of returning to *Baltimore* is not in itself sufficient, to restore them to their neutral rights. They had departed from *America*, with all their property, and all their books and papers, and with a professed determination not to return to it. It would, therefore, be going much farther, on the score of national indulgence, than any decided case of domicil would warrant, to admit the claim of Messrs. *Dennis* under these circumstances, and to restore the cargo to them as resident merchants of *Baltimore*.

On the part of the Claimants, the Solicitor General.---No question can arise in this case, but what relates to the domicil of Messrs. *Dennis*. The ship is avowedly *French*, and the cargo is admitted to be the property of persons, who are natives of *France*, but who, for several years during the late war were domiciled in *Baltimore*, there carrying on trade as resident merchants of *America*. Had the capture taken place while the ship was proceeding to *France*, the claimants must have been considered as sailing under their native

The Les Trois Freres.

Oct. 12, 1808.

and hostile character; but as, at the time of capture, the ship was actually bound to *Baltimore*, at the express desire of the claimants, their intention for returning there must be taken for granted, a fact upon which their claim of restitution altogether rests. They had gained a neutral character by their former residence in *Baltimore:* and, a peace intervening between *France* and *England*, they were desirous of visiting their native country; and were removing with their papers and property for that purpose, totally ignorant of the existing war, which, no doubt, had they known of it would have determined them to remain in *Baltimore*. While on their voyage to *France*, they receive the first intelligence of this event, by which their intentions of returning to *France* are decidedly abandoned, and they are captured on their way back to *Baltimore*, with the determination of again residing there. This is, therefore, a perfect *re-assumption* of their neutral character, which, under the existing circumstances, they had a right to adopt. It is evident that the intention, on their part, of returning to *France*, was altogether founded on the presumption of there being an established peace between that country and *England*. The *animus redeundi* originated in that idea, and it would be a violation of national justice to consider the claimants in the light of enemies; when their conduct, so far from being hostile at the time of the capture, was consistent with every principle of neutrality. Immediately upon hearing of the war, they desire again to become neutral inhabitants of *America*, and to regain that peaceful domicil, which they never would have quitted, but in the event of peace. They should, therefore, be considered as still domiciled in *America*, and, of course entitled to the restitution of their property.

The King's Advocate in reply.—The claimants

The Les Trois Freres.

Oct. 12, 1803.

having made their election to quit the neutral country, and embarked themselves and their property in an enemy's vessel, must take all the consequences of such election, and cannot plead their ignorance of the war. Nor can a change of intention, after their knowledge of it, avail them. The *animus redeundi* was carried into effect the very moment they quitted the shores of the neutral country under a *French* flag: and their being in a *French* vessel, at the time of the capture, was as effectual a return to their native country, as if they had landed in *France*. It is true they were on their way back to *Baltimore* at the time they were captured, but they might have adopted this measure for the purpose of protection, and in order to secure a safer retreat to *France* in a neutral vessel. They are no more entitled to restitution under these circumstances, than they would have been, had the ship been captured while pursuing her course to *France* in ignorance of the war.

JUDGMENT.

Dr. *Croke*.---This is a case of some goods found on board a vessel, bound originally from *Baltimore* to *Dunkirk*, but which, at the time of capture by an *English* privateer, had changed her course, and was destined to *Boston*. They have been claimed by *Benjamin Denys*, a passenger on board the vessel, his property in them has not been disputed; and the only question for the consideration of the Court is, whether *Denys* is a person, in respect to his national character, who is intitled to restitution.

It appears by the affidavit annexed to the claim, that he is a *Frenchman* by origin, born at *Dunkirk*. With respect to the following circumstances of his life, besides his own affidavit, it is proved by the act of naturalization, which bears date in 1798, that he

had then been resident five years at *Baltimore*. The correspondence in his letter-book, and other documents, shew him to have continued there from that time. It being therefore fully proved that he had been resident at *Baltimore* for ten years, that he has been admitted a citizen of the *United States*, possessed a house, and had been carrying on commerce there for that period, it must be admitted that, till this transaction, he was to all intents and purposes an *American* merchant, and intitled to all the privileges that attach to that character.

But it appears that he had formed an intention, for some time, of removing from the *United States*. In some of the earlier letters indeed, his mind seems to have fluctuated a good deal upon this head. In some of those of 1796, he occasionally expresses himself in terms of satisfaction at the prosperity of his affairs, and his wish to end his days in his own country. As we advance, his resolution to quit the *United States* becomes more definite, till it is carried into execution by the present voyage.

It has been said by the counsel, that these letters are not intitled to much credit, that they are a sort of colourable letters, to hold him out as a *Frenchman* for the advantage of his commercial connexions with that country. If we cannot discover a man's real intentions in a private confidential correspondence of this kind, with his father, his brother, and other particular friends, and carried on for a number of years, I do not know where else we can look for them.

At first it appears to have been his design to return to *St. Domingo*, where he had formerly resided, but as the dreadful state of that island had rendered it impossible, and as he had been repeatedly requested by his father to return to *France*, he deter-

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mined upon going to that country. It has been argued by his counsel, that this voyage was merely for the purpose of making a visit to his father, and that he intended to return to *Baltimore:* but it is impossible to read those letters without being fully confirmed, that it was his intention to leave the *States* entirely, and to transfer his domicil, and his whole property to his native place. This appears plainly from the whole series of letters; from the first wish which he formed upon the subject, to the moment of his setting sail. In a letter of the 3d *April*, 1798, he says "he hates the country and desires to be out of it." There are many other expressions of a similar tendency, in letters both before and after that date. At the end of 1802, his plan of removal seems to have been completely arranged. He is winding up his affairs, and proposes to sail the next summer. In a letter of the 22d of *November* 1802, to *Naninck* he says "I will ship all my little capital and sail to *France* in the spring." The 23d to his father, "I wait for the approach of spring to change my batteries and seek my fortune elsewhere." In 1803, 11th *January*, "I have nothing more to do but ship my small concerns, and come to him." His rent for his house expired the 10th of *July*, and he "wishes that may be his last day of being there." He speaks of his "having sold his house, and of taking his two negro girls with him, and shipping all his little capital." In short, from the whole tenor of the correspondence, no person can hesitate a moment to pronounce that he had quitted his domicil in *America*, and was going with the whole of his concerns to take up his abode in *France*. From the moment therefore, that he put his foot on board this vessel, he was completely divested of his *American* charac-

ter, and was become a *French* citizen. And had the capture been made in the prosecution of the original voyage, this property would have been subject, without the smallest doubt, to confiscation.

But a circumstance occurred, which completely alters the complexion of the case. They had sailed from *Baltimore* without any knowledge of the war, which is proved by all the witnesses, and indeed by the evidence of the thing itself, for the order for general reprisals did not issue till the 16th of *May*, and this vessel sailed 17th *June*, within which time the news could scarcely have arrived. On their passage they met an *American* brig from *England*, which informed them of the declaration of war. They immediately altered their course and stood for *Boston*, the nearest port in the *States*. Whether this was at the suggestion of the passengers, or of the master's own motion, there is some little difference in the evidence of the master, and the mate. But it is of no consequence, for this alteration of the destination was so obviously for the benefit of all parties, that probably little discussion took place about it, and it might be difficult to say accurately by whom it was first suggested. After the vessel had pursued her voyage to *Boston* for a whole month, the capture was made.

Here then is a very material alteration in the circumstances of the case. Whatever might have been the original intention of the parties, and whatever might have been the consequence of a capture in pursuit of that original intention, the vessel was not taken whilst she had a *French* destination, but upon a voyage actually to *Boston*. No doubt, if in consequence of the war the claimant had changed his intention of removing to *France*, and had resolved to continue in the *United States*, provided such in-

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tention were proved, it would entirely do away the consequences of his original intention, and of all the acts done in pursuance of it, and he would become re-invested with his former *American* character. But the mere change of destination to *Boston* alone is not conclusive upon this point, for it might be designed only to facilitate the means of effecting the voyage to *France* with greater security, to avoid the danger of transporting himself and his property in an enemy's ship, by procuring a neutral vessel. For it is not the mere fact of being captured on a voyage to *France*, which would affect this question, but the fact of his having abandoned his *American* domicil, and being in the act of transferring it to *France*, and it is of no consequence whether this transmigration was to be effected by a direct or a circuitous voyage, through a *French* or through a neutral communication. It remains therefore a question of intention, and of this there is but little evidence. The circumstance of his being captured on a voyage back has a little weight. It cannot likewise be denied, that something of an idea of peace was mixed up in his first design of removal. During the continuance of war, he takes no steps towards it, but is constantly wishing for peace, that he may go to *France*. In his letters just before he sailed, he speaks of the rumours of war, which had spread, and though he gives little credit to them, he seems under great apprehension lest they should prove true. And in one letter he says expressly, that such an event would render the execution of his plans impossible. These are circumstances in favour of the claimant, though not quite conclusive. In this state of the cause, I cannot either condemn or acquit, and I must direct the claimant to bring in an affidavit, that, upon his receiving this information

of war, he had totally abandoned his intention of removing to *France* during the continuance of the war, and designed to return to his domicil in the *United States.*

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A very full and satisfactory affidavit was afterwards brought in, upon which the goods were restored.

La Reine Des Agnes, *Le Chevalier*, Master, taken by His Majesty's ship, *Aurora.*

November 15, 1803.

Sentence.

Prize forfeited for non-compliance with His Majesty's instructions.

Dr. *Croke.*---THIS is an extraordinary case. It is an application to the Court for the condemnation of a vessel which has been seized, not on behalf of the captor, but of a person to whom he has sold it.

It is irregular in every respect, and not one of His Majesty's instructions relating to proceedings upon prize have been observed. Neither the master nor any of the crew, have been produced for their examination upon the standing interrogatories, nor has any affidavit been offered to account for the omission. The ships papers have been brought in, not upon the oath of the prize master, or any person on board the capturing ship, but of a mere stranger, a man who went accidentally from this country after the capture was made, and who must be entirely unacquainted with every circumstance relating to it. The captor, not only before condemnation, but before any legal steps whatever had been taken, has sold the vessel to a person of this province. If the right to prize even rested only on the King's proclamation, no interest whatever could vest in the captor till condemnation. It has uniformly been held, that till that period the possession of the captor is

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a possession merely, under the authority of the Court of Admiralty, on trial for those persons who shall ultimately become intitled to it. By this sale therefore before that time, he has not only disposed of what he had no right to sell, but has also been guilty of a breach of trust, by parting with a possession which could not legally be transferred without the authority of a proper court.

If captors suppose that a Court of Admiralty is merely an appendix to a fleet, to hold up the tail of a capture, and just to give it the last seal of formality, and that it is under their controul and direction, and subject to their caprices, they have formed a very erroneous opinion upon the subject. As between *Great Britain* and other countries, whether enemies, or neutral powers, they are established under the general conventional law of nations, and of particular treaties, and are bound to execute the same impartially, as if they were composed of persons entirely independent and unconnected with either party, and were situated in an indifferent country. Considered with respect to *Great Britain* only, and as between His Majesty and his officers, and other subjects, they are invested by special commission with all the judicial powers and authorities of the Lord High Admiral of *Great Britain*; and the persons who have the honor to preside in them, are the commissary's deputies, or lieutenants of that high officer. In this capacity as it is their duty to obey His Majesty's directions, whether conveyed in his proclamations, in acts of parliament, or in particular instructions, so they are bound to see that they are observed by His Majesty's officers, and by all other persons; and this is a duty which this Court will endeavour to perform firmly, and conscientiously, whatever murmurs or discontent it

may occasion in those persons who stand as parties before it.

Though the right to prize is given by His Majesty in his proclamation to the captors, yet as that proclamation is always followed by acts of parliament, and instructions proceeding from the same authority, it is held that the directions for proceeding in case of prize are a sort of conditions annexed to the original grant, and therefore that the non-observance of His Majesty's directions, and other misconduct, amount to a forfeiture of the general right to prize. This has been decided in many cases, in particular in that of the *Speculation, Roupel*, where for a much smaller misconduct than appears here, it was held that the captors had forfeited their right to the prize. What degree of irregularity will amount to a forfeiture it is unnecessary to inquire, it is sufficient that, in this case, all His Majesty's instructions have been set totally at defiance. However unpleasant, therefore, it may be to my own sensations, I should not perform the duty required in this station, if I gave the sanction of this Court to such proceedings, and I shall therefore condemn the vessel, not for the use of the captor, or purchaser, but to His Majesty absolutely, not as a droit and perquisite of Admiralty, to which it bears no resemblance, but to His Majesty's *jura coronæ*, as a portion of that original right to all captures, which, in this case, from a breach of the conditions of the grant, have not been divested out of him.*

* This case was decided upon the common law of the Court of Admiralty, but in subsequent prize acts, as the 45 *Geo. III. Chap.* 72, *Sect.* 32, it was expressly enacted, "that it shall be lawful for the judge of the Admiralty, upon proof of the breach of any of His Majesty's instructions, or any offence against the law of nations, to condemn the prize to His Majesty's use and disposal."

November 16, 1803.

The Venus, *Oakford.*

Enemy's interest concealed.

TAKEN by the *Lapwing*, Captain *Skene*, on a voyage from *Charlston* to *Bourdeaux*, which commenced on the 31st July 1803. The cargo consisted of colonial produce, and, together with the ship, was claimed by the master for Messrs. *Le Paux* and *Toutain*, of *Charlston*, as *American* citizens.

Judgment.---Dr. *Croke.*

The regular proof of property in this case is defective. With respect to the ship, it consists merely of a certificate from the magistrates that *Lepaux* had sworn that it belonged to himself and the other claimant, and a sea letter obtained on the oath of the master. On the other hand, though it had been a foreign vessel, there is no bill of sale, nor of course is it registered. As to the cargo, the invoice and bills of lading express neither account nor risk, though they state it to be the property of the owner of the ship. The master deposes that he knows the claimants to be the owners, because he saw them take an oath to that effect, that he saw a paper called a bill of sale, but he knows not from whom, nor the contents. They also gave him possession. He says likewise, that they are owners of the cargo. He states as a reason why she had no register, that she had been a foreign vessel; and though he has shewn himself so ready to swear to the property, his connexion with the vessel commenced only ten days before she sailed, and three weeks after the cargo had been shipped. *Thebé*, a passenger, professes, that he had no knowledge of the schooner prior to the time of seeing her a few days before he went on

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board, and there is nothing in the other examinations to confirm the master's statement.

Under a *defect* of evidence, which is admitted by the claimant's counsel, the only question to be considered is, whether they are entitled to farther proof.

As matter of *right*, they certainly cannot claim it; as an *indulgence* they can scarcely be allowed that privilege.

It is clear that every art has been employed, to keep out of sight the real history of this ship and cargo. Not a single paper appears which is dated before the 23d of *July*, a week only before the voyage commenced. The master, and the whole of the crew, were not shipped till the same late period; and the owners do not seem to have furnished the master with that authentic information, which a longer acquaintance with the vessel might have enabled him to have acquired by his personal experience. *Thebé*, the passenger, is evidently better acquainted with these transactions than he is willing to allow. He appears to be a confidential friend of the asserted owners *at least*, for in their letter to the consignee, they direct him "*to take Thebé's advice as their own.*" Yet he is impenetrably silent about her concerns, and he affects even a fastidious delicacy not to interfere in them. "*It is not his business to attend to such things,*" and after being on board nearly three weeks "he did not feel sufficient interest to enable him to perceive that six sailors were employed in navigating the vessel."

A satisfactory reason for this secrecy may be found in the declaration of war, on the 16th of *May*, 1803, and which arrived in *America* in the month of *July*, just before this vessel sailed.

There is proof that this was a *French* vessel. The

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master deposes that she was a *foreign* vessel, and had been sold in the *West Indies*, whether in a *French* island, or not, he does not know. It is proved by many of the witnesses, that she was lying in *Charleston* harbour, only three weeks before, with *French* colours flying, with a *French* master and crew, and *French* passengers, who had arrived in her from a *French* colony. *Broderick* deposes, that he was on board when she was under *French* colours, that there was a man named *Thebé* on board, giving orders to the carpenter, and the mate told him she came from *Guadaloupe*. He was informed that *Thebé* was the owner.

Malony was on board also when she was under *French* colours. The mate informed him "that *Thebé* was the owner, and the merchant of her, that is, owner of the cargo." He deposes, that the present cargo was then stowed, and he observed *Thebé* ordering bags to be mended; he is positive from the information of the mate, and the rest of the crew, that *Thebé* was the owner of the vessel and cargo.

If then the evidence of consistent, uncontradicted, and unimpeached witnesses, is to be believed, this was a *French* vessel, and the property of Mr. *Thebé*, as was also the cargo, and these circumstances receive great confirmation from the care to conceal them.

If any change of the property took place, it was under a most suspicious state of affairs. It must have been immediately upon the arrival of the information that war had been declared. It was after the cargo was on board, a week only before sailing, and after the destination was settled. Yet here is neither a bill of sale, nor any proof whatever of a transfer. If it had been really transferred, under circumstances so unfavourable, the claimants must

have known the necessity of putting full documents on board; their not having done so, would be contrary to the usual prudence, with which mercantile men ordinarily conduct their affairs.

This omission gives full credit to what is deposed by many of the witnesses, that *Thebé* was not only the original owner of both ship and cargo, but continues to be so. *Jones*, the steward, believes the vessel to be brought in, because *Thebé*, a *Frenchman*, is owner of ship and cargo, that he had the sole management, and he heard him say he was concerned in her. He heard him say he had been on board of her ever since she had been built; he heard him tell the captain what the cargo cost, and how it was stowed; and that there were hoops for dunnage, and he had a knowledge of all her provisions and stores.

This is confirmed by *Broderick*, who says that *Thebé* is concerned in vessel and cargo. He deposes to a conversation between *Thebé* and the master, in which it appears that *Thebé* had ordered rice for the use of the vessel. *Malony* testifies to the same purpose; and has no doubt if the vessel and cargo are restored, they will belong to him. Another person proves his giving orders to the carpenter.

On the other hand, there are no acts of ownership, proved in the claimants. The formal papers are as meagre as possible. In the instructions from them to the master, he is referred entirely to *Agassier*, the consignee, at *Bourdeaux*, "*he having their orders on that subject.*" In the letter to *Agassier*, he again is "*to resort to Mr. Thebé, who will direct him, and whose advice they will take as their own.*"

The master swears, that, on her arrival at *Bourdeaux*, the ship was to be sold. Where were the title deeds? There were none on board. Where

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was the authority for the sale? None is given to the consignee, none to the master, none is produced to *Thebé*. If then we take the fact as deposed to by the master, who is certainly competent to speak to so material a circumstance in relation to his vessel, that *she was to be sold*, since no power to that effect emanated from the claimants, *Thebé* must have had it in his own right and therefore must have been the owner.

Yet in the face of this mass of evidence, Mr. *Thebé* has been bold enough to swear, "that he has no interest or concern whatever, directly, or indirectly, in vessel or cargo, and that he had no knowledge whatever of the schooner, prior to the time of seeing her a few days before he went passenger in her," though there is a pass which shews that he sailed in her to *Guadaloupe*, in 1801!

Broderick gives the explanation. He was told that the vessel had changed her colours to go to *France*, and to deceive *British* cruizers, and that *Thebé* was called a passenger to conceal the property from those cruizers, to carry on the deception, and to conceal his having been on board before, he took all his trunks and baggage out of her; and after a few days returned with them again, as a fresh man.

It is not necessary to enquire into the national character of *Thebé*, he swears himself to be an *American* citizen, and that he now lives at *Charleston*. In the pass before-mentioned, in 1801, he is stiled a subject of *Denmark*, the master says, he was a planter of *Martinique*, we trace him at *Guadaloupe*, and he was now going to stay some time at *Bourdeaux*, where his father resided.

In this case then, the original evidence being essentially defective in every material document,

there being evidently a suppression of the truth, palpable perjury, and fraud, and clear evidence of enemy's interests; it is not such a case as can entitle the claimants to further proof, and I therefore condemn both ship and cargo.

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This sentence was affirmed by the Lords of Appeal, and the appellants condemned in costs, 7th *Feb.* 1805.

The Herkimer, *Church.*

August 1st, 1804.

Concealment of enemy's property, confiscation.

THIS was a case of much legal importance, involving in it several questions of national law, that engrossed the attention of the court and bar for some time. The property in dispute was valuable, and the parties interested in the claim were persons of the first respectability in *New York;* who had engaged in a voyage to *Lima*, under a *Spanish* licence, which they had obtained with much difficulty, and a considerable expence. The case was argued at great length, by *Hutchison, Crofton, and Uniacke for the captors,* the King's Advocate being then in *England,* and by the *Solicitor General, Robie, and Haliburton,* on the part of the claimants. The points of argument are so fully considered in the Judgment, that any detail of them would be unnecessary.

Judgment.---Dr. *Croke.*

This vessel was taken by the *Leander,* upon a return voyage from *Lima* to *New York.* The transaction commenced at *New York,* where she was laden, in *March,* 1805, with bales of dry goods, and

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articles of *European* manufactory, and sailed to *Boston*, where she lay a short time, without breaking bulk, or taking any articles on board, and sailed from thence on the 12th of *May*, bound to *Lima*, where she discharged her cargo. Here she lay four months, took in copper in pigs, and *Jesuit's* bark, sailed from thence to *Guiacala*, took in the remainder of her cargo, consisting of cocoa, and sailed in *February* last, for *New York*, in which latter part of her voyage she was captured. This return cargo is stated to have been purchased out of the proceeds of the outward cargo.

This trade with the *Spanish* colonies, was carried on under a *Spanish* licence, which was left with the Vice Roy of *Peru*.

Two claims have been given: the one by the master, on behalf of *John Jackson*, of *New York*, as the sole owner of the ship, and for his own adventure. The other by *Edward Griswold*, *William Cutting*, and *James Baxter*, for themselves; and *Brockhold Livingston*, *Robert Gilchrist*, *Theodosius Fowler*, and *Josiah Ogden Hoffman*, of *New York*, jointly for the whole cargo, consisting of 739,947 pounds of cocoa, 697 bars of copper, and 143 boxes of *Jesuit's* bark; and for *Brockhold Livingston* separately, for 1572 dollars. The evidence consists of two affidavits annexed to the claims, the examinations of seven witnesses, and four parcels of ships papers, which were found at different times, and in different places.

The first object is to ascertain to whom this cargo really belongs, upon which, and upon the nature of the trade, all the questions of law in the case arise.

Church, the master, and *Baxter*, the supercargo, who are of course the principal witnesses, both

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swear that the claimants are the sole owners. *Burrit* deposes generally to the same effect; but I shall have occasion to consider his evidence more particularly. With this evidence agree all the papers which were delivered up to the captors, and are contained in the list No. 1. There is a contract entered into, for the arrangement of the transaction between the present claimants, in which it is agreed, that *Livingston* shall be the manager. To him the vessel was chartered for the present voyage. There is an agreement between the owners of the cargo, acting by *Livingston*, and *Baxter*, by which he is appointed supercargo. *Baxter* is admitted to a share, and a receipt is given by *Livingston*, for a part of the consideration. In the invoices and bills of lading of the outward cargo, the goods are stated as the sole property of the claimants, and they are sworn to in the joint affidavit of *Livingston*, *Gilchrist*, *Griswold*, and *Baxter*. In the invoices and bills of lading, of the return cargo, the same ownership is expressed, and *Baxter* swears, "that no subject or citizen, of any foreign state, has any interest in them." In the instructions from *Livingston*, to the supercargo, in case of capture, he is "to claim the property as belonging solely to citizens of the *United States*, as no foreigner whatever, is in anywise concerned in vessel or cargo." In none of these papers does any other name, or interest appear, but those of the claimants.

But it happened, that besides these papers which were delivered up by the master, another parcel was afterwards found in the chest of the mate, and more in Captain *Church's* box, and in Mr. *Baxter's* writing desk. These concealed papers introduce a new character into the drama, a Mr. *Barrosa*, who

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is stiled a *Spanish* merchant, and appears to have had a considerable share in the business.

It has been argued by the captors, that some of those papers go the length of proving *Barrosa* to have been the sole owner of these goods. And indeed such an inference might be made from some of them, if taken singly. There is a power of Attorney from him to *Baxter*, in which the outward cargo is stated to be laden on his account and risque, that the vessel sails in virtue of a royal privilege which he possesses, and he appoints *Baxter* supercargo, with full powers. The bills of lading and clearances at *Guiacala*, a certificate from *Baxter*, and other documents imply the same sole ownership. Some letters from the consignee, seem likewise to bear that meaning. But these mere formal papers are sufficiently explained by the nature of the trade. It was a trade to a *Spanish* colony, it was carried on under great restrictions, and was confined to *Spanish* subjects, the possessors of a special licence. No foreign name could appear in it. The exportation from a *Spanish* colony could be accomplished only by the person licenced. And with respect to the letters, they are not so clearly expressive of a total ownership, as not to be capable of explanation, and may be shewn to refer only to a partial share or interest. As they are capable of such explanation, I should not be forward to set them in direct opposition to the oaths of so many respectable persons, whom I would not willingly suppose to be involved in gross and unqualified perjury.

That *Barrosa* had a great share of the interest in this transaction is most fully proved. *Wakeman Burrit* was clerk to the supercargo, and in that capacity had means of obtaining good information. He

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has stated the whole history: he says that the licence or permission, under which this voyage was made, was granted by the king of *Spain*, before the war, to the *Marquis de Bedmar*, who transferred it to *Barrosa*, a *Spanish* merchant, that he disposed of it, *or part of it*, to Mr. *Livingston*. That it was a permission to allow the *Spanish* marquis to import goods in foreign bottoms into the *Spanish* settlements, in *South America*, and to transport produce to any part of the *United States*. He believes that the cargo belongs to *Livingston*, and the other claimants, because he knows that they purchased the outward cargo, which was sold for their account and benefit, at *Lima*, and the present cargo was purchased with the proceeds. He believes them therefore to be sole owners, *except that they are to pay a proportion of the proceeds to Mr. Barrosa*, for the benefit of the licence. He has heard he was to receive 50 per cent. on the profits of the voyage; and if there was no profit, he was to have nothing. He knows that another vessel had sailed under the same licence, upon the same terms, and which had been cast away. The persons concerned, consider *Barrosa* as having an interest. *Osma*, the consignee, in a letter to his brother, speaking of the present cargo, says that *Barrosa* ought to carry it to *Europe*, where it would fetch a large sum. *Barrosa's* nephew says, that his uncle will profit by these speculations, if they prosper as they hitherto have done. There is another letter from *Osma*, advising him how to proceed in sending other vessels. A merchant named *Tarranco*, in a letter to *Barrosa*, complains that he had sent goods little suited to the country, that *Baxter's* information would be useful; and that if the adventure had arrived in time of peace, he would have lost 25 per cent. of *his* principal,

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These letters though they do not prove to the full extent of a sole interest, yet they plainly shew that it was well known, and understood that *Barrosa* was materially concerned in this cargo, and confirm the evidence of *Burrit*. On the other hand, the credibility of *Baxter*, and the master, who deny any interest beyond that of the claimants, is completely shaken, from the prevarication in their examinations, and from their swearing "that no papers were made away with, or concealed in any manner whatever, and that they knew of no others than what they produced;" though other papers were afterwards discovered in the master's own box, and some more had been concealed by the third mate by *Baxter's* own direction.

It has been said by the counsel for the claimants, that some of the evidence in favour of the claimants proceeds from such a respectable quarter, that it is intitled to the fullest credit. Besides the general unimpeached character of the other gentlemen, Mr. *Livingston*, it is alledged, is in a high judicial situation in the *United States*, a Judge of the Supreme Court of *New York*. All these gentlemen have sworn to the invoices and bills of lading of the outward cargo, that the goods contained in them are their sole property. In the instructions to the supercargo, from Mr. *Livingston*, he directs him in case of capture, to claim the property as belonging solely to citizens of the *United States*, and that "*no foreigner whatever is in any wise concerned in vessel or cargo.*" By the general rules of amity, observed between nations, all persons in public stations are justly intitled to the greatest respect and credit in their respective departments. This court would be deficient in its duty, if it should be disposed to treat with any want of attention, those who preside in fo-

reign tribunals. To any judicial act of Judge *Livingston*, it would pay the utmost deference, and it would give the fullest credit to every certificate which proceeded from him, within the limits of his judicial cognizance. But if gentlemen will step down from the bench, and intermix with the merchants of the country, in such transactions they cannot claim their judicial prerogatives, but they must be considered as upon the same footing with other mercantile men. Their affidavits and declarations, like those of other respectable persons, will be intitled to credit *prima facie*, yet they are still open to discussion, and are liable to be disproved by facts, and stronger evidence. If these affidavits and declarations are to be understood as negativing all interest whatever in Mr. *Barrosa*, it is evident that they are directly contrary to the fact. If they are to be explained upon a supposition that the parties considered the interest of *Barrosa* as so remote as not to affect the ownership of the goods, I fear the words are too comprehensive, and too exclusive to admit of that excuse, since it is asserted that no person whatever is in *any wise concerned.* If, as has been argued, they imagined that *Barrosa* was not a foreigner, because he was residing at *Boston*, it is scarcely conceivable how such an error in law should have been entertained, as he had never been admitted a citizen of the *United States*, and the whole of the present transaction was founded upon the supposition of his being *a subject of the king of Spain.*

Barrosa's interest is evidently that of a partner in this transaction. It is not necessary that all the partners should contribute money, or in equal proportions. It is sufficient if they contribute what is equivalent to money. *Societas, uno pecuniam conferent alio operam, contrahi potest.* Nor is it required

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that all the partners should share equally in the profits and losses. *Ita coiri societas potest, ut nullius partem damni alter sentiat, lucrum vero commune sit.* We have not the contract entered into between the parties, nor do we know whether *Barrosa* supplied any of the funds for the outward cargo. Take it upon the supposition that he did not, still he found the licence and his name, whilst they supplied the cargo. The licence was very valuable, without it the voyage could not have been made. It was granted as a douceur to a *Spanish* nobleman, and no doubt had been purchased for a considerable sum by *Barrosa*. In consideration of furnishing this important document, and of the aid of his name, he was admitted to share in half the profits. These interests would constitute a partnership under the laws of any country whatever, from the *Roman* law to those of the present times.

It has been argued, that the interest of *Barrosa* is merely contingent, a mere lien, a personal interest against the parties, but not an interest in the cargo itself. Whatever might have been the nature of this interest upon the outward voyage, it is now become real. It is actually on board this vessel, it exists in a tangible form. *Burrit* has calculated the clear profits upon the voyage, at *New York*, at 108,000 dollars, and *Barrosa's* share at 54,000 dollars, or £13,500. It is an interest, which by decisions in the *British* Courts, and probably in other mercantile countries, is even insurable. *Barrosa* having been proved to have so great an interest in this cargo, the next question is as to his national character. *Burrit* believes him to be a *Spanish* merchant. Upon the whole evidence it appears that he was a native *Spaniard*, that he purchased this licence, and went into *America* to execute it. The execu-

tion of the licence required a continued stay till the return of the vessel. Other incidental business might arise, though none such is proved in this case. He was resident therefore for a special purpose, which covered the whole time of his continuance there. But that purpose was not only temporary, but it was of such a nature, that the retention of his *Spanish* character was essentially necessary to the performance of it. The licence was confined to *Spanish* subjects. The importations and exportations from a *Spanish* colony, even by licence, could be made by no other persons. The nature of the licence implied that the *Spanish* subject was to go to the *United States* to take the benefit of it. He could acquire no domicil in the *United States* whilst he was acting upon this licence, and in a transaction which was founded upon it. The licence was in itself a protest against acquiring a domicil. In all the documents he is stated to be a *Spanish* merchant, and in all the correspondence he is considered as under that character.

Whatever part of this cargo can be clearly ascertained to belong to *Barrosa*, is therefore liable to confiscation; but that is not all. It is proved that the other owners, or their agents, have deliberately interfered in the war, "to mask and withdraw from the rights of a belligerent the property of his enemy to so large an amount,* the consequence will attach upon them to confiscate their property engaged in the same transaction." Have the claimants been guilty of deliberately concealing the interest of this gentleman? Now, *Barrosa's* name was completely kept out of sight. It does not appear at all in the ostensible papers delivered to the captors. The entries

* See Benrom. Rob, 2. 1.

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and clearances into and out of the *Spanish* ports, which were necessarily in his name, were not produced, nor any one document in which it did appear. *Baxter*, the agent for the owners of the cargo, and *Church*, the representative of the owners of the ship, both swear positively, that they know of no papers but what they had delivered up, yet the other papers were found in the master's trunk, and a considerable number in the possession of the third mate, which he swears were delivered to his care by *Baxter*, and which concealed papers contained the true state of the business. It is true that *Baxter* came forward afterwards with an affidavit, admitting the concealment, and pledging repentance. But he never divulged this secret till after the papers were found. It was not, as he alledges, in his penitentiary affidavit, a mere sudden momentary impulse, and not persevered in, but the concealment was a deliberate act, having been before planned, and adhered to till the last moment. The third mate swears that the papers were given to him off Cape *Horn*. They continued the concealment at the time of the capture. They stood stoutly to it upon their examination under oath, and no hint was given till after the papers were found. They say nothing of *Barrosa* in their examinations, but deny any interest beyond the claimants. As these persons are the lawful agents of the parties, their acts would be conclusive against their principals upon the general rule of law, and because it is hardly credible that they could have so acted, without their express directions, since the responsibility would have otherwise been very alarming. But with respect to the claimants of the cargo, it is brought directly home to them. *Livingston*, in his instructions to the master, declares that no foreigner what-

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ever, is *in any* wise concerned in vessel or cargo, and the other owners swear to their sole property. This is an ostensible paper, designed to be shewn to cruizers, and proves a wilful and designed subduction of all information respecting this very important share in the business.

There is another ground upon which this property is perhaps liable to condemnation, but which it is not now necessary to enlarge upon. I mean that this is a trade peculiar to *Spanish* subjects, and in which no foreigners can appear. *Lima* is a port not open but by licence, and the privilege is granted only to *Spanish* subjects. "Where the property is so decidedly of a *Spanish* character, and is engaged in a trade so exclusively peculiar to *Spanish* subjects, as that no foreign name could appear in it, it must take the consequences of that character, and must be considered as *Spanish* property."* As to the other arguments, alledged by the captors, that this cargo was intended to be sent on to *Europe*, and therefore that the voyage was a violation of His Majesty's Orders in Council, I can find no proof. There is however upon the other points, sufficient ground to condemn this vessel and cargo.

Note. This case was appealed, but the appellants did not proceed, and the inhibition was relaxed, *January* 16, 1808.

See another case respecting this vessel concerning the proceeds, *infra*.

* Princessa, Rob. 2. 52.

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The NANCY, *Hurd.*

Blockade of *Martinique.* Evidence of the fact and knowledge of the parties. Condemned.

THIS was a schooner taken by the *Boston*, Captain *Douglas*, on account of having broken the blockade of *Martinico*. She was an *American* vessel, chartered by *John Inhel*, of *New York*, to carry a cargo of provisions to that island, where she arrived the 29th of *March* 1804, at the port of *Trinitè*, from whence she proceeded to *Saint Pierre* on the 3d of *April*, sailed out again on the 15th, on her return to *New York*, and was taken upon the 29th. The cause now came on upon further proof.

Dr. *Croke*.---

At the former hearing of this clause, further proof was directed to be obtained upon these points; first, whether the knowledge of a strict blockade of *Martinique*, and particularly of Commodore *Hood's* notification of the 7th *February*, 1804, had reached *New York* before this vessel sailed from thence; and, secondly, whether the blockade of that island had been suspended from about the 28th of *March*, and had continued to be so suspended, till after the 15th of *April*. It remains for the Court to consider the proofs which have now been brought in, in conjunction with so much of the original evidence, as has not hitherto undergone a complete discussion, and the whole case resolves itself into two questions; the existence of the blockade during that period, and the knowledge of the party.

That a close and most rigorous blockade of this island had existed, till about the time when this vessel arrived there, is established beyond all possibility of doubt. It is ascertained by the best of all

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evidence, the official dispatches, written by Monsieur *Villaret*, the Captain General of *Martinique* to *Talleyrand*, the *French* minister of the *Marine*, confirmed by a multitude of private letters from merchants to their correspondents in *America*, and other places. But it is alledged by the claimants, that about the 28th of *March*, the *British* force was withdrawn from this island, and that the blockade, during the whole time the vessel was there, was totally superseded and relaxed.

I shall consider first the claimant's evidence to this fact, and I must observe, that the further proof now brought in advances our information upon this subject, very little, if any, beyond what appeared in the original documents. Here is the affidavit of *Tonyleet*, who was resident in the island at the time, and who deposes that it was the general opinion there, that the blockade had ceased. That this notion was entertained, appeared clear enough before, but such an opinion will go a very little way to establish a suspension, unless it is proved to have been founded upon facts, which would support such a conclusion. What then are the facts alledged? No vessels, it is said, had been seen from the island, except that the *Blenheim* had once looked into *Saint Pierre's*, and another vessel or two had occasionally appeared. This is no proof of a relaxation. The vessels might have taken their stations further off. Distance is immaterial, and nothing can be considered as evidence of a suspension, which is consistent with an actual blockade. Here are affidavits from two masters of ships, deposing that they had gone in and out of the harbours without molestation, and without seeing a *British* ship. The same circumstance was proved before. By the whole tenor of the evidence, neutral ships had gone in and had

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gone out, even during the strictest period of the blockade. Captain *Ferris* informs us, that, notwithstanding the utmost vigilance of the cruizers, they took advantage of the night, of the occasional absence of ships in chasing, and other services. These captains have not informed us of the time, or manner, in which they entered the ports. They have not stated that they went in openly and boldly in the face of day, and, unless they had so stated, their evidence will not prove that the ports were open for the admission of neutral vessels. Captain *Richards* has deposed, that after he had come out of *Martinique*, he was stopped and examined by a *British* ship of war, the *Mercury*, or *Mentor*, and suffered to proceed. But this vessel formed no part of the blockading force, she was employed in other services, and had a transport under her convoy. A ship coming from *Great Britain*, could know little of the state of this blockade, and her conduct therefore could afford no proof as to its existence, or otherwise. In the *Juffran Maria*,* the vessels employed in the blockade had searched neutral vessels, and permitted them to enter, but the state of this blockade cannot be affected by the conduct of vessels totally unconnected with it. It is said that other *American* Captains have been examined by the blockading ships, and have been permitted to enter. Of this no proof whatever has been brought. Vessels, it is said, which had been taken in going in, or coming out from *Martinique*, have been released by the sentences of the Courts of Admiralty at *Antigua*, and other places in the *West Indies*, and one sentence to that effect is produced. But no inference can be formed from thence, since we are unacquainted with

* Rob. 3. 147.

any of the circumstances composing those cases, and are totally uninformed of their relation to the present.

So little then being the amount of the evidence produced by the claimant, to prove a relaxation of the blockade, let us proceed to consider the affidavit of Captain *Ferris*, as to its continuance. He deposes, that the squadron under Commodore *Hood* was employed in the close blockade of this island till *March*, without intermission, that about the middle of that month, a court martial was held at *Lucia*, where Commodore *Hood* assembled all the vessels upon the station; that the captains all went on board the *Romney*, and that during the sitting of the Court all the other ships went out and cruized round *Martinique* under the lieutenants; that on the 23d of *March* they all sailed to *Barbadoes*, to join the *Surinam* expedition, leaving only the *Blenheim* and *Romney*, with strict orders to carry on the blockade; the *Blenheim* being directed to blockade the ports of *Fort Royal* and *Saint Pierre*, and the *Romney*, the weather side of the island. Captain *Ferris* himself had command of the *Blenheim* till the 23d of *March*, when he was appointed to the *Drake*, and sailed with the fleet to *Surinam*, from whence he returned to *Martinique* the 1st of *June*, when he found the *Centaur* off *Saint Pierre*, that vessel having relieved the *Blenheim*, and understood that during his absence, the port of *Saint Pierre* had continued to be rigorously blockaded.

It has been contended by the claimant's counsel, that one vessel is not sufficient to constitute the blockade of a port, and that a blockade is a legal idea, which is not to be determined by the mere opinion of sailors. Undoubtedly, the existence of an actual blockade, and the sufficiency of the force

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stationed for that purpose, are plain facts, of which the Court will take evidence, as of any other facts. Captain *Ferris* positively swears, that the *Diamond Rock*, with four ships of war, are sufficient to blockade the whole island, and that one vessel can completely command the two ports of *Fort Royal* and *St. Pierre*, so that no vessel could enter those two ports without evident danger. This is an assertion, not made rashly, but from a thorough knowledge of the subject, from having been engaged several months upon the service, from having seen the chart, or plan, for the conduct of the blockade, and from having had the command of the *Blenheim*, during the time when that ship occupied that station, and it is completely established by the circumstance, that only one vessel was stationed at those ports, during the time that the most rigorous blockade existed, of which the effects are so feelingly described by the inhabitants.

The sufficiency of the force being established, the only question is, whether it was actually applied, after the departure of Captain *Ferris*. He is positive that the blockade of *Saint Pierre* was not relaxed during his absence, and, from the means of information, which he possessed, little doubt can be entertained, as to the truth of his assertions. Upon his departure for *Surinam*, Commodore *Hood* left positive, and specific orders to that effect, and whoever is acquainted with the *British* navy, and knows with what exactness, alacrity, and ardour, the orders of a commander in chief are obeyed by the officers under them, will have little doubt that they were obeyed. On his return, he found the *Centaur* upon that duty, and was informed that the blockade had been strictly maintained. Had the orders been disobeyed, it must have been known, and enquiry would

have been made, nothing of that kind occurred, and not a suspicion was entertained that the service had not been diligently performed: this circumstantial evidence, for it is certainly not direct, as Captain *Ferris* cannot depose from his personal knowledge, does impress upon the mind a very high degree of conviction; and when it is considered that no contradictory fact, no proof whatever of a relaxation, has been produced by the claimants, it must be admitted that the existence of the blockade, during the time which affects this question, is sufficiently established.

Now, as to the knowledge of the parties, and first at *New York*.---By the affidavit of the printer, it appears that Commodore *Hood's* proclamation of the 7th of *February*, appeared first in the *New York* newspapers on the 3d of *April*, which was long after this vessel sailed, but it seems that this closer blockade had subsisted before the issuing of this proclamation, and might have been known at *New York*. Some little confusion seems to have arisen from Commodore *Hood's* proclamation of *July* 1803, before the real investment took place, and the Consul *Barclay's* affidavit refers to that period, when he says "he never heard that any relaxation had taken place." *Inkel* and *Arnald* have both sworn that they never heard of the blockade, but they are parties, and little attention can be paid to the affidavits of parties, when better evidence can be obtained. Upon a point so notorious, as whether this blockade was known at *New York*, or not, very full evidence might have been procured, and the Court had a right to expect it; but here is not a single affidavit from any of the numerous merchants in that place who trade with the *West Indies*, and of whom multitudes must have been able to give information.

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Mr. *Inkel's* clerk, *Coch*, had been stationed four months in the island, to receive and transmit his cargoes. Many letters must have passed between them during that period, and the situation of *Martinique*, as to the blockade, must have formed a principal feature in the correspondence. These were entirely in Mr. *Inkel's* own power; and, if they had stated the island to have been as free from blockade, as he represents it, these letters would have been brought forward, and would have supplied a complete justification of the transaction. No such letters are produced, and it is the necessary conclusion, that if they had been brought forward, they would have disclosed a complete knowledge of the blockade.

It is, however, unnecessary to push this point any further, since it is more material to enquire as to the knowledge of the fact, after this vessel arrived at port *Trinité*. And here I must observe, that as *Inkel*, the charterer of the vessel, had his clerk and agent established in this island, the parties cannot be considered in the same light as mere stranger merchants, who might have sent a cargo upon speculation, but they must be charged with all the information which was possessed by the inhabitants of the place. That the blockade actually did subsist, is already proved, and therefore I cannot admit that even if a pretty general report to the contrary had prevailed in the island, that it would amount to a justification. That an error as to a fact, in some cases excuses, is undoubted, but it must be an invincible error, such an error that the party could not easily remove, and such as would have misled any man of prudence and good sense. In the case of the *Neptunus*, *Hempel*, the master, had fallen in with Lord *Duncan*, who informed him

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that *Havre* was not blockaded. Under this impression she sailed for that place, and was captured, and it was held that false information arising from such high authority as could not be suspected, discharged the vessel from the penalty of breaking the blockade. In this case the mere report alone could be no justification as to a fact, so near them. If such a report prevailed, it was the duty of the master and agents to have enquired into the foundation of it. Nothing of this sort which appears in the evidence, in the great quantity of letters on board, which were principally occupied with a subject that naturally engaged all their thoughts, or in the farther evidence now brought in, discloses any one fact from which an inference could be drawn that the blockade had ceased. If such unfounded reports, and unfounded they must have certainly been, would justify neutrals in entering the enemy's ports, every blockade would be defeated. Nothing would be so easy as to circulate such rumours, and it is the standing interest of the inhabitants of every blockaded, place that they should be propagated and believed.

But in truth, this report is far from having been generally credited, and it may well be doubted whether it was ever seriously believed at all. Take it in the utmost extent at which it appears, and it is plain that it was thought to be nothing more than a mere temporary accidental secession of the force, or that the blockade was not so rigidly enforced. In many of these letters the writers do not seem to have believed it at all, and speak of the blockade as still in force. Nay at this very period, when it is said the blockade was believed to have actually ceased, we find plans suggested for evading the

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blockading ships, and merchants advising their correspondents not to omit insuring against capture.

Whatever might have been the opinion of other persons, here is I think very satisfactory proof that the captain of this ship was convinced in his own mind that the blockade still existed. It appears in the letter of *Coch, Inkel's* clerk and agent, that after *Hurd* put into the harbour of *Trinité*, he absolutely refused to depart from that port to *Saint Pierre*, till *Coch* had insured his vessel. The reason he assigned for the refusal was, that his instructions were for the first port he could make. Now by the charter party, *Hurd*, who was part owner, as well as master, was under an agreement to carry the cargo to *Saint Pierre* specifically. In one of the instructions, *Martinique*, indeed, generally is only mentioned, but in the other instructions, signed by his co-owners, he is directed to be guided by the charter-party, and to perform the conditions contained in it, which were to go to *Saint Pierre*, unless that port was blockaded. Unless then Captain *Hurd* knew of the blockade, how is this refusal to be accounted for? It would have been a breach of his contract not to have gone to *Saint Pierre*, and he would have incurred all the consequences which would have attached from the violation of his engagements. To have disposed of the cargo at *Trinité* would have been a great loss to the freighter, for it appears that there was a difference of 25 per cent. between those two markets, and the master no doubt would have been liable to make good the loss.

To account for this refusal, and these risques, against which insurance was to be made, he must have apprehended some great danger. Was his

vessel unfit? The leaks were stopped. She performed the voyage in perfect safety, and delivered her cargo, dry and in good order. Was it from the navigation? She actually went from one port to the other in a very few hours, and in the night too. In the whole circle of possible and assignable motives, is there a single reason to be discovered, which could have induced the master to have acted in the manner he did, except that single ground of exception, provided against in the charter-party, that the port of *Saint Pierre* was in a state of blockade? And when we add, that he premeditatedly sailed out of the port of *Trinité* into that habour *in the night*, and that he chose the same obscurity for sailing out again, it does appear to me to be fully demonstrated that he was perfectly cognizant of the existence of the blockade, and that he knew as well as we do, that the port of *Saint Pierre was so* invested that he could not attempt to enter it, or depart from it, without imminent danger of capture.

There is another question arising in this cause, which it is not necessary now very fully to discuss, or decide upon. Though the mere residence of an agent in an enemy's country, is held not to stamp the character of the enemy's trade upon a transaction, yet it is true likewise that, when coupled with any proceedings of an unusual, or unneutral nature, it would have that effect. Now when we see Mr. *Inkel*, after Commodore *Hood's* proclamation declaring *Martinique* to be under blockade, sending his clerk thither for the express purpose of receiving cargoes of provisions, and shipping return cargoes of colonial produce, in other words, engaging in a new commerce which would have the effect of defeating the blockade, and rendering it nugatory,

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a very considerable doubt may be entertained whether such a traffic originating in the blockade, and owing its existence to it, is not a transaction so completely for the enemy's benefit, and so material an aid afforded to him against the naval operations of *Great Britain*, that it cannot be justified under the privileges of a fair neutrality.

Be that as it may, I am of opinion that the breach of the blockade is fully proved, and that the legal penalty of confiscation must attach upon the parties who are privy to it, upon the ship from the conduct of the master, and upon the general cargo claimed by *Inkel*, as the whole business was conducted under the immediate directions of his clerk and agent. If any distinction can be made, as to any other parts of the cargo, I am ready to hear any thing that can be alledged in their favour.

Ship, and master's adventure, and the general cargo claimed by *Inkel*, condemned.

This judgment was reversed on appeal 8th *March* 1810, except, as to *Inkel's* goods which were condemned.

See, in the next case, the *Betsey*, *Savage*, an affidavit of Commodore *Hood* as to the existence of the blockade at the time when the *Nancy*, *Hurd*, was at *Martinique*.

The Ship BETSEY, *Savage*.

Sept. 26th, 1804.

Blockade of *Martinique* raised in *May* 1804, restored with costs.

THIS was another case upon the blockade of *Martinique*, at a subsequent period: the vessel loaded at *Middleton*, in *Connecticut*, with beef and other provisions, sailed from *New London*, on the 11th of June 1804, bound for the *West Indies*, with orders to go to *Barbadoes*, or where the master pleased. A further order directed him to go to *Martinique*. He arrived at *Saint Pierre* on the 7th of *July*, discharged his cargo, took in the present, and sailed on the 27th of *July* for *New London*. The master deposed, that before he left *New London*, it was the common report that the blockade was *lifted*, but no decisive evidence appearing in the case to that effect, further proof was ordered. It was heard upon the farther proof upon the 4th of *May* 1805, when it appeared, that before the vessel sailed, a notification had been published in the newspapers in *Connecticut*, that the blockade was raised, that insurance thereupon fell from 25 per cent. to 8 or 9, and that vessels went in and out of *Saint Pierre* without interruption. There was likewise an affidavit of *Samuel Hood*, Esquire, Commodore and Commander in Chief of His Majesty's ships at *Barbadoes*, and the *Leeward Islands*, dated the 9th of *October*, 1804, in which he stated "*that from the 16th of June* 1803, *down to the latter end of May* 1804, *the ports of Saint Pierre, Trinity, Port Royal, and Marine, in Martinique, were completely blockaded, closely, and without interruption, except by winds, weather, and currents; and when driven off, so soon as was practicable, the ships resumed their stations.*"

The Ship BETSEY.

Sept 26th, 1804.

This vessel and cargo having been taken by the *Leander*, Captain *Skene*, on the 13th of *August*, 1804, above two months after the blockade had ceased, were restored, and the captors condemned in costs.

Oct. 16, 1804.

The HIBBERTS, *Haynes.*

A Court of prize in a neutral country has no authority to deliver a vessel upon bail to persons, not the representatives of the owners; and the right of the owners upon recapture is not defeated by it.

TAKEN by the *Leander*, Captain *Skene*, 17th of *August*, 1804, off *Sandy Hook*, bound from the *Havannah* to *New York*. She was a British built vessel, belonging to British merchants, when she was captured on her return from *Honduras* to *England*, with a cargo of mahogany by a *French* privateer, called the *Restant*, Captain *Antoine Pique*, and carried to the *Havannah*.

A suit had been instituted in the *Spanish* Court of War there, respecting this prize, the precise nature of which did not appear, but an appeal had been entered to the superior tribunal in *Europe*, i. e. at *Madrid*. It appeared by the proceedings at the *Havannah*, that the captain of the privateer, not being able to bear the expence of maintaining the crew, agreed that the vessel should be delivered to the captain, upon a mortgage of 30 cabellerias of land, offered by *Don Manuel Martinez*, and the personal security of *Felix Crucet*, a merchant, there resident. *Crucet* appeared upon the proceedings, as stating himself to be the attorney of *Francis Shore*, and *Henry Oellers*, first and second mates of the *Hibberts*; that an advertisement, by order of the *Spanish* government, had been inserted in the public papers, that the legal representatives of the captain of the *Hibberts* should appear, to receive

the vessel upon security; that his constituents were such representatives by their situation, the captain never having arrived at the *Havannah*, having been sent by the captain of the privateer to the *United States;* and therefore he prayed to be admitted in their place to give security, and receive the vessel. The vessel and cargo were appraised at 32,065 dollars, the mortgage and his personal securities to that amount were given, and the vessel and cargo were delivered to *Crucet* upon the 11th *July* 1804, by the order of the *Marquis de Somerueles*, the governor of the *Havannah*. Under *Crucet's* directions she proceeded to *New York*, consigned to *Henry Hill*, subject to *Crucet's* orders till he should be indemnified for his disbursements, for costs of suit, outfit, commission, &c. and till he should be released from the mortgage, and bond. She was furnished with a passport from the captain of the privateer, stating that the vessel having been brought into the *Havannah*, a difficulty had arisen *du gouvernement* followed by a law suit; and that the parties by their attorney, according to the decree of the tribunal of war, having given *une caution hipothequée*, till the decision of the superior tribunals in *Europe;* and *Felix Crucet* having given security for the value to the *French* captain, he informed "all whom it might concern, that the prize could not be again taken, from the circumstance of the existing responsibility of the security and mortgage." On the bill of lading, an affidavit of *Crucet* was indorsed, made before the *American* Consul, that "the cargo went on account and risk of the owners, underwriters, and others in *England*, and was consigned by the deponent to *H. Hill*, at *New York*, to be sold, and the proceeds retained by him till the deponent should be fully indemnified and paid his advances, &c. and released from the security and mortgage."

The HIBBERTS.

Oct. 10th, 1804.

In a letter to the consignee, *Crucet's* charges for expences and commission were stated at 8,923 dollars. Upon this voyage the vessel was captured, and a claim was given on behalf of *Felix Crucet*, "as owner and proprietor of the ship and cargo, subject to such equitable claim as the owners or underwriters might have had thereto in case the property had arrived at *New York*."*

Dr. *Croke*.---

This was originally a *British* vessel, owned by Messrs. *Hurry*, of *London*, which had sailed from that port to *Honduras*, touching at *New York*, in her way, and was captured by a *French* privateer, upon her return, with a cargo of mahogany and logwood. She was carried to the *Havannah*, and was taken by the *Leander*, on a voyage from thence to *New York*. A claim has been put in by *Felix Crucet*, a neutral merchant of the *Havannah*, for the ship and the cargo, as his sole property.

By the law of nations, till a sentence of condemnation has passed in a competent tribunal of the belligerent power, property captured acquires no transferrible quality. Till then the right of recapture is not extinguished. By the laws of this country, the original owner recovers his property upon re-capture, but this is merely a municipal regulation, as between the state at large, the re-captors and the owner. The general question as between the re-capturing country, and neutral, or other third, parties, must be decided by the law of nations. If a condemnation is held necessary to enable the captor to transfer the prize to a neutral, it is difficult to conceive how any other legal proceedings, short of such sentence, can be sufficient. It might

* *January* 1305, war declared against *Spain*.

perhaps be enough, in this case, to enquire whether such condemnation had taken place, and as this question must be answered in the negative, to direct the property to be restored to the owner; but it will be more satisfactory to examine the particular circumstances.

The claim of Mr. *Crucet* must depend entirely upon the validity of the proceedings of the Court at the *Havannah*.

Respecting the nature of the proceedings of the law Court at the *Havannah*, we are left entirely in the dark. If we enquire into the jurisdiction of the Court itself, the names of the parties, the sentence appealed from, the Court appealed to, or the appellants, though the extracts from the proceedings occupy seventeen or eighteen sides of paper, no information is to be obtained upon those heads. In this obscurity we are left only to general principles. The expressions, and particularly the words *sobre el aprisamiento*, seem to imply that it was a Court of prize. But a Court of prize, to decide upon questions as between the two belligerent powers in a neutral country, is a thing unheard of, and would be an unwarrantable assumption of superiority, inconsistent with the equality and independence of nations. Such jurisdiction could not be maintained, and if the final sentence of such a Court were invalid, all prior proceedings, and interlocutory decrees, must be equally null and void.

If, as was suggested, these law proceedings arose from any dispute with the *Spanish* government, relating to entries or duties, or other transactions of a similar nature, they were occasioned solely by the vessels having been carried into the *Havannah*. But the owner cannot be deprived of his right of *postliminium*, or become answerable, from any acts

The HIBBERTS. *Oct.* 10th, 1804.

of the captor, whilst the property was in his hands.

It has been suggested, that the proceedings at the *Havannah* were founded upon an interference of the *Spanish* government, on account of a violation of territory, from the place of capture. This, I believe, is the only case in which a neutral government could interfere in prize, but there is no proof that such was the nature of the suit. If that, however, had been the case, the *Spanish* government by the intervention of its tribunals indeed might have compelled the captor to restore the property to the owners, if the capture had been made within the limits of the *Spanish* territories, or might have permitted the captor to retain his prize, if that suggestion had proved to be untrue. But in any case the *Spanish* government could not, without a departure from neutrality, place the *French* captor in a better situation than he was before, or defeat any right of recapture which the original owners might have. If, indeed, the owners had appeared by themselves, or their lawful agents, in the Court at the *Havannah*, by their *consent*, they might give validity to any proceedings there had, but without such appearance, and consent, the *Spanish* government could not by delivery upon bail, or other proceeding, secure this prize to the captor beyond all contingencies. But such was the consequence of these proceedings. If the vessel had not been bailed, the *French* captain could not have disposed of her till he had obtained a proper sentence of condemnation, and, in the mean time, she would have been liable to be retaken. By delivering her upon bail, he acquired a double security, a landed mortgage, and a personal bond, in lieu of his prize, and the vessel was sent in safety

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to *New York* to be disposed of. That this was a very material advantage to the *French* captor, and an injury to the *British* owners, cannot be doubted, and therefore exceeded any powers which a neutral tribunal could have over prize. Let us examine then, whether there was any consent on the part of the *British* owner, or any person properly constituted on his behalf. In these law proceedings an advertisement appears to have been published, under the authority of the *Spanish* governor, calling upon the representatives of the owners to appear, and take this property upon bail. And it is stated, that the first and second mates of the ship came forward in that capacity, the master not having been brought to that country. Now, though undoubtedly in case of the master's death, or absence, some share of his powers does devolve upon the senior officer of a vessel, in cases of necessity, and for the ordinary purposes of navigation and commerce; yet, in the first place, as these mates were not the original officers, but were men taken on board by mere accident, at *Honduras*, as little privity exists between them and their owners, as can possibly be conceived. Secondly, the absence of the master was not occasioned by death, or the act of God, but solely by the act of the *French* captain, who sent him to the *States*. Now, as no man can take advantage of his own acts, though the separation of the master from the vessel might not have been very culpable, yet it would be strange if it should give authority to the inferior officers to perform any acts for the benefit of the captor, by whom the master was sent away. But thirdly, it is not clear that these were acts which the master himself could have made valid. The security was given to the *French* captor, and since, if it is considered as a

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transaction immediately with him, though through the intervention of the *Spanish* Court, it amounted in reality to a ransom, and therefore was directly in the face of a *British* act of parliament. But these mates seem to have been brought forward merely as a colour. After the power of attorney, which they are said to have given to *Crucet*, though it is not produced, they vanish out of the transaction. They retain no authority over the vessel, the vessel is put under a new captain and officers, and they totally disappear. Mr. *Crucet* therefore cannot be considered as the legal representative of the owners, nor had he any authority whatever from them to dispose of their property, or to receive it upon bail. I am therefore of opinion, that the property in this ship and cargo is not changed, so as to bar the original owner upon this recapture, for whose account and risque likewise the cargo was stated to be going, in the affidavit annexed to the bill of lading. As to any claims upon the owners, which Mr. *Crucet* may have for his services in this affair, and to be reimbursed his expences, they do not properly come before the Court in the present case, since it has only to decide upon the validity of Mr. *Crucet's* claim to restitution, *as owner and proprietor of the vessel and cargo*. If he thinks proper to institute proceedings in this, or any other Court, to enforce those claims, it will be to be considered whether his conduct has been calculated most for the benefit of the *French* captain, or of the *British* owners, how far he has consulted their interests, and whether his own charges are just and reasonable. Meantime, I decree restitution to Messrs. *Hurry*, the original *British* owners.

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WAS upon a voyage from *New York* to *Cayenne* and back; and taken on the return voyage.

Contraband upon the outward voyage, under false papers, ground of condemnation upon the return voyage.

JUDGMENT.---Dr. *Croke.*

The general principle, upon which this case must depend for its decision, is perfectly clear. If the vessel has carried contraband upon her outward voyage, with false papers, the return cargo will be affected with condemnation.*

I have therefore to enquire, first, whether contraband goods composed a part of the outward cargo?

Secondly, whether they were concealed by false papers, or other evidence.

Thirdly, whether this is a return cargo, from the proceeds of the outward cargo.

And, fourthly, how far the owners of the ship, or of different parts of the cargo, are implicated in this transaction.

Of the first point there is very sufficient evidence. The commencement of the transaction is fully proved by the charter-party, between *Daraud* and *Smith*. The whole vessel was engaged to go from *New York* to *Cayenne*, and back; "the vessel will be loaded with naval stores and other articles." There is a contract of sale, dated the 19th of *May*, by which 79 barrels of tar, 25 of rosin, 50 of pitch, 2 casks of shot, and 86 coils of cordage are sold for the sum of 10,807 dollars "to be delivered at *Cayenne*, and if they shall not arrive safe, or not be

* Rosalie and Betsey. Rob. 2.

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delivered to *Dennis* the supercargo, the money is to be returned with interest."

The actual delivery at *Cayenne* is proved also, by the mate's pocket book, containing an account of the cargo of this vessel to *Cayenne*, in which are stated, 25 barrels of pitch, 40 of rosin, 84 of tar, 10 of lead, and 2 of shot. There is a memorandum made by the mate also, of part of the cargo taken on shore on the 5th and 6th of *July*, at *Cayenne*, in which 36 barrels of naval stores are mentioned. There is an order signed by *Dennis*, to deliver a certain quantity of pitch and tar to the bearer, dated the 5th of *July*, and another of a similar import, signed *Beauregeu*. The second point, is also clearly established. A concealment of the nature of the outward cargo made a part of the original plan. By the charter-party, the vessel was to *be cleared out for Demerara*, with articles of *no contrabands*, but "was to go as above mentioned, that is, *with naval stores*, to *Cayenne*." This design was faithfully executed. The clearance from *New York*, the bills of lading, and affidavit annexed to it, all omit the naval stores, the deception is still carried on at *Cayenne*. There is *Dennis's* account of sales, which do not extend beyond the goods specified in the clearance bills of lading, and even his account current with his employers is confined to the same articles, and no account is given of the residue, nor does he mention it in his letter of advice. Still farther, even positive evidence has been brought which denies that any contraband was carried to *Cayenne*. For *Smith* swears that "all the contraband articles were relanded and left at *New York*, and that another cargo and lumber were taken in room thereof." Besides the whole weight of evidence against this man's testimony, it is inconsis-

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tent with the log book, which states that they began taking in cargo the 30th of *April*, that the lading was completed by the 14th of *May*, and they hauled down into the stream on the 17th, without any mention of relanding any part of it, for which indeed there does not seem to have been sufficient time. Bearing date on the 19th, there is a letter from *Gardere* to *Dennis*, in which he is directed to sell the goods for account of *Durand*, and he specifies them as they are stated in the contract of sale, namely the contraband articles.

The third and fourth points may be jointly considered. The outward, and the return voyages were one unbroken transaction, in which the owner of the vessel, and of the whole cargo were equally implicated, by the charter-party. *Dennis* was their joint agent. By him the outward cargo was sold, and the home cargo was purchased out of the proceeds, and he gives credit for the freight as per charter-party.

It is impossible to conceive a case where all the facts are more clearly established, and I therefore condemn this ship and cargo.

The Schooner NANCY, *Huxford.*

March 13th, 1805.

In the *Instance Court*.---

Spirits of turpentine not importable under the 33d *Geo.* III. Ch. 50. Sec. 14. Importers, means owners. *British* subjects resident abroad cannot import.

A CASE upon the Statute of the 33d of *Geo.* III. Ch. 50. Sec. 14, which enacts "that it shall be lawful to import pitch, tar, and turpentine, being the growth or production of the *United States*, from any of the territories of the *United States* into the province of *Nova Scotia* and *New Brunswick*; provided such pitch, tar, and turpentine shall not be

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imported, except by *British* subjects, and in *British* built ships, owned by His Majesty's subjects, and navigated according to law." The vessel, with 8 barrels of spirits of turpentine, and 190 bbls. of tar, were seized by the collector, as having been imported from the *United States* contrary to law, inasmuch as the spirits of turpentine were not comprehended under the act, and the importers were not *British* subjects. A claim was given for the schooner, on behalf of *Henry Huxford* and *John Selig*, of *Halifax*, and for *John* and *Jonathan Tremain*, of *Halifax* likewise, as consignees of the cargo, on behalf of *George Scott* and *Joseph Tremain*, stated to be natural born *British subjects*, residing at *New York*, by whom the goods were there shipped, and consigned to the claimants, as was alledged with an offer to take and dispose of the same on their account, paying to the shippers the costs and charges.

JUDGMENT.---Dr. *Croke*.

This is a suit instituted by the King's advocate against the schooner *Nancy*, eight barrels of spirits of turpentine, and 190 barrels of tar, being part of her cargo. (The pleadings and evidence shortly stated.)

The principal facts in this case, stand upon the admission of the parties. On behalf of the prosecution, it is admitted, the vessel was *British* built, *British* owned, and navigated according to law; and that Messrs. *Scott* and *Tremain*, the supposed importers, are *British* born subjects. By the claimants it is admitted, that Messrs. *Scott* and *Tremain* are merchants, resident, and carrying on their business, at *New York*.

The whole case therefore, rests upon two points

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of law, first, whether spirits of turpentine can be imported under the Act of the 33d of *Geo.* III. Ch. 50. Sec. 14; and, secondly, supposing it to be in itself importable, and admitting the tar to be so, whether the importers are persons intitled to the privilege of importing them under that act.

As to the question of the spirits of turpentine. It is scarcely necessary to observe, that raw turpentine, and spirits, or oil of turpentine are two articles totally different from each other. That the spirits are obtained by a chemical process of distillation, which changes the form, and the denomination from a gum to an oil. It becomes no longer applicable to the uses for which raw turpentine is employed, and, on the other hand, the manufactured article is adapted to an infinite number of purposes for which raw turpentine is not calculated. It does not differ, as was alledged by counsel, as different species under the same general denomination, but by distillation it becomes an article of a new and different kind and description. The spirit is no more a species of turpentine, than wine is a species of grapes. Nor is the appellation of *common turpentine*, as has been argued, in books of chemistry set in opposition to the spirit, but to *Venice* turpentine, *Chio* turpentine, and other species of the raw drug.

They differ no less in common mercantile parlance. If a general merchant ordered his correspondent to ship a certain quantity of turpentine, I apprehend he would not be justified in sending spirits of turpentine; nor in case any litigation should arise, would the shipment be such a compliance with the order as would bind the consequences of it upon the merchant who gave the directions; unless there were some special circum-

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stances to show that it was otherwise understood between the parties.

A legislative interpretation is of more importance. Now, upon looking into the various statutes for imposing duties upon imports and exports, it clearly appears that these two articles are considered as distinct, and are not comprehended under one general denomination. They are separately enumerated, differently classed, and charged with different duties.

Now, looking at the words of the act, spirits of turpentine are clearly not included under them. It says such pitch, tar, and turpentine being the growth, or production, of the *United States*, the word "*manufacture*," being omitted, as if for the express purpose of excluding spirits, the manufactured article. And though it may be said, that pitch, tar, and turpentine, all undergo some kind of manufacture, and therefore that the words growth or production, if applicable to them, would be applicable likewise to other manufactured goods; yet they are not usually considered as being manufactured. There are no articles so rough, but what undergo some change or amelioration by human labour, before their exportation. Lumber is cut down and hewed, skins are caught and dried, and yet such articles, whilst they continue in their first state, are considered as raw, or unmanufactured. It is the same with pitch, tar, and turpentine.

Nor is the importation justified by the preamble of the clause. It says that "whereas His Majesty's subjects in these provinces are building great numbers of ships, but are in want of pitch, tar, and turpentine." Now, if raw turpentine is imported, the inhabitants cannot be said to be in want of the spi-

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rits, which they not only can manufacture themselves, but for which several manufactories are now established here, and actually at work. It may likewise be imported from *Great Britain*. The price alone cannot be considered as producing a want or necessity, and if it is too high, it is an evil which will remedy itself. Raw turpentine is an article of the first necessity in building ships, but the use of spirits of turpentine is very small and limited. As far as I am informed, it is employed only in painting. And, even in that work, the colours are mixed chiefly with linseed oil, a small quantity of spirits of turpentine being added for the sole purpose of accelerating the process of drying. Other articles, more useful in ship building, are not allowed to be imported.

Considering the subject in every point of view, and from the words of the act, compared with the context and preamble, and referring to the usual mode of understanding the same expressions in common life, and in other acts of parliament, I am of opinion, that oil, or spirits of turpentine, is an article which cannot be legally imported under this statute.

But the claimants have endeavoured to justify themselves under another plea, that it is dangerous and impossible to bring a cargo of pitch and tar, without distilled turpentine to clear the pumps, in case the pitch and tar should get loose, and clog them. In answer to this allegation, it may be remarked, that the quantity of spirits of turpentine is too large, and that neither the master, or the claimant have ventured to swear that it was put on board for this purpose, and for this purpose only. And it was evidently shipped for importation with the rest of the cargo, since it was comprehended, though

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under a false description, in the bill of lading, was to pay freight, and was offered to be entered at the custom house.

They have likewise alledged, that it has been the usage and practice of the custom house here to admit this article to an entry, since the statute of the thirty-third of the king. Their own evidence proves the contrary. Mr. *Binney* deposes, that spirits of turpentine have been admitted in five instances only, under licence from the governor, and the importation of that article has always been considered as inadmissible, unless authorized by licence. Whatever might be the opinion of the Court upon the validity of those licences, if the question came before it, entries permitted under their authority are no proof of an usage to permit the importation of this article generally, and without licence. In this case no licence was obtained.

The opinion of parties does not constitute the law, but as it is evident, from the ship's papers, that there was an intention of concealing the spirits of turpentine, it may be inferred that, in this case, the parties were conscious that they could not lawfully import it. In the bill of lading and manifest, it is confounded with the tar, under the general description of naval stores. In the clearance, the eight barrels of spirits of turpentine are totally omitted. And in the entry, at *Halifax*, where a particular specification was required, and made upon oath, it is not stated as spirits of turpentine, but as turpentine simply.

I come now to the second question, respecting the tar, and there is a previous point to settle, who were the importers? It is alledged that these goods were consigned by the shippers to Messrs. *John* and *Jonathan Tremain*, of this town, with an offer to

take and dispose of the same on their own account, paying to the shippers the costs and charges thereof. From hence it has been argued that the house of *Tremain*, at *Halifax*, are to be considered as the importers, and consequently are within the words of the act of parliament. But there can be no doubt, but that by *importers*, the *owners*, or *proprietors*, must be understood. Such has been decided to be the import of the term in a variety of cases. So in the construction of licences from His Majesty, to trade with the enemy, it has been held that they were to be understood to be licences for their own account and risk only. Was then the house of *Tremain* here the owner, admitting the fact as alledged? To transfer property, there must not only be an offer on the part of the transferors, but an acceptance on the part of the transferree. Suppose such an offer to have been made, no act is stated to have been done by Messrs. *Tremain* in the way of an acceptance. If these goods had been shipwrecked, upon whom would the loss have fallen? If they should be condemned in this Court, who will be the sufferers? It is clear therefore that, even under this allegation, Messrs. *Scott* and *Tremain* continued to be the owners of these goods, and consequently the importers; but the offer itself is not proved, the letter has not been produced, and there is not a single circumstance in evidence, which can even tend to disprove the ownership of Messrs. *Scott* and *Tremain*, on whose behalf they are claimed.

Messrs. *Scott* and *Tremain*, of *New York*, then being the importers, it becomes a question whether a *British* born subject, resident in a foreign country can import pitch, tar, and turpentine into this province under the statute.

If the word "*subject*," necessarily extends to all

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persons born within the King's dominions, or rather, if all natural born subjects are intitled to the same rights, under all circumstances of residence, or otherwise, there is at once an end of the question. But this proposition, I apprehend, is not tenable, and I conceive that *British* born subjects may lose many of their rights by non-residence.

It is said, indeed, by Sir *William Blackstone* (Vol. I. p. 371,) "that natural born subjects, have a variety of rights, which they acquire by being born within the King's allegiance, and can never forfeit by any distance of place or time, but only by their own misbehaviour." But this doctrine is not laid down universally, as extending to all the rights of *British* subjects. True it is, that they may have a variety of rights so indefeasible, and yet as to other rights may be in a different predicament. And, indeed, considered as a general rule, it must from the nature of the thing, be subject to many qualifications and exceptions. Mr. Justice *Chambré*, in a case which I shall presently have occasion to state more at large, expressly declared so from the bench, and said that "though he did not controvert what *Blackstone* has laid down, yet that many distinctions arise out of that general proposition." One of those exceptions must be the case of commercial privileges.

In prize, a *British* subject forfeits every right, which he would be intitled to in that capacity by residence in a foreign country. If *Great Britain* was in a state of peace, during a war between *France* and *Spain*, an *Englishman* who inhabited either of those countries, would be liable to have his property seized by the respective enemies as much as the natural born subjects of the country. His *British* allegiance would afford him no protection. This

principle does not rest only upon the Prize Courts, and the law of nations, but it is recognised by the common law. In the case of *Tables* v. *Bendelack*,* an *American* born, married, and occupying a house at *Liverpool*, purchased an *American* vessel, documented as such, he insured and warranted the ship *American* property. But Lord *Kenyon* held, that the warranty was not complied with, and said that "whether the ship be intitled to *American* privileges does not depend merely upon the owner being an *American* born. Persons residing in this country, reaping the advantages of the trade of this country, and contributing to the well being of this country, must *for the purpose of trade be considered as belonging to this country*."

This indeed was a case, as between neutral countries, and the powers at war, and depended chiefly upon the law of nations, but there is another case, in which the same principle was applied between *Great Britain* and her own subjects, and with reference to *British* laws only. I mean that of *Mac Connel* against *Hector* (in *Bosanquet* and *Puller's* Reports, Vol. III. 113.) The question related to the validity of a commission of bankruptcy, and this depended upon the point, whether the debt upon which the petition issued, was such as could be sued for at law, the petitioning creditors being three partners, of whom one was resident in *England*, and the other two being subjects of *Great Britain*, were resident and concerned in trade, at *Flushing*, a port belonging to the enemy. It was held that they were not intitled to sue as *English* subjects in an *English* Court of justice, and Lord *Alvanly*, said, "every natural born subject has a

* *Bos.* and *Pul.* Vol. III. 207. n. *Espinasse. Vol.* IV. 108.

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right to the King's protection so long as he entitles himself to it by his conduct; but if he lives in an enemy's country, he forfeits that right. The question is whether a man who resides under the allegiance, and protection of an hostile state, for all commercial purposes, is not to be considered *to all civil purposes,* as much an alien enemy as if he were born there? That an *Englishman,* from whom *France* derives all the benefits which can be derived from a natural born subject of *France,* should be intitled to more right than a native *Frenchman* would be a monstrous proposition. While the *Englishman* resides in the hostile country, he is a subject of that country, and it has been held that he is intitled to all the privileges of a neutral country, while resident in a neutral country." The residence in the enemies country was in no respect a criminal act. For Sir *Matthew Hale* says expressly, P.C. Vol. I. 165. "If there be war between the King of *England* and the King of *France,* those *Englishmen* that live in *France* before the war, and continue there after, are not simply, upon that account, adherents to the King's enemies." He says likewise that they might be called upon to return upon privy seal, or proclamation." It was therefore merely a *disqualification on account of residence;* by residence alone, a *British* born subject acquired the disabilities of an alien enemy, and though his allegiance still subsisted, and the rights which corresponded to it, though he was liable to be called home by the King's authority, yet a *British* born subject in virtue of his residence alone, without being guilty of any crime, became deprived of one of the most valuable rights of a subject, that of suing in the King's Courts.

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Such is the effect of residence in an enemy's country, and it should seem, upon the same principles, that, by residence in a foreign country, in amity with us, a *British* subject must acquire the same disabilities of other inhabitants of that country, especially as by such residence he acquires all the privileges of the foreign country. Antecedent to the cases already quoted, was the case of *Wilson* v. *Marryatt*, (8 T. R. 45; and *Bos.* and *Pull.* Vol. I. 430,) determined. It was there settled, that a *British* born subject, residing in *America*, might trade to the *East Indies*, notwithstanding the *East India Company's* charter, and the various acts made in support of it, by which *British* subjects are totally prohibited from that commerce. In the two cases first quoted, the eminent judges who presided, both assigned the case of *Wilson* v. *Marryatt*, as one ground of their decision. Now if the circumstance of a *British* subject's enjoying the privileges of a foreign country, by residence in a friendly country, was held to be a reason why a *British* subject, resident in an enemy's country, should participate in the disqualifications of that country, *á fortiori* is it a reason why he should share in the disqualifications of the friendly country. For in *that case* it applies only in the way of analogy, in *this* it is a direct application. In those cases the situation is only something similar, in this they are identically the same.

But the case of *Wilson* v. *Marryatt*, goes still further. It determines not only that a *British* subject may acquire foreign privileges, but that by mere residence abroad, he may become *divested of British disqualifications*. The words of the *East India* acts are strong, "that no subjects of his Majesty, of what degree or quality soever they be,

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shall trade to those parts." Yet it was held, that a *British* subject, naturalized in *America*, might legally trade thither. If *British* subjects acquire all the privileges of *American* citizens, they must acquire likewise all the disadvantages of that character. It would be strange indeed, if *British* subjects settled in *America*, should obtain all the privileges of *American* subjects, should shake off the disqualifications of a *British* character, and yet retain all its privileges. Such an incomprehensible accumulation of rights, would place non-resident subjects in an infinitely better situation than those who continued within the king's dominions. It must act as a bounty upon emigration; and as a reward to those who withdraw themselves from the defence and support of their country. It is but just, that they who quit their country, and fix their habitation elsewhere, should partake of the inconveniences, as well as the benefit of their new station

This is a question which must necessarily have engaged the attention of writers upon public law; and though what rights a subject shall retain, after emigration, must be decided by the municipal laws of each community, yet some light may be obtained upon the subject, from a science founded upon the principles of reason, the general nature of civil societies, and the practice of civilized nations. And an interpretation of municipal laws, upon a question of this nature, is more satisfactory, and receives no little confirmation, when it is found to be conformable to those principles. Those writers are unanimous in their judgment upon this subject, and I shall quote two for all. *Gaill*, (Lib. 2. Ob. 36. No. 6.) speaks of it as the general law and custom, that "*Civis originarius renuncians civitati, et domicilium alio transferens, civis esse desinit. Eo ipso quod mutat domicilium, perdit privilegia et jura civitatis.*" *Voet*, vol. I. 347.

says, "*neque dubium quin migrans jura amittat, ac privilegia et immunitates domicilii prioris.*" *Gaill* adds the reason, and a solid one it is. "*Proprie enim civis non dicitur qui onera civilia, vel civium, non sustinet.*"

Whether it was the intention of the legislature in this case, to extend the privilege of importation to *British* born subjects resident in foreign states, we must consider the object, and purport of the statute. And we must not only view it as a single and insulated law, but as connected with a number of other statutes, forming altogether the system of *British* navigation and commerce. This system is a monopoly, and its object is to confine the benefit of the trade of the colonies to the *British* empire. It is a system *in itself* not unjust, for any country has a perfect right to exclude other nations from its commerce. It is not inequitable in another respect, inasmuch as it was a policy established amongst all the *European* nations, before *Great Britain* had colonies, or laws to regulate them, and is still reciprocally and universally maintained. In adopting it, this country was influenced by the soundest principles of wisdom; and it has been justly esteemed as the foundation of our commercial and naval superiority.

It can never have been the intention of the legislature, to relax principles so beneficial, more than absolute necessity in certain cases required. When the statute says, "provided such articles shall not be imported, except by *British* subjects;" it gives no right to *British* born subjects, who may be disqualified upon other grounds. With respect to such, there must necessarily be a tacit exception. Would it give such privilege to a *British* subject resident in the enemy's country? Why then does

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the act restrain the importation to *British* subjects at all? It evidently keeps in view the general system of confining all the benefits of colonial trade, within the *British* empire, it is the object of the restricting clause, that the profits and advantages of the colonial trade may center in the *British* dominions. But if a *British* born subject resides and carries on his traffic in a foreign country, the *British* empire derives no advantage from his trade with the colony. The profits all flow to the country of his domicil. The *British* empire receives no benefit whatever from his capital, his labour, and his industry. His person neither increases the strength of the country, nor can any part of his property be compelled to contribute to its defence. The mere place of birth is perfectly immaterial; every benefit, which a country can derive from a man as a subject, depends upon the place of his residence. What difference in reason is there, in all *commercial* points of view, between a natural born *Englishman*, and a natural born subject of the *States*, both resident in that country?

It will not be contended, that the resident subjects of the *British* empire, are not able to procure a supply of these articles, for the use of this province, without calling in the aid of those who live abroad. When therefore I see the object of this act may be perfectly attained, by the permission given to resident subjects, to import: and that the object of the general system would be entirely defeated, as far as this case goes, by admitting foreign residents, I cannot but be of opinion, that it was the design of the legislature not to extend it to them; and consequently that Messrs. *Scott* and *Tremain*, being merchants, residing and carrying on their trade at *New York*, these goods were not imported according to law.

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But it is pleaded in justification, that it has been usual for the officers of the customs, under the 28th *Geo.* III. *c.* 6. and the authority and proclamation of the governor, to allow goods of the description named in the said act, owned by *British* subjects, residing within the *States*, to be entered by the consignees residing in this province.

In the first place, I do not think that the practice is sufficiently proved by the evidence. Some instances indeed, are produced, but these are, in some measure answered by the deposition of Mr. *Binney*, that the officers of the customs, looked upon the person making the entry as the owner of the goods, and that prior to the appointment of the present collector, no enquiry was made respecting the ownership, without a special reason. One of the witnesses, *David Scaling*, proves rather too much. He says, that in one case, flour was allowed to be entered, which was known at the custom house to have been the property of an *American* subject: now as this was undeniably illegal, such examples prove that the practice at the custom house here, has been extremely irregular.

But in the next place, admitting the usage to have been uniform, I must hold that the practice of the custom house, even supported by the sanction of the board of commissioners, cannot legalize an illegal act, and cannot form such an authoritative interpretation of the statutes, as shall be binding upon a court of justice, which must decide upon the law itself, and upon the construction of it, according to its own discretion. For this opinion I have the authority of that court, which is most peculiarly conversant with matters of this nature, and has the controul over the customs and revenues. I mean the court of exchequer.

In the case of *Stephani* v. *Barrow (Anstruther,*

The Schooner NANCY.

March 13th, 1805.

Vol. II. 355), the question was whether *Peruvian* bark which had been imported in the gross state, pulverized in *England*, and exported, was intitled to a drawback. It was stated that the commissioners had allowed the drawback as long as only small quantities were exported, but that lately it had become more considerable, and they refused. The Lord Chief Baron, in pronouncing sentence, said, that "as to the conduct of the commissioners of the customs, it makes no difference the one way or the other; at the different times when their attention has been called to this subject, they have thought differently upon it; when the case but seldom occurred, and they had not given it much consideration, they allowed the drawback; but when the practice of exporting this article became more frequent, they thought of it more seriously, and determined not to allow it."

I am of opinion therefore, that the turpentine, the tar, and consequently the vessel, are all subject to confiscation. In pronouncing which latter part of its sentence, the Court feels the less reluctance, as the master has not only shewn that he was conscious of doing an illegal act, by attempting to conceal the nature of part of his cargo, but in so doing, was likewise guilty of a fraudulent attempt to import it clandestinely into the province.

The HAPPY COUPLE, *J. W. Story.*

April 18th, 1805.

TAKEN by the *Cambrian, John P. Beresford.*

Monition. 22d *March*, 1805.

Claim. 23d *March, Thomas Walmsley Story* on behalf of *Elias Kane* and Co., and *John B. Murray* of *New York*, owners of the Brigantine.

Ditto, of 100,023lb. Coffee in bags.

Ditto, of 16,000lb. Cotton in bales.

Ditto, of 15,000lb. Logwood.

Master's adventure 6,500lbs. and 49 bags Coffee, himself *George Youle* and *C. Bickerstaff*, citizens of the *States* for 24 bags Coffee.

St. Domingo a *French* colony in 1805. Arming for defence against *French* cruisers lawful. Carrying contraband on outward voyage, confiscation.

The facts in this case will be best seen by the affidavit of the Master.

He swears that he is a native of *Ireland*, now of the *States*; that he sailed with the Schooners *Dash, Morgan, Lewis*, and *Anne*, from *New York*, 19th *October*, for *Gonaives* and *Port au Prince* in *St. Domingo*, the *Dash* and *Anne* under his convoy. The Brig was laden with 3105 quarter casks of gunpowder, 11 barrels beef, pork, flour, bagging stuff and adventures. The *Dash* had 1000 casks of gunpowder belonging to the owners of the *Happy Couple*. The *Anne* had gunpowder but she foundered. He touched at *Turk's Island* to gain information respecting *French* privateers, and arrived with the *Dash* 12th *November*, at *Gonaives*. *R. B. Forbes* of *New York*, had made a contract with *Dessalines* the emperor of *Hayti*, to furnish him

The HAPPY COUPLE.

April 18th, 1805.

with gunpowder, to prosecute the war against the *French* government. *Forbes* sold the contract to *Kane* and Co. and *Murray* for ¼d of the profits. The outward and home cargo were their property. On his arrival with the brig and the *Dash* at *Gonaives*, he waited for Messrs. *Windsor* and *Powel*, who were the consignees in case of *Forbes*' absence. When they arrived, in consequence of directions from *Dessalines*, he proceeded to *St. Marc's*, and delivered both cargoes of gunpowder to *Dessalines*, in part of the fulfilment of the contract; *Windsor* and *Powell* also sold to *Dessalines* 132 casks of pork and flour, and obtained an order for payment, the gunpowder at 1¼ dollars each pound, agreeable to contract. Payment was made in coffee, cotton, and sugar, part of which is loaded on board the *Happy Couple*, with logwood for dunnage with the adventures; the remaining articles were to be shipped on board the *Sampson*. The adventures were the proceeds of outward adventures. That *Dessalines* was at war with the *French*, and he believes in amity and peace with the King of *Great Britain*, because during the time deponent was at *Gonaives*, His Majesty's schooner *Superior*, commanded by a lieutenant of the navy, came into that port for refreshments, which were supplied by permission of *Dessalines*, and the commander of the schooner came on board the *Happy Couple*, and furnished deponent with signals to enable him to distinguish him from the *French* privateers, which were cruizing off the *Island*. And that *Dessalines* had a short time before exchanged a number of anchors with Admiral *Duckworth*, for small arms, as he hath been informed and believes. He sailed from *St. Marc's* 22d *February*, with the ship *Alert* of *Boston*, and the schooner *West Indian* of *New York*, and was captured 8th *March*, 1804.

The HAPPY COUPLE.

April 18th, 1805.

For the Captors the King's Advocate.---

This is the simple case of a neutral ship, that in her outward voyage had carried an avowed contraband article to a port in the Island of *St. Domingo*, a colony of the enemy; and a question arises, owing to the peculiar state of that part of the Island to which she was bound, whether or not it can be considered as hostile to the government of *Great Britain*.---That a large portion of that Island has thrown off the yoke of *France*, and that the port in question is included in the number there can be no doubt, but we have no official evidence of its being considered otherwise than hostile on the part of our government.---The insurrection of the negroes may be a temporary event of no permanence, and the enemy at this moment, may be again in possession of those parts of the Island, which have been rebelliously wrested from them.---The whole of *St. Domingo* therefore is still to be considered as an enemy's colony, and it would be infringing one of the most important rules of national law, to suffer an article so noxiously contraband as the cargo of this ship, to be carried to any port of that colony. Another objection was raised as to the ship's being armed and fitted for purposes of war.

For the claimants.---*The Solicitor-General* and *Hutchinson.*

This is certainly a case *primæ impressionis;* in the decision of which the Court can be guided by no legal precedent whatever, as far as can with safety be pronounced after a very diligent search for authorities.---The question before the Court, must therefore, be argued and determined upon

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principle, and it resolves itself after all into an enquiry of *fact*, whether or not the port in question be hostile to His Majesty's government.---That it is not under the dominion of *France* must be conceded, for it appears to have been completely wrested from the power of that country, by the insurrection of the negroes, who are making one common cause with *Great Britain*, by a vigorous war against the same enemy.

To aid them in this operation is the main object of the voyage, in which the claimants were engaged; the pursuit may therefore be considered rather in the light of affording assistance to an ally, than carrying a contraband article to our enemy.---It is contended however, on the part of the captors, that His Majesty's government has adopted no measures, that can justify or countenance the inference contended for on the part of the claimants; but is the neutral bound upon any principle of national law, to wait for such measure, when the *fact* upon which his right exists, is clearly ascertained, and not even disputed? the port in question is not in *fact* the port of the enemy, nor by any construction of law can it be so considered, for though it be a part of the enemy's colony, the people who are now in possession of it, and who held the possession of it, at the time the ship was bound to their assistance, were in hostile array against the government of that very colony.---No other evidence, therefore, can in reason be required, in determining the mind of a neutral individual in this instance, than the actual state of the belligerent country, with the concerns of which for his own interest, he has a right and thinks fit to intermeddle. A contrary doctrine might lead to much intricacy, confusion and injustice.---As to the objection arising from

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the hostile equipment of the ship, that fact could not be construed into a breach of neutrality, the avowed object of such equipment being for protection against the cruisers of our enemy; but at all events, the armament in itself is not unlawful, as may be inferred from the cases of the *Maria*, *Paulsen*, and *Elsabé*.

JUDGMENT.---Dr. *Croke*.

The principal facts in this case are indisputed. They seem to be stated with sufficient accuracy in the master's affidavit; from which I shall read them.

(Here the Judge read the Master's examination.)

In this history of the transaction two circumstances appear, which must properly have engaged the attention of his majesty's cruisers, and are now the subjects for the consideration of this court, the armament, and the nature of the outward cargo.

A vessel is found upon the high seas, belonging to a nation professing itself to be at peace with all the world, and in amity with *Great Britain*, armed and completely equipped for war, the captain assuming the character, and performing the duties of a commodore, having other armed vessels under his convoy, with a regular system of signals and martial discipline.

To carry arms for self-defence, and the protection of person and property, under certain restrictions and limitations, is, undoubtedly, one of the most sacred and imprescriptible rights of mankind; whether considered as individuals under the law of nature, or in their collective capacities, as members of established governments, under the law of nations. That such armaments *in themselves*, and without reference to the particular purpose for which they may be intended, are not unlawful, is a principle which is

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implied and recognised in the cases of the *Maria*, *Paulsen*, and the *Elsabe*, by their being sent for further proof; as has been properly observed by the counsel for the claimants. Nor do I think it of much consequence whether these vessels were armed by public, or only private, authority. That is rather a question between the *American* government and its own members; as far as foreign nations are concerned, without a disavowal on the part of the government of the *United States*, a permission either express or tacit, must be presumed; because no subject can be supposed to act so openly in violation of the laws of his own country.

The only question then is, the *purport* and *object* of such arming, and, whether it be such as is consistent with the duties of neutrality; which must be ascertained from the evidence in the case.

The first document to which one would naturally have recourse upon this head, is, the master's instructions (No. 2.) They are general, "if you should meet with *any* armed vessel." They allow search according to the most usual mode of exercising that right, by receiving an officer on board; but they order resistance in case the cruiser insists upon their hoisting out their own boat.

In these instructions the owners are setting up a new law of nations, and prescribing to cruisers a restriction in their mode of search, which they have no right to do. Cruisers, no doubt, may examine vessels as well by ordering persons to come on board their own ship, as by sending their own officers; or, in any other reasonable manner, under the responsibility of costs and damages, if they abuse their right. I have no scruple in saying, that, if these instructions had been acted upon, or if it had appeared that they were designed against *British*

cruisers, that I should have held them ground of confiscation. I agree with the doctrine laid down by Sir *William Scott*, in the *Maria*, *Paulsen*, that the delivery and acceptance of such instructions, and the sailing under them, are sufficient to complete the act of hostility, unless there is some abandonment of them.

But the question is, against whom these instructions were directed. If, as the master alleges, they were intended to be applied only against *French* cruisers, and not against *British* vessels, I cannot hold them to be ground of confiscation in this Court. We have nothing to do with the abstract or general duties of neutral nations; we are not sitting here in the spirit of pure Quixotism, to redress the wrongs of all the world; we have to decide only whether the subjects of any country have been guilty of a breach of their neutrality to *Great Britain*.

There is much to support the master's explanation of these instructions. The depredations committed by the *French* upon *American* commerce are notorious. In the last war, when *American* vessels were captured by the *French*, the same salvage was allowed upon re-capture, as in the case of recovery from an enemy. The general apprehension of *French* cruisers was greatly increased in the present case, from the object of the voyage, which was to supply the enemies of *France* with ammunition, and the seas round *St. Domingo* swarmed with cruisers belonging to the Republic.

The master swears they were armed expressly for their protection against these *French* cruisers, and for no other purpose whatever. *Mackay*, the mate, confirms this account, and adds, that he knew they would have allowed any *British* vessel of inferior force to board them, as they considered them as

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friends. The other witness tells the same story. Amongst the letters on board, the danger and number of *French* privateers is a prominent feature in the greater part of the different correspondence. In No. 9, is an account that the *West Indian* had been taken and ransomed by a *French* privateer, and it is accompanied with the *proces verbal*, and ransom-bill. The conduct of the master, as it appears in the log-book, was conformable to his declarations. *Turk's Island*, a *British* colony, was appointed as the general rendezvous, and they actually touched there in their outward voyage.

All the evidence then, pointing one way, and there not being a single circumstance on the other side to excite even suspicion that this armament was directed against *British* cruisers, bound, as I am to decide according to the evidence before me, I cannot hold the arming of these vessels, *in itself*, to afford cause for condemnation.

I say *in itself*; for after all, its legality must depend upon another question, in which it is completely involved; I mean the nature of the outward voyage.

This was no ordinary transaction in the usual course of mercantile affairs. It was a contract to supply the new government erected in *St. Domingo* with gunpowder in very large quantities. In the account of sales it appears that 4101 quarter-casks were delivered, equal to 92,016 pounds; for which, at the rate of a dollar and a quarter a pound, no less than 115,020 dollars were to be paid. Gunpowder being a contraband article, of all the most noxious, the question of the legality of this supply must depend upon the national character of *St. Domingo*, under the present government. For if it is to be considered as a colony of *France*, this Court has a

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safe rule for its decision in his majesty's instructions of the 24th of *June*, 1803, which allows of a trade between neutral countries, and the enemy's colonies, with the express exception of such vessels as shall be supplying, or shall on the outward voyage have supplied them with articles contraband of war. That *St. Domingo* was a colony of *France* there can be no doubt. It belonged originally to *Spain;* but the western part of it was ceded to *France* by the treaty of *Ryswick* in 1627. By the treaty of *Basle* in 1795, the rest of it was surrendered to the *French* Republic. In 1801 a written constitution was formed for that Island, under the authority of *Toussaint*, in which the sovereignty of *France* was acknowledged expressly. Up to this period then, *at least*, it continued to be a *French* colony; and it remains to be proved at what time, or by what means, it has ceased to be so. True it is, that an insurrection of the slaves has taken place, and that, after a series of barbarities, disgraceful and shocking to human nature, they have succeeded in driving out the former proprietors, and have made themselves masters of the greater part of the country. But might does not constitute right; and if *France* has a just title to the dominion of *St. Domingo*, no acts done by revolting negroes can divest it. Without entering into the question between the mother country and her colony, with which we have nothing to do, as far as third nations are concerned, the claim of *France* to this Island as her colony, must be allowed sufficient to impress that character upon it.

France has certainly never acknowledged the independence of *St. Domingo*. Expeditions to recover the possession of it have only been suspended by the present war; and the activity of the *French* cruisers from *Guadaloupe* to prevent supplies from

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being conveyed to *Dessalines*, which appears in this case, prove that the reduction of the place is still in the contemplation of the *French* government.

Nor has the independence of *St. Domingo* been acknowledged by the *British* empire, in any declaration, treaty, or other public act.

True it is, that though, generally speaking, one nation has no right to interfere in domestic disputes between the different parts of an extended empire; yet, as is admitted by *Vattel*, and other writers upon public law, when matters come to extremities, a nation may interfere and take part with either side, according to what it supposes to be the justice of the case; and therefore *Great Britain* would be justified, and might even plead the example of *France* itself, in supporting the revolted colony of *St. Domingo* against the mother country.

But no such alliance is proved:---No treaty to that effect is in existence---no public declaration---no general instructions or orders to his majesty's cruisers, or to the Courts of Admiralty.

There being then no *public evidence* of an alliance of which this Court would be bound *ex officio* to take notice; is it proved by any *private evidence* in this particular case?

The master deposes, that *Dessalines* is at war with the *French;* and *he believes* in amity and peace with *Great Britain*, because a *British* schooner was supplied with refreshments in the port of *Gonaives*; and because he was informed and believes, that *Dessalines*, a short time before, had exchanged a number of anchors with Admiral *Duckworth* for small-arms. He states, likewise, that he was informed by the interpreter and Aid-de-Camp of *Dessalines*, that he had received a letter from the *British* naval commander, informing him, that he had sent three frigates

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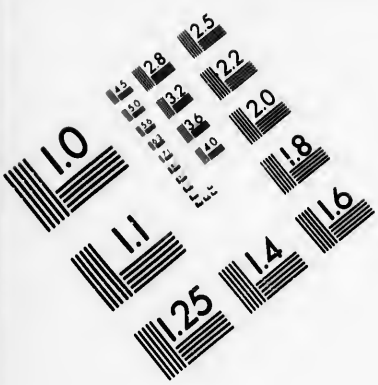
to blockade the city of *St. Domingo*, and to co-operate in the reduction of that fortress.

The whole of these depositions amounts to nothing more than mere belief, hearsays, reports, and suppositions. That *Dessalines* behaves with attention to the *English*, and is desirous of their aid, is very probable. That there should be some interchange of reciprocal civilities, and even occasional limited co-operations, between parties engaged in war against a common enemy, is extremely natural; but all these circumstances fall very short of proving what is necessary in this case, that an alliance subsists between *Great Britain* and the Emperor of *Hayti*, to such an extent as would authorize such an immense supply of ammunition, in support of the establishment of an independent government in that Island. The only question at present is that of a mere fact. Whether such an alliance is proved?---To discuss the propriety or impropriety of such a measure, is not a subject within the province of this Court; though after the many reasons both of humanity and policy, which have been often alledged against it, by men of great political wisdom, from the injustice of giving any countenance to transactions so rapacious and cruel in themselves, and the danger to our own islands, from the example, the piracies, and even the assistance which might be given to our own revolting slaves, from an independent nation of that description, in the centre of the *West-Indies*, such an alliance is not lightly, nor easily to be presumed.

Taking then, as a basis or *datum*, that *St. Domingo* was a *French* colony, and there being no proof, either public or private, that it has acquired another character, or is in alliance with *Great Britain*, to the extent this case requires; and it being proved



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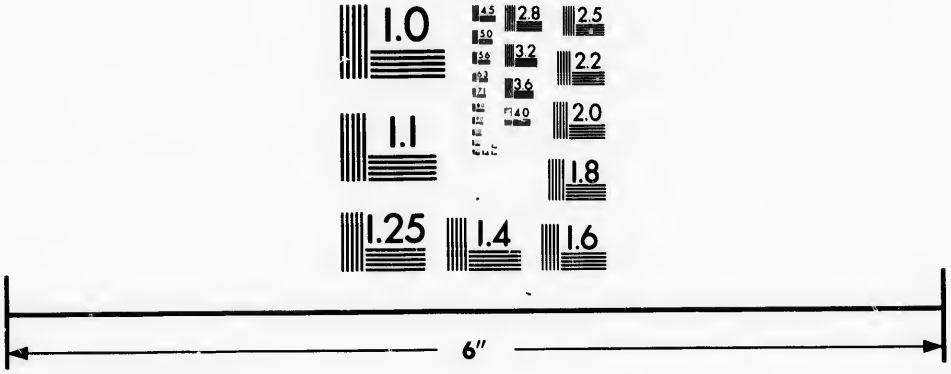

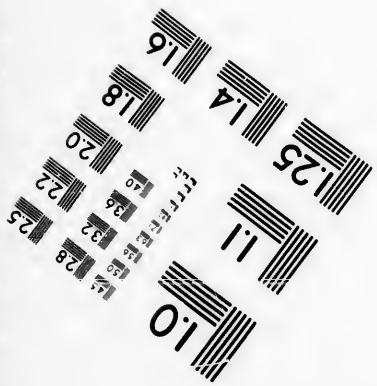

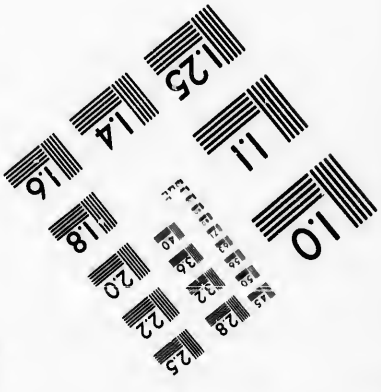

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that this vessel carried out gunpowder to a large amount, of which the present cargo is in part the return, I feel myself bound to decide, that it is a case which comes under the exception in his majesty's proclamation, and consequently is liable to confiscation.

Such is the judgment which this Court thinks it incumbent upon itself to pronounce, under the evidence before it. And I conceive such sentence to be the readiest way of enabling the claimants to avail themselves of any circumstances in their favour, which possibly may exist, though not, hitherto, satisfactorily proved in this Court. I see insuperable difficulties in their obtaining, by any other mode, such proof of any alliance between *Great Britain* and *St. Domingo*, as would be necessary to support their case; by an appeal, the whole business will be brought before the *Privy Council*, comprehending of course, his majesty's ministers, who are informed from their own direct and immediate knowledge, of what relations of amity may subsist between those two countries.

Note. Upon appeal the sentence in this case was affirmed, 17th *March*, 1808, when the court of appeal decided that nothing had been declared or done by the *British* government that could authorize a *British* tribunal to consider this island generally, or parts of it, (notwithstanding a power hostile to *France*, had established itself within it) as being other than still a colony, or parts of a colony, of the enemy: the trade to *St. Domingo* was placed upon a new footing by the orders in council of the 19th of *November*, 1806, the 11th of *February*, 1807, and the 15th of *July*, 1807. After these orders, such ports of that island as were not in possession of the enemy were considered as not within the principle

of the *Happy Couple*. See *Edwards's* Reports, vol. I. page 1. The *Manilla, Barret*,

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The SUCCESS, *Samuel Day*, Master.

May 20th, 1805.

A SCHOONER from *Guadaloupe* to *Baltimore*, on a return voyage, taken by the *Driver*, *J. Nairne*. She was claimed by *S. Day*, for *William Walm* and *Lewis Hollingsworth* and Son, of *Philadelphia*, as owners of the ship, and of 97 hogsheads, 5 tierces, and 42 barrels of sugar, 8 barrels of coffee, and 4 boxes of castor oil. The claim stated that she sailed the 19th of *December*, 1804, for *Guadaloupe*, with 10 cables, unwrought iron, 14 rolls of sheet lead, leather, flour, and nails, the property of *S. Clarkson*, of *Philadelphia*, merchant, to whom she was chartered. The cargo was delivered to *Robert Hollingsworth*, to whom it was consigned. The master believes the return cargo to be the property of *Hollingsworth*. In his examination, the master deposed that the vessel had been under the management of *William Walm*, with respect to her employment in trade. That there was a charter-party, but the consignee, *Robert Hollingsworth*, nephew of *Levi Hollingsworth*, broke the charter-party, tore it to pieces, and deponent's letter of instruction. The charter-party was between the owners and *Samuel Clarkson*, sole owner of the cargo out. He does not know the terms. The manifest, and other papers, relating to the outward cargo, did not mention the contraband articles. The log stated the landing of the cables.

Contraband out, confiscation.

The Success.

May 20th, 1805.

JUDGMENT.---Dr. *Croke.*

The facts and the principles in the case are perfectly clear. It depends upon his Majesty's instructions of the 24th of *June*.

It is said that *Guadaloupe* being open to neutral trade after the peace, it is taken out of the instructions.

But the interval before the two wars, was very short, it was rather a new truce, both parties being still armed. If the port was open, it was still the effect of the pressure of our forces. *France* had not recovered, her merchant vessels were destroyed, and she was under the necessity of employing neutrals till her navigation and commerce were restored, therefore it cannot be concluded, that the *French* colonies would continue open in peace. The general principle of colonial monopoly, is not to be controverted. It is the general principle, that all trade with colonies is unlawful. This rule is relaxed by instructions, which are under restrictions, and conditions. One of these is, that they are not supplying, and shall not have on the outward voyage supplied, contraband.

This vessel carried out cables, and other contraband articles. *Guadaloupe* is an island of naval equipment. One cannot but observe the strange course of *American* commerce. We have lately had cases of vessels armed for protection against *French* cruisers, loaded with papers full of complaints of the depredations upon the trade of *America*. Here a vessel has been brought in, which had been supplying those cruisers with the means of equipment, and of annoying the trade of their fellow citizens.

It is said that the noxious part of the outward cargo did not belong to the owners of the ship and return cargo.

The Success.

May 20th, 1805.

But first: I do not know that I have any business to enquire into the ownership. For this trade being permitted only on express conditions, those conditions having been broken, the whole trade to the enemy's colony, as far as this voyage is concerned, becomes unlawful in itself, by whomsoever carried on. It is a mistake in the claimant's counsel to argue it as a case of simple contraband. The cases upon that point do not apply to this.

And, secondly: There is no proof whatever, as to the ownership of the contraband. It is not mentioned in any of the ship's papers, the vessel indeed was chartered to another person, but the charter-party, and the instructions to the master, were destroyed by the consignee at *Guadaloupe*. There has likewise been a fraudulent concealment of the contraband. There are false clearances, and manifests, in which they are omitted. The bill of lading is likewise false, not only by the same omission, but by inserting other goods which were not on board. As the contraband, which did not appear in the papers, occupied a large part of the vessel, these supposititious goods were inserted into the papers, in lieu of the contraband, to prevent any suspicion from the vessel appearing to have a very short cargo. In the bill of lading, the master is stated as the consignee, though it is evident that the owner's brother at *Guadaloupe* was the real consignee. All the parties engaged in the concern must have been cognisant of the fraud and parties in it.

This vessel having carried contraband to a *French* colony, under such aggravating circumstances of fraud, and false papers, I have no hesitation in *condemning both ship and cargo.*

The separate adventures to be restored upon proper claims being given, provided the property can be proved.

July 17th, 1805.

The Schooner, ELIZABETH, *Garret Benners*.

Blockade of *Curacoa*. Fact of. Excuses insufficient.

JUDGMENT.---Dr. *Croke*.

THE case, as stated by the master, is that of a vessel bound from *Saint Thomas's* to *Laguira*, from thence to *Curacoa*, and to *New York*. It is alledged by the captors, that the blockade of *Curacoa* has been broken. The supercargo in his claim denies that any blockade of that port existed at the time when the vessel entered that port, or departed from it, and the parties are at issue upon that fact. The claimant's state of the case is contained in the examination of the master. He says, "that the vessel sailed from the island of *Saint Thomas* upon the 3d of *April*, for *Laguira*, where he arrived upon the 10th of *April*. He was there permitted neither to enter, nor to take water. He left it the same afternoon for *Curacoa*, as he received a letter from the shore, informing him that the blockade of that place was raised. He arrived at *Curacoa* on the 11th of *April*, when he was commanded to land his flour, and other provisions, and then thought it best to dispose of all his cargo, and to purchase the present, which he accordingly did, and sailed in *May* for *New York*, upon which voyage he was captured by the *Leander*." To the second additional interrogatory he answers, "that he knew that *Curacoa* had been under blockade, but he understood at *Laguira* that it was *raised*. He got in about sun down, saw one ship off the harbour, which he took to be a man of war, but he did not perceive her till he was just going in, that she was standing off, and did not attempt to speak the schooner, and he was told that it was an *English* frigate, commanded by Captain *Murray*." The mate deposes "that there was a

The Schooner ELIZABETH.

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charter-party for 600 dollars freight to *Laguira*, but a proportionable allowance was to be made, if the voyage was altered, or extended." To the second additional interrogatory, he swears "that they only went in for a supply of water." Amongst the papers is a protest of the master, made at *Curacoa*, stating that "he entered that port on account of being short of provisions."

Now the whole of the correspondence found on board this vessel, and the rest of the evidence, most clearly prove the existence of the blockade, at the time this vessel went in, when she came out, and during her continuance there. The master admits that he saw Captain *Murray* off the port. In the log-book of the *Volunteer*, which has been invoked with other papers from that vessel, it is expressly stated, that the *Volunteer* was near being taken in entering the port of *Laguira* by an *English* frigate, on the 12th of *April*, the very day on which this schooner entered the same port. And this vessel's entering the port safely may be accounted for by what the master says, that "he got in at sun down," probably when it began to be somewhat dark, or allowing a little latitude to the expression, if the truth had been fully divulged, when it was quite night. There are letters dated in *April*, which have such passages as these in them. One says "there has been no commerce this long while, and there is a great deal of wretchedness." "The *English* continue to visit us, though only with one frigate, and a schooner, the greatest risques attend our commerce." In *May*, other letters say, "the blockade is now continued so strictly, that it is almost impossible for a vessel to escape, *in* or *out*." Again, "there is so close a blockade, that vessels cannot escape." The place cannot hold out if they continue this block

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ade." Another speaks of "the descent of the *English*," and says, "the *Elizabeth*, the *Volunteer*, and other vessels are still detained by the watchfulness of Commodore *Murray*, although it is expected that the lateness of the moon will enable them to get out in two or three days." How the schooner made her escape is not stated, or at what hour she sailed.

The fact of the existence of this blockade being established, the excuses set up for the breach of it, are too slender to afford a justification. The parties must have known the situation of *Laguira*, and that the vessel could not have been permitted to enter there, before she sailed from *St. Thomas's*, from the vicinity of the two places, and the nsual course of trade; yet the destination was originally to that place, without any alternative in the ship's papers. The charter-party does not appear. It was very convenient to hold out an ostensible destination to *Laguira*, to enquire there if it was safe to go to *Curacoa*. The letter which the master states himself to have received off that port, to inform him that the blockade was raised, is not produced. There is great reason therefore to believe, as the pretended place of destination was not open to them, that the voyage was really to *Curacoa* from the commencement. The loose information received at *Laguira*, that the blockade was raised, can afford no lawful excuse, as has been long since decided. The excuse of the want of water and provisions, is not proved, and would not be sufficient if it were. The master does not mention it. The cargo consisted in part of flour and provisions. The mate's evidence is contradictory, he says, "they should not have gone in *on any account*, if they had not been credibly informed that the blockade was taken off." This is inconsistent with a plea of

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necessity, which could not be very pressing, if it allowed them to go to another port. It is besides, improbable in itself. Without having experienced any delay to exhaust their stores, it is unaccountable that so little water should have been taken in originally, as to be exhausted in so short a time. The failure of their excuses, shews plainly, that the voyage was premeditated. What is alledged by the master? that he went in merely for water, and had no intention of selling his cargo there, till he was commanded by the government to land his flour, is not confirmed by the supercargo, who, without saying any thing of this alledged force, swears that the whole cargo was unloaded, and, that finding the market low, he directed the master to clear out for the *Havanna* till they altered their minds.

I condemn vessel and cargo.

NUESTRA SENORA DEL CARMEN, *Andres Fernandez*, Master.

Dec. 11th, 1805.

SENTENCE.---

Dr. *Croke.* THIS vessel was captured in the *West Indies*. It has been claimed, together with the cargo, as the property of *Spanish* subjects, and therefore, is liable to confiscation; unless it is protected by a licence, found on board, granted by the Governor of *Jamaica*. A condemnation has, notwithstanding, been prayed on the part of the captors, on several grounds, which I shall consider in due order.

The importation of goods under the free-port acts, not there specified does not confiscate the vessel, and other goods allowed by the act.

The first argument was of a sweeping nature, and

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its object was entirely to throw the licence out of the case. It was said, that, as it was granted in favour of a vessel, of which Jose Domingo Orena, was described as master, it could not apply to this vessel, which is commanded by another person. But this is an objection of no weight whatever. The licence is granted, not to the *master*, but to the *owners*, *this* name is introduced merely by way of description at the time of granting it, it is mere surplussage, and a change of master can no more vitiate the instrument, than it would bills of lading, a letter of marque, or other document where his name appears. The identity of the vessel is proved, by the bill of sale, and a *Spanish* passport, on which the names, and the changes of the masters are indorsed, and where it appears that Orena was in that capacity when the vessel was at *Jamaica*, and that conformably to the account given by the master, he was left sick at *Porto Bello*, when the owner himself, the present master, took the command.

As little validity is there in the next objection, that this vessel having gone first to *Truxillo*, and from thence to *Porto Bello*, for the purpose of trading, was carrying on a commerce between two *Spanish* ports, and therefore could receive no protection from a licence to trade between *Jamaica* and the colonies---and this would undoubtedly be true, if the trade had been independent of the purpose of the licence, but the licence is not confined to any one *Spanish* port, the words are general, and even in the plural number, "colonies," and it cannot be said to be a departure from it, to touch at different ports, for the very purpose of carrying it into effect. The cargo from *Jamaica*, was disposed of at *Truxillo*, and the vessel then went in ballast to *Porto Bello*, to take in her return cargo.

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It has been argued, that the real destination was not, as pretended, to *Jamaica*, but to *Cuba*. Supposing this fact to be fully proved, I do not see that it *necessarily* carries condemnation with it. It would still remain to be shewn, that the vessel was going for purposes not connected with the licence, for all the ports of that island are as open to it as other *Spanish* colonies, those of *San Jago* and *Barracoa*, only by name excepted. Nor can I think that the intention of touching at *Cuba*, merely to land the two *Spanish* officers, would deprive the master of the protection of his licence. It is admitted that they were not taken on board by his voluntary act, but that he was compelled to receive them by the order of the *Spanish* government. Now, if he had found himself obliged actually to have taken them immediately thither, this intervention of a superior power, perhaps would have justified his going there for that purpose only, though a deviation from the licence. Every fair allowance must be made for persons who engage in a trade of this nature, prohibited by the *Spanish* government under penalty of death.

But the master has had recourse to no such pleas, he positively denies any intention of going now to *Cuba*, and asserts that he was actually bound to *Jamaica*. This court has no means of looking into men's bosoms to see their intentions, it can judge only from overt acts by which they are manifested. It must weigh the evidence produced before it, and determine on which side there appears a preponderance. One of the most natural circumstances would be the situation in which he was found at the time of capture. If the vessel had been taken near a port of *Cuba*, and sailing in that direction, such a conclusive fact would outweigh any declarations, or oaths to the contrary, but it happens that in this

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case the situation is not decisive either way. She was indeed out of her direct course for *Kingston*, yet had not deviated beyond what the force of winds and currents might have driven her; which is alledged by the master to have been the case. This point, very material to the cause, depending upon a knowledge of navigation, and of the *West Indian* seas, was referred by the Court to the examination of three gentlemen approved by the parties, and well-skilled upon that subject. They have reported that "having fully considered the nature and course of the winds, &c. as stated in the affidavits, and examinations of the master and seamen, they are unanimously of opinion, that from the winds, and from light airs, calms and currents, and the master's ignorance of navigation, the said vessel might have fallen so far to the northward and leeward of the port of *Kingston*, as to have been found in the situation. where she was captured." (Lat. 18d. 28m. long. 80d. 36m.)---This report confirms the probability of the master's account, but taking the ship's situation to be a circumstance merely doubtful in itself, let us examine the other evidence. The ship's papers, which all express a destination to *Cuba*, are admitted to afford no proof, because she was obliged to clear out for a *Spanish* port. All the witnesses positively swear that they understood and believed that the vessel was going to *Jamaica*, and they are six in number, all of them unexceptionable, and two of them *Spanish* officers of high respectability. One of the passengers, a young merchant, was going for the express purpose of learning the nature of this forced trade with *Jamaica*.

It is admitted that the master's taking on board the *Spanish* officers, by order of his government whose object certainly was *Cuba*, is not decisive,

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because he was obliged at *Porto Bello* to hold out that destination, and could not confess the falsehood of his papers; but it is said that his having large packets of letters directed thither, was a voluntary act, and shews his real intention.---Now, not to mention how difficult it might have been for him to avoid taking such letters without betraying the nature of his trade, it is certain those letters, and the officers might have been forwarded from *Jamaica* by other opportunities, and the master even tells us, that he designed taking out another licence at *Jamaica*, which would have enabled him to go from thence to *Cuba*.

The two officers went on board under the idea that they were bound to *Cuba*. After two or three days the master informed them that *Jamaica* was his destination. It is improbable that he should have told them so if it were not true, for it would have been one of the most impolitic falsehoods that ever were uttered. The officers were highly offended by it, one of them deposed, that he would never speak to the captain, after being told by him that he was bound to a different port from which he pretended at *Porto Bello*. Their indignation is apparent in their examinations. Such information given them must have been fatal to the master, in case they had fallen in with *Spanish*, or *French* cruisers, to whom the officers, angry as they were, would have not have failed to communicate it. On the other hand policy would rather have dictated to him to have still held out his original supposed destination.---This would have secured him from all danger from *French* or *Spanish* vessels, and the licence, coupled with an explanation of the manner in which the officers had been put on board, together with the course of his voyage, would have justified

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him to any *British* cruiser. Discretion then suggesting a directly contrary conduct, it is scarcely possible that he should have been telling an useless falsehood, at the hazard of his life.

The general opinion of the witnesses, that they were bound to Jamaica, is confirmed by circumstances; they all invariably depose that the master was afraid of *Spanish* or *French* vessels, and endeavoured to avoid them, and that he had no fear of *British* cruisers. Even one of the officers, certainly not friendly to the master, swears that he believes the reason of his endeavouring to escape from the *Mermaid*, was because he feared she was either a *French* or *Spanish* frigate, and they depose likewise, to his not being apprehensive of *British* vessels. If he was really bound to *Cuba* these fears were unnatural.

It has been argued that the copper on board, which is an article that cannot legally be imported into *Jamaica*, though it is well calculated for *Cuba*, a place of great naval equipment, is a proof that the destination was not to *Kingston*. That copper cannot *de jure* be imported into *Jamaica* is certain, but it is equally true that the governors of *British* colonies often *de facto* permit the importation of commodities not authorised by law, and the master swears positively that he took the copper on board knowing that article was permitted to be imported into the Island of *Jamaica*.

To sum up the evidence then upon this point, the situation in which the vessel was captured is ambiguous; the witnesses unanimously depose to their belief of destination to *Jamaica*, and that opinion is rather corroborated than rendered improbable, by all the other facts in the case. The preponderance is therefore greatly in favour of the master's account, and by every rule of evidence, this Court is under

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the necessity of considering this vessel as actually bound to the port of *Kingston*.

Upon this supposition a very material question arises, "whether the vessel and the whole of the cargo are not liable to confiscation for importing copper into the Island of *Jamaica*, being an article not included in the licence."

It is necessary to consider this question in two points of view, *first*, with reference to the statutes upon which the licence is founded, and *secondly*, as between enemy and enemy, under the law of nations.

1st. This species of trade which is contrary to the general navigation system, is authorized by what are usually called the Free Port Acts, and principally by the 27th of *George* III. chap. 27. This statute enacts, that no other goods, besides those which are enumerated, can be imported under pain of forfeiture, together with the vessel. That the copper and the vessel therefore are liable to forfeiture, under this act, cannot be doubted, provided the prosecution were carried on before a court of competent jurisdiction. But it is enacted in section 9th that all forfeitures shall be prosecuted and sued for in the same manner as by the laws of revenue, trade, and navigation. Now it was decided in the case of the *Fabias, Cooper*, (*Robinson* II.) upon the authority of the case of the *Dorothea*, determined by the Court of Appeal, that as a *prize Court*, no Court of Admiralty has jurisdiction in revenue cases, and that as an *Instance Court*, which is the proper tribunal for causes of that nature, a Court of Vice-Admiralty has no authority to take cognizance of offences, committed not within the limits of its local jurisdiction.* As to penalties, therefore, under those laws

* The jurisdiction of the Instance Court was afterwards extended by act of parliament.

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incurred at *Jamaica*, I apprehend this Court has no power to inforce them; not by *one branch* of its jurisdiction, though extending to the place where the offence was committed, because the *subject matter* is not within its cognizance; not by the *other* branch, which has cognizance of the subject matter, on account of its locality.

2d. To consider the case, independently of the acts of parliament; it has been argued that the licence is conditional, and that the importance of commodities not expressly mentioned, is a breach of the condition, that consequently the licence is entirely annulled, and the whole is liable to forfeiture as enemy's property unprotected by licence.

It is necessary to see upon what ground these licences rest. The general permission to trade between the *Spanish* colonies, and the free ports, as I have before observed, is granted by the statutes above quoted. Though the words are very general, and without limitation, I apprehend that the state of war intervening between *Spain* and *Great Britain*, would suspend their effect. His majesty therefore, with whom it rests to relax the rigid rules of war, before hostilities, and as early as *September* 1803, issued his instructions to his commanders, "not to seize *Spanish* vessels trading to the free ports, provided in case of hostilities, such vessels should be required to have a licence from the governor." After war was declared, instructions were sent to the governors, authorising them to grant licences both to *British* and *Spanish* vessels, under which power the present licence was issued by governor *Nugent*.

These licences then being founded upon the free-port acts, for the proper construction of them we must look to the purport and intention of the legislature there expressed. Now it is evident that the

framers of that act did not consider the importation of non-enumerated articles as a breach of the condition, and a forfeiture of the licence itself, because they have imposed a specific penalty for such illegal importation, which would in that case have been unnecessary; and it must be observed, that the penalty so enacted is less than what would take place if such importation was a breach of the condition, and annulled the licence. The statute confiscates the non-enumerated goods, and the ship, but does not extend to the articles enumerated, which it should seem would not be forfeited, with the prohibited goods. If such importation were a breach of condition, and destroyed the licence, the whole would be unprotected, and would be confiscable; in peace under the navigation acts, and in war likewise, as enemy's property.

I am sorry the industry of the gentlemen at the bar has not been able to discover any case upon these licences granted to subjects of the enemy, nor am I aware that any such exist. Cases, indeed, there are many, of licences to *British* subjects to trade with the enemy, which seem to have pretty well settled the law upon that head, and it is very material to the present cause to ascertain how far they are applicable to licences of this species. In those cases it was held, as past all dispute, that the importation of non-enumerated goods was no breach of the condition, for though the illegal commodities were condemned, the vessel, and the lawful part of the cargoes were restored by consent. I cannot think that any little variation in their forms, with with which by the by, we are not here much acquainted, can make any material difference between the two cases. Wherever there is an enumeration of articles, it must be understood to be exclusive

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whether there are any words of exception, or not; and though these exceptions may be expressed in something of a conditional manner, they must be understood with reference to the original act of parliament, upon which they are founded, and of which the licences are merely the execution, and as we have already seen the legislature in those acts did not hold such importation to be a breach of the condition.

It is an inviolable maxim of the law of nations, that all engagements with the enemy should be observed with the greatest good faith and liberality. I know of no mode by which this maxim can more properly be carried into execution, than by adopting towards them the same rule of construction which is applied to similar grants of privileges to our own subjects; at least, to use a harsher construction, would scarcely be consistent with good faith, and liberality.

If this be true generally, it seems more particularly reasonable in *these cases*, in which subjects and enemies, seem to stand precisely in the same situation; both with licences, and without them. A subject who trades with the enemy without a licence, is considered as acting in a character hostile to his own country. It is aiding and abetting the enemy, and doubts have formerly been entertained whether it did not amount to a species of treason. Even at present it may be observed, that property seized in that traffic is condemned as prize, that is, as enemy's property. On the other hand, by a licence to the enemy, the hostile character is completely suspended, as far as the licence extends, and the grantee becomes *pro hac vice* a neutral, and even entitled as in such case where he is admitted to partake of a monopolized trade, to the privileges of a *British* subject.

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Those cases of licences to *British* subjects were decided principally with a view to the municipal law; transactions with the subjects of the enemy, are governed by the law of nations, the only law which is equally binding upon both parties. Let us see what principles have been laid down upon this head by eminent writers in that species of jurisprudence. Grotius, and it is impossible to quote a higher, or more venerable authority, is remarkably clear and explicit upon this point. *Jus commeandi est privilegium neque tertio noxium, neque danti admodum grave; ideo intra verborum proprietatem laxa magis quam stricta interpretatio admittenda est, eoque magis si non petenti datur beneficium, sed ultro oblatum sit; multoque magis, si ultra privatam publica quodam utilitas in negocio vertatur. Rejicienda ergo stricta interpretatio, etiam quam ferunt verba, nisi alioqui absurdum aliquod sequereter.* (Lib. III. c. 21. § 14.) that is, a safe-conduct, of which these licences are a species, is a privilege neither injurious to a third party, nor burdensome to the grantor; provided therefore it be within the proper meaning of the words, an *extended,* rather than a *strict interpretation* is to be admitted; and the more, if the privilege is spontaneously offered, and not at the instance of the grantee, and with still stronger reason, if besides the benefit to the parties, it is for the public good. A strict interpretation is therefore to be rejected, even if the words will bear it, unless an absurdity would follow.

Now it must be remarked that this case comprehends all those circumstances which this great man lays down as the strongest grounds for a most extended interpretation---for the privilege of trading to the free-p[illegible] is spontaneously offered by the *British* government to all who choose to apply for it, and

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besides the benefit to the parties, it is a species of traffic encouraged solely for the advantage of his majesty's dominions.

In the case of *British* licences under the municipal law, it is held that licences being high acts of sovereignty are necessarily *stricti juris* (*Cosmopolite, Mathieson, Rob.* IV.) But, nevertheless, the importation of non-enumerated goods is decided not to be a breach of the condition. If then, under that law, by which licences are of strict interpretation, it is no breach of the condition, how can it possibly be held to be so under the law of nations, which points out a most extended and liberal mode of interpretation?

There is another consideration which arises in this particular case. The master swears that he knew that copper was permitted to be imported into *Jamaica.* Now, whatever may be the case with *British subjects* who are bound to be acquainted with the laws of their own country, with regard to *foreigners*, who are under no such obligation, though a permission contrary to law cannot protect the illegal goods themselves from forfeiture, yet it would be a hardship bordering upon injustice, to extend the confiscation to ship and innocent articles, in a case which is without the reach of the penalties inforced by the statutes, and where the party himself had good reason to believe that he was doing a lawful act, and especially when the condemnation prayed for would be an extension of the penalties even beyond what is inflicted by the statutes, under which *Cocoa*, the licensed part of the cargo, would not be subject to condemnation.

Having already condemned the copper and the tin, I feel myself now therefore under the necessity

of decreeing the restitution of the vessel, and such parts of the cargo as are specified in the licence.

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The FAME.

Aug. 1, 1806.

Instance Court.

American vessels may supply the fishing vessels with necessaries, and enter an uninhabited port in the course of such trading under the *American* treaty.

THIS was an *American* vessel from *Boston*, with a cargo of rum and other articles, to barter with the vessels fishing upon the *Labrador* coast, to receive fish in return, and to proceed with it to *Europe*, and was seized in a remote and uninhabited creek in this province. It was said on the part of the prosecution that this was not fishing under the *American* treaty, but trading with fishing vessels. That it was not only a breach of that treaty, but impolitic for this country to admit, as it destroyed our trade on the fishing banks. It was not argued that there was any intention of actually *importing* in the gut of *Causo*, where the vessel was found at anchor, but that she put in there with an intention of doing further what was an illegal act. An opinion from *Reeves* on shipping was quoted, in which Sir *George Treby* had said. "that though a mere involuntary importing by distress of weather is not an importation under a prohibiting act, (for though not excepted by express words yet it is in equity,) but this exception is not be extended to cases, where there is a *mala fides* and a positive intent to break the law, for that takes away all title to such favour and equity." That though by the *American* treaty the subjects of the *United States* might fish upon the coast, bays, and creeks, of all his majesty's dominions in *America*,

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they were not permitted to trade there. On the other hand it was agreed, that if the *Americans* may fish, and may even dry their fish, upon unsettled parts of the coast, they may send ships to supply their fishing vessels with necessaries. That the intention of importing into *Nova Scotia* was clearly negatived, and there is no restriction in the treaty, or otherwise, which can prevent them from sending ships to supply their own fishing vessels, or from sending vessels to puchase the produce of the fishery, to send on to market in *Europe*.

Restored with costs.

The VENUS, *Reuben Allen*.

Sep. 19th, 1806.

Taken by the Bermuda, Captain Byam.

Papers concealed, and fraud detected.

THE ship was claimed for *Eliphat Loud*, and others, and the cargo for *John Carrere* of *Baltimore*. She was bound from *Baltimore* to *Bourdeaux*, with a cargo of sugar, and other articles. A letter was discovered on board this vessel written in sympathetic ink. On applying the proper composition the letters became legible, and it was found to be therein stated, that a paper was concealed in the head of a sugar cask, No. 36, under the title of letter *I*, in which the real state of the property would be found. After a diligent search it was discovered, that a hole had been bored in the thickness of a board of the head of the cask, that the paper had been rolled up, put in, and corked. It shewed that the property claimed by *Carrere* as his own, was

The VENUS.

French property; it stated various frauds in accounts current, and as to the proceeds of cargoes, and it appeared that the proceeds of one cargo were to be used as the colourable funds for several return cargoes. It spoke likewise of the vigilance of the abominable Court of *Halifax*. Upon which the claimant's counsel abandoned *Carrene's* claim for the cargo, as being indefensible, and admitted that it was liable to confiscation. The captor's counsel consented that the ship should be restored, and the only question was as to freight.

Sept. 9th, 1806.

It was alledged on behalf of the owners of the vessel that the master was not privy to the concealment, and that the vessel was only on general freight, without charter-party. The ship with freight, and the master's adventure, restored.

On appeal, the sentence was affirmed, and the appellant condemned in costs, 20th *February*, 1809.

The information obtained from this secreted letter, furnished evidence for the condemnation of property in other vessels.

The FRIENDS ADVENTURE, *John Marshall.*

Sept. 24th, 1806.

THIS vessel and cargo were restored, but the owners claimed damages for ill usage upon the capture. They alledged that the Lieutenant who boarded them was intoxicated, that the people in the *Bermuda's* boat fired a volley of musquetry into the schooner, and cut the sails, and that they boarded in a riotous manner, with drawn swords and cutlasses, though they were informed that it was an *American* vessel. The question of damages was reserved till the return of the *Bermuda*, with Captain *Byam*.

Captors not liable to damages for firing at the rigging of a ship, which seemed preparing for resistance.

The FRIENDS ADVENTURE.

Sept. 24th, 1806.

This question was heard on the 3d of *October*, upon a number of affidavits. It appeared that the *Bermuda* had chased this vessel the whole day; that when she came up, she sent her boat; that the vessel stood towards the boat, and seemed preparing to resist, or to fire, and hoisted no colours. Upon which hostile appearances the boat fired some vollies at the rigging, and took possession. The Court held this to have been no breach of duty, and that the captors were not liable in costs and damages.

Instance Court.

Oct. 30th, 1806.

The Brig, UNION.

JUDGMENT.---Dr. *Croke.*

Clearing out to *Boston*, entering, trading, and clearing out from thence to *Halifax*, was an importation from *Boston*.

THE principal question in this case is, whether a part of this cargo was imported into the port of *Halifax*, from *Boston*, not being such articles as might be from thence imported under the statutes. The vessel sailed originally from *Trinidad* to *Boston*, and from thence hither. The cargo consists of sugar and molasses; one part of it, consisting of *Cocoa*, was landed at *Boston*. It has been argued on behalf of the claimants, that it is to be considered as one voyage from *Trinidad*. The parties themselves have decided that question. Upon all the documents it is clear that they understood that the first voyage was completed at *Boston*. At *Trinidad* they took out their clearance, and other papers, as being bound to *Boston*. A bond was given to land part of the cargo there, which had been purchased at *Trinidad*, for *Nicholas* and Company,

of *Boston*, and there to be delivered. They accordingly went to *Boston*, entered the vessel regularly, and traded there. At sailing, they cleared out from thence, and gave bond to carry the cargo to *Nova Scotia*. This constituted altogether, a new voyage from *Boston*. The bringing of this cargo from that port, was an importation contrary to the statute, and I therefore condemn both ship and cargo.

The Brig, UNION.

Oct 30th, 1806.

The THREE BROTHERS, *Daniel Fitch*, Master.

May 9th, 1807.

JUDGMENT.---Dr. *Croke*.

THE vessel and cargo are both claimed for *John Carrere*, of *Baltimore*. The voyage was from *Baltimore* to *Bourdeaux*, and she was taken upon the return with wine, brandy, and other goods. The proof of the property in the ship is complete, and of the national character of *Carrere*, who has been resident in the *United States* for twenty years, and I therefore decree restitution.

Further proof not allowed to a claimant, who had been guilty of fraud and perjury in a recent case.

The evidence, as to the ownership of the cargo, is very deficient. There are no orders from *Carrere;* the master can only swear that he believes it to be his property, because he saw a great many goods in *Ducornau's* store at *Bourdeaux* having *Carrere's* mark upon them. It is a case for farther proof, but the captors have invoked papers from a case lately tried here, the schooner *Venus, Allen*, upon which they argue, that such a mass of fraud and perjury has been there detected, that *Carrere* is entirely discredited, and not intitled to bring further evidence, which he has shewn himself so capable of falsifying.

The THREE BROTHERS.

May 9th, 1807.

That case is so recent, that it is scarcely necessary to state the particulars. It may however be shortly observed, that *Carrere* swore fully to the property as being his own. Yet in the concealed letter, it appeared to be the property of *Frenchmen*, and he directs his correspondent, the consignee of the outward, and the shipper of this present cargo, "in freighting a vessel, to send him by her an account of the sale of goods. To inhance the prices of the sale, that the remittances may appear to be the returns of goods, and to make all the papers tally." After the discovery of these plans of deception, accompanied with the most palpable perjury, and which seem to extend to this very case, I am of opinion, that Mr. *Carrere* is not intitled to the privilege of further proof.

I condemn the cargo.

N. B. This sentence was affirmed on appeal, *Nov.* 30th, 1808.

May 23d, 1807.

The Brig, CLYDE, *John Garnes*, Master.
Taken by the MELAMPUS, Captain *Hawker*,

Trade to *St. Domingo*. Equitable circumstances cannot atone for the want of a licence. Order in council not complied with. Order in council, *Nov.* 19th, 1805.

CLAIMED for *Michael Cavan*, of *Bridgetown*, *Barbadoes*, both ship and cargo. In the affidavit annexed to the claim, it was stated, that she was a *British* built vessel, with a letter of marque. That her voyage was from *Barbadoes* to *St. Domingo*, with dry goods, fish, provisions, and specie, consigned to the master and *Basil Muter*, the supercargo. She cleared out at *Barbadoes* for *Tortola*, and *St. Thomas*, and a trading voyage. She sailed for *Tortola*, *Feb.* 12th, 1807, to obtain a li-

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cence to trade to *St. Domingo*. The owner was there informed that no licences were to be had. From thence the vessel sailed and put into *St. Thomas's* for bread and water, and then proceeded to *Jaquemel* in *St. Domingo*. There she arrived the 20th of *February*, the master entered the vessel, disposed of the cargo, and with the proceeds, and the specie which he carried out, he purchased the present. On the 25th of *March* he sailed for *Liverpool* in *England*, but meeting with gales of wind, on the 4th of *April*, he was compelled to make the first port in *America*, and was endeavouring to get into the *Chesapeake*, when he was captured within three miles of *Cape Henry*.

JUDGMENT.---Dr. *Croke*.

This vessel was captured upon a voyage from *St. Domingo*, which is held to be an enemy's colony. It is a trade which is made lawful for a *British* subject *only* by the order of council of the 19th *November* 1806. Without a licence under that order, or if the conditions there imposed have not been complied with, a ship and cargo engaged in trading to that island, are liable to be seized, and condemned.

It is admitted that there is no formal licence on board this vessel, but it has been argued, that under the circumstances of the case, there is what in justice ought to be considered as equivalent to a licence. That His Majesty by the order in council having permitted a commercial intercourse to be carried on from the free ports in the *Bahama* Islands, and the port of *Road Harbour*, in the Island of *Tortola*, to *St. Domingo*, authorised the respective governors or presidents to grant licences to that effect. That it was announced in the

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Gazette at *Barbadoes*, that licences would be granted at *Tortola* to trade to *Hayti*. That in consequence this vessel was sent to *Tortola* to obtain a licence. The owner, *Michael Cavan*, went on shore there, and applied to the president of the island, but he was informed that no licences had been received from *England*; he was told likewise, that although licences were not to be had, there was no risque of interruption by *British* cruisers, as the brig *Harmony*, of *Bermuda*, which had been detained by the *Alexandria*, on a voyage from *Auxcayes*, had been sent to *Tortola*, and by a decree of the Court of Vice-Admiralty restored, and the captors condemned in costs. That at *St. Domingo*, there were a number of *British* vessels. That this vessel had on board a minute of the order in council. Upon these circumstances it has been contended, that the parties having done all in their power to obtain a licence, ought not to be deprived of the benefit of His Majesty's gracious permission to carry on this commercial intercourse, from the neglect, or ignorance of his officers. They were entitled to a licence, and the president at *Tortola*, without any necessity of waiting for further instructions from *England*, was empowered, and ought to have granted one. They might very reasonably have presumed, that from having on board a copy of the order in council, and from the information which they had received at *Tortola*, that the voyage might have been lawfully made, and as the parties had actually gone to that island, and had applied for a licence, there was no fraudulent intention of evading the law.

If these statements were correctly true, this would certainly be a case in which the parties would be entitled to every favour and indulgence, which it

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would be in the power of the Court to shew them. But I fear that it would, nevertheless, be impossible to extend any equitable relief to them, even if this case was perfectly free from any suspicion of want of good faith. The order in council requires that the licences shall be under the hands and seals of the governors, or presidents respectively, in his Majesty's name. This Court can substitute nothing in the place of a formal instrument so executed. Whatever may be the merit of the parties, the order is positive, and cannot be dispensed with.

But this is not the whole objection, there are other conditions annexed in the order in council, in which the parties have failed, and which would be sufficient to invalidate the most regular licence. The order requires that the vessel should clear out from the port of *Road Harbour*, in the Island of *Tortola*, or from the free ports in the *Bahama* Islands. Now, it is evident, that the vessel did not enter the port at *Tortola*, or clear out from thence. No clearance, or other port papers, of that island, are on board, and the log states, that they only "stood off and on."

It is another requisite, that the cargo should be of the produce or manufacture of the united kingdom. The dry goods are said to have been of that description, but it does not appear that the fish, and the provisions were *British* produce and manufacture, and certainly the specie, of which a large sum was on board, could not be so considered. The nature of the outward cargo formed a very material object in the contemplation of his Majesty's government, in permitting this trade, and the conditions in this respect must be literally observed.

The order also directs, that the articles of the produce of *St. Domingo* shall be brought back from

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thence " to the free ports in the *Bahama* Islands, or to the port of *Road Harbour*, or to some port of the united kingdom." If, indeed, this vessel had been taken in going to *Liverpool*, the order so far would have been complied with, but she was in fact entering the *Chesapeake*, and there is very good reason to believe that it was the original destination. The necessity for putting into the *United States* is not proved. On quitting *Jaquemel*, the vessel sailed to the west, went round Cape *Donna Maria*, and *St. Nicholas*, and steered north west, before the storm came on. The ship's articles state the voyage to have been to *North America*. This paper was kept back by the master upon his examination, and was not then specified as being amongst the papers. It was produced five days afterwards, and the words " *Great Britain*," appeared to have been interlined after the words " *North America*," in a hand different from that of the rest of the instrument, in a fainter ink, and lately written. When we add to these circumstances, that the vessel sailed from *Baltimore* to *Barbadoes* the beginning of the present year, which appears in the log-book, though the master was silent respecting it, when he gave an account of what former voyages the vessel had been engaged in, there arises a very strong presumption that *Liverpool* was not the real destination, as was held out in the ship's papers, but the *Chesapeake*, to which she was actually going.

The claimants, therefore, having failed in every part of their defence, I condemn this vessel and cargo as having been taken in trading with the enemy, and unprotected by his Majesty's licence.

The WALKER, *Clark.*

June 24th, 1807.

Salvage, Rescue by the Crew, &c. King's ship not intitled to salvage for performing their ordinary duty.

THIS *American* ship was captured by a *French* privateer, whilst on a voyage from *London*, to *New York*, and afterwards rescued by the master, passengers, and others, who rose upon the prize crew, and re-possessed themselves of the vessel. Soon after this event, they fell in with His Majesty's ship *Crocodile*, the commander of which ship took possession of the *Walker*, and brought her to *Halifax*. Several claims were given for salvage, and among the number, one on behalf of the captain and crew of the *Crocodile*.

On the part of the Crocodile, the King's Advocate contended---That notwithstanding the master and passengers were in possession of the *Walker*, at the time she fell in with the *Crocodile*, and although they had overcome the prize crew, and secured them for a short time, they had it not in their power to have continued their possession. That if the *Crocodile* had not appeared in sight, an attempt would have been soon made on the part of the prize crew, to recover the ship; and that the master, conscious of this fact, was desirous of availing himself of the protection of the *Crocodile*, though he was now contending against her claim for salvage.

The Solicitor General and Haliburton, contra.---The claim, on behalf of the *Crocodile*, has no *merit* whatever for its support. The *Walker* was in the complete possession of the original master, and no reasonable fears entertained of a rescue on the part of the prize crew, as those who had gained the possession, it appears, were well inclined, and well able to retain it. The assistance afforded by the *Cro-*

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codile, upon which the claim for salvage rests, is that of a mere convoy protection. It is true the prisoners were removed from the *Walker*, but that was nothing more than an act of duty on the part of the Commander of the *Crocodile;* and with regard to the few men that were sent from that ship to the *Walker*, they were of no use either in the navigation or protection of the vessel, indeed one of the passengers has asserted in his deposition, that these men were sent in the place of better seamen, who had been pressed from the *Walker*. The *Crocodile*, therefore can be entitled to no salvage.

SENTENCE.---Dr. *Croke*.

The monition in this case, and the allegation, are as in a prize cause. There is a claim of *Eber Clarke*, the master, for the ship, on behalf of *Seth Russel* and Sons, of *New Bedford*, in *Massachusetts;* on behalf of *Russel* and Sons, and various other persons, for the cargo, who are all named in the bills of lading and manifest, are all of *New York*, and citizens of *America*. No opposition is made to this claim, or to the restitution of both ship and cargo to those persons. The Court has only to decide upon several claims for salvage. There is a petition of *Cornelius Hatfield*, Esq. an half-pay Captain in his Majesty's service, and *Richard* and *James Spinks*, stiling themselves yeomen, and *British* subjects, as re-captors. A petition of *Lawrence Hartshorne* and *Thomas Boggs*, agents for the *Crocodile*, on behalf of the officers and crew of that ship, as re-captors likewise. Some affidavits are annexed to the claim and the petitions, and seven examinations have been taken. The facts will appear principally in the master's examination, upon the standing interrogatories. He there states "that the vessel loaded in *New*

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York, in *January* last, with a cargo of wheat and flour, and, after touching at *Falmouth*, proceeded to *London*, where she sold her outward cargo, and took on board her present cargo, with which she sailed on the 15th of *April*, bound to *New York*. She was captured on the 28th of *April* by a *French* privateer, in lat. 49° 6*n*, long. 27°, who assigned as a reason that the goods on board were of *British* manufacture, and as such confiscable. The prize crew were endeavouring to make the first port in *France*, or *Spain*, when, on the morning of the 1st of *May*, the master, with his people, and the passengers, rose upon the prize crew, and retook the vessel: after disarming them, and being in complete possession of the ship, about seven hours and an half, he was boarded by a boat belonging to the *British* ship of war, the *Crocodile*, who took possession of his ship (notwithstanding he had explained to them the whole transaction, and he knows of no pretence or cause for his detention by the *Crocodile*) and brought him into this port. That he was making his way for *New York* after the recapture; that the captain of the privateer removed the chief mate and five of the crew, with three of the passengers, and put on board two officers and seven men, and that there remained the captain, the second mate, four of the crew, with four passengers, and a Mr. Sniffan, mate of a ship of *Philadelphia*, which had been captured by the *French* privateer." The owner having appeared under protest against the jurisdiction of the Court, because the captors had abandoned their prize allegation and had proceeded for salvage only, the protest has been overruled on the authority of the case of the *Two Friends*, *M'Dougall*, (*Rob.* I. 272,) and the case comes on now upon the merits of the parties. Though this is

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a neutral vessel, it is clearly a case for salvage, on account of *Bonaparte's* decree, by which he has declared the *British* islands in a state of blockade, and confiscated all vessels engaged in trade with them. It is admitted that the persons left on board actually recovered the ship from the *French*, the only question *as to them* is the quantum, and the distribution of the reward. There is some little difference in the evidence, chiefly as to who first thought of the rescue. Every man is the hero of his own tale. This throws no discredit on their evidence. It must have been planned in secret, in whispers, there could be no general council of war. It seems to have suggested itself to several of them, which was natural, and the others readily concurred. From an apprehension of discovery, the attempt was made suddenly and unpremeditatedly before the time fixed. The master going below, and being shut down, could not from his situation be so active as the others. Captain *Hatfield* was certainly the leader upon this sudden and premature commencement of the attack, and directed the rest. It was a service of great danger and merit as they were inferior in number to the *French* and *Spaniards*, and though no blood was shed, it was owing to the cowardice of their enemies. The *Crocodile's* interest requires rather more consideration. This is not a case of recapture under the prize act, because the *Crocodile* did not rescue the vessel from the enemy, that was done by the passengers and crew. But it may be a salvage case of service and merit.

The petition states three points of service, first, protection; secondly, taking the prisoners; and thirdly, putting men on board to navigate her.

The claim is supported by only one affidavit; from a quarter so respectable, from a person so conver-

sant in maritime affairs, and so disinterested, every particle of testimony must have the weight and value of gold. But, unfortunately, Captain *Hickey* appears to be perfectly unacquainted with any of the circumstances upon which this claim must be founded. It must rest, therefore, upon the examinations taken in preparatory, and the affidavits of the other claimants of salvage.

1st. The *Walker* was indebted to the *Crocodile* for protection against the *French* privateer, which, however, does not seem to have made her appearance, after they had joined the *British* fleet. To protect vessels against the common enemy, is part of the duty of a *British* commander, and it has been repeatedly settled that mere convoy, and protection, are not such services as to be entitled to salvage.

2d. In taking out the prisoners, though a benefit to the *Walker*, the captain of the *Crocodile* was doing a part of his military duty. If they had been taken to the *States* they would have been set at liberty, and would have gone on board *French* ships to fight against *Great Britain*. It was the general duty of a *British* commander to secure the enemies of his country, and those of the most injurious description, and in this he could not have been considered as performing a service of salvage. It is not alledged, or proved, that the *French* prisoners could not have been so secured as to render the *Walker* safe from any future attempt to regain the vessel.

3d. The merit of putting a number of men on board to navigate the vessel, and of bringing her safe to *Halifax*, must depend upon the want which the *Walker* had of them; if they were unnecessary, and the *Walker* had a sufficient crew to carry her safely to *New York*, and if no request was made for

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them, it could not be considered as any special service rendered.

Captain *Hickey* says nothing upon this head. All the witnesses, seven in number, concur in swearing in the most positive terms, that the crew was perfectly competent to the voyage, and that they were not in want of any hands from the *Crocodile*, that the master did not ask for any, and expressed his surprise that men should be sent on board.

If we look at the facts themselves, we may perceive that there were eleven persons on board, the captain, the second mate, four of the crew, and *Sniffan*, the mate of another ship. These were all seamen, and though two of the crew are stated to have been sick, it does not appear that their disorder was of such a nature as that they might not have recovered, or have been capable of doing some duty. Besides these, there were four passengers, Captain *Hatfield*, whose courage and activity are sufficiently proved by his share in the rescue, and the two *Spink's*, fine active young *Sussex* yeomen, capable of any duty imposed upon them. The new *Orleans* man, indeed, was considered rather as an enemy than a friend, but here were seven sailors, and three useful landsmen, in all ten, and the original crew consisted only of twelve.

I can decide only by the evidence before me. That is all one way. It is said that the witnesses have all an interest. This is true, but there is nothing to oppose to their testimony. It is uncontradicted either by any other testimony, or by the facts. A weak degree of evidence is sufficient to establish a point, where there is nothing to counterbalance it.

I must pronounce therefore, that the *Crocodile*

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has failed in the proof of her petition, and that she is not intitled to salvage.

There is another point to consider. If it is admitted that the *Crocodile* had no ground whatever to proceed against this vessel as prize, and since it appears that she had no legal claim to salvage, it has been argued that she had no right whatever to bring her into this port, and therefore ought to pay costs and damages.

To these I should hold the *Walker* to be intitled, if there had been no good reason for bringing this vessel to this port, but undoubtedly some service was performed to her by the *Crocodile*. She was protected from the *French* privateer. It does not fully appear that though the *Frenchmen* were subdued, that they were actually in irons, or confinement Taking out the prisoners was a great security, though perhaps after this had been done, every essential service was performed, and the *Walker* might have been suffered to proceed on her voyage. It is in evidence, that the *Walker* ran eagerly to the *Crocodile*, and that they considered themselves *till then* in great danger, and that they prepared to hoist a signal of distress. When the *Crocodile* came in sight, Captain *Bettesworth* might have put men on board under a supposition, though erroneous, that he was doing a service to the ship. If sailors were put on board, it was necessary to bring the vessel to *Halifax*, that the *Crocodile* might again receive her men. After the conduct of the *States* towards *British* seamen, by promoting desertion, it would have been madness to send them in this vessel to the *States*. The delay occasioned by the vessel's coming here, was perhaps fully compensated by the security of the convoy, and this port is but little out of the way.

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I am of opinion, therefore, that though the *Crocodile* has not made out such a case as would intitle her to salvage, yet that her services have been sufficient to warrant me in decreeing that her costs should be paid by the claimant.

In ascertaining the salvage due to the other parties, I shall adhere to the established principle of considering rank and station, in apportioning it, and I decree, on the authority of the *Beaver*, *Conner*, (Rob. III. 292) and other cases, one sixth of the value of the ship and cargo, of which, one half to be divided equally between the master and Captain *Hatfield*, the other half to be divided in equal portions between the other four persons, who appear to have effected the business without any help from the others, that is to say, *Richard Spinks*, and *James Spinks*, *Sniffan*, and the mate.

Instance Court.

July, 1807.

Schooner FAME.

Certificate of probable cause of seizure must be granted upon the facts appearing in the cause. Not necessary to prove them to have been known at the time of seizure. False papers, probable cause.

UPON the 4 *Geo.* III. c. 15. §. 46, which enacts that "in case any information shall be commenced, and brought to trial in *America*, on account of any seizure of any ships or goods as forfeited by this, or any other act of parliament relating to His Majesty's customs, wherein a verdict, or sentence, shall be given for the claimants thereof; and it shall appear to the judge or court, before whom the same shall be tried, that there was a probable cause of seizure, the judge or court before whom the same shall be tried, shall certify on the record, or other proceedings, that there was a probable cause for the prosecutors seizing the said ship or goods; and in

such case the defendant shall not be intitled to any costs of suit whatever; nor shall the persons who seized be liable to any action or suit on account of such seizure," See *Sullivan* against *Montague Douglas*, 102.

SENTENCE.---Dr. *Croke.*

This is a question upon the admissibility of certain affidavits offered to the Court upon a motion to obtain a certificate of probable cause of seizure, upon the act of the 4th of *Geo.* III. c. 15. §. 46. The Court, no doubt, will not debar parties from making such affidavits if they think proper, as a foundation for their application, and of course will permit them to be read. But in forming its judgment upon the propriety of granting a certificate, the Court can take into its consideration, no fresh facts, nothing more than what appeared upon the trial of the cause.

What is the certificate? That in a certain cause, tried before the Court, there appeared probable cause of seizure. How can the Court so certify, when it did not then appear in the cause itself? Every word in the act refers to the trial of the cause. It is directed to be certified on the record, or other proceedings. To what else then can it bear relation, but what is there contained, the pleadings in the cause, or the evidence brought in support of them? It is to be given only where a cause is brought to trial; a verdict, or sentence, must be given, and it can be granted only by the judge or court before whom it is to be tried. To admit fresh facts, would be in reality to begin a new cause. It is admitted that the other party should have an opportunity to answer them. To what length such proceedings might go it is impossible to say.

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The costs form a very material part of every cause, sometimes the most material, and are consequently a very essential and integral feature in the decree of the court. The first effect of the certificate is, that the defendant in the original action shall not be intitled to any costs of suit whatever. It is equivalent therefore to a decree of the court to that purport. Now it would be the height of absurdity to suppose that the court could decree against the defendant's receiving costs, which he would regularly be intitled to in consequence of the judgment in his favour, upon the ground of a probable cause of seizure on the part of the plaintiff, when no such probable cause was proved in the course of the suit itself, to which the question of costs referred, but were merely brought forward after the cause had been decided.

The next effect is to be a bar to actions, that is, to deprive parties of a legal remedy if they conceive themselves injured. The facts therefore should have been fully proved in the course of the cause, not merely rest upon subsequent affidavits. They should be as perfectly established by evidence as any other part of the case.

It was objected that seizing officers might be deprived of the benefit of this act from having omitted to plead and prove facts, which though they would shew a justifiable cause of seizure, they had not thought material, or relevant to their case, and therefore had not introduced them in the cause. It is difficult, I think, to conceive any circumstances which could amount to a probable cause of seizure, without being likewise evidence tending to prove the offence for which the vessel was libelled. Were they otherwise, I can see no impropriety in alledging, or proving, what would affect the costs in the suit.

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I shall consider this application, therefore, upon the original evidence merely, without attending to those affidavits. The prosecutors having failed in supporting their allegation, and it even being admitted, that there were no facts to prove an importation, the only offence which has been charged, costs followed of course.

The act of parliament intervenes in favour of officers, and enacts, that if the court shall certify that there was a probable excuse of seizure, the defendant shall be intitled to no costs, and the seizers shall not be liable to any action. The grounds upon which the court ought to grant a certificate, I apprehend to be where the proof is doubtful, though not sufficient to establish the facts, or where nice points of law may arise, or where certain other circumstances appear in the case to afford good reasons for suspicion, not of a vague and loose nature, but such suspicion as is just and reasonable. It is not necessary that there should be proof that the circumstances were known at the moment of actual seizure. It is enough if they are proved afterwards. Because it may be difficult to ascertain by direct evidence upon what ground or information, the officer may have proceeded; and secondly, it would be a bounty upon fraud, if parties by concealment could prevent officers from the benefit of the act. I think them intitled therefore to the benefit of all circumstances which may appear, although it should not be proved that the officers were cognizant of them at the time of seizure.

When a vessel comes within the dominions of another state, it has a right to be satisfied that its laws are not broken, and it is the duty of officers to make enquiry False papers are a breach of good faith. If such are discovered, it throws a just sus-

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picion upon the vessel, and all her concerns. No dependance can be placed upon the other papers, or the master's accounts. Wherever false papers are found they certainly supply a justifiable ground for seizing a vessel and instituting a suit against her for further examination.

In this case 26 casks of rum were concealed. Neither the clearance, nor any other papers contained them. It is an article calculated for an illegal importation. I am of opinion therefore, that there was a justifiable ground for seizure, and decree the certificate.

Dec. 16th, 1807.

The UNITED STATES, *Moor.*

Contraband on the outward voyage, ground of condemnation.

THIS vessel, and a very valuable cargo, were taken by the *Leopard*, Captain *Humphreys;* the *Triumph*, Sir *Thomas Hardy*, and the *Columbine*, Captain *Bradshaw*, being in sight. Three points were stated by counsel, on which the captors expected condemnation.

1st. That there was strong suspicion that the cargo was not wholly owned as claimed.

2dly. That part of the outward cargo was contraband.

3dly. That the vessel had been trading between two ports of the enemy.

JUDGMENT.---Dr. *Croke.*

If the second point, which has been argued by the captors, is established, it will not be necessary to enter into the others. The vessel sailed in *December*, in 1806, with a cargo of earthenware, pro-

visions, and bar iron, of the value of 8,500 dollars, and 72,000 dollars in specie, both ship and cargo being the property, as is alledged of *William Wilson* and company, of *Baltimore*, for the Isle of *France*. *Buchanan* and *Bickham* were then employed to sell the cargo, and to procure a return cargo. With the proceeds, and the dollars carried out, the present cargo was purchased, and taken in, partly at the Isle of *France*, and the rest at *Saint Denis* in the Isle of *Bourbon*. It consisted of cotton, coffee, tea, and pepper.

If a vessel has carried out contraband upon her outward voyage, generally speaking, she is not liable to the consequence of it upon her return. The offence is deposited with the offending subject, and the parties must be caught in the fact before they can be convicted of the crime. As a common principle, it has however, been established in the case of the *Nancy*, *Kundson*,* and recognised in other cases, that "in distant voyages to the *East Indies*, the different parts are not to be considered as two voyages *but as one entire transaction*, formed upon one original plan, conducted by the same persons, and under one set of instructions, *ab ovo usque ad mala*, and therefore in cases of contraband, especially when there is any thing of fraud, or concealment, the return voyage is to be deemed connected with the outward."

If this is admitted as a general principle, in this peculiar species of trade, it is made an indispensable condition in His Majesty's order in council, by which it is allowed. In virtue of the rights of war, one enemy may seize and confiscate property engaged in commerce with the colonies of his adversary.

* Rob. III, 126.

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For the benefit of neutral nations, His Majesty by his order in council of the 24th of *June* 1803, directed "the commanders of his ships, not to seize neutral vessels which should be carrying on trade directly between the colonies of the enemy, and the neutral country to which the vessel belongs, laden with the property of inhabitants of such neutral country. Provided that such neutral vessel shall not be supplying, *nor shall have in the outward voyage supplied the enemy with any articles contraband of war.*"

If this vessel therefore, carried out any contraband articles upon her outward voyage, she is indisputably subject to confiscation.

It appears from her papers, that there were 365 bars of flat *Russia* iron. This article is admitted abstractedly considered, to be of all others the most ambignous in its nature, and of the most universal application, of all the subjects of commerce. It was in its unmanufactured state, and was capable therefore of being applied to the most innocent, as well as the most noxious purposes. The nature of the iron, its peculiar fitness for naval purposes, and the usual occupation of the port to which it was carried out, are the criteria upon which its character as contraband depends. To ascertain whether it is a kind of iron which is usually supplied to dock yards, and is particularly useful in the construction and repair of vessels; I directed a reference to the proper officers of His Majesty's dock yard, and they have made their return upon oath. Affidavits likewise, by leave of the Court, have been brought in from several highly respectable officers of His Majesty's military and naval service, who have served in the *East Indies*, and who, from a personal knowledge of the islands of *France*, and

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Bourbon, have been enabled to give a satisfactory history and description of them, as far as has been required.

It is fully proved, by these, that the Isles of *France* and *Bourbon*, are posts of naval equipment, and the only naval and military station which the *French* hold in the seas to the eastward of the *Cape* of *Good Hope*; that they have always a strong naval and military force there stationed; that these are the only places where they can repair or fit out ships of war; that they are the rendezvous of all their naval forces, both national, and private; that the naval expeditions made from these islands, have been highly injurious and destructive to the trade of *Great Britain*, both in the last and present wars; that the national and private ships of war, which cruize in those seas, would be unable to continue their depredations on the *British* commerce in that part of the world, was it not for the outfits and supplies which they there receive: that the naval and military establishment which the *French* have made at the Isle of *France*, is considered by that nation as the first and principal objects for which those islands are held, and supported; and that by mean of such establishments alone, they compel *Great Britain* at all times to keep a powerful naval force in those seas.

Besides the general part of these affidavits, there are particular statements of vessels which had been so fitted out and repaired within the knowledge of the deponents, such as the *Triton*, and the *Princess Royal*, indiamen, which had been captured from the *British*, and had been fitted out there as ships of war, and the *Marengo*, and other vessels of Admiral *Linois* squadron, which had been repaired there after an engagement. These affidavits, from officers of rank, who have not only had the means,

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but who have sworn that they always considered it as part of their duty to obtain the best information in their power, respecting the naval and military establishment of *France*, must be decisive as to the character of these ports.

It is extremely important therefore to the enemy that islands of this description should be supplied with naval stores. It is only by neutral vessels that they can be obtained, and they must have formed a considerable feature in the neutral commerce with that place, as far as it could be conducted with safety. In a letter found on board this ship, there is a list of goods proper for cargoes to be sent there. Amongst them are included spars, masts, tar, and pitch. That neutrals had succeeded in furnishing their supplies to a great degree is proved by another letter, which says, that "naval stores are plentiful, and the sale of them dull." From the same cause it appears that this very iron had proved rather a bad speculation, for it sold to a loss. There can be no doubt then but that this is a port of naval military equipment, of great consequence to the enemy, and of the greatest injury to some of the most valuable interests of *Great Britain*, and it follows therefore, that every article which can fairly be classed under the description of naval stores, and bound thither, must be considered as clothed with a very hostile and noxious character.

As to the quality of the iron, which composed so large a part of the outward cargo, here is an affidavit from *William Hughes*, master shipwright, *John Garry*, foreman of shipwrights, and *John Brush* foreman of blacksmiths, in His Majesty's naval yard at *Halifax*. They swear that they are thoroughly well acquainted with their several branches of business, and know well every material which is necessary to construct, build, or re-

pair a ship of war, and their opinion is, that a ship of war cannot be built, repaired, or constructed without iron; that *Russia* flat bar iron, or flat bar iron of an equal good quality, is absolutely necessary for all purpose of naval equipment, and is used in large quantities in constructing, building, and repairing vessels of war. That it is used both in flat plates, and in bars, for making bolts and chains, &c. and each in their public situations are in the habit of using such quantities of *Russia* and other flat bar iron for the above purposes. With this, is an affidavit of Mr. *Dawes* the storekeeper, of the same yard, who deposes "that he occasionally, and at stated periods, when it is wanted, demands from the honorable navy board flat bar iron for the purposes of naval equipment, and upon notes or demands made by the master shipwright, issues the said article for naval equipments accordingly." It is clear therefore, that this iron, so well adapted to naval purposes, and going to such a port, must be considered as decidedly contraband.

There is another article, concerning which there can be no hesitation.

John Hill, the steward of the vessel, deposes upon the seventh interrogatory "that they landed at the isle of *France tar in barrels*, that the cargo consisted of flour, tar, and iron, that they used one of the barrels of tar in the ship and rigging, kept another for the ship's use, and the remainder they left on shore at the Isle of *France*. He cannot swear to the exact number of barrels, but he is positive there were as many as twelve barrels and upwards of that article" It has been said that the quantity was very small, and the rule of law has been quoted, *de minimis non curat lex*. But every little quantity contributes something to the

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conveniences and uses of the enemy. It is only with such small supplies that vessels can venture to engage in trade, and if every vessel brings what taken separately, might be considered as trifling, the amount upon the whole will be considerable. If that argument could be admitted, well supplied as the island was with such articles, perhaps no individual vessel which had brought them, would have been liable to seizure, and the stock as it was consumed might be removed with impunity.

In the case of the *Richmond, Brattel,** the importation of forty-two barrels of pitch and tar, though of the paltry value of ten or fifteen pounds, was considered as constituting the offence of contraband. In this case, as well as in that, the tar was perfectly concealed, and does not appear in any of the papers, or the examination of the master. That was a cargo going likewise to the same port, the Isle of *France*.

Without any examination of the other arguments which have been advanced in behalf of the captors,

I am of opinion, that this vessel and cargo, all belonging to the same owners, are liable to confiscation.

N. B. This case was appealed, and was then abandoned by the captors, and the sentence reversed by consent.

* Rob. V. 325.

Enoch Stanwood's *Case.*

Dec. 23d, 1807.

Commitment for contempt of Court.

ON the 7th of *December*, *Enoch Stanwood*, of *Yarmouth*, in this province, was arrested by the process of the Court of Admiralty, for rescuing a vessel and cargo, out of the custody of the marshal, and the officers of the customs.---Upon which he presented the following petition.

Nova Scotia Court of Vice-Admiralty.

To the Right Worshipful *Alexander Croke*, Doctor of Laws, Judge or Commissary of His Majesty's Court of Vice-Admiralty, in the province of *Nova Scotia.*

The Petition of Enoch Stanwood, of Yarmouth, in the county of Shelburne, Mariner.

Most humbly sheweth,

That your petitioner being now in prison and confinement, for an high offence committed against the law, and a contempt of this honorable court; and having most sincerely repented of his misconduct, and illegal proceedings, begs your worship to view with indulgence the contents of this, his humble petition, and to bestow a merciful attention to the prayer thereof.

That your petitioner was employed, some time in the year 1803, by *Messrs. George Worster*, *Samuel Hall*, and *James Morrison*, of *Granville*, in the county of *Annapolis*, farmers, as master of the schooner, *Patty*, to go a voyage to the *Bahama* islands, and to touch at *Virginia*, in the *United States*, on her return homeward, to make up the cargo of said schooner. That while in *Virginia*,

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your petitioner became acquainted with a Mr. *Thomas Wilcock*, a merchant residing there, who had a schooner, called the *Agnes*, which he was desirous of selling; and, upon his purposing to sell her to your petitioner, (who being in partnership with the above named persons, and wanting a vessel of that kind, for the purposes of their trade and business,) he, your petitioner bought the said schooner from him, paying him at that time a part of the consideration money, and securing to him the rest by a bottomry bond.

That he, your petitioner, gave the command and direction of the said schooner *Patty*, to the mate, and took the direction of the said schooner *Agnes*, himself, and sailed in her from *Virginia*, bound to *Cape Breton*, intending to touch at *Yarmouth*, but on his way he met with such bad weather, and such strong and violent gales of wind, that he was obliged to put into *Yarmouth*, in distress, and after the vessel was repaired, he sailed, thence bound for *Halifax*, to get a main-sail, and to dispose of the cargo, if he should find a good market there. But on his arrival at *Halifax*, his schooner was seized, for the want of a certificate of registry, and on taking counsel upon the subject, and being informed that the vessel would be forfeited and condemned, he was thrown into a hopeless and wretched despair, and felt extreme vexation and mortification, at the loss of his vessel, on a ground which had arisen from his ignorance, not being acquainted with the law, and the absolute necessity of having such a document, supposing that the certificate from the *British* consul, which he had, was all that was requisite. And being advised by many persons to carry away the vessel secretly, rather than to lose her entirely, and being urged on by the

solicitation and advice of a person of the name of *William Smith*, who had an old register, which he said he could alter, so as to answer the said schooner *Agnes*, and also by one *Thomas Dalton*, master of a schooner belonging to Messrs. *Foreman* and *Grassie*, and by one Captain *Kellyhorn*, and many others who were strangers to your petitioner, and whose names he did not know, and aided by the assistance and help of the said *William Smith*, *Thomas Dalton*, and the said Captain *Kellyhorn*, who promised to assist with his negroes, but was not requested so to do by your petitioner. Also by one *John Trevoy*, a sea-faring man, and a man of the name of *Trider*, he was prevailed on to take the rash and illegal step of secretly taking and carrying away the sails of said schooner, out of the stores where they were kept, and of carrying away the said schooner out of the harbour of *Halifax*, to *Virginia*, where she was taken away from him by the former owner, of which illegal and criminal act he has had cause since most sincerely to repent. That your petitioner most heartily laments all that has passed respecting this unfortunate event, and would most cheerfully make any atonement towards replacing the value of said property, in the hands of your worship, to be disposed of as the law directs, were it in his power: but begs leave of your worship to state, that so far from having the means of so doing, that his family, consisting of a wife and six children, have been in much distress ever since, and have been supported almost wholly by the parish, and must continue so unless he is restored once more to his liberty, when he will pursue an honest and industrious line of life, for the support of himself and family; and will not fail, the remainder of his days, to remember, with penitence and remorse, the sad event of his

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life, which has produced innumerable difficulties and sorrows to himself and his young and helpless children, who are yet in very infant and tender years.

Your petitioner therefore most humbly implores and beseeches your worship, that mingling mercy with a due discharge of your judicial duty, you will take his wretched and deplorable state, and the unhappy condition of his little family, into your most lenient consideration; and when informed and satisfied of the truth of his petition, you will please to extend whatever indulgence and relief your power and duty will permit you; at the same time your petitioner feeling himself open to the just judgment of the law, submits to any order your worship shall please to make.

And will ever pray for your Worship,

ENOCH STANWOOD.

December 22.

On the 23d *December*, his petition was heard, when the king's advocate, and the officers of the customs attended, and expressed their wish that the prosecution might be discontinued, as far as was consistent with His Majesty's rights, on account of his poverty, numerous family, and humble submission, when the judge of the court addressed him to the following effect:

"*Enoch Stanwood*, you are brought up by the marshal, having been committed to jail, under an attachment for a contempt, in having rescued a vessel and cargo which had been seized by the king's officers, and were in the custody of this court.

"The original offence for which the seizure was made, was an alledged breach of the navigation

laws of *Great Britain*. I am sorry to find that there should be any persons, who, from ignorance or disaffection, are disposed to treat those laws with disrespect; and offences committed against them with levity. A little reflection would shew that they ought to be considered in a much more important point of view. The high superiority of the naval force of *Great Britain*, to which, in these times of extraordinary danger, we look for safety, is founded upon those regulations. In the common crimes, which are the subject of enquiry in courts of justice, beyond the disturbance of the peace, a few individuals only are the sufferers; but offences against the navigation laws, and protection and encouragement afforded to offenders, tend to weaken and destroy a system to which millions, all the subjects of the *British* dominions, are indebted, for the security of their lives, their property, and their liberty.

"In your case, as it stood upon the first seizure, I believe there were favorable circumstances under which you would have obtained an acquittal of the vessel and cargo. But, instead of waiting for the decision of the court, you took the law into your own hands, broke open the store where the sails were deposited, and carried off the vessel and cargo by force---this is a crime of the most heinous nature---it is a contempt of the greatest magnitude against the Court of Admiralty, and of your sovereign, from whom this and all other courts of justice derive their authority. It leads to the destruction of all law and order in society, and to the revival of that state of violence and anarchy, which it was the object of all civil institutions to remedy.

"There is a circumstance stated in your petition, which whatever effect it may have upon the humanity

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of the court, or of the prosecutors, I cannot but consider as an aggravation, rather than an extenuation, of your offence—you plead that you have a wife and six children brought into a state of distress by your misconduct. Persons in that situation ought to be doubly cautious how far they commit crimes for which the innocent, who are under their peculiar care and protection, may eventually become sufferers.

"Taking however, into consideration the distressed state of your family, and your being utterly incapable of making any pecuniary compensation to those who are injured by your conduct; the imprisonment you have already undergone—the great sorrow and repentance you express for your offence, and your solemn promise in future to demean yourself as a good and peaceable subject; and since his Majesty's officers have declared that they have no wish or intention to carry on the prosecution farther against you, I am disposed upon this your petition to extend the mercy of the court towards you, and to decree a supersedeas of the attachment, upon which you will be discharged from custody."

Jan. 26th, 1808.

The rights and powers of Captors and Prize Agents, over capturer and proceeds, before final sentence, considered.

The HERKIMER, *Church.*

THIS vessel was condemned (see Ante. p. 17.) 1 *August*, 1806, and appealed. A decree of prelivery and appraisement was sued out. A difficulty having arisen, as to taking the property upon bail, the parties prayed a sale. The purchaser retained the proceeds in his hands, and a monition issued against him to pay them in. An appearance to the monition under protest was given in, and the

cause came on upon this return. The particular circumstances are fully stated in the judgment.

JUDGMENT.---*Dr. Croke.*

The case which now remains for the decision of this court, arises upon a monition issued against *Andrew Belcher*, Esq. "to bring into the Registry the sum of £41,671 19*s.* 4*d.*, being the proceeds of the ship *Herkimer* and cargo; and also interest thereon at the rate of five pounds per centum per annum, to commence from six months from the day of sale; or to shew cause why he should not pay the same." This vessel and cargo were condemned on the 1st of *August*, 1806, and an appeal was entered on the 6th of the same month. A decree of unlivery and appraisement was sued out, and on the return the valuation of the ship appeared to be £3000, of the cargo £37,896 5*s.* 3*d.*, making in the whole £40,896 5*s* 3*d.* currency. A motion was made by the captors to take the property upon bail; but, difficulties having occurred in procuring securities, the parties jointly prayed the court to direct a sale of the property, and the proceeds to be paid into the registry. The commissions for the sale of ship and cargo, issued on the 18th and 27th of *September*, returnable in the usual form in one month. The sale by public auction was made on the 29th of *September*, 1806, by Messrs. *Hill & Co.* The conditions were, that the purchase money should be paid in six months, when, Mr. *Belcher* became the purchaser of the ship, and the greater part of the cargo, for the sum of £41,671*s.* 19 4*d.* The marshal returned the commission of sale, without the proceeds, which he alledged were in the hands of the purchaser, to whom he had applied for payment, but without effect. Upon the 23d *September*, 1807, a general order of the

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court was made for all purchasers of prize goods to pay in the proceeds. No notice of this order was taken; a second general order was then made upon the 29th of *December*, and a monition was issued against Mr. *Belcher*.

To this monition an appearance has now been given, under a protest against the jurisdiction of the court, which it will be necessary first to consider; because if the court has gone beyond the line of its authority, the party is entitled to his dismissal.

The substantial part of the protest alledges, "that the said ship *Herkimer* and her cargo, were sold at public auction by *Charles Hill* and Company, of *Halifax*, auctioneers, in pursuance of an advertisement inserted in the public newspapers of *Halifax* inviting purchasers to the said auction; that the proponent was one among the bidders at the said auction, and being the highest bidder for the said ship and cargo, did purchase the same of the said *Charles Hill* and Company, for the sum of £11,671 19*s.* 4*d.*, and received from him *a bill of parcels of the said purchase in the name of the said* Charles Hill *and Company, as auctioneers, and not as persons acting under the authority of this worshipful court, as appears by the said bill of parcels hereunto annexed*, and the proponent humbly submits that the said *Charles Hill* and Company alone can be entitled to enforce the payment of the said £11,671 19*s.* 4*d.*, so bid by him for the ship *Herkimer* and cargo as aforesaid. This proponent therefore humbly prays the judgment of this worshipful court, whether he the proponent is bound to submit to the jurisdiction of this court in the matter of the said monition."

"Sworn to and signed by *Andrew Belcher*."

In arguing upon this protest, it was assumed by counsel that the contract of Sale was made merely

with the auctioneer, and the sale itself not under the authority of the Court of Admiralty---I do not think it at all material to the case, but the facts will not bear them out in this assumption. The advertisement in the public papers expressly stated the sale to be made by the authority of the Court of Admiralty; the bill of parcels, annexed to the protest, is headed "*Andrew Belcher*, Esq. bought of *Charles Hill* and Company *at Admiralty Sales*;" and it is to be observed that Mr. *Belcher* has not sworn positively that he purchased the goods of Messrs. *Hill* and Company, merely as auctioneers, and not as persons acting under the authority of the Court of Admiralty, but that Messrs. *Hill* and Company had so stated themselves in the bills of parcels.

But admitting the fact in its fullest extent, still there is nothing upon the face of the monition itself or in this protest which can oust the court of its jurisdiction. The respondent is monished to pay a certain sum of money which is alledged to be the proceeds of the ship *Herkimer* and cargo. Upon that allegation the jurisdiction of the court is founded. Mr. *B.* admits that he is in possession of those proceeds. Whether he purchased them at public auction, whether he may be answerable for the amount to Messrs. *Hill* & Co, is perfectly irrelevant: for the stubborn fact still remains unshaken, that the respondent is in possession of the proceeds of this Ship and cargo. Whatever matter therefore may be pleaded in answer to the monition, the admitted fact is sufficient to found the jurisdiction of the Court; which has the exclusive cognizance of Prize, and the proceeds of Prize, with all incidental questions which may arise.

The Court will naturally feel some degree of delicacy in discussing the subject of its own authority: it

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affords it therefore a considerable degree of satisfaction, that it is able not to rest the point upon its own assertions but rather to refer to the decisions of other Courts of Justice, those of *Westminster* Hall, and in cases of prohibition.

The Solicitor General quoted a *dictum* of Lord *Kenyon*, in the case of *Smart* against *Wolff*, in support of this protest, "that if the legal property in prize goods was altered, as by sale *in market overt*, the Court of Admiralty might no longer have jurisdiction over them." In the first place, this mere *obiter dictum* of that eminent Judge, expressed too with some hesitation, was not admitted by another Judge upon the bench, of no less respectability, Mr. Justice *Buller*, who doubted, supposing the plaintiffs *had* obtained these goods under a legal title, under which "they might have retained the possession, whether that circumstance would be a ground for prohibition." Supposing, he says, that they had obtained the possession of them in market overt, or under any legal title, still I think a prohibition ought not to be granted on that account, "because," he adds afterwards, "that he does not see why they could not defend themselves upon that plea in the Admiralty, as well as in other Courts."

But, secondly, to make this *dictum* applicable to the present case, it should have been a monition to call in the ship and cargo themselves. Had a monition to that effect been directed to a person who had *bonâ fide* purchased them at public auction, whether under the marshal's authority, or in the common course of trade, the party might have availed himself of Lord *Kenyon's* opinion, as far as it was valid; but this is a monition not to call in property sold in market overt, but the price, the

proceeds of that property so sold, and which are admitted to be in the parties hands.

Upon *that point*, this case of *Smart* and *Wolff* is decisive. It was there adjudged, that the Court of Admiralty has the power, which it has repeatedly exercised, of issuing monitions to require persons to bring in so much of the proceeds of prize as remains in their hands, *as having the possession of the proceeds by whatever means they may have been obtained.* "The proceedings in that case were said by Judge *Buller* to have been founded on the plaintiff's *having the possession of the proceeds*, in which character they are amenable to the Court of Admiralty."

In the case of the *Danish* ship *Noysamhed*, 7 Ves. junr. 593, a prohibition was moved for upon grounds something similar, though still stronger, than what is stated in this protest, and has been argued so warmly by the advocates, namely, that the contract was with the auctioneer, mere matter of account with him, and perhaps settled. A cargo was condemned by the Vice-Admiralty Court at *Tortola*, was sent to *Chorley* at *Liverpool*, and was sold by him for the benefit of the captors. The Court of Appeals reversed the sentence, and decreed restitution. A monition issued against *Chorley* for the proceeds. He moved for a prohibition on the ground that the property was consigned to him, *not as a prize agent, but as a general merchant, and that he had since accounted for the proceeds to the consignors*, but the Lord Chancellor thought *that* a question proper for the Court of Admiralty to decide, as incidental to the principal question of prize; and that therefore he was not authorised to grant a prohibition.

In a subsequent case, *Willis* against the Commissioners of Appeals in Prize Causes, *East*, 5. 22. it

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was thus laid down by Lord *Ellenborough*, "It is clear that the Court of Admiralty has jurisdiction *in rem*, and may take into its possession the thing itself, *or the proceeds wherever they may be found, either in the hands of the principal captor, or agent, or of any other*, who has no lawful title to hold them." And Justice *Laurence* adds, "it is supposed that the Prize Court has jurisdiction over the agent only under the prize acts; but this is not so; for if those acts had never been passed, that Court would have had jurisdiction over the *res*, and the proceeds of it, *into* whatever hands they get."

These cases clearly shew, that the jurisdiction of the Court of Admiralty over prize, and the proceeds of prize, wherever they may be found, and under whatever title they may have been obtained, is almost without limit or controul, and that the grounds stated in the protest, and in the arguments adduced by the gentlemen at the bar, are not founded in law; and I therefore over-rule the protest.

The monition then having been issued within the proper jurisdiction of the Court, the respondent is bound to comply with the requisition contained in it, either by paying the money, or shewing cause why it should not be paid. This he has done in his answer and return, upon oath.

"In this he states "that a proposal was made by the claimants after condemnation to purchase the ship and cargo from the captors; after much negociation, the captors consented to sell the same to the claimants for £24,000, *Holifax* currency. That Captain *Henry Whitby*, who captured the ship, told the respondent that he would prefer taking £24,000 than to the receiving the proceeds three or four years afterwards. That in consequence, Captain *Whitby*, his officers, and crew, unsolicited by the

respondent, and without consulting him, executed to him a special *letter of agency*, authorising him on their behalf to sell the said prize, subject to all incumbrances, for £24,000, ratifying whatever bargain or agreement the said respondent should make, provided he obtained the said sum of £24,000 to be divided to the captors, without deduction. That in consequence he agreed with *Edward Griswold*, one of the parties in the claim, who was fully empowered by all the other claimants, to sell the same for the aforesaid sum, together with every expence which had or might occur, upon condition that he should engage on behalf of said claimants to discontinue and withdraw the appeal; and the respondent and *Edward Griswold*, did, for and on behalf of their respective constituents, conclude the aforesaid *bargain of sale*.

"That when the parties were about to carry the said agreement into effect, *John Pool Beresford*, Esq. on whom as senior officer the command of His Majesty's ships devolved, claimed as flag officer one eighth part of the said prize, and, upon his asserted interest, objected to the agreement, and applied to this Court to prevent the same from being carried into effect, whereby the said agreement was prevented from being completed, and the captors became involved in a legal controversy. But the captors being of opinion that Captain *Beresford's* claim would never be admitted in a Court of Law, and the agreement beneficial to them, expressed their desire to carry the same into effect, and to put an end to the controversy notwithstanding; and for that purpose moved the Court for an order for the sale of the ship and cargo, and it was agreed by the respondent and *Griswold*, that the respondent should purchase ship and cargo at pub-

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lic auction for the purpose as aforesaid, and that he should hold the property so purchased to the amount of £24,000, and the captors expences, and that the remainder should be held by the claimants.

"That the ship and cargo were accordingly put up to auction, and purchased by the respondent for £41,671 19*s.* 4*d.*, and he believes if he had not bid they would not have produced much above £36,000.

"That he would not have been concerned if he had apprehended that it would have been required of him to pay into Court the proceeds, the particular object being to carry into effect the agreement.

"That after the sale the respondent retained of the cargo to the amount of £24,000, and the remainder was delivered to *Edward Griswold* upon the express condition that the same should be refunded in the event that the sale made by him could not be carried into effect, and that it should finally be determined that the appeal should be prosecuted.

"That the respondent considers himself responsible to the captors for £24,000, and bound to pay whenever all the difficulties which prevented the final execution of the agreement should be removed.

"That a part retained, the bark and copper, amounting to £17,747 19*s.*, was sent to *London* and insured. The 16th *December*, 1806, he shipped the bark in the *Yarico*, which was captured. On the 13th *February*, 1807, he shipped the copper in the *Trusty*, which was lost, she sailed 21st *February*. That he is advised that it will be impracticable to recover from the underwriters until he receives a certificate of the custom-house at *Halifax*, dated

one year and a day from the sailing of the vessel, that she had not been heard of.

"That the parties proceeded to carry the agreement into effect. The opinion of Sir *J. Nicholl* was taken, who declared the aforesaid agreement could be validly carried into effect, after giving due notice to the parties who had not assented.

"That a meeting was held, and that it was agreed that Captain *Whitby* should give indemnity against Captain *Beresford's* claim, and others. That he believes that all difficulty has been removed, that *Griswold* directed *James Stewart*, Esq. to withdraw the appeal whenever the agreement could be carried into effect, and which he is ready and willing to do, and the captors and claimants are satisfied and content the property should rest and remain as it is, and Captain *Beresford's* agents are likewise satisfied.

"That the respondent owns property, free from debts, to a larger amount than £24,000, and has property sufficient to pay £41 671, but it would be highly detrimental, if not ruinous to him, to be compelled to pay either of the said sums into Court, when he has received but a small part, that he has not derived the smallest advantage from this transaction; and that it would be grievously oppressive upon him to enforce obedience to a monition which no person interested in the said prize, or any part thereof, wishes should be enforced against him."

Upon this answer, as was properly stated by the counsel, two questions arise, 1st. Whether there was any thing illegal in the agreement of sale between the captors and claimants? And 2dly. Whether the Court had any right to interfere?

In considering the first question, it is necessary to ascertain precisely in what situation the respon-

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dent stands before the Court, since that situation has been represented by his counsel in a variety of different lights.

If he is to be taken as *a mere purchaser*, as was sometimes stated in the arguments, the whole of the answer is perfectly irrelevant. For from the moment the purchase at auction was complete, the ship and cargo were the absolute property of the purchaser, to dispose of in what manner he pleased, nor is the Court in the least concerned in any subsequent transactions: but then the respondent, the same as any other indifferent person, is liable to pay the price, according to the conditions of sale, and no legal defence can be set up against the payment.

But it appears from this answer, and the arguments of his counsel, that the respondent does not place his case upon that footing. He states himself to have been an agent, authorised by Captain *Whitby*, and the crew of the *Leander*, to sell to the claimants in this case, the *Herkimer* and her cargo, for the sum of £24,000 and the charges; that the sale made by Mr. *Hill* was only an amicable sale, merely between the parties to ascertain the value; that the parties never intended it to be a real sale, but a mere form to enable them to carry the agreement into execution, that the respondent therefore, the nominal purchaser, was not liable to be called upon to pay into Court the proceeds of that sale, but was answerable only to the captors, and for the sums which they had deposited with him in consequence of these agreements, namely, the £24,000 and the surplus for expences, after *Griswold's* £9,704 were deducted, and which £24,000, together with the surplus, were in reality the sum, or price, which *Griswold* had paid the captors for the *Herkimer* and cargo, under the *bargain and sale.*

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A great deal of argument has been used to prove the legality of compromises. It does not seem to me to have any thing to do with the present question. Compromises no doubt have been, and may still be made. Parties may recede from their rights, may desert their appeals, and may dispose of their interests, whether present, or only remote, or contingent, upon any terms or conditions they chuse; but the real question before the Court upon *this* defence is, whether the captors have such a vested interest in the prize itself, or the proceeds of the prize, in the present stage of the cause, that they can take possession of them, and alienate them, without any authority from, and in defiance of, the Court of Admiralty.

I must own I have my own private opinion upon compromises: that they are making a *job* of war, not very honorable to the nation, and bad policy in the end for the navy themselves, and many high and eminent persons have entertained the same idea. But that is only my own private opinion, and I am certainly not disposed to throw any impediment in the way of a compromise, when conducted in a legal, justifiable, manner, and the parties think it for their interest; as I trust I have ever endeavoured to promote the real good and advantage of the service, as far as was consistent with an impartial performance of my duty. But I cannot but resist an attempt in parties to take the whole law into their own hands, and to wrest prize property out of the legal custody of the Court.

If this power of attorney, and the agreement founded upon it, were merely *executory*, and to operate only after final sentence, as was contended by the King's Advocate, I do not see how they could at all apply to the present state of the case; they

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cannot be any authority to the respondent to keep possession of, or to dispose of capture or proceeds, until the time arrives when they are to become operative. They cannot, as powers from the captors, or as agreements with the claimants, justify an intermediate possession, or disposal of the capture or proceeds; unless he has a right to such possession, or to make such disposal, from some other quarter.

But I think it is pretty evident, that this power, and agreement, are in *verbis de præsenti*, and have been actually *executed*, as was admitted by the King's Solicitor. Such was clearly the intention and understanding of the parties. The respondent was in possession of the ship and cargo. He says in his answer, that "he and *Edward Griswold did conclude the bargain and sale.*" It was actually carried into effect: for the respondent, retaining in his own hands a part of the cargo to the amount of £24,000, and upwards, as an equivalent for the purchase-money which *Griswold* was engaged to pay, delivered the vessel, and the remainder of the cargo to Mr. *Griswold.* There was indeed an agreement, that in case the former agreement could not be carried into effect, that *Edward Griswold* should refund the sum of £9,704 10*s.*; but the sale, subject to that sort of contingent defeasance, was nevertheless actually made and completed as a present transaction, by delivery of the goods, and the payment of the price.

The question then, whether this is a legal agreement, or, in other words, whether the parties had a right to sell the ship and cargo to the claimants in the present stage of the cause, depends upon these points:

1st. Whether captors have a *disposable property* in things captured, or the proceeds of them, before

final adjudication? And what is the final adjudication?

2dly. If they have no disposable property, it will be necessary to consider who is entitled to the *custody or possession*, of captures and proceeds until that period? And how that right of custody or possession is to be exercised?

Upon the first point it must be observed, that even after final sentence, and condemnation, it is far from being clear and certain that the captors would become entitled to the whole, or even any part of the capture.

1. It is possible that the crown might claim the *whole* of this prize. By one clause of the prize act, it is enacted that upon proof of the breach of any of His Majesty's instructions relating to prizes, or of any offence against the law of nations committed by the captors in relation to any prize, or the persons taken on board the same, the prize shall be condemned to His Majesty's use and disposal., Sec. 32. Prize Act.

By another clause, Sec. 20, it is enacted, that in case any ship or goods shall be taken and restored by the commander of any vessel of war belonging to His Majesty, clandestinely, or by collusion, or connivance, or by consent, (unless the same shall afterwards be allowed and approved by the Court of Admiralty) such commander shall forfeit the sum of £1000, and the goods and ship so taken and restored, shall be adjudged as good prize to His Majesty.

It is not for me to decide, in the present stage of the cause, whether such a forfeiture has been incurred. But is it clear that it has not? It is capable at least of some doubt and argument: this ship and goods have been certainly taken and restored

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by the commander, and can it be said otherwise than clandestinely by collusion, connivance, or consent, since it was done by a private agreement, under colour of a sale, and was not allowed or approved by the Court of Admiralty. In the former part of the clause relating to privateers, the words "without being brought to adjudication" are introduced; but, in the latter part, respecting king's ships, no such qualification is to be found; so that the clause applies to a restitution at any time before final sentence. Under the *direct words and apparent meaning* of the Act the case does *most certainly come.* It was argued by counsel, that it could not be the intention of the act to apply to *compromises.* Be it so, if the compromise was of such a kind, that it could be legally carried into execution; as a compromise which was not to take effect until after final sentence. But would this equitable interpretation hold good, if the compromise was of such a nature, that it could not be legally supported? If the captors had restored the ship and cargo before they had a right so to do?

It is certainly the *spirit* of the Act to prevent connivance between parties, and restitutions without the intervention of the Court of Admiralty. In all other cases of compromise the parties have not proceeded to carry them into execution, until the property was legally delivered by the Court, upon a final sentence of condemnation, or restitution by agreement. In *Berens* and *Rucker*, the property was not sold or disposed of; for one reason assigned for the compromise was to enable the parties to obtain a final sentence in order to sell and take advantage of the markets, when restored by final sentence, and not before; notwithstanding the agreement of the two parties, the vessel proceeded to Amsterdam.

But here all has been done without any intervention of the Court, or final sentence obtained. Under colour of an order for sale, which the parties themselves represent as a merely fictitious, and not a *bonâ fide* sale, merely between the parties to ascertain the value, and never meant to be a real sale, the compromise and restitution have been completed. If this does not amount to a connivance, and real restitution, I do not know what does. Nothing remains for the court to do; the parties have no occasion for any farther proceedings, they do not stand in need of any farther sentence. They have got the property, and as they have made a *private division* of it, so they may proceed to a *private distribution*, and if, according to the arguments of counsel, these are the only parties interested, who else has a right to interfere? The Court of Admiralty, and the Prize Cause may rest in *statu quo* to eternity, these parties have certainly no further occasion for them, the business is as much completed, without final sentence of the Court, and any cognizance in, or intervention of, the Court, as if the whole had been done at sea—the very mischief intended by the Act to be guarded against.

The Act does indeed speak of restorations, which may be allowed, and approved afterwards by the Court of Admiralty, but this must refer to cases of necessity, or under very peculiar circumstances; not to cases, where, without any plea of that kind, the whole law of prize has been subverted.

So far then from its being clear, that a forfeiture has not been incurred, I think a very strong case might be made on behalf of the crown. So strong, that I cannot but entertain very great doubts, whether it is not the duty of his Majesty's Advocate, to enter an appeal on his behalf, against the sentence of this

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Court, or even of the Court itself, to direct such an appeal to be entered, and prosecuted in the Court of Appeals.—Since it is incumbent both on the Court itself, and his Majesty's officers, whenever any apparent interests of the crown arise, to intervene on behalf of the crown, and bring them forwards, to place them in a train for discussion, and, if well founded, to give them effect.

It is not in that view, however, that I *now* refer to these clauses in the Act; but, merely to shew that it is extremely possible that, in consequence of these very transactions, the parties may have no interest whatever, in this capture, either present or future.

If this claim of the crown is well founded, it is liable to be barred by no time, or limitation whatever. In the case of the *Clarissa*, before the lords, 20th *July*, 1799, the Admiralty intervened as in a case of forfeiture to the crown, on account of malfeasance by the captain. An appearance was given by the captor, under protest, upon three several grounds, 1st, that the captor should first have been proceeded against criminally, 2d. that the time of appeal had expired, and 3dly, that distribution had taken place.—The protest was overruled by the Court, on all these points, and it was held, that the limitations in the Act apply only to the question of prize or no prize, or between captors and claimants, and do not bind the crown, as against the captors; and that the crown can be guilty of no *laches*.

2. Other persons besides the actual captors, may be entitled to *share*: Vessels may have been in sight, which may hereafter claim as joint captors. It is usual for joint captors not to assert their interest until after final condemnation.

I shall say nothing respecting the claim of Com-

modore *Beresford*, or other persons, to the Flag-eighth, since it has been stated, though without any documents, that no opposition will be made from those interests. But the power of attorney itself was not signed by the whole of the officers and crew, who are therefore not bound by it.

Greenwich Hospital has two different claims upon the proceeds of prize. By the 46th *Geo.* 3, *c.* 101, it is entitled to £3 6*s.* 8*d.* per centum, on the net proceeds of every prize. This claim is paramount to any prize act or proclamation.

By the marshal's return of the commission of sale, it appears upon the records of this court, that the gross proceeds of this prize were £41,000, after deducting all necessary charges. May not the hospital be entitled to a per centage upon this sum?

By the prize act, *Greenwich Hospital* is entitled not only to all unclaimed shares, but to all unpaid balances of the proceeds of prize, which shall remain after distribution shall have commenced six months. It will appear in the records of the court that those proceeds are £41,000, deducting charges, and that they are in the hands of the agent. If, according to these agreements, the captors shall divide only £24,000, will not *Greenwich Hospital* have a right to demand the residue as an unclaimed balance?

I have now shewn that there are actual, contingent, and possible interests in the proceeds of prize, besides those of the captors, even to the extent of totally annihilating the captors' rights; and consequently that the captors can make no disposition or alienation of the capture, even as to the future contingent event of condemnation, by which those other actual, contingent, or possible interests may be

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affected; nor can any agreements between the captors and claimants enure to the defeating of those interests, which will still have a lien upon those proceeds, to the full amount as they appear upon the records of the Court, according to their respective extent.

As to the *present interest*, nothing can be more certain, than that *before final condemnation* the captors have no legal interest in the capture at all, nothing which they can by any possibility convey to another, either in the name of a compromise, or of any other denomination, and that in case of an appeal, the first sentence is not the final sentence, but the ultimate decision upon the appeal.

This is too clear to admit of a doubt. It is a question which has been most accurately examined, and deliberately settled in some of the most solemn decisions, which have ever taken place in the *British* Courts of Justice. Ships and goods, taken as prize, belong to the crown, as the representative of the nation. No subject has any right to them but by express grant from His Majesty. Those grants are subject to any restrictions and limitations, which His Majesty thinks proper to make. What is not expressly granted, or comes within any limitations, or restrictions in the grant, is an interest still remaining in the crown. The captors title deeds are the King's Proclamation, and the Prize Act. The proclamation directs that prizes may be lawfully sold or disposed of by captors and their agents, *after the same shall have been to His Majesty finally adjudged lawful prize*, and *not otherwise*. By the Prize Act, the whole interest and property is given to the captors, expressly "*after the same shall have been adjudged lawful prize to His Majesty*." The interest in prize, therefore, before final condemnation, not

having been granted to the captors, still remains with His Majesty.

These are not mere abstract and theoretical doctrines, nor is the interest of the crown a fiction of law. It is a real disposable interest, and accordingly in the case of the *Elzebé, Maas,* (5 *Rob.*) it was decided, "*that the crown can* release ships and goods that have been taken *jure belli* before adjudication, without the consent of the captors."

These points were the subject of discussion in the case of *Home* against Lord *Camden.* Few cases were ever more frequently and deliberately argued. The action was first brought in the Court of Common Pleas, from thence it was removed by appeal to the Court of King's Bench, and finally by writ of error to the House of Lords. It was there referred to the Twelve Judges, who delivered their unanimous and elaborate opinion by Lord Chief Justice *Eyre.* (*H. Blackstone,* II. p. 533.) After recognizing the general doctrine that the interest and property "do not vest until after the same shall have been finally adjudged lawful prize to his Majesty," Lord Chief Justice *Eyre* proceeds to state, "that the effect of an appeal is to suspend the force of the sentence. From the moment of the appeal being interposed, the sentence is no longer *final;* on the contrary, it is liable to be reversed in part or in whole." After arguing this point at length, he concludes, "your Lordships will see how perfectly inconsistent with the plan of the Prize Act, this notion of the interest and property vesting in the captors, at any time before the final adjudication in the Court of Appeal, will be found to be. In truth, so far from the interest and property vesting at an earlier period, the legislature by the words

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seems to have cautiously guarded against its being so understood."

But the decision in that case does not rest even here; after settling that the captors had no interest, it proceeds to consider particularly the power of agents over captures and proceeds.

"If it be the true construction of the Prize Acts, that no interest or property vested in the navy, until after the final adjudication by the commissioners of appeals, it follows that the agents proceeding to sell soon after the sentence in the Admiralty Court, must be without colour of authority. In this stage of the proceedings, the agent could only act under the authority of the Prize Court; and in the manner in which such agents usually do act. Acting *under* the authority of the Prize Court, they would be to *account* to the Prize Court; acting *without the authority of the Prize Court*, they would be in the condition of mere *strangers*, who had *possessed themselves of the proceeds of a prize*, to whom it is admitted, a monition might and *ought* to be issued, to compel them to bring in proceeds." He goes on to state, that "agents, though perhaps they may be *appointed* before the final adjudication of the prize, have nothing to do until after the final adjudication has taken place, that all the different sections of the Prize Act, which give powers, or impose duties upon agents, all respect *sales in order to distribution*." "The result of these observations is," says Lord Chief Justice *Eyre*, "that that whole case, (and I think *I* may add the whole of the present case) rests upon two fundamental errors, the first, that an interest and property *vested* in the navy as captors, long before it could by any possibility vest; the second, that the navy agents had authority under

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the Prize Acts to take upon themselves the *management*, and *disposition* of the prize long before such authority could be derived to them."

This case then being decisive, that captors have no interest or property in prize, and that agents have no right to sell, until after final adjudication, it follows that an agreement entered into by them for the sale of a ship and cargo to the claimants, before that period, is not a legal, or valid agreement.

2dly. Had the captors then any right to the possession of the ship and cargo, or of the proceeds, and therefore under cover of a legal possession of the one, or of the other, might give effect to the agreement?

This leads us to the next point proposed, namely, who is entitled to the custody or possession of prize until final adjudication, and how it is to be exercised?

This question, in general, is answered by the same high authority, Lord Chief Justice *Eyre* says, in the same case, "I take it to be clear, and it was so stated by the civilians in the case of *Smart* and *Wolff*, (3 T. R. 323.) that pending a suit in the Prize Court, the ship and goods are in the custody of the Court, the interests of all who are concerned in the capture, are under the protection of the Court."

The manner in which the Court is bound to execute this trust imposed upon it, depends chiefly upon the respective Prize Acts: I say chiefly, because it is well known that "these acts form a portion only of the law of prize, and that a great part of the Admiralty jurisdiction is founded on the established usage, and common law of that Court."

In *the High Court of Admiralty*, captors are left

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in possession of the capture until final sentence, unless it is taken out of their hands by the Court; usually in two cases, that of *delivery* upon bail, and of a *sale* under a perishable monition, upon farther proof, or sentence and appeal. Even *there* upon every sale the proceeds are taken out of the captor's possession and are remitted by the commissioners to the registrar of the Court of Admiralty, to remain until final adjudication.

In the Courts of *Vice-Admiralty*, a different mode is pointed out by the acts of parliament. At the very commencement the prize is taken out of the captors hands, the marshal, to whom the officer of the customs is added by the Prize Act, takes the vessel and cargo into his custody. Being once in the custody of the Court, neither the prize itself, nor the proceeds arising from the sale of it, which are the representative of the prize, can be taken out of, or retained from that custody, but by the authority of the Court itself, or the superior Court of Appeals.

The Prize Act, in case of appeal, first provides that the execution of the sentence appealed from shall not be suspended in case the party appellate shall give security for the full value of the ship or goods: 2dly, captures may be delivered either to captor or claimant upon giving security for the full value thereof.

In both these cases, the only cases in which *the act directs the delivery of captures to the parties*, security is to be given for the full value.

We come now to the third case provided for by the act, that of a sale. "If there shall be any difficulty, or sufficient objection to giving security, the Judge shall, at the request of either of the parties, order such goods and effects to be entered, landed,

and sold by public auction, under the care and *custody* of the proper officers of the customs, and under the direction and inspection of such persons as shall be appointed by the claimants and captors."

How the proceeds of sale are to be disposed of is the next question. There are two acts which direct the Court upon this head, the one enacts what shall, and the other what shall not, be done. The Prize Act says positively, "that the monies arising from the sale *shall* be brought into Court, and by the registrar *shall* be deposited in the Bank of England, or, (in case the captors and claimants shall agree thereto) in some public security at interest, in the name of the Registrar, and of such trustees as the captor and claimant shall appoint." The other act, 41st *Geo.* III. C. 96, which is a perpetual act, and expressly confirmed by the Prize Act, says, "Whereas it is expedient that the proceeds of property captured and converted by sale should be secured until final adjudication; be it enacted, that *in all cases* when a commission of appraisement and sale is granted by the Judge of the Vice-Admiralty Court before *final sentence*, the proceeds of such sale shall *not remain in the hands of the captors or their agents, but shall* be brought into the Registry of the Court, and remain subject to the farther orders of the Court until final sentence."

The cautious, systematic, and well considered regulations of the acts, with the practical interpretation of them by Prize Courts, for the safe custody of the property, is very observable. The captured property itself is either in the custody of the law, or it may be delivered to the parties upon sufficient security; if sold, the proceeds must be left in the Registry in the actual custody of the Court, or placed in the

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public funds in the name of the Registrar, and consequently still in the protection of the Court; these are the only alternatives, no power is given to leave the capture in private hands without security given, or the proceeds in any case whatever.

Which of the courses prescribed by the act have been followed in the present case?

The ship and cargo were not delivered to either of the parties upon bail, because sufficient securities could not be found.

Upon the joint motion of both parties, the other alternative was adopted: it was sold under a commission from the Court.

An argument was advanced by the King's Advocate, that "this sale was not made under the authority of the Prize Act, or in conformity to the regulations prescribed in it, and that the agent could only have been answerable for the proceeds, if the commission of sale had been directed to him."

If the fact were as represented, still the conclusion would not follow, because, as proceeds of prize, which they are admitted to be, however acquired, they are liable to be called in, unless the party can shew a legal title to retain them.

But the proceedings in this respect have been perfectly regular, and conformable to the Prize Act. It was said by the King's Advocate, that the sale ought to have been made by the prize agent, under the 53d section of the act, which directs that "all appraisements and sales shall be made by agents appointed by the flag officers, &c." This clause has received a judicial interpretation in the case I have so often referred to, *Home* against Lord *Camden*, where it is expressly held to relate "to appraisements and sales after final adjudication," only.

It was then said that the ship and cargo were not "sold under the direction and inspection of such persons as shall be appointed by the claimants and captors," under the 52d clause. The act does not direct the sale to be made by such nominees, *that* by the usual course and practice of the Admiralty is done by commission to the marshal. The parties have a right, if they choose to exert it, that the sale shall be conducted under the direction and inspection of such persons as they shall appoint, but if no such persons are appointed, they must be taken to have waved their right; and since the sale took place upon a joint motion of the parties, that the property should be sold by the marshal, *he* may in some measure be considered as their nominee to direct and inspect the sale.

The sale then was conducted in the usual manner: in virtue of the commission directed to the marshal, the ship and goods were advertised as being to be sold, under the authority of the Court of Vice-Admiralty, they were put up to auction by Messrs. *Hill*, and Co. and were knocked down to the respondent as the highest bidder.

Upon this review of the Prize Acts, it appears that as to the *right of possession*, the parties could only acquire the possession of *ship and cargo* upon *bail*, or as *purchasers*. They were not entitled to it upon *bail*, as that mode was found impracticable; if they acquired it as *purchasers* they were answerable for the purchase-money, as before stated. And as to the possession of the *proceeds*, they are not entitled to it, either as parties, agents, or purchasers, *in any case whatever*, but are bound to pay them into the registry.

Right, then, the parties having none, how can the Court be justified in allowing the respondent to re-

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tain the proceeds, contrary to the Prize Acts, for the purpose of effecting an agreement, which in itself, is substantially illegal, and to support arrangements which the parties had no power whatever to make?

This brings me to the second question, made by counsel.

It is farther pleaded in the answer, "that the captors, and claimants, and the agents of Captain *Beresford*, are all satisfied with the security they now have, and are willing to allow the property to remain where it is at present."

Not only no power or authority whatever is given to the Court to permit proceeds to be lodged in private hands, but the words of the act are very positive against it; "that the proceeds *shall* be paid into Court, and *shall not* remain in the hands of the captors' agent." How then can any consent, or acquiescence amongst the parties, set aside a positive direction to the Court?

No such power is given them by the act itself, but the direct contrary may be inferred from it. Certain things are allowed to be done "*in case captors and claimants shall agree*," such as, that proceeds may be placed in public security at interest, instead of the bank: in another clause that "property, with the consent of captors and claimants, may be sent to *England* for sale." But if captors and claimants, *by their joint consent*, could dispose of proceeds in a different manner from what the Prize Acts direct, these clauses, empowering them to make a particular disposition in certain cases, would be totally nugatory. The introduction of these clauses, is therefore complete proof, that, in the opinion of the legislature, claimants and captors, by their joint consent, can make no disposition

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of captures proceeds, other than such as the Prize Acts have directed.

So with respect to delivery upon bail. There is no point upon which it should seem that parties might be more safely trusted to agree, than upon the sufficiency of the securities. Yet here the competence of the bail is not left to the mere acquiescence and satisfaction of the parties. A warrant is always directed to the marshal, to enquire into, and report the sufficiency of the security proposed. How then can it be contended that the consent of parties can justify the Court in leaving this property without any security at all?

How little latitude is given by the acts to parties *jointly agreeing* as to the disposition of the proceeds!---They have only their choice between the Bank of England, and other *public security*. This joint consent gives no power of making any other disposition, and even then the proceeds are still in the custody of the Court, for the property stands in the name of the Registrar, as well as of the other trustees. How then can this consent be an authority to the Court, to suffer property to remain in the possession of private persons?

For who are these parties who assume a right to authorise the Court to permit this property to remain in private hands, and without the security required by the acts? They are parties, who, as has been already proved, have no legal interest or property in the capture whatever. It was because the captors and claimants have not the legal interest that the custody and protection of the property are vested in the Court of Admiralty. These regulations and restrictions in the Prize Acts were made as much against captors and claimants, and their agents, as any other persons; to prevent collusions,

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embezzlements, and other unfair practices, and most particularly to prevent captors from fraud, or loss of property, by their agents. Shall parties then come in and say, *we* are willing to dispense with Acts of Parliament made against ourselves, *we* desire to divest the Court of Admiralty of that legal custody and protection, with which the law has entrusted it exclusively, and as against ourselves. And for what purpose is this consent, and acquiescence of the parties entered into? To carry into effect an illegal agreement, and to dispose of property to which they have no right or title whatever.

It has been farther urged, that since the parties are quiescent, the Court has no *right* to proceed *ex officio*. Admitting that the Court was acting merely *ex officio*, in the present case it was competent so to do.

I shall first consider the objections made to this power by the King's advocate, from the Prize act. In several sections of this Act, security was to be required, or proceeds called in *at the request of parties*. In section 62d, In case of condemnation, where there is *no claimant*, in the Vice-Admiralty Court, the Judge may compel the agent to give security, at the *requisition of the captor*. In clause 63, In cases likewise where there is *no claim*, the proceeds may be vested *at the prayer of the captor*. In the 64th clause, The Judge of the High Court of Admiralty, at the time of serving the inhibition, or at any time pending the appeal, shall assign the agents or other persons in whose hands the proceeds may have come, to bring them into the Registry, *at the prayer of either party*, or of the treasurer of *Greenwich* hospital. The 65th clause gives a similar power to the Court of Appeals. It was admitted that these provisions mention only cases

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of no claim, causes in the High Court of Admiralty, or in the Court of Appeals, and do not verbally comprehend cases where there *is a claim*, in causes in the Courts of *Vice-Admiralty;* but it was argued that the same *spirit* must be extended by *analogy* to *these* cases likewise. The inference is certainly to be drawn the other way; when those other cases and Courts are by name mentioned, these clauses cannot be extended to cases and Courts not at all mentioned, and which therefore the legislature must be supposed to have intentionally excluded from the operation of those clauses. But in the clauses of the acts under which *these* proceeding took place, and which *do* relate to the case of claims in the Vice-Admiralty Court, expressly, no such restriction, as "*at the request of parties*," is to be found at all. They say categorically, "the proceeds shall not remain in the hands of captors or their agents, but shall be brought into the registry of the Court." They do not require the Court to wait for the application of the parties, but positively direct the thing to be done, and consequently impose it as a duty upon the Court.

It was laid down expressly by Sir *William Scott*, in *Smart* and *Wolff*, that Courts of Admiralty have generally the power of proceeding to compel the payment of proceeds, "as well *by the act of the Court, ex officio*, as on the application of the parties interested," (3. T. R. 329,) He stated it *arguendo*, indeed, but as a settled incontrovertible doctrine, and which was neither disputed by the opposite counsel, or denied by the Court; and as a power which is frequently, and notoriously exercised.

And indeed the Courts of Admiralty, from their very constitution, must necessarily be invested with such a power. Those Courts are the trustees, guar-

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dians, and protectors of prize, on behalf of the public. The parties, neither separately or jointly, have *the legal property* in the subject of litigation. How many cases may be supposed, in which the security of the property might demand the interference of the Court, independently of the parties? Imagine fraudulent connivances between parties themselves, or, in their absence, amongst their agents, to the injury of captors and claimants themselves, unforeseen circumstances by which proceeds might be endangered without parties or their agents having it in their power to make application, or not feeling an interest so to do. In these and many other cases which might be conceived, a power of proceeding of its own authority is absolutely necessary to enable the Court to execute the solemn trust reposed in it, for the security of prize property. This custody, and the want of property in the subject of litigation in the parties, create a great difference between the constitution of Courts of Admiralty and all other Courts. A trust and custody imply the possession of powers to execute them.

The only question then is, whether this power has been properly exerted? Proceedings, *ex officio*, must necessarily be governed by the discretion of the Court. I agree with the King's advocate, that this discretion, ought not to be a mere capricious exertion of authority, but a legal discretion, proceeding upon solid grounds. I conceive then,

1st. That the *positive directions of the Prize Act* are of themselves a sufficient legal foundation for the proceedings of the Court.

2d. When the respondent says "that he stands ready and willing to do any thing which any of the parties interested have a legal right to require him to perform," he does not place the business upon a

right footing. He is debtor not to the *parties*, but to the *Court;* since the property was in the legal custody of the Court, and the sale made by its officers. The Court must look to the security of the property; I can have no doubt of the respondent's competency---he has sworn that "he has property sufficient to pay the whole sum." But that is not the question---the Court must proceed upon general principles. It is not asked, whether A. B. or C. are responsible men, but whether the Court, without authority and without security, can justifiably leave property to an immense extent in *any* private hands? The opinion of the Commissioners of Naval Enquiry, in their fourth report, to the House of Commons, was very decided upon this head; they strongly reprobated it as an abuse that agents should have the use of the proceeds of prize in cases of appeal. "It sets," they observe, "his interest at variance with his duty. The property is in many instances too great to be trusted to an individual, especially if that individual be engaged in trade; and most of the prize agents abroad are merchants: they are tempted to speculate upon it; and we find that some of the most considerable among them have failed at different periods for very large sums. The principal Agency house in Jamaica, which is said to have been concerned in nine-tenths of the captures carried into that island during the last war, amounting in value to about £2,143,000 sterling, has been very lately under pecuniary embarrassments," p. 262.

Under such an authority can the Court be blamed for using some little caution? No power whatever is given to the Court to leave proceeds in the hands of purchasers, or agents; in case of the failure of those purchasers or agents, as no security

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is given, where is the Court to look for the property? And what is to shield the Court and its officers from the imputation of a neglect of duty? Not the acts of parliament, for they would have been guilty of *laches* in not enforcing them, not an agreement between the parties, which, as respecting the proceeds, are illegal, and void. The Court must look to possibilities; individuals may exercise a discretion, and may run risques, but a public body, acting as a trustee for the public, must go upon certainties. It would be wanting in its duty to itself, if it did not reduce these proceeds into its own possession, and to the crown, in whom the present legal interest vests, and for the protection of which the Court is bound to interfere.

3d. The manifestly hazardous situation of the property itself, from other quarters, in addition, would be a still stronger impulse upon the Court. A war between *Great Britain* and the *United States* was daily apprehended, this province was threatened with an immediate attack; allowing every merit to the brave defenders of the country, it was not impossible that it might be taken by the enemy. In that case it was evident that nearly the whole of the prize property in the hands of individuals would be in danger of total loss.

In consequence of a requisition from the court, the marshal made a report of the state of prizes. It appeared that upwards of £120,000 of the proceeds were in the hands of purchasers, whose time of payment had expired. It was retained by them too without any security.

The court thought it right, that property to this immense amount should not be left exposed in this dangerous situation, but that in compliance with the acts of parliament it should be called in, and

invested in the *British* funds. In so doing it thought it was exercising a sound discretion for the security of the property entrusted to it, and that it was performing its duty to the King, to the *British* nation, and to the officers and men of the squadron upon this station.

Upon these grounds the general order of the 23d of *September* was issued, directing all purchasers to pay in their proceeds. Three months elapsed, and but a small part was brought into the registry. The order of the 29th of *December* was then made, and monitions directed against defaulters, beginning with the case of the *Herkimer*, because the proceeds in that case were of far greater amount than in any other, and because it was understood that resistance would be made to the order for payment. If the order was properly issued, it was necessary to enforce it by farther process.

I have hitherto gone on the supposition that the Court proceeded *ex officio*, and have shewn that it had that power, and was fully justified in exerting it, under the present circumstances. But I am more inclined to think that these proceedings were not *ex officio*. They were founded upon the application of the parties. The minutes of the Court appear thus in the registrar: "On motion of counsel for captors and claimants, stating that difficulties had occurred in procuring securities, and praying the Court to direct *a sale of the property, and the proceeds paid into the registry, and to take the usual course*, the judge decreed a commission of sale." The express application of both the parties, concurred, therefore, with the regulations of the Prize Act, in imposing an obligation upon the Court to compel the payment of the proceeds. The monition was merely in execution of the commission

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of sale, and in aid of the marshal, who was answerable for the proceeds of sale.

The Court might indeed have proceeded against the Marshal, and have committed him upon an attachment for not returning the commission with the proceeds, as in the case of the *Fortuna*, *Gerritts*, or the Marshal might have prayed a monition against the party. But as the Marshal stated to the Court that he had applied in vain for payment, the Court judged it expedient, and the most expeditious mode of proceeding, to issue a monition directly against the party who was in possession of the proceeds.

Little stress was laid upon one argument just stated by the counsel, that the whole cause was now out of this Court on account of the appeal. On this no farther observation need be made, than that these proceedings are what are directed by the act to take place after the appeal entered, and in consequence of the appeal.

In considering the protest, and the answer, and in following the arguments of counsel in their full extent, and in every point of view, which for the satisfaction of the parties, and the justification of the Court, I thought it incumbent upon me to do, I have been obliged to take a wide range. To bring the whole to a single point, it is evident then that the respondent's plea,---that though in *strictness of law* he may be a purchaser, under the Marshal's sale, and responsible for the purchase-money, yet *in justice and equity* he ought not to be called upon to pay it, because *the truth of the transaction was*, that it was a present sale of the ship and cargo by the captors to the claimants,---is not maintainable; because the captors had no legal interest, or property in the ship or cargo to dispose of. 2dly, That though after the sale by the marshal, the purchasers had a

right to dispose of the ship and cargo in what manner they thought proper, the Court is only concerned with the contract of sale, and has nothing to do with the subsequent transactions, which can therefore afford no plea for the retention of proceeds. 3dly, That the respondent has no right whatever to hold the proceeds as agent for the parties, because the prize acts give no such power, but expressly direct them to be paid into the Registry. 4thly, That the respondent, therefore, stands before the Court only as a purchaser, as a mere stranger in possession of the proceeds of prize, and consequently liable to the farther compulsory process of the Court in case of non-payment.. I conceive too that as any other purchaser, by the law and practice of merchants, he is chargeable with interest from the time of payment, which, by the conditions of sale, was fixed at six months.

However great may be the interests at stake, the present transaction in itself is a mere trifle, in comparison to the real question before the Court, which is not merely whether the proceeds of the *Herkimer* shall be brought into the Registry, but whether the parties, or the Court of Admiralty, have the custody and disposal of captures before final adjudication; whether the powers and authorities of the Court shall be superseded, and the regulations of the legislature evaded and defeated by a combination of parties. The substance of the answer, with the statements of counsel, do indeed afford a most extraordinary kind of defence. When the purchaser is called upon to pay the purchase-money, we are told, that by some private understandings, unknown to, and unauthorised by the Court, a solemn public sale made under its authority, by its own officers, and under the express directions of an act

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of parliament, is a mere fictitious sale, the purchasers ideal, and the purchase-money returned in the marshal's account of sales, a non-entity, which nobody is accountable for; and that under colour of that fictitious sale, without any authority from the Court, the parties have taken possession of ship, cargo, and proceeds; the law indeed says that captures shall not be delivered to parties, but upon bail, upon the stipulation of two securities, who must justify, in double the value, besides the responsibility of the party; and that proceeds shall not be retained in any case. By this contrivance of a sale, they have evaded the prize act, and have got possession of the capture, without giving any security whatever, and still claim to hold the proceeds; and it cannot but occur to the recollection of the Court, that the person who has thus acquired the possession without security, in open Court declared himself unable to justify as *one* of the securities. Having thus, I may say, as against the Court, and if their plea could be valid, *fraudulently* obtained possession, the parties have divided the ship and cargo amongst themselves, without a shadow of right, or power. Such a case loudly calls upon the Court to vindicate its own authority, and that of the laws.

It has been alledged, by way of a mitigatory plea, by the respondent, "That he would not have been concerned in the purchase if he had apprehended that it would have been required of him to pay into Court the whole proceeds of the sale of the said ship and cargo, the particular object of the said purchase on the part of the respondent being to enable him to carry into effect the said agreement." If indeed the parties in this case had erred through ignorance, or from inadvertence, they might justly

be entitled to some indulgence; but they were perfectly cognizant of the nature of the transaction in which they were engaged. The law upon the subject has been frequently stated by this Court. It has had occasion to animadvert upon former irregularities, which had taken place with respect to agreements, and divisions of proceeds. In this case, in particular, soon after the condemnation, when it was proposed to take the property upon bail, and when Commodore *Beresford* gave in his protest against a compromise, the Court, at length, stated the law relating to the rights and powers of parties and their agents over captures and proceeds. It stated them precisely in the same manner as it has done this day, and it supported its opinion by the quotation of the same great leading decisions which it has now again referred to. If, with this information, and after such caution given, parties will take upon themselves to be wiser than the law, to contravene the provisions of the legislature, and to act in defiance of the Court, to themselves only they must attribute the consequences.

But the respondent, though thus without lawful excuse, has thrown himself upon the compassion and mercy of the Court. He alledges, that though "he has property sufficient for that purpose, engaged as he is in commercial concerns, it would be highly detrimental, if not ruinous to him, to be compelled to pay the said sums into Court." I hope, in attending to that plea, I do not suffer my feelings as a man to encroach too much upon my public duty; but I am unwilling to exert even the just authority of the Court, to the detriment of any individual. However unjustifiably they may have acted, the Court is disposed to enable the parties, as far as is consistent with its duty, to disentangle themselves,

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if possible, from the difficulties in which they are involved. I have no doubt but the respondent is responsible, both now and after the final decision, to the full amount of the proceeds of this ship and cargo: the only relief which it is in the power of the Court to allow, is that of delay as to the time of payment.

The respondent prayed the Court to receive another affidavit in explanation of the transaction before it decreed any further process, the material part of it was as follows:

"The only means which now remained to be adopted were to let the ship and cargo be sold under the authority of the Court, but adhering to the purpose of compromise, the basis of which was that *Griswold* and myself should be accountable to the claimants for the sum of £43,875 (from which would be deducted £23,600, their part of the sum compromised) it became necessary that we should not suffer the property to be sold for a less sum; it was agreed that I should become the ostensible bidder, and as neither ship or cargo brought the sum, we agreed upon to be the true value, they were of course knocked down to me. After the sale it was agreed that as the ship could not sail from *Halifax* in any other capacity than a *British* vessel; that I should take her wholly to myself for £2,500, which I accordingly did, and she was registered in my name by that of the *George*. The cargo was to be equally divided between Mr. *Griswold*, and myself. As the bark and copper were better adapted for the *English*, than the *American* markets, we determined that those articles, which composed part of the *Herkimer's* cargo, should be sent to *London* on our joint account. The cocoa, being the other part of

the cargo most suitable for the market of the *United States*, it was decided should be laden on the *George* for *New York*. Upwards of 300 tons were accordingly shipped on that vessel. Previous, however, to her sailing, I agreed to buy from Mr. *Griswold* half the copper, (being his interest in it) at 1*s.* 4*d.* per lb. amounting to £4,668, and seventy-five tons of his half the cocoa, at £71 per ton, amounting to £5,325. Thus I held an interest in the *George's* cargo, to *New York*, of two hundred and twenty tons of cocoa. I also agreed with him for a certain commission of four and a half per cent. to consign my said part of that vessel's cargo to him for sale at *New York*, he guaranteeing to me the sales and remittances. In consequence of his allowing me to ship to *London* his half the bark, to be consigned to my correspondent, and the proceeds to be under my controul, I allowed him to retain 17,400 dollars (the prime cost thereof) out of the proceeds of the *George's* cargo. The balance of the proceeds of that consignment, and the amount of sales of the ship, *Griswold* was to remit to my agent in *London*, on or before the 1st of *August*, 1807, in the event that the compromise, could not, by the opinion of Sir *John Nicholl*, be legally completed in the Court of Appeals. For the more clear elucidation of these transactions, and the state of Mr. *Griswold's* account with me, I refer to the annexed paper, by which it will evidently appear, that he has under his controul the proceeds of the ship and cargo, to the amount of about £27,000."

From this affidavit, though the respondent had stated in his affidavit that it would be "grievously oppressive upon him to be compelled to pay the said proceeds, when he had received but a very small part of the said property," it now appeared

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that more than three fourths of the property belonged to him, and had been sent on his own account for sale to the most advantageous markets, above a year since.

That though the respondent had stated, "that he had not derived the smallest profit or advantage from this transaction," yet that it was in reality a speculation from which the agents expected to have received much emolument; that the bark and copper sent to *England* and lost, were covered by an insurance; that by the statement in the account current, of the probable proceeds of the ship and cargo at *New York*, compared with the prices paid by the respondent to Mr. *Hill* and Mr. *Griswold*, the respondent expected to realize above £3000 upon those sales only; that those sales having been effected, and Mr. *Griswold* charged with those probable proceeds, there was reason to believe that that part of the speculation had succeeded.

That though the respondent stated, that one principal reason for listening to the claimants proposals was, "the great loss of interest which would arise to the captors on the proceeds of the ship and cargo during the controversy of an appeal," yet that by the mode adopted no interest whatever would be made upon the proceeds for the benefit of the captors, as would have been the case had the method prescribed by the act of parliament been pursued, by placing the money upon public security, where the accumulating interest would have paid the expences of the cause.

And, upon the whole, that though these statements were immaterial to the points in question, yet that the facts appearing upon them, rendered the principles laid down by the Court still more applicable to the case.

The Court however in fixing the time for payment consulted the wishes of the party himself, and, accordingly,

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Decreed a peremptory monition to the respondent, to pay £41,671 19s. 4d., with interest, from six months after the sale, on or before the 10th day of May next.

Instance Court.

May 18th, 1808.

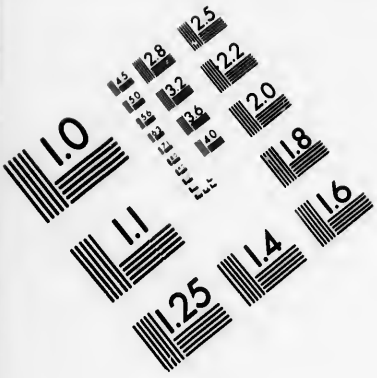
THE Ship ACTIVE was seized in port by the collector. She sailed from *Bristol* under licence for *St. Domingo*, put into *Cork* for a convoy, where she took in thirty-four cases of wine. She touched at *Madeira*, where she exchanged some goods for wine. Upon her arrival at *St. Domingo*, she landed the thirty-four casks of wine, and about a fourth part of her cargo, and took in nothing in return but some coffee and sugar, for the use of the ship, except a bale of slops which had been put on board by mistake, and were relanded. Having received some damage she put into *Philadelphia* to get a mast, sold as much of her cargo as was required to pay for it, and then sailed for *Halifax*.

Touching at *Cork* for convoy, and at *Madeira*, no deviation from a licence to sail from *Bristol* to *St. Domingo*. Putting into *Philadelphia* in distress, without landing or entering a cargo, not an importation from thence.

The King's advocate prayed the condemnation of this vessel and cargo upon two grounds, that of an importation from *Philadelphia*, and of a departure from the licence, by touching at *Cork* and *Madeira*, and not returning to *Bristol*.

JUDGMENT.---Dr. *Croke*.

I cannot consider these as deviations from the licence. The vessel put into *Cork* merely for the purpose of joining a convoy, which was about to sail



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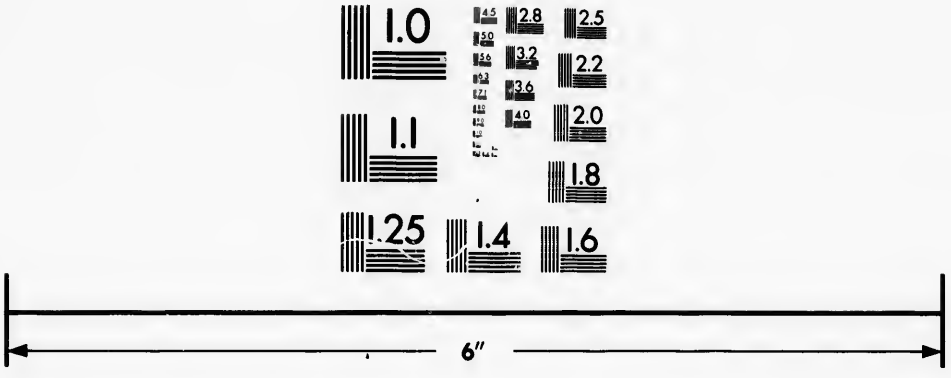

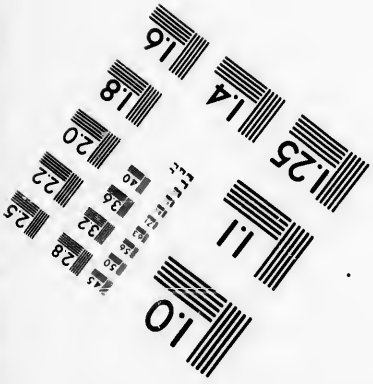

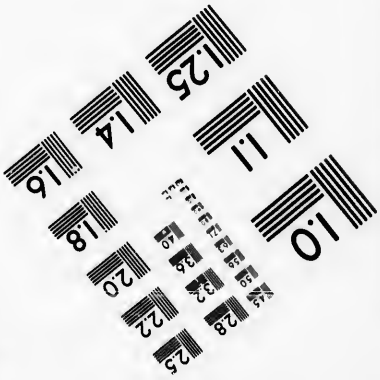

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The Ship Active.

May 18th, 1808.

from that port. This is proved by the affidavit annexed to the claim, by all the witnesses, and by some letters on board. This, so far from being any violation of the licence, was only a means of executing the powers given by it with greater safety, and it was indeed meritorious on the part of the captain and owners not to expose their vessel to capture. To touch at *Madeira* is not unusual in a voyage to the *West Indies*, and sufficient latitude for any such trifling departure from the straitest course possible is allowed in the licence itself, which does not say "direct to *St. Domingo*." It is objected that the vessel put into all these ports for the purpose of trading. A quantity of wine was taken in at *Cork* and was landed at *St. Domingo*. It is to enquire whether this was a breach of the licence, or even whether the licence was violated in any other respect, because the licenced voyage was at an end when the vessel arrived at *St. Domingo*. The offence, if any had been committed, was there deposited. The effects of the licence ended there, for the terms of it did not require that the vessel should return to *Bristol*. The moment she quitted *St. Domingo*, except as to the protection afforded by the licence, for having gone to that port, she was at liberty to trade the same as any other *British* ship. Putting the licence, therefore, out of the question, what is the case of this vessel upon her arrival here? She brings to this port a cargo taken in at *Bristol*, and a quantity of wine from *Madeira*. These were both lawful importations. The vessel's touching at *St. Domingo*, which she might do under her licence, and her putting into *Philadelphia* in distress, and purchasing a new mast and provisions there, cannot render the voyage unlawful. Nor was it an importation from *Philadelphia*, since whatever

might have been the original intention of the master, his putting in there appears to have been merely occasioned by necessity, nothing more was done in that port than what the distressed situation of the vessel required, and no part of the cargo brought here was either landed or entered there.

The Ship Active. *May* 18th, 1808.

The King's advocate having failed therefore in the proof of his allegations, and there appearing to have been no grounds for the seizure of this vessel and cargo, I declare the same to be restored with costs.

The Fly, *Frazer*.

July 4th, 1808.

On further proof.

Judgment.---Dr. *Croke*.

Trade to *Vera Cruz*. Licence not produced, and proof of property not satisfactory, on further proof. Condemned.

THE further proof in this case is insufficient, and I therefore condemn both ship and cargo. It has been brought in after nine months have been allowed the parties for that purpose, and which was sufficiently ample to have procured what would have been satisfactory, if it could have been obtained. The vessel was taken upon a return voyage from *Vera Cruz*, to the *United States*. Her cargo consisted of one hundred and fifty thousand dollars, bark, and logwood, to a large amount. The peculiar nature of the port from whence the vessel was bound, and the great value of the cargo, naturally engaged a considerable portion of the attention of the Court at the former hearing, and must have been no less an object to the owners. The Court therefore required proof of what did not ap-

The FLY. July 4th, 1803.

pear in the first instance, of the authority under which this vessel had gone to *Vera Cruz*, and of the ownership of the *American* claimant. The trade from the *United States* to *Vera Cruz*, is not in any manner prohibited by any orders or instructions which have been given by His Majesty.

With the legality of the trade, as far as the laws and colonial regulations of *Spain* are implicated, and the licences under which it is carried on, as a mere part of the internal policy of that country, we have no concern. But as the colonial trade is much confined to *Spanish* subjects, and may be placed under such limitations as may render it completely an adopted trade of the enemy, it was required that the claimants should produce the licence and authority under which this voyage was made. This has not been done.

The proof of property is left as deficient as it was upon the first hearing and the difficulties which then appeared have not been removed. The orders upon the outward voyage, which are now brought in, do not explain the transaction. The master was directed to bring only dollars in return, but here is bark to the value of two thousand seven hundred pounds, besides other goods. This at least is an advance. The outward cargo does not seem to have been paid for, yet no authority appears for making any advances.

In short, the whole transaction is left in a degree of obscurity, perfectly inconsistent with a real and fair transaction. A business to so large an amount could not have been carried on without many documents which might have been ready to produce. Such a quantity of property could not have been left so entirely without documents as this now appears to be. There must have been authorities,

powers, accounts and correspondence, sufficient to comprehend the whole of it; and to explain every circumstance. I feel no scruple therefore in condemning both vessel and cargo.

The Fly. July 4th, 1808.

N. B. This sentence was affirmed by the Lords of Appeal, upon the 18th *July*, 1809.

Beaver Schooner, *John Jones*, Master, in Ballast.

April 26th 1809.

THIS vessel, in ballast, from *New York*, was seized in port by the collector of the customs at *Halifax*. The allegation on behalf of the seizure, stated that she was seized on the 27th of *March*, 1809. That a licence had been granted at *Halifax*, to trade to *St. Domingo*, to *Angus Shaw*, the owner of the vessel, and to *Hartshorne* and *Boggs*, merchants of *Halifax*, as shippers. It stated that the produce of *St. Domingo*, brought back to some port in the province of *Nova Scotia*, shall not be liable to condemnation; that she sailed from *St. Domingo*, to *New York*, against her licence. That ships must be registered in the port to which they belong; that she was registered in *Quebec*, not the port she sailed from.

Trade to St. Domingo.

Claim of Master.

The ship, in ballast, was claimed for *Angus Shaw*, of *Quebec*, who was the owner, according to the best of deponent's knowledge and belief. In *November*, appointed to the command by Messrs. *Robinson* and *Hartshorne*, of *New York*, the agents as he understood, and verily believes of the said

The BEAVER Schooner.

April 26th, 1809.

Angus Shaw. In 1808, he sailed in *November*, for *Halifax*, arrived in *December*, addressed to *Hartshorne* and *Boggs*---if a licence could be procured, to *Havannah*, or otherwise to *St. Domingo*---master's name indorsed at *Halifax*---obtained a licence, sailed 28th *December*, arrived at Port au Prince, 27th *January*; disposes of his cargo, took on board a cargo of coffee and wood, for dunnage. Before he left *St. Domingo*, he received intelligence that His Majesty had granted permission to vessels to carry and return cargoes to the *United States*. Sailed 14th *February*, for *New York*, arrived 4th *March*, discharged his cargo, thereby *concluding his voyage.*

19th *March*, sailed from *New York*, in ballast, for *Halifax*, arrived 26th, and seized 27th *March*.

Master's Examination.

4th. Took the command; 5th *November*, the former master, *Angus M'Intyre*, delivered the papers; 6th known her only from the time he took charge.

Built in *Quebec*.

7th Believes the licence did not warrant or authorize her to proceed on the voyage, as pursued by the deponent, only back to *Halifax*; but on his arrival at *St. Domingo*, having seen a proclamation, which was stated, and he believes to have been issued by His Majesty, as it is called the king's proclamation, authorising *British* subjects to trade and carry the produce of *St. Domingo*, to neutral ports, he was induced to go to *New York*. 8. Does not know under whose management, before he took the command; since, under the direction of Messrs. *Robertson* and *Hartshorne*, he corresponds with them only respecting her concerns. 9. Cannot undertake to swear who are the owners, further than he believes her register will tell. Believes *Angus*

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April 26th, 1809.

Shaw is the real owner, as his name is in the register: no correspondence with him.

Papers.

1st Register. *Angus Shaw*, owner, *Angus M'Intyre*, master; built at *Quebec*, 2d *November*, 1805.

4th Indorsement at *Quebec*. On the change of master, to *Louis Leverai*, 4th *July*, 1806; to *Basil Planti*, 23d *August*, 1806; to *Angus M'Intyre*, 9th *May*, 1807; to *Jones*, 23d *December*, 1808, at *Halifax*. 8th, *St. Domingo*, clearance to *Halifax*, 11th *February*.

SENTENCE.---*Dr. Croke.*

There are two preliminary questions upon the incapacity of the claimant. It is said, 1st, that it is not *Angus Shaw's* property, because *Robertson* and *Hartshorne* have the management. The cases which have been quoted of *Robertson* and *French*, 4 *East*. 130. *Thomas* and *Joyle*, 5 *Esp*. 88, were founded upon possession *as owners;* here *Robertson* and *Hartshorne* appear only *as agents*, which is stated in the master's examination. This, coupled with the register, and there being no proof to the contrary, is evidence sufficient of the property.

It has been argued, 2dly, that the owner has not complied with the register acts; that she has been employed from and to *New York*, which therefore is the port to which she belongs, and yet she was registered at *Quebec*. By several indorsements on the register, she sailed from and to *Quebec* till *May*, 1807. There is no evidence how she has been employed from that time to *November*, 1808, but there is no proof that she was not employed from *Quebec;* and during the winter she must either have been unemployed in the river *St. Lawrence*, or must have been employed from other ports. The owner's resi-

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dence at *Quebec*, and the employment of the vessel then, for a length of time, is a sufficient compliance with the act.

The master is said not to be a British subject, but he was born in *Scotland*, lived there till within four years, and is unmarried; on taking command of a British ship, he again resumed a British character, and is not a citizen of any other country.

As to the main allegation.

The vessel is said to be liable to forfeiture, for having broken her licence, by going from *St. Domingo* to *New York*, and not having returned with a cargo to *Halifax*. Since the order of council upon which that licence was granted, viz. 15th *July*, 1807, permitting a qualified trade to *St. Domingo*, to licenced vessels; another order was issued, 14th *December*, 1808, laying open the trade to *St. Domingo*, to all British subjects, and issued orders, previous to the sailing of this vessel from *St. Domingo* To maintain this ground, the prosecutor must prove that the Claimant, by having received a beneficial licence from His Majesty, before the trade was laid open, is now in a worse condition than all other subjects, who have received no such benefit, which is monstrous.

To support this, they argue, that the licence was conditional, and the condition has been broken. No such thing. There was no condition to bring a return cargo to *Halifax*. The out cargo was protected, so was a return cargo, but there was no obligation upon the owner to bring back such a cargo, even without the second order. I do not think the vessel was confiscable. Her voyage from *St. Domingo* to *New York* was not protected by it, and if she had been seized upon that voyage, the vessel would have been confiscable, but the cargo having

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been unloaded at *New York*, the offence was there deposited, and unless the vessel had been caught in the fact, was not subject to confiscation afterwards.

Besides the voyage was completed at *New York*, and the present is a new voyage.—

Even under the licence *only*, then it does not appear, that the vessel would have been confiscable. But now the licence, with whatever conditions or restrictions it contained, is swept away, and merged in the order which lays the trade quite open. The claimant is entitled to the full benefit of it, as it bears date antecedently to the commencement of the transaction.

I restore the vessel with costs.

The Schooner ELEANOR, *Hall.*

July 22d. 1809.

THIS case having been appealed to the High Court of Admiralty, and the Judgment of this court affirmed, upon much the same grounds, with those which were stated by the Judge of the Vice Admiralty Court, they are not here repeated. They are reported in *Dr. Edwards*, vol. 1, p. 135.

LA FURIEUSE.

Sept. 4th, 1809.

THIS vessel was taken by *La Bonne Citoyenne*, Captain *Mounsey*, on the 6th of *July*, 1809, an allegation was now given on behalf of the *Inflexible*, Captain *Brown*, as joint captor. The cause came on upon the admission of the allegation.

Joint capture, conjunct expedition pleaded in an allegation not proved by the evidence actual, and constructive, assistance not proved.

LA FURIEUSE.

Sept. 4th, 1809.

JUDGEMENT---*Dr. Croke.*

In deciding upon the admissibility of this allegation, the court has to consider, whether the parties, if they can prove the facts as there stated, have made out such a case, as will support their claim to be considered as joint captors.

In the first article, they plead, that the *Inflexible* and *La Bonne Citoyenne*, were under joint orders to convoy a fleet of merchantmen to *North America*, and that Captain *Mounsey* was under Captain *Brown's* orders.

In the second, that they sailed together on the 18th of *June*, with fifteen sail, under their joint convoy, under the command of Captain *Brown*.

In the third, that on the second of *July*, at four in the morning, a strange sail appeared, distant about fifteen or sixteen miles; that Captain *Brown* ordered *La Bonne Citoyenne* to chase and examine the strange sail; that thick weather came on, and *La Bonne Citoyenne* was separated from the rest of the convoy.

Fourthly, that *La Bonne Citoyenne* having examined the strange sail, shaped her course to rejoin the convoy. That at Noon, of the 5th of *July*, the *Inflexible* being to the northward of *La Bonne Citoyenne*, about fifty-one miles distant, and out of sight; Captain *Mounsey* chased the *Furieuse*, and about four in the morning of the 6th, the *Furieuse* was seen from the deck of the *Inflexible*, above fifteen miles distant, steering nearly the same course, and *La Bonne Citoyenne* was seen from the mast head of the *Inflexible*, in chase, at the distance of about twenty-nine miles. Fifthly, that *La Furieuse* upon discovering the *Inflexible* with the convoy, was intimidated, and was induced to alter her course

from North West, and by North, to South; in consequence of which, she was under the necessity of approaching *La Bonne Citoyenne*, and did actually approach her, and about nine o'clock the same day *La Bonne Citoyenne* brought her to action, and captured her about four in the afternoon of the same day. *La Bonne Citoyenne* did not afterwards rejoin the convoy, but bore away to *Halifax*.

Sixthly, that the *Inflexible* was not in sight at the time of capture, being distant thirty or forty miles, nor did she alter her course, or chase, but continued with the convoy, believing it to have been a detained vessel, nor could *Captain Brown* have ventured to chase to leeward, without being in danger of separating from his convoy, and neglecting his duty.

Seventhly, that if the *Furieuse* had continued the course she was steering, she would either have come into the convoy, or escaped from *La Bonne Citoyenne*, and she would have contiuued such course, had she not been intimidated.

These are the facts as stated in the allegation, and I must premise, that, as a general principle, it has been the object and intention of the Courts of Vice Admiralty, to *narrow* rather than to *extend*, the interest of joint captures, and to confine as much as possible, the benefit of prize to such vessels as are the real and actual captors. For in many cases it would be extremely hard, that they, who have borne the burden and heat of the day, should be liable to be dispossessed of a part of their reward, by vessels which had no other merit, than that of having been in sight, or under such circumstances.

This claim may be reduced to three points, 1st. that an actual assistance was rendered. Secondly, that

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there was a constructive assistance; and thirdly, that these two vessels were employed in a conjunct expedition.

The *actual assistance* which has been alledged, is, that *La Furieuse* upon seing the *Inflexible*, changed her course, and by that means, ran into the mouth of *La Bonne Citoyenne*. But it is not a very remote contribution to a capture, or every circumstance which may have led to it, which is sufficient to constitute a vessel a joint captor.

The cases of the *Waaksamkeit* and *Furie* * bear much resemblance to the present. The capturing vessel and the alledged joint captor, were both employed in the same convoying service. The *Dutch* frigate parted upon seeing the other vessels, and was thereby more easily taken, separately. But that circumstance alone, was not held to be sufficient in the case of the *Waaksamkeit*, because proof of other facts was required by the court. In the *Furie* it was held that all effect of presumptive assistance was extinguished by the distance and actual contest; which took place twelve hours after the vessel had been seen, though a joint chase had actually been begun.

In this case, *Captain Brown* was perfectly unconscious of what was going on, he did not even know that it was an enemy, and believed it to have been a detained ship. He had no intention therefore, of chasing or rendering any assistance, and performed no act with that view, but pursued his course without alteration. The *Furieuse* was not intimidated, and thereby induced to surrender by having seen the *Inflexible*, for as the *Furieuse* thereupon changed her course, the *Inflexible*, continuing her former

* Rob. III. 1.

course, the distance from that time was continually increasing. The *Furieuse* had perfectly made her escape from the *Inflexible*, and was out of sight. The engagement continued a long time, and it was not till twelve hours after seeing the *Inflexible*, that the capture was made.

2d. A *constructive* assistance is alledged upon the ground that the *Inflexible* was in sight during part of the chase, which alone, it is said, will intitle her to share.

Most of the cases, which have been quoted to prove that being in sight would intitle a vessel to be considered as a joint captor, suppose it to have been at the time of surrender. Even then, an opposite course forms an exception, and every other circumstance which shews there was no *animus persequendi*, as a want of knowledge, and intention. Here the two vessels were sailing at a large angle from each other, and the distance was continually increasing. Captain *Brown* took it for a detained vessel, and therefore he had no design of co-operating. But there is another consideration more material: The Captain of the *Inflexible* could not have quitted the convoy, to chase a strange sail, without a breach of his duty. In the *Waaksamkeit* it was held necessary to prove, that the capture was made within such a distance as would not totally have removed the vessel from the fair limits of her convoy duty. *Here* it is admitted by the allegation, for it is stated, "That Captain *Brown* could not have ventured to chase to leeward, without being in danger of separating from his convoy, and neglecting his duty." All constructive assistance must be founded upon a supposition, that an actual assistance would have been given if necessary. It cannot, therefore, be raised in cases where such assistance

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could only have been given by a breach of duty, which is *in se* a legal impossibility.

It is next alledged, that these two vessels were engaged in a joint operation, that of convoying a merchant fleet, in which both were equally employed.

The general principle relating to associated vessels was laid down in the leading case of the *Vryhied*,* but there the exceptions were principally dwelt upon. In the case of the *Forsighied*† the general rule was stated more distinctly. "A fleet, associated by public authority, is considered as one body, *unless detached by orders*, or entirely separated by accident; and what is done by one, continuing to compose, *in fact*, a part of that fleet, ensures to the benefit of all. By detachment, is meant for some distinct and separate purpose, which carries them out of the scene of common operation for the time; not merely whether they were sent only on the look-out to preserve their connection with the service of the fleet, and maintain their dependence upon it."

Hence arise two points for enquiry. Was this a joint enterprize? Was *La Bonne Citoyenne* detached from it?

1st. It is stated that "the *Inflexible* was ordered by the Admiralty to proceed, in company with *La Bonne Citoyenne*, from *Portsmouth* with a convoy of merchant ships. Captain *Mounsey* was placed under the orders of Captain *Brown*, and was directed to associate and co-operate with him in the protection and safe conduct of the convoy, and to obey his orders." This certainly constitutes, in the fullest manner, a joint enterprize.

2d. Was there a detachment on a separate ser-

* *Rob.* II. 16. † *Rob.* III. 17.

vice? To examine, to chase within due limits, and to capture the enemy's vessels, is no doubt a part of the duty comprehended within the service of a convoy. In this chase Captain *Mounsey* was within the line of his duty in furthering the common object and purpose of the convoy, and was therefore directed by Captain *Brown* to chase the strange sail, in the course of which duty this capture was made. The connection was perfectly kept up by his making a signal to Captain *Mounsey* not to risque losing sight of the Commodore, and the actual separation was only in consequence of an accidental fog. So that *La Bonne Citoyenne* was not detached from the convoy at all. In the *Forsighied*, instructions given to a vessel "to avoid" being at such a distance as not to observe signals, was held not to be a detached service. That case applies exactly to the present; but there are some facts even more favourable, and which, though not sufficient to found a joint capture upon, as amounting to an actual, or even a constructive co-operation, yet are circumstances which afford stronger proof of connection between the two vessels, and with the prize. There the captured ships were not seen by the fleet till they were in the possession of the captor, so that he could have derived no manner of benefit or assistance from it whatever. In this case the prize was actually seen by the *Inflexible* during a part of the chase. Some remote aid was afforded by the *Inflexible*. Both officers were acting in their proper stations; *Brown* protecting the convoy, *Mounsey* chasing the enemy. If *Brown* had not staid with the convoy, *Mounsey* could not have quitted it to chase. By falling in with the *Inflexible*, the prize was so far intimidated as to change her course, by which means *La Bonne Citoyenne* was enabled to

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come up with her, and in consequence to take her. The *Inflexible* was certainly the *causa sine quâ non* of the capture.

If the good of the service is to be attended to, that would support the admission of this claim. If ships, by chasing out of sight, could exclude the other vessels, engaged in the same service, from chasing in prize, it would act as an encouragement to violate their duty, by going too far from their convoy.

I admit this allegation to proof.

This cause came on to be heard upon the evidence on the 25th *Nov.* 1809. It was proved that the *Furieuse* was not intimidated by having seen the *Inflexible*, that assistance was then impossible, and the surrender was in consequence of all her ammunition being gone. It appeared to be far from a clear point, that the *Bonne Citoyenne* could not have come up with the prize if she had not changed her course upon seeing the *Inflexible*; several of the witnesses swore that she could have overtaken her. Most of the questions of law having been argued and decided upon the admission of the allegation, the case turned upon the joint co-operation. The orders from the Admiralty were produced, which were to the following purport. "To *J. Brown*, Esq. commanding the *Inflexible*, at *Spithead*, 17th May, 1809. You are to proceed forthwith to Halifax, taking with you any merchant ships may be lying at *Spithead* ready for sea, and on arriving there to put yourself under the command of Sir *John Borlase Warren*." The other was directed "to *W. Mounsey*, Esq. *La Bonne Citoyenne*, 1st June, 1809. You are to enquire for, and take under your convoy, such vessels as may be ready to sail to *Nova Scotia*, *New Brunswick*, and *Canada*: you are to put to sea on

the 10th, and to part on the *Green Bank*, and pursue your voyage to *Canada*."

The Court thereupon observed: "Such an association as will constitute a conjunct expedition, must be by superior authority. It is not the mere accidental sailing of vessels together, although the senior officer would necessarily have the command of the whole, and the others were bound to obey his signals. It must depend upon the nature of the orders upon which they sailed.

In these orders no association whatever is expressed, no instructions are given to Captain *Mounsey* to put himself under the command of Captain *Brown*. The orders issued at different times and bear different dates. Captain *Brown* might have sailed before Captain *Mounsey's* orders arrived. The services are different. *Brown* was bound for *Halifax*, *Mounsey* for *Quebec*, *Mounsey*, indeed, was to take charge likewise of such vessels as were destined to *Halifax*, in his way, in case such happened to be ready to sail. But this was only an incidental part of his duty. Their duties, therefore, so far, incidentally coincided; but they could not be considered as composing one conjunct and indivisible expedition.

I am of opinion, therefore, that the allegation given in on behalf of the *Inflexible*, is not supported by the evidence, and I pronounce against its claim to be admitted as a joint captor.

Note. The sentence, in this case, was affirmed by the Lords of Appeal, 9th May, 1811.

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On the 12 *Car.* II. chap. 18. Sect. 2. aliens exercising the trade of a merchant in the colonies. American treaty dissolved all connection with the subjects of the United States. Persons born under the king's allegiance there, not intitled to the privileges of British subjects.

The PROVIDENCE, *Mac Nutt.*

Burbank's Case.

THE King against 329 barrels of mackarel, 22 half barrels of mackarel, 18 hogsheads of cod-fish, 4 hogsheads of beans, 4 tierces of rice, 139 barrels of flour, 1 barrel of alewives, 8 barrels of salmon, and 12 boxes of herrings, seized by *Thomas N. Jeffery*, Esq. Collector of the Customs for the port of *Halifax*, on board the schooner *Providence, Mac Nutt*, Master.

JUDGMENT.---Dr. *Croke.*

A libel has been given in this case on behalf of his Majesty, which pleads, first, that by a certain statute of the 12th year of his late Majesty, King Charles II, it is provided, That no alien, or person not born within the allegiance of the king, shall exercise the trade or occupation of a merchant, or factor, in any island, plantation, or territory, thereto belonging, or which may hereafter belong to his Majesty, his heirs, and successors, in *Asia*, *Africa*, or *America*, upon pain of forfeiture of all his goods and chattels, or which are in his possession. (12 *Car.* II. c. 18. Sect. 2.) The second article pleads the jurisdiction of the Court, under the 49th of the King. Third, that the articles specified were, on the 10th day of *December*, 1809, at *Halifax*, in *Nova Scotia*, one of his Majesty's colonies, or plantations, in *America*, seized by *Thomas N. Jeffrey*, Esq. the Collector of the Customs, as forfeited to his Majesty, for that the same were owned by, or in the possession of one *Eleazer Burbank*, an alien and foreigner, who, at the time of such seizure, was exercising the trade and occupation of a merchant,

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or factor, at *Halifax*, aforesaid, and who had then and there shipped the same goods and chattels as a merchant, or factor, at *Halifax* aforesaid, in and on board a certain British ship or vessel called the *Providence*, whereof one *Thomas Mac Nutt* was the Master, for the purpose of transporting and carrying the same, in and on board the said schooner to the British colony or plantation in *South America*, called *Surinam*; he, the said *Eleazer Burbank*, having, as a merchant, or factor, at *Halifax* aforesaid, chartered and hired the said British vessel for that purpose, all of which is contrary to the statutes in such case made and provided, wherefore the said articles are liable to forfeiture, and ought to be forfeited and condemned.

In answer to this libel, a claim and answer has been put in by *Eleazer Burbank*, stiling himself, late of *Salem*, merchant, now residing in *Halifax*, and *John Osborne*, of *Halifax*, merchant, which states, first, that the said *Eleazer Burbank* for himself saith, that he is not an alien, or person not born within the allegiance of the King, but on the contrary, was born in the 15th year of his Majesty's reign, at *Deerfield*, in his Majesty's then province of *New Hampshire*, and is therefore a natural born subject of his Majesty. That becoming desirous of residing altogether in this province, and of removing his family and property hither from the United States, where he formerly lived; for this purpose he made application, by petition, to the Lieutenant Governor, and obtained his Excellency's permission to reside here, and also to bring his property here, and that he therefore took the oath of allegiance. That having a *bonâ fide* intention of taking up his permanent residence in this province, projected a voyage from *Halifax* to *Surinam*, and back, and chartered this

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vessel; that in conjunction with *John Osborne*, the other respondent, he loaded the said schooner with goods, two-third parts thereof on his own account, and the other third on account of the said *John Osborne*. He prays therefore that they may be restored.

Upon petition, *Burbank* amended his claim, and pleaded the statute of the 13th *Geo.* II. entitled, "An act for naturalizing such foreign protestants as shall settle in His Majesty's colonies in *America*."

A reply was given by the king's advocate to this answer, in which he alledged, that the said goods ought to be condemned, notwithstanding any thing in the said answer, for that *Eleazer Burbank*, in whose possession they were, was an alien.

Upon these pleadings several exhibits have been brought into the registry, and a great number of witnesses examined. Upon those, the facts are proved to have been as follows. That *Burbank* was born in the *United States* of *America*, in the 15th year of the present King, when they were colonies of *Great Britain*. That he resided there till the latter end of last year, when being desirous of removing his family and property into this country, and to become a subject of the King, he petitioned the governor, and received from him a licence, bearing date the 2d of *December*, in these words: "permission is hereby granted to *Eleazer Burbank*, an alien, to reside within this province during pleasure, he having given bonds according to law, and in such case made and provided; signed *George Prevost*." The law to which the licence refers, is a provincial law, passed in the general assembly of the province, in the 38th year of the King, which enacts that, "no alien who shall come to reside within the province of *Nova Scotia*, shall

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be permitted to be, and remain within the province, without a special permit, under the hand and seal of the governor; that to attain such permit, he shall state in writing, his name, age, place of nativity, rank, and occupation," provided he shall enter into a bond for his good behaviour, and comply with certain other regulations; "and it is further enacted, that if any alien, as aforesaid, shall not obtain a permit, he shall, on conviction thereof, be sentenced to imprisonment, or pay such fine as shall be imposed by the court, before whom he shall be convicted, and be transported beyond His Majesty's dominions in *America*, to such place as the governor may think proper."

This prosecution is founded upon a clause of the celebrated navigation act, of *Charles* the Second, which, though not often acted upon, yet never having been repealed, and having even been recognized by the legislature within a very few years,* is still in force, unless so far as it may have been partially repealed by any particular subsequent acts, as has been alledged by the claimants, or unless the parties are protected by the governor's licence.

It may be convenient to consider first, whether the claimants are persons who come within the act, that is whether they are *aliens*, or persons not born within the allegiance of our Sovereign Lord the King, and are *exercising* the trade or occupation of a merchant or factor, within this province. It is admitted that *John Osborne* is a *British* subject. The only question relates to *Eleazer Burbank*, who is alledged to be an alien, and therefore that his property is forfeited under the act; as likewise the rest of the cargo, whether belonging to *Osborne* or

* 37 *Geo.* III. c. 63, sect. 5

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others, as having been found in the possession of *Burbank*.

I shall consider the following questions:

1. Is *Burbank* an alien?

2. Has he been exercising the trade of a merchant here?

3. Were the other goods found in his possession?

4. Is he protected by the governor's licence? or,

5. Is this clause of the act repealed by subsequent statutes?

6. It is proved, or admitted, that *Eleazer Burbank* was born within the allegiance of the king, in the 15th year of his reign, at *Deerfield*, in His Majesty's then province of *New Hampshire*, and of course, before the acknowledgment of *American* independence. That he resided in the *United States* till last year, when he came to settle here, and took the oaths of allegiance.

Many arguments which have been brought from the judicial construction of other acts of parliament, relating to trade and navigation, and from the law of prize, are inapplicable to the present case, which must be decided upon the express words of the act itself. Though *Burbank* then was born within His Majesty's allegiance, yet if he has become an alien, he is still within the prohibition of the act which extends to aliens, as well as to persons not being within the king's allegiance.

Burbank was certainly a natural born subject; generally speaking, it is an indisputable maxim of law, that natural allegiance with its duties, and the privileges derived from it, is perpetual, unalienable, and indefeasible. But Sir *Michael Foster*,* one of the first authorities in the *British* law, justly

* Crown Law, p. 184.

observes, "that though this doctrine of allegiance, founded in birth, may be considered as a good general rule, yet it is not *universally true*. Cases may be put which will be considered as exceptions to it." It must be admitted to be one of those exceptions, where the tie between the sovereign and the subject is broken; and the connection dissolved by the concurrent acts of the sovereign, to whom it is due, and of the party himself. For all compacts, and the duties and obligations of allegiance are in the nature of a compact, may be dissolved by the mutual consent of all parties interested. A dissolution of this nature took place between the king of *Great Britain*, and his subjects in the *United States*, when their independence was acknowledged by the treaty of peace, in the years 1782 and 1783. By the first article of that treaty, His Majesty acknowledged the thirteen *States* to be free, sovereign, and independent *States;* and for himself, his heirs, and successors, relinquished all claims to the government, propriety, and territorial rights of the same. This is a complete renunciation of the rights of allegiance, on the part of His Majesty, and a perfect discharge of the inhabitants of that country, from all their obligations as subjects. This treaty was directly authorized by a preceding act of parliament, 22 *Geo.* III. *c.* 46. by which it was enacted, that it should be lawful for His Majesty to conclude a peace with the colonies, any law to the contrary notwithstanding, and was subsequently, though indirectly, confirmed by other acts. There was the sanction therefore of the legislature as well as of the sovereign. On the other hand there was the assent of all the inhabitants of the thirteen colonies, represented and expressed by the ratification of their government,

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which had been established by their own free choice. From this concurrence of all parties concerned, no act could be more valid, or unexceptionable. The inhabitants of that country, from that time, became aliens to every purpose, and liable to all the disabilities of aliens. As they were no longer bound to any allegiance, so neither were they entitled to any of the privileges of *British* born subjects.

These privileges and obligations are reciprocal; if they retain the one, they must be subject to the other. They cannot say we are natural born subjects, as to any advantage to be gained; but we are discharged from the duties and burdens of natural born subjects. If they can trade as *British* born subjects, they must be still bound by their allegiance to the king. If they were taken in arms, if they had a warlike commission for any other sovereign, they would be guilty of high treason. But this has never been the law. In trials in the Court of Admiralty, for offences committed on the high seas, if a sailor found on board an enemy's ship of war, can prove himself to be an *American* born, he is acquitted of high treason, without any distinction, whether his birth was before, or after the acknowledgment of independence. In the discussions between the two countries, *Great Britain* never claimed *Americans* of this description, as her own liege subjects, or asserted any right of impressment over them. They could not be restrained by a writ of *ne exeat regno*, or recalled in time of war, by a proclamation.

If any part of the character of a natural born subject is not to be shaken off, it is his allegiance. No private subject can divest himself of it; no foreign prince can discharge him from it. If the

act of independence has dissolved this first and most important bond of union, how can it be maintained that other subordinate, and less important connexions should still subsist?

If they are not considered as bound by the tie of allegiance, if *Great Britain* has no title to their services, it would be absurd to suppose they still retained the privileges of *British* subjects. If that principle were once admitted, where could it stop? If they might trade, they might own and navigate *British* vessels, and enjoy the full privileges of other subjects.

I do not find that there is any decided case which is directly to this point. In that treasure of legal learning, *Calvin's* Case, which relates to a question something similar, the rights of the *Postnati*, (*Coke* 4,) there is nothing to the point, whether after the cession of any part of our foreign dominions, those who had been born subjects, and continued to reside, still retained their *British* birth-right. All the cases there stated, of the subjects of *Normandy*, *Guienne*, *Gascony*, *Calais*, and other foreign dominions, were cases which took place before the cession of those countries.

There is a modern case, *Marryatt* v. *Willson*, (Term Reports, Vol. VIII. p. 30,) and *Bosanquet* and *Puller*, I. 430. *Butler*, one of the parties, was a natural born subject of this kingdom, but was resident and domiciled in *America* before, and at the time of the declaration of the independence of the *United States*; and it was stated in the special verdict, that upon such declaration he became, and from thence hitherto hath been, and still is a citizen of the *United States*; and it was alledged that *Collett*, the other party having been born under the King's allegiance, and not being a citizen of the

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United States, at the time of the declaration of their independence, he could only be considered as a *British* subject within the scope of the navigation laws. The counsel did not deny that *Butler* was an *American* citizen, and that he was not a *British* subject, though he is stated as having been born in *Great Britain*, because he had settled in the *United States* before their independence.

In the Exchequer Chamber, *C. J. Eyre*, after considering fully whether *Collett* could be considered as an *American* subject, having been born in the King's allegiance, and gone there *after* the declaration, said: "he did not understand upon what ground the case of *Butler* was distinguished from *Collett's* case, unless *Butler* had been expressly discharged from his allegiance by act of *parliament, in consequence of our acknowledgments of the independence of the United States.*" This *distinction* seems to have been admitted at the bar as indisputable, because it was not argued or denied, and the ground of the distinction, both in fact and law, must have been the circumstance here stated by the Chief Justice, and in some measure admitted by him, though not very distinctly.

There is, however, an author of very considerable weight, who has given his private opinion upon this subject, conformable to the principles which I have laid down,—Dr. *Wooddeson*, the late Vinerian professor.* He says "when by treaty, especially if ratified by act of parliament, our sovereign cedes any island or region to another state, the inhabitants of such ceded territory, though born under the allegiance of our King, or being under his protection whilst it appertained to his crown and authority, become effectually aliens, or liable to the disabilities of alienage,

* Lectures, Vol. I. p. 382,

in respect to their future concerns with this country. And similar to this seems the condition of the revolted *Americans*, since the recognition of their independent commonwealth." I quote this passage, not as affording any express authority to this Court, but in a dearth of judicial decisions, as tending to confirm by the concurring judgment of a man of sense and learning, the opinion which my weaker judgment has enabled me to form upon the subject.

Taking it then as proved, that *Burbank* is an alien, the consequences of the law must attach upon him, unless the force of the statute of *Charles* has been destroyed by some subsequent act of parliament, or other law.

The permit granted by the governor may be at once laid out of the case. It is founded upon a law of this province. It is a local regulation respecting aliens, for the safety and tranquillity of the province. To prevent foreigners who might be of suspicious, or dangerous characters from resorting to it, or residing in it; this law was passed to place all aliens under the eye and the controul of the government, to ascertain their qualities, to provide securities for their good behaviour, and to arm the hand of the magistrates with sufficient powers of removal or punishment in case of reasonable suspicion, or actual misconduct. But it gives them no new right or privileges which they did not before possess, it removes no disqualifications to which they were before subject, and there can be no ground for a supposition that it could tacitly supersede the express enactments of a statute. It was not passed for the benefit of foreigners, or to facilitate their residence here, but it was a mere regulation of police for their better restraint. If an alien has no permit, he is liable to the penalties imposed by this law;

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if he has a permit, he is merely exempted from those penalties, but he acquires no further positive advantages, and is still under the operation of all other laws which may relate to his situation. And it may be observed, that *Burbank* in the licence itself is stiled an alien, and the permission is only to reside, *as such*, within the province during the governor's pleasure.

Neither is the claimant protected by having taken the oath of allegiance. Alienage can only be removed by the act of the sovereign, or of the legislature. The oath of allegiance, taken by an alien, is merely in confirmation of the obligation to which he is previously subject, as long as he resides within the King's dominions. During that time he is under the protection of the country, and is bound by a local and temporary allegiance, but he is still *an alien*.

The parties have pleaded the statute made in the thirteenth year of his late Majesty King George the Second, Chap. 7. But that statute only provides that "all persons born out of the legiance of His Majesty, who shall have inhabited and resided for the space of seven years in any of His Majesty's colonies in *America*, and shall take the oaths there required, shall be deemed, adjudged, and taken to be His Majesty's natural born subjects of this kingdom, to all intents, constructions, and purposes." *Burbank* is entirely out of the beneficial provisions of this act, not having resided seven years, but having come into this province only last winter.

There is another act which has been referred to, the thirtieth of *Geo.* III. cap. 27. It is intitled "An Act for the encouraging new Settlers in His Majesty's colonies in *America;*" and it provides that if any persons, subjects of the *United States*, will come

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from thence to any part of the province of *Nova Scotia (inter alia)* for the purpose of residing there, "it shall be lawful for such person, having first obtained a licence for that purpose, to import into the same any negroes, household furniture, utensils of husbandry, or clothing, free of duty, provided they shall not exceed the value of fifty pounds. And all sales of such articles so imported, made within twelve months shall be void." This is evidently an act made for the personal accommodation of settlers, and it is confined merely to matters of domestic convenience, to the implements useful and necessary in the pursuits of agriculture; it authorizes the importation of these only, and the limitation in value; and the latter clause shews clearly that it was not intended to comprehend any commercial privileges whatever. But although there are no express words to enable foreigners to trade, it has been argued, that under the general title of the act, and its preamble, which state that it was passed to encourage persons to settle in the colonies, coupled with the last clause, which directs all persons so coming to reside, to take the oath of allegiance, that the act must be understood, by these general provisions, to have removed generally the disabilities of such settlers, which would be the most effectual mode of inducing strangers to come and reside. But this argument goes too far. It would prove that this statute altered all the law, and repealed all preceding statutes relating to the disqualifications of aliens whenever they chuse to settle in an *American* colony, and placed them upon the footing of natives, born subjects, a proposition which I suppose will scarcely be contended for.

Neither the *American* treaty, nor the act passed to

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carry it into execution, the 37th *Geo.* III. cap. 97, give any privileges in that respect to the inhabitants of that country, whether born before, or after the declaration of independence. The 9th article of the treaty relates only to the lands held at that time by *American* citizens, who so far were not to be regarded as aliens. And the 25th section expressly declares, that nothing in that act contained shall extend to give any right, title, or privilege to any person which he would not have been entitled to if that act had not been made, other than such rights as are contained in the said article of the treaty, and which relates only to those lands.

The statute upon which this prosecution is founded being then in full force, and unrepealed, the next question is, whether *Burbank* has been exercising within this province the trade and occupation of a merchant, or factor. It is proved that these goods were shipped on board the *Providence* by *Burbank*, that *Mac Nutt*, the owner and master of the vessel, made an agreement with him to carry the cargo from *Halifax* to the port of *Parimariboo*, or *Surinam*, and back to *Halifax*, for a specified sum, and that a charter-party was made out for that purpose. The manifest states the cargo to be consigned to *Burbank;* and in the affidavit indorsed upon it, *Mac Nutt* swears that it belongs to him, and was on his account and risk. In this transaction it is clearly proved, and brought home to *Burbank*, that he was carrying on the trade of a merchant by chartering a vessel, and exporting goods upon his own account.

Then as to the penalty, which is the forfeiture and loss of all his goods and chattels, or which are in his possession, to be informed or sued for in any

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of His Majesty's Courts in the plantation where such offence shall be committed; by the 49th *Geo.* III. Cap. 107, all penalties and forfeitures which may be incurred under any acts for penalties, incurred in the *British* colonies under any law relative to trade or revenue, may be prosecuted or sued for in any Court of Record, or Vice-Admiralty. I am of opinion, therefore, that His Majesty's Advocate has established his allegation both in law and in fact, and that such goods as were belonging to *Burbank* are forfeited according to the provisions of the act.

But it appears, that though *Burbank* chartered this vessel, *John Osborne*, the other party, was jointly concerned with him, and that the goods on board the schooner, and now libelled, were two thirds on account of *Burbank*, and one third on account of *John Osborne*, who was a *British* subject. The question then is, how far these goods were in the possession of *Burbank? Dulhanty* swears that he sold the fish to *John Osborne*, and delivered them to him from a store on *Muirhead's* wharf. Two truckmen have sworn to their having been employed by *Osborne* to truck the fish from *Muirhead's* wharf to the schooner. It appears that *Osborne* was on board whilst the cargo was taking in, that he there received it, and examined the state of the casks as they were put on board, and that they were shipped under his directions. Though this was a joint concern, it is proved therefore, that *Osborne's* part of the cargo was the whole time in his own possession, and not in the possession of *Burbank* till it was delivered to *Mac Nutt*, the master of the vessel, for the account and risk of *Osborne*, in whose possession it was seized. I pronounce therefore against the claim of *Eleazer Burbank*, to

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two thirds of this cargo, and I condemn the same as forfeited to His Majesty; and I decree the other third part of the cargo, claimed on behalf of *John Osborne*, to be restored as claimed.

Instance Court.

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The Schooner FRIENDS ADVENTURE, *Daniel Curry*, Master.

JUDGMENT.---*Dr. Croke.*

Change of master not indorsed on register, and no bond given by new master, according to the 26 *Geo.* III. c. 60, sect. 18. 15, and 27 *Geo.* III. c. 19, sect. 7, forfeiture. "People," in 7 and 8 *W.* III. c. 22. sect. 2. means "inhabitants," by 26 *Geo.* III. c. 60. sect. 8. The 34 *Geo.* II. c. 68. sect. 14, that transfers of ships shall be in writing, applies to sales to foreigners.

THIS vessel was seized at *Horton*, in this province, having on board fifty-seven oxen, three casks of gin, and some tobacco.

The vessel is claimed for *Daniel Curry* and *Mark Treffry*, thirty-eight of the oxen for *Richard Curry*, and *Andrew Curry*. No claim has been given for the other nineteen oxen, or for the gin, or tobacco.

(The Court then stated the substance of the libel and of the claim.)

On the part of the captors, five breaches of the laws have been alledged.

1st. The trading from *Campo Bello* in *New Brunswick*, to *Nova Scotia*, not being owned and navigated according to law.

2nd. The importation of oxen, tobacco, and gin, into *New Brunswick*, from the *United States*, by an alien.

3dly. The importation from the *United States* into *Nova Scotia*, in a vessel not owned by *British* subjects.

4th. By persons not *British* subjects.

5th. That the cattle were in the possession of

persons who were exercising the trade of merchants, being aliens.

As the same qualifications are required, in vessels importing goods from the *United States*, as for the coasting colonial trade, it is not very necessary to determine, whether these goods were first imported from the *States*, or from *New Brunswick*; but it clearly is an importation from *Campo Bello*, as far as *the ship* is concerned. The cattle were already in that island, and were regularly cleared out at *St. John's*. Whether they were lawfully imported into *Campo Bello*, may be another question; but as there is no privity between the ship owners, and such importers, the ship cannot be affected by that question, as they were not imported in it. This then being a trade, from colony to colony, the case must be decided upon the acts of parliament relating to this branch of commerce.

By 7 and 8 *W.* 3. c. 22. sect. 2. "No goods shall be carried from any one port or place, in the colonies, to any other, in any ship, but of the built of *England*, or the colonies, and wholly owned by the people thereof." Sect. 17. "No vessel to be deemed such a vessel, unless registered, upon pain of forfeiture of ship and goods."

There are then two questions, the ownership, and the registering of this vessel.

1st. As to the ownership. Certainly if, as it is alledged, *Andrew Curry*, is the owner of part of this vessel, he is not entitled to be considered as a *British* subject.

The word "people," was early interpreted to mean "inhabitants;" and it was finally settled by 26 *Geo.* III. chap. 60. sect. 8. by which it is enacted, "that no subject of His Majesty, whose usual residence is in any foreign country, shall be

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deemed, or entitled, during his residence, to be owner of any *British* vessel." It is said that *Andrew Curry* sold his land in *Nova Scotia*, and went to the *United States* to dispose of plaster, and purchase corn; and intended to stay a short time, and return.

But there is no evidence of such intention. *Robert Curry* states, that *Daniel* sold the second cargo of plaster, and therefore it has been argued, that *Andrew* was merely his agent. But the statute makes no exception of agents for persons in the colonies, though it does of agents for houses in *Great Britain*. All the witnesses agree, that he was then residing in *Moose Island*, in the *United States*, with his wife and family, and keeping an inn.

The words of the act are, "during the time he shall so reside." He is no doubt disqualified by such, his residence, from being owner of a *British* vessel. But is he the owner? It is alledged that the property was originally in *Mark Treffry*, and *Daniel Curry*, but that they had sold it to *Andrew Curry*. The register, and the admission of the captors then, are proof that they were owners at first; and the question is, whether it has been transferred to *Andrew Curry*.

This, *R. Curry* and *Mark Treffry*, one the purchaser, and the other the buyer, deny upon oath. It would have been more proper to have stated particularly, some transactions respecting an intended sale, which certainly did take place. It is proved, that an agreement had been entered into for the sale; that a part of the price had been nominally paid, by two notes of hand, and that possession had been delivered. This, no doubt, would have amounted to a sale, if no acts of parliament had

intervened, but there are certain acts to regulate the transfer of vessels.

By the 34 *Geo.* III. c. 68, sect. 14. "No transfer, contract, or agreement for transfer of property, of any ship or vessel, shall be valid or effectual, for any purpose whatever, either in law or in equity, unless it shall be made by bill of sale, or instrument, in writing, containing the recital in the former act. This has not been complied with. It is said, that the act does not extend to foreigners But, 1st. The words are general, though the preamble mentions only ships transferred to *British* subjects, yet the enacting part makes no reference to the preamble. It is most agreeable to the spirit of the act, that all transfers should be public. The object is to prevent secret transfers, and concealed interests of foreigners. Now a bill of sale has a great degree of publicity; it may be said, that all foreigners are now not safe, in secret agreements, if the legal and equitable right is still in the former owners, without a bill of sale in writing. It is equally necessary for the purpose of ascertaining the identity of the vessel in future. I am of opinion, therefore, that the regulations of the act apply to sales to foreigners, and therefore that *Daniel Curry*, and *Mark Treffry*, are the right owners of this vessel

2d. Have they complied with the requisites of the register acts, and if not, what is the consequence? By the 26 *Geo.* 3, c. 60, sect. 18. the change of the master is to be indorsed on the certificate. By the 26 *Geo.* III. s. 15; and 27 *Geo.* III. c. 15, s. 7. whenever the master is changed, the person becoming master, shall give security by bond.

Now in this case, *Mark Treffry* appears as master, on the register; there is no indorsement, although it is admitted that *Daniel Curry* is her

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master. It so appears on the clearance, at *Campo Bello*, is so stated on the claims; but it has been alledged, that this was owing to the neglect of the officers of the customs, who were informed of the change, and had the papers in their custody. This rests only upon the assertions of the counsel. It is not ascertained, not so stated in the claim, or proved by any witnesses. If the fact were so, it is not a sufficient justification; it should have been proved, not only that the papers were in their possession, but that the certificate had been delivered to them, for this very purpose; that they had been required to do it, and had neglected or refused. Nothing of this appears; there is no protest, or even assertion in any affidavit or document whatever, of this fact. The sect. 40 of the 26 *Geo.* III, speaks of officers who wilfully neglect, or refuse to perform any act required to be done by those statutes; and if such had been the conduct of these officers of the customs, they were liable to a penalty of £500, as well as further responsibility for the consequences of their breach of duty. It is therefore a serious charge against those officers, and not proved by the slightest evidence.

We have now to consider what are the consequences of this omission. By the 27 *Geo.* III. c. 19, and 13, "all vessels not registered according to the directions and regulations of the 26 *Geo.* III, although owned by *British* subjects, shall be held, and deemed, to all intents and purposes, as alien ships; and shall, in all cases, be liable to such penalties and forfeitures as alien ships." That the name of the master should be correctly ascertained, is a material and integral part of the object of these regulations, and a great number of them are directed to this point. In case of a sale to a

foreigner, he is the principal person looked to for the delivery of the certificate, he gives a bond to that purpose, and as no special penalty is inflicted upon the neglect of the direction, upon a change of master, this part of the act would be neglected, unless it were in the power of the court to inflict some penalty. Since therefore, vessels not complying with the directions of the act, are not to be considered as *British* vessels, this must be taken to be an alien vessel, and as such, both ship and cargo are liable to forfeiture.

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The MERCED, *Echeverria.*

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THE *King's Advocate for the Captors*,---Upon the original hearing, contended, that, admitting this ship to be *Spanish*, she would be liable to condemnation, upon the principles established in the case of the *Amedie*, having fitted out, in a port of the *United States*, for the avowed purpose of engaging in the slave trade. That although the government of *Spain* had thought fit to permit a continuance of a traffic, which other nations had recently abolished, the owners of the *Merced* and her cargo, had, in a port of the *United States*, in defiance of the prohibitory laws of *America*, undertaken to equip the ship, upon a voyage to the coast of *Africa*, there to receive slaves, and proceed with them to the *Havannah*. This was an act, not only contrary to the laws of the country, in which she was sojourning, but contrary to the statute laws of *Great Britain*, and, indeed, to the ordinary notions of humanity.

Slave trade. detection of *American* property, concealed under a *Spanish* character. Condemned.

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So that admitting the *Merced* to be a *Spanish* vessel, she would, for these reasons, be liable to forfeiture. But this ship is not documented, as a *Spanish* vessel, having no regular papers that can give her that character; and there is every reason to believe, from the general deficiency of the evidence, that both ship and cargo are the property of *Americans*. If so, the judgment that has been given in the case of the *Amedie*, will forcibly apply to the present case, and a decree of condemnation must ensue.

On the behalf of the claimants, the Solicitor General observed, that, if the ship and cargo were admitted to be *Spanish* property, there would be little difficulty in the case. Under the government of *Spain*, there are no prohibitory laws against the trade in question, and the equipment of the ship in a part of the *United States*, if it be a violation of any law of that country, is not elsewhere a subject of legal discusssion. The ship and cargo are evidently *Spanish*, nor is there any deficiency among the papers that can warrant a suspicion of *American* interest in the property, or any part of it. But, allowing such interest to exist in this projected voyage to the coast of *Africa*, it may be argued, in the first place, that, although the ultimate destination of the ship was to the *African* coast for slaves, the immediate voyage was to the island of *Teneriffe*, and at all events, she has not been captured *in delicto*. In the next place, if the principles adopted in the case of the *Amedie*, are to be applied in the present one, it becomes requisite to ascertain what are the specific prohibitory regulations of *America*, with regard to the slave trade. A knowledge of *American* law, upon this important point, is absolutely essential, if the punishment of an offender against that law, is to be in-

flicted by the decree of a *British* court. Different penalties may, perhaps, attach at different stages of the offence, and to different persons engaged in it. Does the condemnation of the ship and cargo, ensue in all cases? In what way is the crime defined by the legislative acts of *America*? What are the provisions or exceptions of those acts, and to what extent have they carried the prohibition of the trade? These are questions, that can only be answered by an acquaintance with the law, of which, nothing more seems to be known, but that it prohibits a trafficking in slaves, which had been previously sanctioned by the custom of past generations, in all parts of *America*. The case of the *Amedie* has not been, as yet, officially reported. It has only appeared in newspapers and reviews, in which one cannot look for great accuracy of statement, with regard either to law or to fact.

The great and good judge, who pronounced the decree of their lordships in that case, is said to have observed, that until the *British* legislature thought fit to prohibit a continuance of the slave trade, no notice could be taken of the prohibition on the part of *America*; and that an act of parliament having now abolished the trade, it is the interest and duty of the nation to unite with *America* in preventing a traffick so inconsistent with the first principles of humanity. But the same learned judge, we are told, acknowledged it to be the general rule of nations, not to interfere with, or take cognizance of the municipal regulations of each other. Now this rule will be materially infringed by an adjudication of this ship, upon the legislative acts of *America*, or in other words, the laws of a foreign country, for which there is no precedent among the records of *English*

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jurisprudence, or indeed, those of any other country. If the universal law of humanity be the rule of conduct, by which to try offenders of the description of the claimants, it will apply equally to them in their *Spanish* or *American* characters; but the learned judge has also observed, that we cannot legislate for other countries, and that if other countries violate the natural law of humanity, by encouraging a trade in slaves, we have no legal right to controul their conduct. So that the general sentiment of accusation against this pernicious trade, is founded, after all, upon the municipal regulations of the country in which it is prohibited. When prohibited in *America*, it was allowed in *England*, and though now prohibited in *England*, it is permitted in other nations in *Europe*. If this ship and cargo, therefore, be *Spanish*, they must be tried by the test of *Spanish* law, and the ordinances of *Spain* referred to and cited for the direction of the Court in its sentence. If they be *American*, reference must be had to the statute books of *America*, and though a law of that country may prohibit the trade in question, and inflict a penalty for the transgression of it, that penalty, in certain cases, may be far short of the condemnation of the ship and cargo; and yet, in the present instance, and in all cases of the kind, a forfeiture of the whole property, if *American*, is required, without a consideration of any part of the law, under which the condemnation is sought, but the mere prohibition of the trade on the part of *America*. As this is a case *primæ impressionis*, and no reported decision of that of the *Amedie* has yet been published, these arguments on behalf of the claimants, are submitted, with the utmost diffidence, to the consideration of the Court, which may probably

conceive itself bound by the judgment in that case; if so, the cause must proceed to further proof, should there be any doubt as to the property being Spanish.

FURTHER PROOF, DECREED.

Upon the further proof, after hearing the arguments of counsel, the Court gave its final decision.

JUDGMENT —Dr. *Croke*.

THIS vessel and cargo are both claimed, as *Spanish* property, by the master, for himself, Don *Francisco de Ajuria*, Don *Francisco de Bengechea*, and Don *Diego de Unsiga*, all of the *Havanna*. The present cargo was shipped at *Philadelphia*, from whence the vessel sailed upon the 17th of *July* last for *Santa Cruz* in *Teneriffe*, intending to proceed from that island to the coast of *Africa* to purchase slaves.

When this cause was heard upon the original evidence it appeared that the vessel was engaged in the slave trade. By the decision of the Lords of Appeal in the case of the *Amedie*, it was established that this trade was unlawful in itself, and that claimants cannot recover property employed in it, unless they can shew a special justification, that it is a permitted trade under the laws of their own country. It followed therefore, that if this property should prove to be *American*, it would be condemnable under the authority of that case directly. But if it belonged to *Spaniards*, as it has been claimed, it remained for the parties to shew the legality of the trade by the laws of *Spain*: for, although it has been notoriously carried on by that country for many years, yet as the *British* Government, in compliance with the wishes of parliament, has pledged itself by negotiation to procure its universal abolition, from the friendly relations which subsist between the two

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countries, it is not impossible that some arrangements upon that subject may have already taken place with *Spain*, as they have with some other countries.

As to the property, the vessel appeared to have been purchased of an *American*, and there was not only a deficiency as to proof, no documentary evidence whatever relating to the purchase having been found on board, but there was great reason to suspect, from the vessel's continuing, after the alledged sale, to trade to the ports of the former owners, who still appeared to be concerned, under the character of consignees, that the transfer was merely fictitious, and for the purpose of covering this unlawful trade. The Court therefore directed further proof, as to the property, and as to the existing laws of *Spain* upon this subject. A voluminous body of papers is now brought in, upon which it is the business of the Court to decide. The general history of the vessel as far as we can trace it is this. She was built at *New York*. In the month of *April* 1809, she made a voyage from *Philadelphia* to the *Havanna*, and back. In *July*, in the same year, she was purchased by Mr. *Worth* of *Philadelphia*, in whose name she was then registered. She was immediately chartered by him to *Ajuria*, one of the present claimants, and sailed to the *Havanna* under that charter party. Here it is alledged she was sold by *Hawkins*, the master of her at that time, by a power of attorney from *Worth* to *Ajuria*. Since that period she has made three voyages, the first of them was from the *Havanna* to *Philadelphia* and back again to the *Havanna*, in 1809. The second voyage was in 1810, from the *Havanna* destined to *Philadelphia*, but not being able to enter the *Delaware*, she went to *New York*, and returned again to the *Havanna*. On her third voyage, she sailed from the *Havanna* to *Philadelphia*, where she

took in her present cargo, and was proceeding to *Teneriffe*, and so to the coast of *Africa*, when she was captured.

The nature of the trade with the *Spanish* colonies, which is under the severest restrictions and prohibitions, and altogether confined to the subjects of *Spain*, necessarily involves all foreigners who engage in it in secresy and deception; but if this is really *Spanish* property, all reason for mystery ceases. It was the business, and the interest of the *Spanish* owners that every thing should be fair and open. Nothing but proof, or suspicion, of foreign ownership could injure them. Under that supposition it is perfectly unaccountable why this vessel should be sent to sea in the first instance, without any written documents to prove the ownership, and with a concealed destination as to the latter part of her voyage.

That Mr. *Worth*, the original owner of the vessel, was not indisposed to be concerned in profitable engagements, of whatever nature they might be, is proved by his own letter to *Ajuria*, of the 15th of *November*, 1809. "The ports of *Cuba*," he says, "and on the *Main* being shut to foreign commerce, handsome speculations might be entered into. We have first-rate vessels, *point out any voyage we could make money by, and I would willingly join you.*" I would not press this letter so far as to endeavour to prove *Worth's* property in this vessel from it, because it is not expressly mentioned. But when it appears that the vessel ever since the alledged sale has continued to carry on trade in the same manner as before, from and to the port of the former owner, and through his hands, it would not be unreasonable for the Court to require the fullest and most satisfactory proof of an actual sale.

Now the only evidence which has been produced

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to this point, are the affidavits of *Worth*, the very party concerned in the fraud, if there is any, and of *Hawkins* the former master, who knew but little of the transaction, and speaks merely to his belief as to the ownership, and other material points. The proof could not be considered as sufficient unless the bill of sale had been brought forward, and the power of attorney given by *Worth* to *Hawkins* to sell, which are the only title deeds of the vessel. Neither is there any affidavit from *Ajuria*, though he is held out as the principal owner, nor any information from *Echeveria* and the other claimants, to specify their respective shares in the concern, the means by which they acquired their interests, or what consideration they paid for them. The case is equally barren of the usual *Spanish* documents; there is no *Spanish* register, or any other paper equivalent to it, no passport or licence, nor is the letter of marque, which she is said to have had from the government, to be found amongst the papers. Yet these omissions are not to be attributed to the want of time, or of means, or opportunity to procure them, for there are certificates and affidavits, both from the *Havanna* and from *Philadelphia*, procured since the capture. And it may be remarked, that all the additional evidence comes from Mr. *Worth*, who, according to the claimant's case, has no interest whatever, and none of it from the only persons who are alledged to be proprietors.

To establish a fair sale the payment ought to be proved. The master has sworn, that the purchase-money, amounting to 16,400 dollars, was actually paid. But upon inspecting the account current between *Worth* and *Ajuria*, it appears that the vessel was never paid for, and is even now mere matter of account between them. *Ajuria* is made debtor for the vessel, but, at the time she sailed for *Phila-*

delphia, it is remarkable that the balance in favour of *Worth* was 17,112 dollars, nearly the amount of the price of the ship. And the purchase money is so far from having been since paid, that in the subsequent part of the account which is continued to *November*, three months after the capture, by the consignment of cargoes, the balance is still farther increased against *Ajurias*. Nothing but an ideal payment has therefore been made.

If we look minutely at the evidence, it is full of contradictions. There are great differences as to the *price* of the vessel, one witness states it to have been 16,400 dollars, another 10,000, and a third at 16,100. So as to the *seller*, the master who claims as a part owner, and who says he saw the bill of sale, swears that she was purchased not of *Worth*, but of *John Goff*, of the house of *Gardner* and Co. the former owners. The *payment* is sworn by *Antelo* the mate to have been actually made in his presence at the time of sale. There is even a variation as to the *day* on which the transfer was made, and the witnesses fluctuate between the 4th of *August* and the 20th.

The claim confronted with the subsequent papers is falsified in many of its statements.. The master, who is not a common commander, but a part owner likewise, has there sworn that at *New York* he purchased a return cargo of flour, fish, and other articles with the *proceeds* of the outward cargo. Now if there is any one fact fully established in this case, it is that, that the proceeds of the outward cargo were transmitted to *Worth*, between whom and *Robinson* of *New York* there is part of a correspondence upon the subject, and which concludes by *Worth's* refusal to find funds for the return cargo, as he says "he can do better with his cash." The master states that he staid behind the vessel at *New York* to receive

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payment upon notes which had been received for the cargo, and were then unpaid. Yet it appears that the sales were made by *Robinson*, and the proceeds by him remitted to *Worth*, and received by him on the 2nd of *April* at *Philadelphia*; he swears that he purchased this cargo out of the proceeds of the outward cargo, yet the purchase money for it appears to be still owing to *Worth*, and the cargo to have been purchased on his credit.

There is an unaccountable circumstance respecting the *American* register obtained by *Worth* upon his purchase. This register is indorsed as having been surrendered up to the Custom-House at *Philadelphia* upon the 11th of *July*, "the vessel having been sold to a foreigner." Yet the vessel is not said to be sold to *Ajuria* till she arrived at the *Havanna* in *August*. After the surrender of her register how did she clear out from the port when she sailed under the charter party to *Ajuria?* She must have cleared out as a foreign vessel, and paid the foreign duties. It is so very improbable that the surrender of the register should have been so prematurely made, and so much to the loss of the parties, that these unexplained circumstances are sufficient alone to falsify the whole business.

In all the letters from *Ajuria* there is constantly an erasure of the word which expressed the relation of the parties to the vessel, whenever there was occasion to mention it. There is no correspondence whatever relating to the first voyage, or to the purchase, though there must have been, if the sale had been real, or the price was not paid but remained in credit.

As to any general expressions in the letters by which the vessel is stated as belonging to *Ajuria*, nothing can be concluded from it. If this was a system of colouring, it must have been carried on ostensibly

in various parts of the correspondence. The farce must have been kept up between them. It is more material to enquire in what manner this alledged ownership has been exercised. This must be presumed to have been the object of the production of a great part of this correspondence.

If this was the property of those *Spaniards*, who amongst them is alledged to have had the principal direction? Not *Echeveria*, the master, since no authority to him to act for the owners is to be found, and he states his writing to the other owners for directions. The affidavits of *Harwood*, *Worth's* clerk, is decisive. He swears that the whole of the transactions of the concern in the *Merced* were conducted by *Fransisco Ajuria*, and that the chief of the correspondence respecting the same was carried on between *Ajuria* and *Worth*. To them therefore, and not to the other owners we must look for the management and control of every thing. Now if we examine the papers, there is not a single document proceeding from *Ajuria*. No instructions from him to the captain, no directions whatever given to his correspondent, agent, and consignee, *Worth*. As to the other alledged owners, there are two letters from *Bengeeha* with some trifling orders of articles for his own use, and not a word respecting *Unsigna*, who is completely a sleeping partner. Let us examine the papers relating to the three voyages which the vessel made after the supposed purchase, for the purpose of discovering who had the real management. The first voyage she made was from the *Havannah* to *Philadelphia* and back. As she was now become the property of a new owner, and going on a new account, it was natural that there should have been some correspondence with the consignee and agents, to settle the manner in which the vessel was to be employed and

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to make the requisite arrangements, There is a letter, written at the time of sailing, from *Ajuria* to *Echeveria*, in which he requests him to bring some copper to sheath another vessel, and he is to bring them *en su fregata*, that is, in *his*, *Echeveria's*, vessel, and the word *su* is nearly erased. There is no letter to *Worth*. Relating to the return voyage, there is a letter from *Worth* to *Ajuria*, merely inclosing the bill of lading. Another which states a heavy balance against him, and proposes some new speculations, but these letters are dry, meagre, and evidently garbled, and afford no conclusion whatever that *Ajuria* was the owner, or had any control over the vessel.

Upon the second voyage, she sailed from the *Havanna* again bound to *Philadelphia*, but being unable to enter the *Delaware*, she bore away for *New York*. Here was an accidental deviation from the voyage intended, and it might reasonably have been expected that it would have been explained to *Ajuria*, and that they would have written for his instructions under this unexpected change of destination. There is a letter from *Ajuria* written upon the outward voyage, directing *Worth* to put 500 or 1000 barrels of flour "with a false letter, that as he "could not procure provisions, he had shipped flour "to *remit proceeds*. Though it is evident from *Worth's* account current, that there was at that time a large balance against *Ajuria*. Another letter to *Echeveria* refers him to *Worth*, and says, if he could not get a cargo as proposed, he was to take a freight to *London* or to *Cadiz*. Now *Worth* is so far from complying with these directions, that on the vessel's arriving at *New York*, though he receives the proceeds from *Robinson*, he refuses to furnish a cargo, or to be accountable for it, and suggests to the master to take freight to the *Havanna*. In

Worth's letter to *Ajuria*, after the arrival at *New York*, he says nothing about her return voyage, nor does he give any answer to *Ajuria's* letter about the return cargo. He is short, for a consignee, he gives no account of his proceedings, and asks for no directions. *Worth's* letter is answered by *Ajuria*, who, most unaccountably, is perfectly silent as to the return voyage, and what *Worth* had been doing. In short, *Ajuria* at this critical time, whilst the vessel was at *New York*, says little or nothing about the ship or her employment. It is evident, that though *Ajuria* has a sort of ostensible ownership, in name, attributed to him, *Worth* acts entirely of his own accord; *Ajuria* is not consulted; and in those letters, which are evidently mere formal letters written for the purpose of holding out *Ajuria* as the owner, he received, with the most philosophic indifference and little observation, any information respecting the vessel which is communicated by *Worth*, who is equally indifferent to the directions given, and to the intimations conveyed in *Worth's* correspondence.

The present voyage was the most important. It was a new employment of the vessel, and so hazardous, that it appears that no insurance could be obtained. For such a voyage it would be necessary to have the fullest authority and directions from the owners of the vessel; yet here is not a line of evidence to prove that *Ajuria* knew any thing at all about it. On the outward voyage from the *Havanna* to *Philadelphia*, there was a letter from *Ajuria* to *Worth*, in which he informs him that the *Merced* had on board 500 boxes of sugar, and other articles, "consigned to you, whereof I shall give you advice for your direction." We may recollect that *Worth's* clerk swore that *Ajuria* conducted the whole of the said concern in the *Merced;* but the

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master *Echeveria*, in his claim, states, that on his arrival at *Philadelphia*, "he wrote to the other owners, requesting to know on what voyage they wished to employ the vessel, on which they proposed the present." *Worth* in his affidavit, says that the vessel was consigned to him, with *orders* to follow the directions of *Echeveria*. These accounts are not consistent; but be that as it may, neither any authority or directions, either from *Ajuria* or the other owners, are produced; all the letters from *Worth* to *Ajuria* consist of three short ones, informing him that the vessel was ready to sail, and had sailed; there is not a scrap of paper to shew that this voyage was commenced or conducted by the claimants, or that they ever knew where she was going. *Teneriffe* is mentioned in *Worth's* letter only. Any farther voyage to *Africa* is not alluded to; and though there might be reasons for deceiving the *American* custom-house or the *British* cruizers, there could be none for concealing the destination from the owner, in letters which were sent by other conveyances. Since *Worth* acted without authority or directions from his supposed principals, and without giving them advice of his proceedings, it is clear that he must have acted as owner, and not as a mere consignee.

It is palpable likewise, that the evidence, such as it is, has been much garbled. Many letters are referred to, which have not been produced; and they appear to be the very letters by which each voyage was planned and directed. There are no letters from *Echeveria*, when at *New York*, to his alledged owners; none from *Worth* to *Robinson* respecting the proceeds of the second cargo, nor in any of the correspondence is *Echeveria* considered as a part owner, but merely as a master.

It is impossible to conceive evidence, both positive

and negative, more full in every part, to prove that this is a fraudulent transaction, and that the real property is still in *Worth*, an *American* citizen, and therefore this vessel is subject to condemnation, as having been engaged in the slave trade.

The cargo does not consist so much of mercantile articles, as of stores and outfit for the slave trade; it is, besides, *Worth's* property, having been shipped by him without orders, and without funds. As materially connected therefore, with this illegal traffic, and likewise as belonging to the same owner, it must follow the fate of the vessel.

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On the Petition of *Andrew Belcher*, one of the Agents for the Captors.

Judgment—*Dr. Croke.*

Upon commissions of unlivery it remains with the Court to appoint the place, and the agents of the captors and claimants are not entitled to have the goods deposited in their stores. Charge against certain stores proved to be untrue.

THIS vessel and cargo having been condemned, and an appeal interposed, upon the application of the parties, a commission of unlivery issued to the marshal, directing the goods to be unloaded and to be put into the warehouses usually employed by the Court for that purpose. A petition has been given in by Mr. *Belcher*, one of the agents for the captors, accompanied by a protest, against the proceedings of the marshal. He therein states, "That there are "no warehouses belonging to the King, or to the "officers of the Customs. That to save expense to "the captors he had offered to the marshal, one "of the best wharves in *Halifax*, for the ship to lie "at, and the best stores in the town for the cargo to

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" be deposited in, free from all expense; that the " marshal refused to accept of the offer, declaring " that he had been ordered by the Judge of the " Court to have the vessel brought to the wharf of " Messrs. *Foreman, Grassie,* and Company, and to " have the cargo deposited in their stores; that the " said stores are private property, and no more under " the direction and control of the King than those of " the protestor.

" That the wharf of *Foreman* and *Grassie* is one " of the most exposed and dangerous wharves in " *Halifax* for vessels to lie at, and prize vessels have " heretofore suffered and received great damage by " lying at the same.

" That the stores are likewise unsafe and exposed; " as the cargo, if deposited therein, must be put " into the same stores with their own property, un- " less considerable expense is incurred.

" That the protestor has examined the proceedings " of the Court since 1794, and believes the practice, " until lately, to have been, to allow the marshal " and parties to deposit cargoes where they deemed " it most convenient. That the Prize Act directs " the landing of cargoes to be at the expense of the " party applying, and that as the captors have ap- " plied, the protestor wishes to save expense to them, " and that the captors and their agents are intitled " to a joint custody.

" Wherefore he protests against the marshal for " removing the vessel and cargo to the said wharf " and stores, and against all expenses, and damages " occasioned by the delay in not allowing the said " ship to have been immediately removed to the " wharf of the protestor, when he received the order " of Court for delivery; and all further expenses."

In the conclusion of his petition, " he prays that

"proper persons may be appointed to survey the "respective wharves and stores, and that the Court "will restrain the marshal from thus acting to the "manifest prejudice and injury of all persons con- "cerned."

Upon this petition the Court directed a writ of enquiry to the registrar, together with three of the most respectable inhabitants of the town, to inspect the wharves and stores, and to report upon them.

They have reported, that "having visited the "wharf and stores belonging to Messrs. *Foreman*, "*Grassie*, and Co. there does not any thing ap- "pear to them, whereby they should have any "doubt of the safety of vessels laying at the said "wharf, nor of property that may be lodged in the "stores; unless in the event of an uncommon and "extraordinary hurricane, such as was experienced "here in *September* 1798, when other wharves and "stores generally suffered."

Besides this report, Messrs. *Foreman*, *Grassie*, and Co. have presented a petition to the Court, in which they alledge, that "The statements contained "Mr. *Belcher's* petition, respecting their wharf and "stores, are incorrect and unfounded; that the peti- "tioners considering such statement to be highly "injurious to them, not only in this province, but in "*Great Britain*, where their connexions in trade are "extensive, have stated on oath, an answer to the affi- "davit of the said *Andrew Belcher*; and they have "brought in a certificate of thirty respectable per- "sons, merchants, traders, and owners of property "in *Halifax*. That for a long time past they have "held the said stores in readiness, upon the shortest "notice, for the use of the Admiralty Court, in con- "sequence of an application from the said Court, and "the assurance given by the Court, that prize ships and "vessels would in future be sent into their wharf."

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"They say likewise, "that in the present instance, if "the cargo of the *Merced* consists of tubs and casks "of water, as they are informed, they would not "make any charge for the wharfage or storage "thereof." In their affidavit annexed they farther state, "that their wharves and stores have been oc- "casionally occupied, for many years past, with "prize cargoes and vessels; and after alledging "generally, the fitness, safety, and security of "their wharves and stores," they swear—"That "no prize ship or vessel has at any time received "any injury of any description by lying at their "wharf, except a ship called the *Liberty*, which "parted, and was driven from the said wharf in "*September* 1798, in an uncommon and violent "hurricane, which destroyed many wharves and stores "in *Halifax*, and in which, many vessels were "wrecked in the harbour." They state, "that the "apartments where prize goods have usually been de- "posited, are separate and distinct apartments, with "separate and distinct entrances from the wharf; "and that ever since the application from the Court "of Admiralty, they have considered themselves as "bound to furnish and provide a wharf and stores "whenever required."

The certificate of thirty of the most respectable merchants in *Halifax*, states "the fitness and safety of the wharf and the stores, and their strength to de- posit any kind of merchandize; and likewise the division of the respective apartments."

The case is now furnished with ample information as to all the facts contained in the original petition, and two questions arise upon it, the question of right, and the question of expediency.

A sort of right is set up by Mr. *Belcher* to have this cargo in his own stores, as agent for the captors.

It must be observed, that there are two joint agents, Mr. *Belcher* and Mr. *Hulbert*, for the *Atalante*, the capturing ship, and that Mr *Hulbert* has not joined in this petition. There is likewise an agent for the claimants, who are equally interested in every circumstance which has been stated; and who are so far from having given their approbation to this application, that Mr. *Black*, their agent, has actually and voluntarily signed a certificate in favour of Messrs. *Foreman*. So that this petition is the sole act of Mr. *Belcher*, the other two agents not having concurred with him in it.

A prize court, by its constitution, has the sole direction and disposal of prize property: unless, so far as this general power is controlled by particular Acts of Parliament. Under this general power, whenever there is an order made for the unlivery of a cargo, it may appoint the places where it is deposited, at its own discretion, provided there is no particular direction given by the statutes. If we look at the Prize Act, it does not appear that any restrictions are to be found upon this head. The general clause, the 31st sect. of the 45 *Geo.* III. *c.* 72. directs captures, without breaking bulk, to be under the joint care and custody of the Collector and Comptroller of the Customs; and the captors or claimants, or their agents, subject to the direction of the Courts, till final sentence or interlocutory order for releasing or delivering. This is the original custody, when a vessel is brought in, without breaking bulk, and previous to any direction of the Court. An unlivery is directed by the act in two cases,—that of further proof, and of appeal. Upon further proof, (sect. the 43d) the Judge shall cause, if he shall think fit, the goods to be unladen, and shall cause them to be put in *proper warehouses*, with *separate locks* of the

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collector, and the agents employed by the captors or claimants. In the 52d sect. relating to appeals, the orders are only "to have the capture appraised as aforesaid." No directions are therefore given as to the place where they are to be deposited, the act does not mention the stores of any of the parties or their agents, but still leaves it to the discretion of the Court to put them into such as it may deem to be "*proper warehouses*;" the collector and the agents still retaining their care and custody of the property, by having different locks upon such warehouses as the Court may appoint for that purpose, which is all the right of possession or custody that is given by the act to the agents, and not any corporeal possession or custody in their own stores or warehouses, and this possession they have jointly with the collector and the claimants' agents, and not any separate or distinct custody. And though the parties who apply for the order of appraisement, are to bear the expenses, this gives them no additonal right or control over the property; there are other interests as well as theirs to be attended to, and the custody is still a joint custody.

In exercising that discretion which is left with it by the act, the Court would certainly consult and provide for the safety of the property: such is its bounden duty: it has therefore given every attention to that part of the petition which asserts that this wharf and stores are unsafe, and unfit for the purpose. If this allegation were true, the Court would undoubtedly not risque this vessel and cargo in so hazardous a situation: but here is the clearest evidence to the contrary: there is the report of the register, and three independent merchants; the affidavit of Messrs. *Foreman, Grassie,* and Company; and the voluntary certificate of thirty of the prin-

cipal merchants of the place; who all concur in pronouncing the wharf and stores to be perfectly safe, and fit for receiving and keeping prize vessels and their cargoes. One fact alledged that the stores are exposed, and that the goods must be deposited in the same stores with the property of Messrs. *Foreman*, is decidedly falsified; since it is proved that there are five distinct and separate stores, and the whole secured by a gate at the head of the wharf. Another circumstance alledged, that "prize vessels "have heretofore suffered and received great damage "by lying at the same," upon enquiry, appears indeed to be partly true; but it is insidiously introduced, and cannot in any manner serve to prove the truth of the allegation, because no other vessel can be discovered to have ever received any injury there, except one unfortunate ship, called the *Liberty*, which parted, and was driven from the wharf in the year 1798, above twelve years since, in an uncommon hurricane, which destroyed half the wharves, and wrecked a great number of vessels in the very harbour of *Halifax*. How far this gentleman can justify his having thus solemnly alledged charges against the wharves and stores of another mercantile house in this town, which might be so extremely injurious to their credit, and which might prevent any consignments of ships and cargoes being made to them from *England* or other places, is a matter for their respective considerations. It is not, as was argued, a comparative inferiority which was alledged against these stores and wharf, as being *less safe* than his own; but a positive charge, that *they were absolutely dangerous and unfit*.

The protestor, as he alledges, to save expense to the captors, and all others concerned, has offered "that the vessel may lie at his wharf, and the cargo

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"be deposited in his stores free from all costs and "charges," I cannot, with the petitioner's counsel, consider this offer as so perfectly liberal and disinterested. Wharves and stores are built at great expense, and the use and hire of them is one of the fair profits of a merchant. There is no reason why a merchant should give the use of them to another gratuitously, and to do so is not very accordant with the customary habits and principles of men in trade. A person who offers such a *bonus* can scarcely be considered as not having some farther view, as not having looked to other profits to be made in consequence of it. Even to give an additional strength by such an appearance of disinterestedness to the other parts of the affidavit, to derive some advantage from the possession of the goods, or to induce captors to employ as their agent in other cases a person who had shewn such liberality in his zeal to serve them; these and other objects which may easily be conceived, would induce a belief that this proceeding might not be altogether without a view to an ultimate reward. The Court cannot divest itself of all recollection of what passed in a late case, in which the same agent got possession of a ship and cargo without giving security, attempted to hold it in defiance of the law, and divided the property amongst the parties, without any legal right whatsoever. The Court ought to be cautious into what hands it entrusts such a charge.

I apprehend that this offer is not meant to be extended beyond the present case. The protestor scarcely proposes to supply the Court with wharves and stores gratuitously in every case which may occur. But the Court must look not to this case in particular, but must make general provision for all cases which may occur. For that purpose it has

engaged a wharf and stores as a general place of deposit for ships and goods, that they may be unloaded under its orders, for appraisement or otherwise, whilst it is under its own custody, and before the parties are entitled to the possession. By this arrangement, it was convinced that it consulted the interest of all parties concerned: it was convenient to have a certain place of deposit, where resort might always be had, without impediment to those concerned, and which being more particularly under the eye of the Court and its officers, they would take care that it should be sufficiently large, safe, and commodious. The Court thought that it was more for the real interest of parties, than suffering the goods to go into the stores of their agents. However disposed the present protestor may be to supply them gratis, the wharfing and storing of prize ships and cargoes is no trifling object of profit to merchants. If there were any claim of right, the agents for the claimants would be as much intitled to it as those of the captors, since they are equally mentioned in the Prize Act, and indeed it has not unfrequently been a subject of contention between them. Complaints have been often made by claimants against this possession. I have always understood that the parties in general have been best satisfied that they should be thus under the more immediate protection of the Court and its officers. The Court have even thought that it could sometimes observe, when cargoes were more usually deposited with the agents, that commissions of unlivery were not always applied for from any appearance of urgent and great necessity, or much to the advantage of the principals themselves.

Apprehending then that it would be for the general convenience of all parties, and a mode of

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proceeding most unquestionable, and satisfactory, the Court engaged with Messrs. *Foreman* and *Grassie* to have their stores at all times in readiness to accommodate cargoes, upon the usual terms. By this agreement they are put to some inconvenience, and expense, and occasionally to some loss, for which their reasonable compensation is the assurance that all such cargoes should be sent to them, unless where there were substantial reasons to prevent it. It would therefore have been a manifest injustice to them to have deprived them of the storage in this case. Upon that ground the order was made.

It is alledged that the wharf and stores to which this vessel and cargo were ordered are not the King's property, but are private property, and therefore that the marshal by placing these goods there would not comply with the commission, and that they are not entitled to any preference beyond any other private wharves and stores. It is true that the officers of the Court in drawing up this commission, following closely the words of established precedents of the High Court of Admiralty, have directed the marshal to put the goods into our warehouses, that is the King's warehouses, or those of his Court of Admiralty: and it may be true likewise that there are literally speaking no places of that description, which really belong either to his Majesty or to this Court. But without minutely considering whether there may be any inaccuracy, or inadvertence, in introducing those precise words, the meaning was perfectly evident, namely, that the marshal should put the goods into those stores, which had been usually employed for that purpose, namely the stores of Messrs. *Foreman* and *Grassie*, which as having been engaged by an express agreement with the Court for the deposit of prize goods, were considered

as the warehouses of the King's Court of Admiralty, and therefore might not improperly be styled the King's warehouses. I have dwelt longer upon these objections than they seemed to merit, because they form so conspicuous a feature in the petition, and have been so much harped upon by counsel, but in reality it is perfectly immaterial to whom the wharves and stores belonged. The Court in that respect has an unlimited discretion, and it might order the goods to be deposited as well in private as in public stores, and if it should be admitted that there are none properly speaking of the latter description, it must of necessity have recourse to those of individuals.

But this is not the whole of the considerations which must occur, respecting the offer of the protestor to charge nothing for the use of his wharf and stores. It is the duty of the Court to look to the security of prizes. Now no principle of law is more clear than, that persons who are trusted with the possession of property *without reward* are very little answerable for its safety. In the Civil Law. *Inst. Lib.* iii. *tit.* xv. it is said, " Depositarius ex eo solo tenetur, si quid *dolo* commiserit: culpæ autem nomine, id est, desidiæ et negligentiæ, non tenetur. Itaque securus est qui *parum diligenter custoditam rem* furto amiserit; quia qui negligenti amico rem custodiendam tradit, non ei, sed suæ facilitati,. id imputare debet." I quote the Roman law not as in itself intrinsically binding, but as having been received in this, as in many other cases, as a general rule by all the countries in Europe, and therefore as having become a part of the law of nations, a deference which has been paid to it from the evident justice and good sense of its decisions. It is the same in our domestic law, Lord Chief Justice *Holt*,

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in the well-known case of *Coggs* and *Bernard* (Lord *Raymond*, 909,) says that "where a man takes goods "into his custody gratis to keep for the use of the "bailor, he is not answerable if they are stole "without any fault in him, neither will a common "neglect make him chargeable, but he must be "guilty of some gross neglect." In the case of *Shields* against *Blackburne*. (*H. Black.* i. 161,) it was said too, "Where money has been paid for the "performance of certain acts, the person receiving "it is by law answerable for any degree of neglect "on his part, the payment of money being a sort of "insurance for the due performing of what has "been undertaken." How then would the Court execute the trust reposed in it, for the safe custody of prize property, or how could it justify itself against many losses and injuries which might happen, if it entrusted prize ships and goods where the legal security for its safety was so slender and limited? But even this ground for granting the petition is completely removed, because Messrs. *Foreman* and *Grassie* have likewise offered not to make any charge for wharfage and storage.

But be that as it may, it is an universal rule that they who apply to a court of justice must come with clean hands. Whatever otherwise may be its merit or seasonableness, a petition founded in untruths, and upon untruths highly injurious to a respectable mercantile house in this place, this Court is bound to reject, and it directs the marshal to proceed forthwith in execution of the commission of unlivery according to the former order.

The BERMUDA.

May 8th, 1811.

JUDGMENT.—Dr. *Croke.*

Case upon a Petition from the Deputy to the Treasurer of Greenwich Hospital, against the Prize Agents of the Bermuda, for certain unclaimed shares of Prize Money due to the Hospital. The facts are all stated in the sentence.

THE question for the decision of the Court, arises upon a petition, given in by Mr. *Brenton Halliburton,* the Deputy to the Treasurer of *Greenwich* Hospital, in which he states: "That three months have elapsed, since Messrs. *Hartshorne* and *Boggs,* as agents for his Majesty's ship *Bermuda,* have made a distribution, according to law, of the prize ships *Venus* and *Charles,* and the petitioner has called on them to pay over the unclaimed shares to him, to be remitted to the treasurer of the said hospital.

"That in adjusting the accounts of the said prize vessels, it appears that Messrs. *Hartshorne* and *Boggs* claim to retain in their hands the sum of forty-five pounds and two-pence—being the share to which one *Owen Cotton,* who was the captain's clerk of his Majesty's said ship, is entitled to receive of the neat proceeds of said prizes. That the said agents have produced to the petitioner, as a voucher for retaining the same, an attachment, issued pursuant to a law of this province, out of his Majesty's Supreme Court, whereby the property of the said *Owen Cotton,* as an absent or absconding debtor, has been attached in their hands.

"That the petitioner does not conceive the said attachment as a voucher authorised by the Prize Act, and prays that they may be compelled, by the process of this Court, to pay the same to the petitioner, for the use of His Majesty's said hospital, as the law directs."

To this petition an answer, and counter-petition has been given by *Lawrence Hartshorne* and *Thomas*

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Boggs, as agents for His Majesty's ship *Bermuda*: stating, "That the memorialists are agents for His Majesty's said ship *Bermuda*, respecting two prize ships, the *Venus* and the *Charles*, that *Owen Cotton*, clerk to the captain of His Majesty's said ship was entitled to the sum of £15. 0s. 2¾d. for his share of said prize vessels, which has been attached in the petitioners' hands by virtue of a process issued out of His Majesty's Supreme Court, under a law of this province, at the suit of *William Duffus*.

"That upon the petitioners settling the accounts of said prizes, with the deputy to the treasurer of *Greenwich* Hospital, he claims to receive for said hospital, from your petitioners, the said sum of forty-five pounds two pence three farthings, as the unclaimed share of the said *Owen Cotton*, and refuses to receive from the petitioners the said attachment, as a voucher to justify them in the payment of said money to the creditors of the said *Owen Cotton*. That by a recent decision of said Supreme Court, it has been determined that money can be attached in the hands of prize agents, at the suit of the creditors of the person entitled to receive the same; and the said *William Duffus*, is proceeding against the petitioners, to compel them to pay him the share of said *Owen Cotton's* prize, in discharge of his debt, which he alledges to be due to him from the said *Owen Cotton*—the petitioners therefore humbly pray that they may not be compelled to pay said money over to *Greenwich* Hospital; and that the said voucher may be received as sufficient to discharge them from the demand of the deputy treasurer of *Greenwich* Hospital."

It is admitted by Messrs. *Hartshorne* and *Boggs*, that, as agents for the ship *Bermuda*, they have in their hands the sum demanded, being the share of

certain prizes to which *Owen Cotton*, clerk to the captain of the said vessel, is entitled. They do not deny that three months have elapsed since they made distribution, and that they are therefore liable to be called upon to pay over the unclaimed shares to the deputy of *Greenwich* Hospital. But they claim to retain in their hands these shares belonging to *Owen Cotton*, because they have been attached under a law of this province; and they have produced this attachment, as it is called, somewhat improperly, as a voucher for retaining the same, which the deputy treasurer refuses to receive as such, and prays a monition to compel payment. The whole question is, therefore, reduced to a single point.

It is stated in the answer, that "by a recent decision of the Supreme Court of this province, it has been determined that money may be attached in the hands of prize agents, at the suit of persons entitled to receive the same," and many of the arguments of the counsel at the bar were founded upon the supposition of a case in which money had been paid under a judgment of that Court: what might have been the legal effect of an actual payment made under that authority, upon such an application against the agent, or against the creditor who had received prize-money under it, the Court has not at present to inquire. It has only to determine upon the facts stated in the petition and answer, namely, that the money has been attached without any judgment obtained, or payment made, thereupon.

Neither has it to decide upon the validity of the attachment in itself, as between the creditor and the agent. That is a question which affects other parties and belongs to other tribunals. The only question here is, how far it is a voucher to the accounts of the agent to justify the retention of *Cotton's* share.

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As a matter indeed collateral to the main point, as having formed the substance of the greater part of the arguments at the bar, and as tending greatly to elucidate the principal question, it may not be improper to consider the nature and effects of the process itself which is thus set up as a bar to the claim.

It appears that *Owen Cotton* being indebted to *William Duffus* in the sum of £12. 15*s.* 4*d.* gave his note of hand for that sum, on the 9th *September*, 1809, upon which a declaration was filed, and served upon Messrs. *Hartshorne* and *Boggs*, as the agents of *Owen Cotton*, alledged to be an absent or absconding debtor, according to the law of the province, in Trinity Term, 1810. It has not been, and indeed it cannot be, contended that the agents would have been protected against the claim of the hospital, in case of a voluntary payment made by them to the creditor, either by the note of hand, or by any discharge which the creditor could have given. Neither could they have been compelled to pay the creditor, upon this note, by the common or ordinary statute law. The effect of the attachment, whatever it may be, is derived solely from the law of the province.

The province, having a legislature within itself, is competent to make laws which are no doubt binding upon all persons, and upon all property, situated within the limits of its jurisdiction; provided that they are applicable to the subject matter, and that they are not controlled by other considerations.

There are three points therefore to be enquired into.

1st. Whether an attachment lies under *the words* of the act of the province.

2dly, Whether such can be the true interpretation of the words of the Province Act, since the act itself might then *be repugnant to the Prize Act* and therefore so far illegal, and void.

3dly, Notwithstanding the validity of the attachment in itself, on both these grounds, whether it is a voucher to the agent, under the Prize Act, as against *Greenwich* Hospital *.

1. The law of the province gives this declaration, or attachment, against *the goods, effects, or credits, of any person absconding or absent out of the province, in the hands of his attorney, factor, agent, or trustee.*

The subject of this application is prize money, in the hands of a prize agent; a species of property of a very peculiar nature, inasmuch as it is created, and laid under many restrictions, by the King's proclamation, and by various acts of parliament.

By the laws of *Great Britain*, all prize belongs originally to the King, as a part of the ancient rights of the crown, and no subject can be entitled to it but by grant from His Majesty. Grants of prize, like all other royal grants, are to be construed strictly against the grantee, and cannot be extended by any construction beyond the plain import of the express words. Such grantees are captors held to be in law, and neither the confirmation of the grant by act of parliament, nor the granting of the further or reversionary right remaining in the crown to other subjects, have taken them out of the general rule. These principles are incontrovertible, and they have formed the basis of most of the decisions which are to be found relating to the droits of Admiralty †.

If then the King, in his proclamation, and by the acts of parliament, has not granted prize money absolutely, but under certain restrictions, those restrictions are limitations which confine and circumscribe

* 1 *Geo.* III. *cap.* 8.

† *Rebecca, Thompson.* 1 *Rob.* 230. *Gertruyda.* 2. 219. *Marie Francoise* 6. 277.

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the grant, and the right cannot by any construction be extended beyond their express terms. *Within* those restrictions the captors acquire a perfect right to prize, *beyond* those restrictions they acquire no right at all. Where the captors do not comply with the conditions, their right does not vest, and the interest remains in the crown, or with those to whom it may have been transferred.

Let us look into the terms of the grant. The proclamation orders *the neat produce of all prizes to be for the entire benefit of the officers and seamen.* If it stopped here it would be an absolute grant; but various restrictions are afterwards introduced, such as that they shall be on board at the time of the capture, and that they shall not be entitled until after a final adjudication.—The Prize Act adds many others; for all the regulations therein contained, as far as they apply to the captors themselves, are the conditions of the grant.

So, though prize money is given to the captors, the mode in which they are to demand it, and to receive payment, is pointed out; and this forms another restriction, or limitation, of the grant. By 49 *Geo.* III. c. 123. § 13. the last act upon that subject: "All shares of prize due and to become due to petty officers and seamen shall be paid by the agent or the treasurer of Greenwich Hospital to the person intitled thereto, or to any other person authorized to receive the same, by any order in the form or to the effect set forth in the schedule annexed, which order shall specify the name of the prize, or give such description thereof as shall be satisfactory to the person in whose possession the prize money shall be, and the name of the ship on board of which the person making the order was serving.—He must procure likewise a certificate in the form annexed, containing a full de-

scription of his person, which must be signed by the captain, and one other signing officer of the ship in which he shall then be serving: If discharged from the service, the certificate must be signed by different persons there mentioned as the case may be, which certificate shall be written or printed on the same paper containing such order, and which order and certificate being presented together, and the said order being paid, such order and certificate shall remain with the agent paying the same: Provided always, that every such order shall be revokeable at pleasure by the person making the same—Provided also, that no such order shall be valid if the party shall be then residing within the distance of five miles from the place of payment."

Two persons are here pointed out for the agent to make his payments to; 1st, *the person intitled* to the prize money; that is, *the seaman himself;* and to prove his identity, and that he was on board, two of the conditions, the 59th section of the 45th of the King directs that the captain shall send to the agent a list of the persons intitled, with their names, ages, and the description of their persons. Under these words it cannot be contended that any man can demand payment but the very individual, so ascertained, and so personally described—

2. The only other person pointed out is *the person who is authorised by an order* in the form prescribed.

The question then is, whether these words of the acts are *exclusive* of all other modes of payment. It was admitted by the counsel against the petition that if the act had contained negative words no attachment would have lain. But if they are in themselves exclusive, they necessarily imply a negative, and the same inference would follow.

The words of a statute are to be interpreted, by the

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rules of law, according to their usual and known signification, and by the reason and spirit of the act itself. Now this is a *disjunctive proposition*, and all such are necessarily exclusive, as it has been observed by all writers upon the subjects of grammar and logic, not from any technical refinements, but from common usage. Such propositions are said not to be correct, if there are any other cases not comprehended under them. As in the *indicative* form, the sentence, *it is day or night*, is said not to be true because it might be twilight, which is neither the one or the other. So in the *imperative* form. If I order a servant to go to *Sackville*, or to *Windsor*, it is no authority to him to go to *Annapolis*. His going thither is not warranted by the order. So the words of the act: "All shares shall be paid to the person intitled, OR the person authorised by the order prescribed," necessarily implies that it shall not be paid to any other person, and affords no authority for any other payment. The word "*all*" renders it equally exclusive, for if *all* the shares are directed to be paid to A. or B. *none* can be paid elsewhere. But the reason of the thing shews evidently that the words are exclusive, because otherwise the regulations would be totally useless, if they were required to be adopted under one form of transfer, yet other modes, in which they might be neglected, were equally valid.

It has been a great object with the Legislature to protect sailors from fraud and imposition by restricting the mode of transfer. Each successive Prize Act has gone beyond its predecessors in multiplying forms and precautions. Under the act of the 26 *Geo.* III. the directions were that "no letter of attorney or will made by any petty officer or sailor shall be good unless made revocable, signed before, and attested by the captain, specifying the name of the ship," and

other particulars there mentioned. Upon this act a case was decided in the court of Common Pleas, *Macdonald v. Pasley*, *Bos. & Pul.* 1. 161. An action was brought by *Macdonald* a sailor, against *Pasley* the prize agent for the whole of the prize money due to him. The agent had paid a part of it to one *Grant*, as indorsee of an order given by *Macdonald* in favour of one *Abraham Joseph* upon *Pasley* for his prize money. On shewing cause against a rule, why, on payment of what remained unpaid to *Grant* to such persons as the Court should appoint, all further proceedings should be staid, it was contended for the plaintiff, that the payments to *Grant* could not discharge the debt, since the order did not comply with the directions of the act, and that it was necessary to subject a letter of attorney to the restrictions of that act, *à fortiori* it was so with respect to an order which was a less solemn instrument. The Court discharged the rule, and Chief Justice Eyre said, that there was a great deal of colour for the argument which had been used respecting the nature of the authority under which these payments had been made. *If the Legislature thought fit to put a power of attorney under particular regulations, there is great reason to suppose that it was meant, that the agent could not be discharged by any thing less than a power of attorney.*" Now in this old act there were no words to direct how the money should be paid, nor was it couched in any negative form, yet it was held that the restrictions laid upon one form of instrument, must, *vi materiæ*, and from the reason of the act, be considered as exclusive of every other instrument. How much stronger is that conclusion under the present Prize Acts where exclusive words are actually employed?

Such exclusive restrictions and limitations then as

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to the mode in which prize money is to be paid, having been introduced into His Majesty's grant under the act of parliament, the captors complying with those conditions have a vested interest, which has frequently been enforced in the courts of common law, but if the conditions are not complied with, the grant cannot take effect, nor does any right whatever vest under it. If the sailor demands his money in person, or by such an order, it vests: if he does not he has no interest whatever. The right to prize, originall, in the crown, not being vested out of it but according to the terms of the grant, still remains in the crown, or in the grantee of such residuary interest.

This is *Greenwich* Hospital to whom the residuary interest is given by the same acts of parliament. By sect. 87, every agent within four months shall remit all *unclaimed* balances and shares, and all shares of run men to the treasurer of *Greenwich* Hospital. All shares are unclaimed which are not claimed according to the act, and the interest of the hospital is real, and not merely, through parly, for the benefit of the individual captors. It has, first, a beneficial possession, from the interest of the shares which are invested in government securities, and it has the ultimate property if they are not legally demanded, as it has originally in run men's shares, forming together a fund for the benefit of the hospital.

In the case of *Home* against Lord *Camden*, 2 *H. Black.* 533, Lord Chief Justice *Eyre* said, that the different sections which give powers and impose duties upon agents, all respect sales in order to distribution, and *the interest of Greenwich Hospital* arising out of those sales. So that the hospital is considered as having an interest from the beginning.

Here *then is no subject matter for the law of the province to act upon.* Prize money is neither the

goods, effects, or credits of the seamen, unless he demands it in person, or by such a power of attorney as is described. Not having so demanded it, it could not be liable to an attachment under that description, and the time having now expired, without such legal demand, the interest of *Greenwich* Hospital becomes vested.

But it was said by counsel, that the seaman *might maintain an action* against the agent, at the time the attachment issued, and therefore that the creditor representing his interests may maintain an action also. Now I doubt much whether the sailor himself could have brought an action for his prize money, until after he had demanded it in person, for his personal appearance, to identify him with the person described in the prize list, is necessary under the act; and as the rules of good pleading prove the law, a demand by the claimant and a refusal by the agent is always pleaded as a foundation for the action in suits in the common law courts against the prize agent, as appears in the case of *Wemyss* v. *Linzee*, in *Douglas*, 310. If the party himself could not have brought an action the argument fails as to the creditor. His appearance in person could not have satisfied the intention of the act.

If the party had been here he certainly could not have *transferred* or *assigned* his right to prize money to the creditor in satisfaction of his debt, unless according to the regulations of the act. Nay more, if the party had been here himself at the time the attachment issued he could not have assigned it all, for no order whatever given by him here would then have been valid to authorise the receipt of prize money, by the express words of the Prize Act. Does the act of the province then make a transfer of rights to the creditor which the party himself could not have done?

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The attachment is besides an order to the agent to detain the money and not to pay it over to *Greenwich* Hospital. But the party himself could make no such order. That privilege is confined to warrant officers.*

Further as to this supposed *representation;* of the two modes of payment, the first is personal to the party, I do not see how this can be transferred to another, and the other regulations are directed to this very point, namely to ascertain how the sailor shall be represented. One only mode of constituting a representation is pointed out, by letter of attorney in the form prescribed. If these restrictions are exclusive they must annihilate every other kind of representation, (except that of executors and administrators which is admitted and put under regulations) whether that representation arises by common law, by statute, or by act of the province.

This property likewise is protected upon another ground.—It was admitted by the counsel for the agents, that money could not be attached if under the custody of the law, and whilst a suit is depending in the King's court. Several cases were cited to this effect. In particular the case of *Coppel* against *Smith*, and *Grant* against *Howding*, 4. T. R. 312. Money in one case attached, and, in the other, paid upon a judgment upon an attachment, were adjudged to be paid again, because the money had been directed to be paid by the Court of King's Bench, and therefore was a judicial act. Yet it had not been attached in one case until after the master's allocatur, nor in the other until the day arrived for payment, so that the interest was completely vested, and nothing remained for the Court to decide.

* 45 *Geo.* III. c. 72. sect. 83.

Prize money is under the custody of the King's Court of Admiralty until it is actually demanded or paid to the parties. Until that moment the prize cause is still depending. This is evident because until that time the Court is open to any application from persons interested, and can make order thereupon, without instituting a fresh suit, which must necessarily be done if the original cause was out of Court. Until payment the judgment given is not effected and satisfied. Till that time all the parties are under the controul of the Court. How many regulations are there in the act, relating to the conduct of the agents *after final judgment*, and to the time of actual payment, all which it is the duty of the Court of Admiralty, by the directions of the Prize Act to enforce? Here after final judgment the agent is to register his power of attorney, to exhibit his accounts of sales, in some cases to bring the proceeds into the registry, or to invest them under the directions of the Court. By the orders of this Court he is to make distribution, here he is to make up and verify his final accounts as the Court shall require, and under the direction of the Court to remit all unclaimed shares to *Greenwich* Hospital.—If property so situated is not under the custody of the King's Court of Admiralty until actual payment, I know not what property can be considered as in that situation; nor do I know any case in which the courts of law have been held even to have concurrent jurisdiction until the property is become absolute and vested by the Prize Act, either by a demand in person, or by an acknowledged power of attorney, neither of which have taken place in the present case.

2. As the sailor has no attachable goods or effects,

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so I think there is considerable strength in another ground which was so fully argued by His Majesty's Advocate, namely, that a prize agent is not either an attorney, factor, agent, or trustee, as intended and described by the act. The more general words "*in whose hands or possession the same may be found*" in the first clause, being confined to such goods or effects as are exposed to view, or can be come at.

They are indeed called agents, and are named by the parties, but they are certainly very different from the persons usually understood under that denomination. They are in reality appointed by the Prize Act for certain special purposes. They are rather officers of the Court than agents of the parties. To the Court of Admiralty they give security, and that not a security in each particular case, but a general security for the due performance of their general duties. They are under the controul and direction of the Court as of its proper authority, independent of any act, or motion of the captors. The parties have no controul over the property in their hands, they cannot take it out, or direct the disposal of it, but according to the restrictions of the act. Nor can they give any authority to him to retain it in his hands, after the expiration of the time limited; and they are not agents for the captors only, but for all other persons interested—they are agents as well for *Greenwich* Hospital as for the sailors.

3. I think there is some weight likewise in the observation made by the Solicitor General, that a sailor, coming here, for a short time, in His Majesty's service, can scarcely be the person intended by the act, under the description of *an absent or absconding debtor*—to be absent, or to abscond, implies a previous residence, and how can a person be considered as a resident who accidentally visits this

harbour in one of His Majesty's ships, and has nothing like a domicil within the province?

In the cases of *Sill* v. *Boswick*, and *Hunter* v. *Potts*, which were cited at the bar, provincial laws were held not to have a complete operation for the benefit of persons who went into a colony merely to take advantage of those laws; how then shall such a temporary and involuntary visit give them effect to any person's detriment?

2. I have hitherto confined my observations to the words of the province act itself, and have shewn that it does not apply to prize money, because it is not the property there described, and because neither the prize-agent, nor the sailor himself, are the persons against whom it is directed.

I proceed now to another point, that such cannot be the true interpretation of the province act, because, if it were, the act itself would be repugnant to the prize acts, since enacted, and therefore so far illegal and void.

It is an admitted principle of law, and was stated as such by Lord *Mansfield*,* that the colonies take all the common and statute law of *England*, which is applicable to their state and condition. The regulations in the Prize Act extend expressly to the colonies, and since all the right which captors have in prize is created by them, in conjunction with the proclamation, these title deeds must be taken with all their limitations. Either the whole is applicable, or no part. It cannot be said we will take the proclamation and the statutes as they give prize to the captors, but we will reject the conditions under which it is given. By the 7 and 8 *William* III. c. 22. § 9. "All laws in any of the plantations, which are repugnant to any laws to be made in

* *Lindo* v. *Rodney*.—*Douglas* 617.

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Great Britain, so far as such law shall relate to, and mention, the said plantations, are illegal, null and void, to all intents and purposes." If then the province law is repugnant to the restrictions imposed by the *British* act, it is so far illegal and void. Considering it in another point of view, and giving it every possible validity, still the *British* act must be allowed to be of equal authority, and then the province act must be taken to be substantially repealed, so far as it is repugnant to the *British* act, which is of a later date, upon the universal maxim, *quod leges posteriores priores contrarias abrogant.*

If the province act is to be construed as is contended, and an attachment lies in this case, it is evidently repugnant to the Prize Act. That act directs the money to be paid to the party in person, or to an attorney, in a certain mode appointed; and if not so demanded and paid, that it shall go to *Greenwich* Hospital; the act of the province would direct, that although it had not been so demanded, yet it should not go to *Greenwich* Hospital, but to any creditor who chose to attach it, and that noble charity would be deprived of a residuary interest vested in it by the same statutes under which the captors themselves derive their right of property. The Prize Act limits the right of transfer to one form of an order; the province act would extend it to promissory notes, to common bills of exchange, nay to every instrument and mode by which credit may be given, and debts contracted. If such is the true construction of the provincial act, a statute may be good so far as it gives an interest, but void so far as it restricts it; a grant made by the Crown in 1805, can be extended beyond its express terms and plain conditions, by a provincial act, passed in 1761, before the property itself was created; and an act of

parliament, extending to the province, passed in the 45th year of the King, can be virtually repealed in some of its most material clauses, by an act of the province, passed in the first year of the same reign.

This repugnancy is not only to the express words of the act, but still more against its spirit and intention. These restrictions were introduced partly to discourage desertion, and partly for the purpose of preventing sailors from being defrauded of their prize money, by their executing powers of attorney and other instruments, improvidently, and thereby transferring not only their present but their future interest—With respect to the first, the prize list indeed ascertained, they were not run men at the time of delivery, but as their share was equally forfeited by a subsequent desertion, the order was required to be signed by the captain, or must contain a certificate of the sailor's discharge. If an attachment can be sued out upon any instrument, executed without any of these precautions, or for any debt, there is no security that run men may not receive their shares, to the encouragement of desertion and the injury of the naval service. Frauds were often practised by impostors who personated sailors, and received their prize money. This was guarded against by compelling them to appear in person to be checked with the prize list, or to be certified by their captain. The same precautions were a protection against forgeries, and frauds in obtaining orders, and the villanies practised upon unthinking sailors, in cheating them by a ticipation of their future prize money, whose value was unknown, was in some measure prevented by the necessity of specifying the prizes, and other circumstances.

Such was the series of well-considered regulations, adopted gradually, as experience suggested their ne-

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cessity, for these wise and benevolent purposes. But if an attachment can be sued out by any creditor, real or pretended, upon any instrument or security, or for any debt whatever, the whole fabric falls to the ground. It is said that the Supreme Court will be extremely cautious, and will so shape its proceedings as to guard against fraud. Be it so, it is the duty of every court of justice. But it has not means equal to those prescribed by the act. All its precautions are ineffectual, in comparison to those of the Prize Act. Under the Prize Act such are the regulations that every point must be proved, and in a mode which scarcely leaves a possibility of fraud, to the satisfaction of the party who has to pay the money. Unless those regulations are pursued, the agent is not discharged, and it is therefore made his interest to see that they are observed *bonâ fide*. But if prize-money can be attached in his hands, and such process or judgment upon it is a legal discharge, he has no interest in resisting it. He may indeed be compelled to appear, but cold and lifeless will be the defence where victory or defeat are equally indifferent. It is said the party may come in under the province law, and set aside the judgment within three years, but how is a poor sailor, who may never revisit these shores, to avail himself of an expensive proceeding at law to recover a poor pittance of a few pounds, and this right of a re-hearing does not extend to *Greenwich* Hospital, since it is confined by the act, to the debtor himself. Since then the proceedings in the provincial courts cannot afford an equal security against the mischiefs intended to be remedied, the process of attachment would set aside all the excellent regulations of the Prize Act, without substituting an equivalent in their place, and would leave His Majesty's service, the sailor, the agent, and the hospital, naked,

and exposed to every species of fraud and imposition. But after all, the question is not whether the precautions used by the provincial courts are equally efficacious with those of the Prize Act, but whether a law of the province, made long before, is to be so interpreted as to make it abolish those regulations, and to leave it to the courts of law to substitute others in their place.

If an attachment lies, it overturns all those provisions which are so advantageous to the seaman. On the other hand it is only an *additional remedy to the creditor*. It is an established maxim, *quod lex citius tolerare vult privatum damnum, quam publicum malum*. It is better that a creditor, who had other means of recovering his debt, having neglected to use those means, should be deprived of this further remedy, (accumulated remedies for the benefit of those who have neglected to use due legal diligence, not being favoured in law,) than that a door should be open to fraud and imposition, that a class of men, to whose bravery and exertions the *British* empire, and the colonies in particular, owe their existence and independence, should be liable to be robbed of the just reward of their meritorious services, to the great injury of the public; and that the *British* legislature should be defeated in an important object, which has occupied so much of its care and attention.

With every deference to the very respectable gentlemen who preside in the provincial courts, after the most diligent examination, and the maturest deliberation which I have been able to apply to this subject, for the reasons which I have stated, I cannot be convinced that prize money can legally be attached, under the act of the province, in the hands of prize agents, and that a decision to the contrary, can be maintained in law. Diffident as I must naturally feel

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in these sentiments, from their not coinciding with what I understand to be the opinion of those respectable gentlemen, I cannot but think that they receive some support from an argument which is not unfrequent in the mouths of some of the most learned sages of the law, against the legality of any actions or other legal proceedings—*that they are not founded in precedent.* The law of the province has now been in force half a century; many and frequent have been the complaints of losses by the debts of sailors; prize money to an immense amount has been from time to time here deposited, and yet neither the keenness of creditors, nor the ingenuity of the gentlemen of the profession, have, till very lately, discovered this mode of proceeding; as a new and unprecedented practice it is at least fairly open to some discussion.

3. But however valid the attachment may be as between the parties, it does not follow that it is binding upon *Greenwich* Hospital. It is *res inter alios acta quæ aliis nocere non debet.* The hospital is not a party in, or privy to, that suit. It cannot intervene in it, and it is excluded from a re-hearing by the province act, which limits that privilege to the absent or absconding debtor.

If an attachment, taken out by a creditor against the agent would be a bar to the claim of the hospital, it would be deprived of its rights without an opportunity of defence. If an attachment, not followed up by a judgment, would be a bar, agents, by fraudulently procuring process to be sued out, by fictitious or small creditors, may retain the money in their own hands; as in this case, where the demand of the creditor is much less than the money in the hands of the agent.

2. By the words of the province act, this process, and judgment of law upon it, are declared to be a

full acquittal and discharge of the agent from all demands by his principal, his executors, or administrators; but it is not declared to be a discharge of the agent against the demands of any other persons, and of course not against the claims of *Greenwich* Hospital.

3. The extensive view which I have thought it necessary to take of the validity and effects of the attachment, and which has led me into an examination of the nature of prize property, and of His Majesty's proclamation, and the prize acts, and the inferences which I have deduced from them, strongly prove that the direction of the act to agents, respecting their payments and accounts, must be literally adhered to. If those directions are decisive, I know of no authority in this Court which can set them aside, or deviate from their obvious meaning. This Court cannot admit this attachment as a voucher, if it is not allowed by the act.

The words of the Prize Act are these (45 *Geo.* III. c. 72, sect. 84.) "And be it further enacted, That no deduction shall be allowed, *on any account*, in the payments of unclaimed or forfeited shares and balances paid over to the Treasurer of *Greenwich* Hospital, or his deputy, for any sums not appearing upon the prize list of distribution, to have been paid thereon and acknowledged, unless satisfactory vouchers from the parties or their lawful attorney, are produced for the same."

To know what are satisfactory vouchers from the parties or from their lawful attorney, we must look at the other parts of the acts. The only voucher from the party directed by the act, except in the case of a personal demand, the only mode by which a lawful attorney can be appointed, is an order in the form there directed. No other vouchers are autho-

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rised under the prize acts. Since then the note of hand given by *Owen Cotton*, and the declaration founded upon it, do not come under that description; since they are neither vouchers for the sums appearing upon the prize list of distribution to have been paid thereon and acknowledged; since they are not such satisfactory vouchers from the parties, or their lawful attornies, as are legalised by the act, they are excluded by the express words of this section, and no deduction can be allowed on that account. So imperative are the words of the act, and so clear in their meaning, that nothing is left to the discretion of the Court; in the allowance of these accounts it has little more than a ministerial power.

I decree a monition against Messrs. *Hartshorne* and *Boggs*, as agents for His Majesty's ship *Bermuda*, to pay the sum of forty-five pounds and two pence three farthings, being *Owen Cotton's* share of certain prizes, to the petitioner, as deputy to the treasurer of *Greenwich* Hospital, as prayed by the said deputy-treasurer.

An Act to enable Creditors to receive their just Debts, out of the Effects of their absent or absconding Debtors. [1st Geo. III. c. 8. § 1, 2, 7, 8.]

(Referred to, page 235.)

BE *it enacted, by the Honourable the Commander in Chief, the Council, and Assembly*, That it shall and may be lawful for any person entitled to any action for any debts, dues or demands whatsoever, against any person absconding or absent out of this province, to cause the goods and estate of such absconding or absent person to be attached, in whose hands or possession soever the same are, or may be found: And the attaching of any part thereof shall secure and make the whole, that is in such person's hands, liable in the law to respond the judgment to be recovered upon such process, if so much there be, and no further, and shall be subjected to be taken in execution for satisfaction thereof, or so far as the value thereof will extend, and the person in whose hands they are shall expose them accordingly.

II. *And be it further enacted,* That were no goods or effects of such absent or absconding person in the hands of his attorney, factor, agent or trustee, shall be exposed to view, or can be come at so as to be attached, it shall and may be lawful to and for any person entitled to any such action as aforesaid, to file a declaration against such absent or absconding person, in the clerk's office of the inferior court of common pleas in the same county where such factor, agent or trustee lives, therein particularly setting forth his debt and damage, how and for what cause it arises; and to cause the attorney, factor, agent or trustee, of such absent or absconding person, to be served with a summons out of the office, annexed to the said declaration, fourteen days before the sitting of the court, for his appearance at such court; which being duly served, and return thereof made under the officer's hand, shall be sufficient in the law to bring forward a trial, without other or further summons, unless the principal be an inhabitant, or hath for some time had his residence within this province, in which case a like summons with an attested copy of the declaration annexed, shall also be left at his dwelling-house, lodging or place of his last and usual abode, fourteen days before the sitting of the court; and such attorney, factor, agent or trustee, upon his desire, shall be admitted to defend the suit on behalf of his principal throughout the course of the law, and an imparlance shall be granted of course at two terms successively, that he may have an opportunity to notify his principal thereof; and at the third term, without special matter alledged and allowed in bar, abatement, or further continuance, the cause shall peremptorily come to trial; and if judgment be rendered for the plaintiff, all the goods, effects or credits of such absent or absconding person, in the hands of such attorney, factor, agent or trustee, which were in his hands at the time of his being served with the summons and declaration aforesaid, to the value of such judgment, (if so much there be) shall be liable and subjected to the execution granted upon such judgment, for or towards satisfying the same; and from the time of serving the summons as aforesaid, shall be liable and secured in the law, in his hands to answer the same, and may not be otherwise disposed of or converted.

VII. *And be it further enacted,* That the goods, effects or credits of any absent or absconding person, so taken as aforesaid by process and judgment of law, out of the hands of his attorney, factor, agent or trustee, by any of his creditors, shall fully acquit

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and for ever discharge such attorney, factor, agent or trustee, his executors or administrators, of, from and against all actions and suits, damages, payments, and demands whatsoever, to be asked, commenced, had, claimed or brought by his principal, his executors or administrators, of and for the same; and if any attorney, factor, agent or trustee, shall be molested, troubled, or sued by his principal for any thing by him done in pursuance of this act, he may plead the general issue, and give this act in evidence.

VIII. *Provided nevertheless, and be it further enacted,* That any absent or absconding person, against whom judgment shall be recovered as aforesaid, shall be entitled to a re-hearing of such cause at any time within three years after such judgment; and the plaintiff in such action, before any execution shall issue on such judgment, shall give sufficient security to the satisfaction of the court, for the re-payment of all such monies as may be levied by virtue of such execution, in case the said judgment should be reversed on such re-hearing as aforesaid.

July 29th, 1811.

The Tamaahmah, *Skiddy.*

Breach of blockade of Bourdeaux carrying passengers no excuse.

FOR the captors, the King's Advocate and *C. Uniacke* contended, that the ship was bound from *New York* to *Bourdeaux*, in direct violation of the order in council of *April* 1809. That her being in ballast could be no excuse, as a decision upon that point, directly militating against the present claim, had been given in the High Court of Admiralty, in the case of the *Comet, Mix,** it being there held, that "generally where a neutral ship, *though in ballast*, is proceeding to a blockaded port, it must be supposed that she is going there for the purposes of trade." It was also contended that this ship was sailing under a *French* pass, and with *French* passengers, some of whom are officers of government, engaged in public pursuits; that the ship herself is contraband of war, being fitted for a

* *Edw.* Vol. I. p. 32.

privateer, and intended, perhaps, for sale at her port of destination, as in the case of the *Brutus*.* That the ship, the voyage, and the passengers, are all subjects of suspicion, and if there had been no breach of the order in council, the Court would not be justified in granting the restitution of such questionable property, sailing under an avowed pass of the enemy.

On the part of the Claimants, the Solicitor General and Robie.---The principle established in the case of the *Comet* cannot affect the present case. This ship, it is true, was proceeding in ballast to a blockaded port, but as it evidently appears, not for the purposes of trade, as neither the condition nor employment of the vessel could warrant the conjecture. She was carrying passengers from her own neutral port to a port of the enemy, and if those passengers were not of the description that could render the transportation of them illegal, the situation of the port to which they were going cannot vary the case. A question then arises as to the condition and quality of the passengers. If all, or any of them are of military appointment, or in those official stations which attach them to the immediate service of their government, the carrying them even from a neutral port to that of their country, would be an acknowledged breach of the law of nations. But the depositions taken in the cause can warrant no such conclusion. The master, on the contrary asserts, that there were fifty passengers on board, but he does not know their names, rank, profession, or occupation; he believes most of them were distressed inhabitants of the *French* colonies going to *France;* they had no commissions that he knows of, nor had they any interest or concern in the vessel. It must therefore be presumed that they were non-combatants, and people in

* Decided at *Halifax*, and confirmed on appeal.

The TAMAAHMAH. July 29th, 1811.

private stations, not then acting in the service of government; and as the captors thought fit to put them on shore in *America*, the want of evidence with regard to them should not prejudice the claimants. The pass found on board the ship is nothing more than a consular certificate, stating the vessel to have been engaged for the service of the passengers, and giving her no particular privilege that could constitute a *French* character. As to her being contraband of war, and going to an enemy's port for sale, there is no evidence whatever of that fact, as in the case of the *Brutus*, and the ship herself is by no means equipt or calculated for the measure.

SENTENCE.---Dr. *Croke*.

The *Tamaahmah*, *Skiddy*, was a brig taken by the *Melampus*, *Hawker*, bound on a voyage from *New York* to *Bourdeaux*. She had no cargo, and there were fifty *French* passengers. A claim was given by *J. R. Skiddy*, the master, for himself, *Stephen Jurnal*, and *Benjamin Desobry*, of *New York*. On petition of the King's Advocate, a commission issued to examine the vessel, if she was fit for a vessel of war; by the return of which, it appeared that she might easily be converted into a ship of war. By the order of council. *Nov.* 11, 1807, "All ports of *France* shall be subject to the same restrictions in point of trade and navigation, (with certain exceptions) as if the same were actually blockaded by His Majesty's naval forces in the most strict and rigorous manner."

That vessels going in ballast are subject to confiscation has been repeatedly decided. As in the *Comet*, and under the same order in the *Augustine Margaretta*.* Therefore this vessel is not exempted

* *Scott*, II. p. 147.

from the penalties of breaking the blockade by having no cargo on board, and is *prima facie*, liable to confiscation, unless the claimant can make out ground of exemption.

The question then is, whether she can derive any exemption from the nature of the business in which she is employed? It has been alledged, that she is a packet boat, and that such are intitled by courtesy to favour.

Carrying passengers is a trade undonbtedly. It is the letting out of a vessel with certain accommodations for the persons who may have occasion for it, for a valuable consideration.

This is not the case of an ordinary packet boat. It is the first time the vessel ever made a voyage in that capacity; two previous voyages to *England*, with cargoes are proved.

Though the vessel was going from the *United States*, there is not a single subject of that country on board as a passenger, they are all *French*.

It is not a packet in the service of the government of the *United States*, or any way authorised by that government.

The question then, whether packet boats may not lawfully enter a blockaded port, and of the comity to which they may be entitled in war, does not arise. The case must be considered as that of a vessel engaged in one particular voyage, and under the particular circumstances in which it is found.

Here is a vessel then fitted out for passengers only, carrying fifty *French* persons, men, women, and children, how many of each is not specified, from the *United States* to *Bourdeaux*. The master professes to have lost the list of them, and not to know their names, rank, or profession, but believes most of them were distressed inhabitants of the

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French colonies. The *French* consul describes them to be *French* passengers, part of whom were *in the service of the government*, and the others refugees from *St. Domingo* and *Cuba*.

It does not appear by whom their passage was to be paid, whether by themselves, or *the French government*, but they sailed under the particular protection of the *French* government, afforded them in a special passport from the consul general at *New York*. In this passport "all commanders of squadrons, vessels, and privateers, are requested to grant their succour and protection to this vessel, and to protect its entrance into *Bourdeaux*, or any other port of *France*. Prefects of departments, and other civil local officers, are requested to admit the said brig, laden with passengers, and to permit her return."

If these persons were going home, after the capitulation of a *French* colony, upon the terms of the surrender, they, and a vessel hired for the purpose, would be protected as a sort of cartel, but this is not alledged. The master only states his vessel as a common passage boat, and the passengers picked up he knows not where.

It has been decided in several cases (*Friendship*, *Rob.* VI. 420.) that carrying soldiers and sailors to *France*, though not regular corps, and not intended for any particular service, is engaging in a trade of a contraband nature. There is no proof that many of these passengers were not of that description. Under the present government of *France*, where the whole body of subjects is under conscription, every man is a soldier or a sailor. Every man capable of bearing arms on board this vessel, might, and probably would be seized immediately upon his arrival in *France*, and sent to fight against *Great Britain* or

her allies. Though a few straggling, or accidental persons might innocently be permitted on board a general passage vessel, yet where a vessel is employed for that purpose only, and carries a whole cargo of the enemy's subjects, who may immediately be hostilely employed against us, such a cargo can scarcely be considered as of an innocent nature, especially when sailing under the peculiar protection and passport of the *French* government.

In the cases above stated, the vessels were going to an open port, without any mixture of blockade. If that was the case here, it might be a question of some nicety to determine how far persons, not professedly of the military state might come under the principles of those cases. Very different is the case here. How far it might render a vessel liable to forfeiture, if going to an open port, is another question. In this case, the port being under a rigorous blockade, the only question is, how far the employment in which the vessel is engaged, is of a favourable nature, and such as to form an exception to the strict rules of blockade. Whatever doubt there might be in the other case, in this there can be none. A vessel hired to carry home the enemy's subjects, who compose the strength of his country, and form his fleets and armies, and whose importance to him is manifested by the peculiar protection granted them by the government itself, is a material service performed to the enemy, and as such certainly cannot afford to a neutral any plea which can justify the breach of a blockade.

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The NEW ORLEANS Packet, *Richard T. Harris*, Master.

JUDGMENT.---Dr. *Croke*.

The orders in council of the 26th of April, 1809, not revoked by the *Duke of Cadore's* letter of *Aug* 5, 1810.

THIS vessel sailed from *America*, with a cargo of provisions to *Gibraltar;* from thence to *Bourdeaux*, where she took on board a cargo of wine, and was captured upon her return to the *United States*. It is not necessary at present to consider the question of property, though it is very doubtful, because the vessel and cargo are liable to condemnation, if the order in council of the 26th of *April*, 1809, was in force, by which it is declared, that "all ports under the Government of *France* shall be subject to the same restrictions in point of trade and navigation, as if the same were actually blockaded."

It has been alledged on behalf of the Claimants, that the Master saw at *Gibraltar* a newspaper, containing the letter of the *Duc de Cadore*, to General *Armstrong*, of the 5th of *August*, 1810, which stated, that the decrees of *Berlin* and *Milan* were repealed, whereupon he determined to go to *Bourdeaux*. It is not argued that this letter misled the master, and that it amounted to a justification only, under the plea of his having been deceived, and that he had gone to *Bourdeaux* under an involuntary, and therefore excusable, error, but a broader ground has been taken. It is said, "that these decrees have been actually revoked, and therefore, that the *British* Orders in Council, being merely retaliatory, and co-existent with their decrees, have, *de facto*, ceased; that the revocation of the decrees is proved, not only by that letter, but likewise by the fact that this very vessel had been seized at *Bourdeaux*, but

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was afterwards liberated, upon bonds, which are said to have been since cancelled. It was besides argued, that the Orders in Council having imposed a blockade on the *French* coasts, by the rules of the Courts of Admiralty, it cannot, in justice, be valid, without an effectual force, to support it, which does not appear to have been the case with the port of *Bourdeaux*; that all blockades are of an odious nature, and that this, which extends to all the ports of *France*, is perfectly new, and a violent restriction of neutral commerce, and therefore, *if at all justifiable*, it ought not to be inforced too rigidly; that property ought not to be condemned under it, but upon the clearest proof of its being in operation, and that if any doubt arises, whether it is in force or not, the claimants are intitled to the most liberal consideration, and, in case of uncertainty upon that head, the scale of justice should preponderate in their favour."

It was incumbent upon the claimants to have proved all the facts upon which they have rested their defence They have produced no absolute revocation of the *French* decrees. The letter of the *Duc de Cadore* is *conditional* only, that the decrees should cease to operate on the 1st of *November*, 1810, provided that "*England* should abandon her Orders in Council, and her new principle of blockade." *England* has abandoned neither, the condition has not been complied with, and therefore the revocation is void, by the very terms of it. This was the understanding of the *British* Government, as appears in its declaration to the *American* ambassador, and, still more, from its conduct. The *British* Government has publicly professed that it would recall the Orders in Council whenever the *French* decrees should be revoked. A year has elapsed since the *Duc de Cadore's* letter was written, yet the *British*

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Government has not revoked the Orders in Council, which it was bound in honour to have done, and which, therefore, it certainly would have done, if it had been satisfied that the decrees were annulled. The document itself, therefore, and the construction put upon it by the *British* government, and evinced by its conduct, shew clearly, that the *Berlin* and *Milan* decrees were not revoked at the time when this vessel was at *Bourdeaux*.

The circumstances which happened to this vessel in *France*, so far from being favourable to the claimant, prove clearly, that the decrees were then in full force. It is admitted, that she was seized at *Bourdeaux*, upon her arrival from *Gibraltar*, on account of her coming from a *British* port, that is, under the decrees. It was incumbent upon the parties to have shewn that she was liberated, because they had ceased to exist; yet, why she was afterwards permitted to sail, does not appear. They should have shewn that she had been discharged expressly because the decrees not having been in force when she arrived, the seizure had been improperly made, or that they had been since revoked. The bonds, which are said to have been given upon her discharge, are inconsistent with those suppositions, for she would have been intitled to be liberated without any security. The contents, object, and conditions of those bonds, and why any were required, or when, or how, they were cancelled, is not even stated. There may be many reasons for which a vessel under certain conditions, should be permitted to quit the port, perfectly consistent with the existence of the decrees. It is well known, that they were frequently relaxed, as to particular vessels, for the benefit of the government, the occasional relief of trade, and even by paying fees to the officers of government. The

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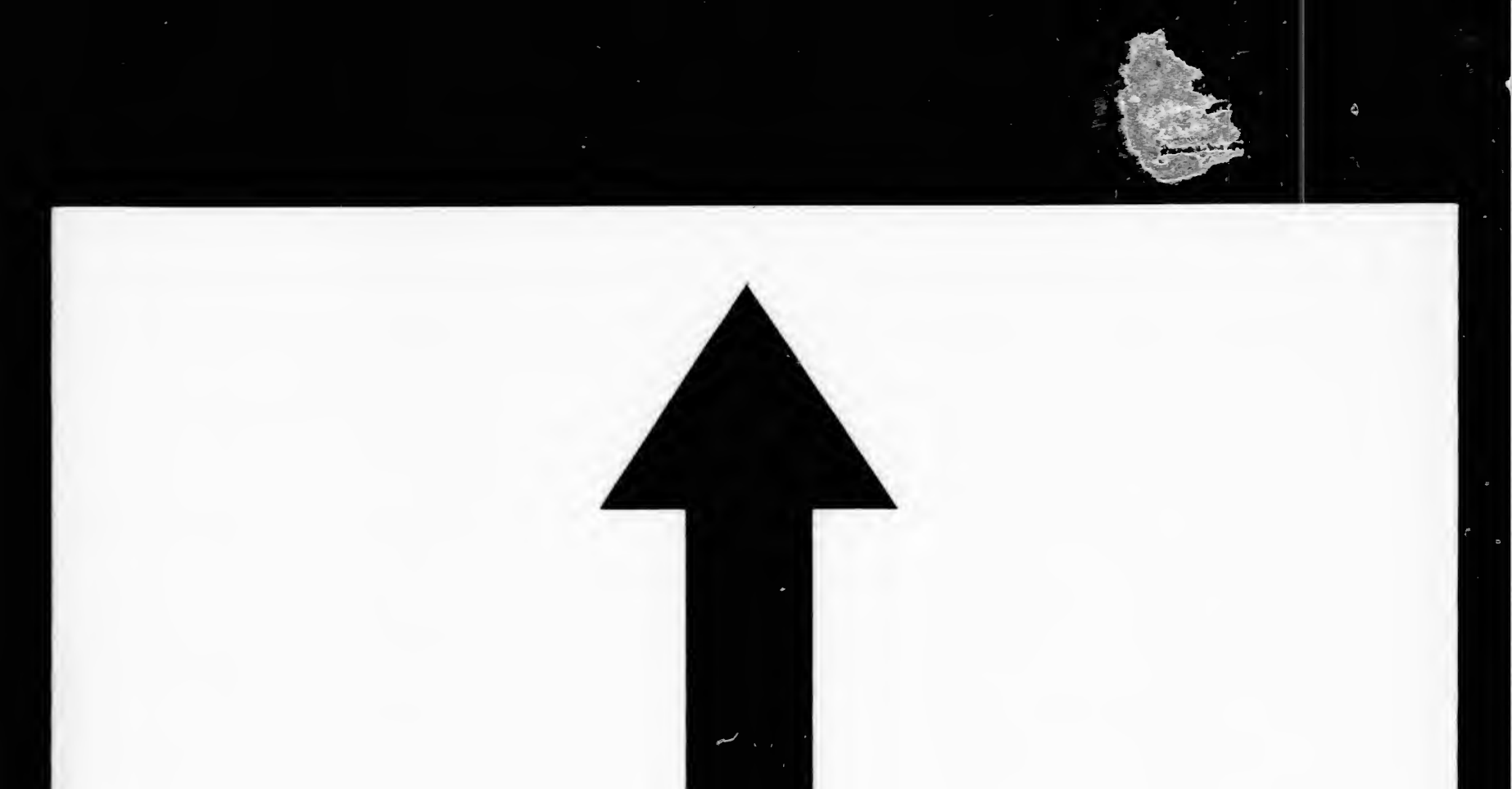
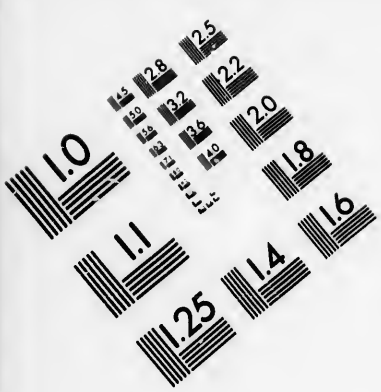
perfect secrecy which the claimant has observed, respecting this whole transaction, clearly implies, that the departure of the vessel arose from some other cause than the repeal of the orders, since, if such had been the ground of the vessel's discharge, it was material to his case to have proved it, but this he has not done.

The main fact then is evident, namely, that the decrees were in force when this vessel entered the port; but that they were not in force when she departed is not ascertained.

If they could have established this point, still it was not enough to support their case. They must have shewn, likewise, that the *British* orders in council had been repealed. No declaration has been made by the *British* government, that the orders in council should instantly, and *de facto*, cease, whenever the decrees should be revoked.* It has bound itself to nothing further than that it will revoke its orders whenever that event shall take place. It has reserved to itself to decide, whether the case has happened, to which the engagement refers, and to fix the time when the corresponding revocation shall be made. Till the *British* government is satisfied that the decrees have been annulled, and has in consequence revoked its orders in council, they continue in force, and they would even still subsist, and be binding upon this Court, notwithstanding the

* By a subsequent order in council, of the 21st of *April*, 1812, the the *Prince Regent* was pleased to declare, "that if, at any time thereafter, the *Berlin* and *Milan* decrees, should, by some authentic act of the *French* government, publicly promulgated, be absolutely and unconditionally repealed, then, and from thenceforth, the orders in council of the 7th day of *January*, 1807, and of the 26th day of *April*, 1809, should, *without any further order, be, and the same were thereby declared from thenceforth, to be, wholly and absolutely revoked.*"—See Appendix.





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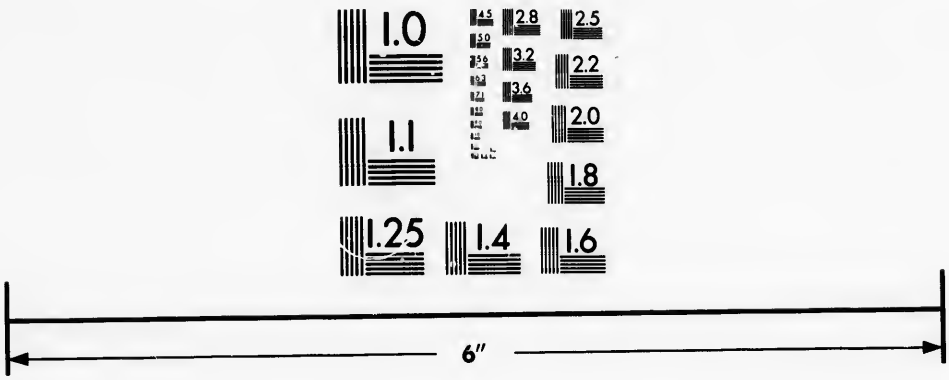

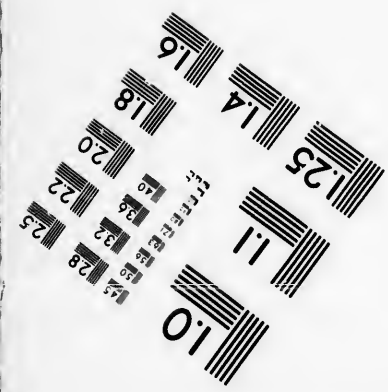

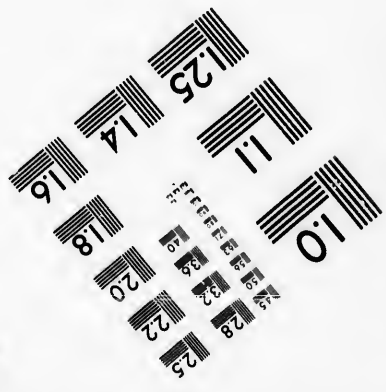

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French decrees should have been proved to be really revoked.

I cannot agree with the learned counsel, that any of the principles which have been admitted, respecting blockade, have any application to this case. The word "*Blockade*" has indeed somehow crept into the discussion, relating to these orders in council, but the restriction imposed by them is, in reality, of a very different description; they do not constitute, properly speaking, a blockade, but a measure entirely *sui generis*. A blockade is confined to particular ports, is usually of a military nature, and it is admitted, that it cannot be extended to ports, where no actual investment is established. *This* order is a general interdict of all commerce with the *French* nation, which, upon the very face of it, cannot be executed in the manner required in blockade, since such an investment would amount to a complete siege of all the dominions of that country. It is absurd, therefore, to think of applying the rules of one kind of measure, to another of a nature essentially different, and which it is impossible, in that case, to comply with. It may not be improper, by way of answer to some observations which have been made in argument, to consider a little more the real nature and foundation of these orders in council. When they are said to be *retaliatory*, it is indeed true, but that expression does not go far enough, they are, strictly speaking, *defensive*. They bear no resemblance to any hostile proceedings, ever adopted by any nation whatever They have no sort of analogy to the blockade of the *French* coast by *England* and *Holland*, because *that* was not in consequence of any antecedent conduct on the part of *France*, but an unjustifiable extention of the common law of blockade. It is a new and unheard-of remedy,

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applied to a new and unheard-of disorder; an extraordinary mode of defence, against a mode of attack equally extraordinary, and is therefore justifiable under every principle of the law of nations. It may be laid down as a general rule, that whenever one nation employs means of whatever nature they may be, to ruin another nation, that nation has a perfect right to defend itself against those means, whatever the effects may be to other countries. If new and unheard-of expedients are employed for that purpose, it is probable that new and unheard-of defensive measures must be resorted to, but they are not the less lawful because they were never before practised.

No one can doubt but that the *Berlin* and *Milan* decrees were intended to ruin *Great Britain*, and to pave the way for its conquest. This was openly professed in various *French* documents, issuing from the *French* government. It was universally known, that "Commerce is the principal source of the greatness, the power, and even the safety of *England*."* It was resolved, therefore, to annihilate her commerce, by prohibiting all trade and correspondence with the *British* dominions, or in *English* merchandize. This constituted what was truly stiled "an unprecedented system of warfare." Was *Great Britain* to sit quiet till she was deprived of all her resources, and compelled to submit to the enemy? The orders in council were issued, imposing a similar blockade upon all the territories of *France*, "to compel the enemy to recall those orders, or to induce neutral nations to interpose with effect, to obtain their revocation." If any prejudice results from them to other nations, it is no injury, for self-defence is the indefeasable right of mankind.

* *Vattel.*

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The *United States* of *America*, of all countries, have the least right to complain, of any inconveniences which they may suffer from them; they give all the effect in their power to these unjust decrees. No vessels sailed from that country without certificates from their own magistrates, countersigned by *French* Consuls, that no part of the cargo was *English* merchandize; thus they actually co-operated with the enemy in his plans for the reduction of this country.

We hear much indeed of the lawfulness of neutral commerce with nations at war, and that neither belligerent power has a right to prohibit neutrals to trade with his adversary. Generally speaking, an impartial commerce is not to be inspected, because it is no injury to either parties: but when it becomes so, *it is no longer lawful.* All such rights are limited by their effect upon other countries. When they can be exercised without any injury to a third party, they are lawful; when they are destructive or detrimental to a third power, they cease to be lawful. To get money by trade, generally speaking, is the right of every nation; but where any particular mode of trade interferes with the operations of war, or is an engine in the hands of one nation, to ruin another, it is no longer lawful, but an injury which the suffering party may forcibly prevent. This is admitted as far as relates to blockade and contraband, but it equally applies to every other case, where the effects are the same. It is continually repeated, that these are new doctrines which have been brought forward, by *Great Britain*, to answer temporary purposes; on the contrary they are as old as the law of nations itself, or rather they are coeval with justice and common sense. The opinions of those great jurists, whose learned treatises are appealed

to by all nations, may be considered at least as impartial testimonies. They state most expressly, the very doctrines now contended for, on the part of *Great Britain*, and therefore untruly said to be new and unsupported, by the adversaries of that Country.

"A nation," says *Vattel*,* "has a right to every thing which may enable it to turn aside an imminent danger, and to remove whatever is capable of causing its ruin." *Heineccius*† says, "a sovereign may do every thing, without which he cannot defend his rights, and may remove every impediment which is thrown in the way of his defence. In that case therefore it is not inquired, whether another has a right of carrying provisions to an enemy, or of supplying him with other necessaries; but it is sufficient, that *we likewise have a right to employ force against any one who renders our defence more doubtful or difficult.* For the same reason, one of the nations at war, may lawfully prevent the exercise of any right of commerce, if in any manner whatever the strength of the enemy is thereby encreased, or his own defence is rendered more difficult."

If this right was even doubtful, and those of neutral commerce, and of self defence, could be supposed to be equally balanced, a right of gain in one nation must give way to the right of another nation, to preserve itself from a material loss and injury. The law of nature and of nations is nothing more than a system of rules by which the greatest good and the least injury are to be procured. That one nation should be saved from ruin, is a greater good than that another country should acquire riches.

* Liv. I. ch. 2. sect. 20.

† De Nav. ob vect. Cap. I. § 9. Op. Vol. II. p. 320.

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That one nation should be ruined is a greater evil than that another should fail to acquire a certain number of dollars. Nations have obligations as well as rights. It is their duty to submit to some privations, rather than by giving effect to the machinations of one enemy against the other to contribute to his destruction.

It cannot therefore be doubted, but that the Order in Council is founded upon the ancient and received maxims of the law of nations, and that, as a means of *self-defence*, it cannot be considered as an unjust infringement of neutral commerce. This court therefore is not only bound to carry it into effect from the high and binding authority from which it issued, but it is well satisfied likewise, that, in so doing, it is acting perfectly conformable to the law of nations, and to the just rights of the *British* nation. The parties therefore, having failed in proving the revocation of those orders, it is my duty to pronounce for the condemnation of both vessel and cargo.*

* The Case of the *Fox*, decided in the High Court of Admiralty, *May* 30, 1811, reported in *Edwards*, vol. 1, p. 311, had not arrived in *Nova Scotia*, when this decision took place. In that case, the proceedings in *France* respecting the *New Orleans*, were brought by the claimants as a proof that *France* had acted upon the revocation. But *Sir William Scott* observed, that, "it was brought forward in such a way, so void of all authenticity and of all accurate detail of particulars, as to make it hardly possible for me to allude to it, with any propriety, and much less with any legal effect. What the circumstances of that case were, in what form, and under what authority, and on what account released, did not at all appear." p. 318. In the Case of the *Snipe*, *July* 30, 1812, (Edw. 1. p. 391. and Appendix, 8.) those proceedings were again brought forward, upon a statement of them in a letter from Mr. *Russel*, the *American* ambassador at *Paris*, to the *American* secretary of state. Upon which fuller state of the facts, *Sir William Scott* says, "how could the *Orleans* Packet have been seized, expressly under these decrees, as Mr. *Russel* asserts, in *De-*

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Cargo brought from a blockaded port by land, and shipped in an open port, not confiscable. Order 2d *Oct*, 1807, revoked. Of 31 *May*, 1809, not revoked.

THE *King's advocate on behalf of the Captors*, contended, that this ship and cargo were liable to condemnation on various grounds. That she had committed a breach of the blockade of the *Eyder* in violation of the order of the 2d. of *October*, 1807. That she had infringed the order of the 31st. *May*, 1809, by entering *Heligoland*, and the order of the 26th *April*, 1809, by a breach of the blockade of the *Elbe*, in transporting goods from *Hamburgh* to *Tonningen* by water and land carriage. That the whole of the cargo was consigned to a merchant in *Hamburgh*, and that the trade of that port, as well any other enemies ports, was carried on through *Tonningen*, to evade the blockade of the *Elbe*. The king's advocate adopted several other grounds, which are noticed in the judgment, and contended also that the ship and cargo were liable to condemnation as enemy's property. *The Solicitor General, on the*

cember, 1810, by the director of the customs at *Bourdeaux*, if these decrees had been notoriously repealed from the 1st of *November*? What must have been the conduct of the *American* master, under such an injury? An instant demand of restitution, with costs and damages from the tribunals. That any remonstrance to government should have been requisite, any application depending there for a considerable time, and the property restored more than a month afterwards, on bond to stand adjudication, on a subject which Mr. Russel justly describes in terms, to be an act ostensibly proving the continued operation of the decrees; and that bond not given up till the month of *July*, 1811, by an Act of the state, exercising its prerogative, and not by any Act of the tribunals, executing a known law, are a series of facts, which prove decisively two things:—One, that the *Duc de Cadore's* letter was not in itself a revocation of the *French* decrees; and, secondly, that no other revocation was publicly known."

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other side, confined himself chiefly to the objections under the order of the 26th *April*.

This ship, it was true, had proceeded from *Philadelphia* for *Tonningen*, with a cargo of colonial produce, and after having touched at *Heligoland*, arrived there with the avowed intention of receiving goods from *Hamburgh*, by land, which she could not have received by water, without a breach of the blockade of the *Elbe*.---That such trade was allowable, and the consignment of the cargo to a *Hamburgh* merchant equally so.---That there were several portions of the cargo brought to *Hamburgh*, from other towns in *Europe*, in order to be forwarded from thence to *Tonningen* for shipment to *America*. If these were neutral property, of which there could be no doubt, they must, at all events, be restored. No part of the cargo could have been transported to *Tonningen* by water, the usual and accustomed trade being confined to land carriage, for the express purpose of avoiding the blockade; and this fact would appear by a reference to the letters and accounts found on board the ship, and made exhibits in the cause. With respect to the point of property, nearly the whole of the cargo was on freight, and if any confidence could be placed in her papers, the whole of it must be considered as *American*.

JUDGMENT.---Dr. *Croke*.

A claim has been given by the master, for the ship, on behalf of *Daniel Williams Cox*, of *Philadelphia*; and for the cargo, as belonging to a number of persons, about thirty-four, all *American* citizens. She loaded in *May*, 1810, at *Philadelphia*, sailed in *June*, and arrived off *Heligoland*, on the 22d of *July*. The next day she reached *Tonningen*; lay there two months, and then proceeded up the

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River *Eyder*, to *Rheinsburg*, where she remained four months. She then returned to *Tonningen*, took in her present cargo, and sailed from thence, upon the 21st *May*, 1811, bound upon her present voyage to *Philadelphia*. In her way, she stopped again at *Heligoland*, and was afterwards captured by the *Atalanta*.

The captors have opposed the restitution, or have prayed the condemnation of this vessel and cargo, upon two grounds. The want of proof of the property, and the breach of certain orders in council.

Upon the first point, the Court has little difficulty. It is allowed by all parties, that there is full proof of the ownership of the vessel; and the claimant's counsel admits, that the evidence of the property, in the numerous shipments of the cargo, is defective, since the master cannot swear to them. The vessel therefore is a proper subject for restitution, and the cargo for further proof, unless they should be liable to condemnation, upon other grounds.

2. Three different orders in council are alledged by the captors, to have been violated.

Of these, the first of the 2d of *October*, 1807, by which His Majesty judged it expedient to direct that the most rigorous blockade should be established at the entrance of the River *Eyder*, is quite out of the question; for it was discontinued by general orders from the Admiralty, on the 13th of *July*, 1809, a year before this vessel entered the river.

The next order in council, is certainly now in full force. It was made upon the 31st of *May*, 1809, and directs that the trade, to and from *Heligoland*, shall be confined to *British* ships; and it is ordered, "That no foreign vessel shall enter into the port, harbour, or road, lying between the island of *Heli-*

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goland, and *Sandy Island*, and the shoals of the said islands respectively, and commonly called, or known by the names of the *North Haven* and the *South Haven*, under any pretence whatever; and that no goods, wares, or merchandize, whatsoever, shall be in any manner put on shore, or transhipped." One branch of this order does not apply to the present case, as it is not alledged that any part of the cargo was landed, or transhipped. But it is said, that the vessel has broken the order, by having entered the port, harbour, or road, of that island, either upon the outward or the return voyage. Let us examine the evidence to this fact. The master was directed by his owners, to touch at *Heligoland*, for orders from his agent. On their voyage out, the log-book states, that on the 23d of *June*, at 3 p. m. they made *Heligoland*, lay off and on till daylight, then bore away for the river *Eyder*. The master states, that a boat was sent on shore, and returned with orders, from the agent of the owners, to proceed immediately to *Tonningen*, which he did. On their return voyage, they lay too, off *Heligoland*, for two hours, during which time they landed a Mr. *Sperry*, and some other *German* passengers, who had taken their passage thither. Now, not to mention that there is not a particle of proof that the vessel entered into any port of the island, or any part of the prohibited ground; and that there is the clearest proof that no manner of commerce, with that island, was ever thought of; and that the mere communication with the agent, for the purpose of ascertaining the existence of blockades, in the neighbouring ports, or of landing passengers, neither in fact, or in law, can constitute a breach of these orders; there is the evidence of local circumstances, to shew that no violation was committed. The vessel was

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boarded by a boat from the *British* custom-house, and paid the light duty. If the vessel had broken the order, a seizure would certainly have been made. There was also an *English* ship of war lying at *Heligoland*, which suffered them to proceed without examination, which shews that she had not entered into the unlawful places. These facts are ascertained by a disinterested witness, *Frederics*, the passenger; who states them, and draws from them the same conclusion which the Court must form, "that they had not entered any blockaded, or prohibited port."

I proceed now to the third order in council, which has been said to have been broken; that of the 26th of *April*, 1809, by which all ports and places, under the government of *France*, were placed in a state of blockade.

This vessel was only at *Tonningen*, and in the River *Eyder*, which were neither of them within the compass of any blockading order: but a great part, nearly the whole of the cargo, was sent from *Hamburgh*. It will be necessary, therefore, to consider the national character of that place, the fact of the transportation of the goods from thence, and the legal consequences which will attach upon it.

The northern part of *Germany* was, for a long time, in a very fluctuating state: countries and cities, rivers, and their banks, were successively occupied and abandoned by the enemy. It was not the wish of the *British* government to distress neutral places, or to restrict neutral commerce, more than was necessary for the purpose of counteracting the designs and proceedings of the enemy. It issued various orders, altered and repealed them, according to the temporary and changeable state of affairs, till at length the present order was made, by

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which the navigation of that part of the world, as far as we are concerned, has been for some time settled. After limiting the particular line of blockade, to the River *Ems*, it extends it generally to all other ports and places under the government of *France*. The complete occupation of *Hamburgh* by the *French* troops, has finally fixed the fate of that country. The entire possession of that city by the *French*, is matter of general notoriety, and there is abundance of specific proof of it, to be found in the present case. From documents produced from the ship's papers, it is proved that *Hamburgh* was annexed to the *French* empire, and became a department of it, under the title of the department of the month of the *Elbe*. Here is an order from *Buonaparte*, that no neutral consul should remain at *Hamburgh*, till his commission had been renewed. There are licences to trade there from him. Goods were permitted to be imported into this city, under decrees signed at *Paris*. In short, there is proof not only that this place was, in point of form, incorporated into the *French* Empire, but there is ample testimony, that every kind of sovereignty was actually there exercised. Having established this point, that *Hamburgh* is comprehended within the order of council, the next question is, whether this blockade has been in reality broken by a fraudulent, and evasive shipment from *Tonningen*. As the cases of ship and cargo may stand upon different grounds, I shall first consider the cargo.

To guide the Court in its judgment upon this case, there are two classes of decisions in the High Court of Admiralty. The one consists principally of the *Ocean*, and the *Stert*.* In these, during the blockade of *Amsterdam*, goods were sent to *Rotter-*

* 3 Rob. 297.

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dam, and shipped there. This was considered as an exportation from *Rotterdam*, and it was held that the goods having been sent either by land carriage, or by inland navigation, had not broken the blockade. On the other hand, in another class of cases,* the *Maria*, *Charlotte*, *Sophia*, and *Lisette*, it was decided that when goods are brought down from the blockaded port, to a neighbouring port, on purpose to be shipped, it is a breach of the blockade, being a continued voyage as to the *teraminus á quo*, and the *terminus ad quem*.

According to the facts, those cases are conclusive upon the Court, unless any distinction can be made between them and the present. This has been attempted, it has been said, that in those cases the goods were transhipped at sea, and were not landed; that in *this* case, they were landed, warehoused, and even paid duties.

The question then is, whether by such landing and payment of duties, the continuity of the passage of these goods was broken, and the voyage from *Tonningen* became a new voyage, and a new transaction. This must depend upon the object intended to be answered by it, or the purpose of the parties. If it was there landed for sale, for the benefit of merchants, there resident, or with any other view connected with the commerce of *Tonningen*, the two voyages from *Hamburgh* to *Tonningen*, and from thence to *America*, might properly have been considered as two distinct transactions; and an offence committed upon the first passage, might not have been subject to visitation, upon a capture upon a second voyage. But if these goods stopped at *Tonningen*, only for the purpose of a farther convey-

* Rob. VI. 201. 387.

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ance, on their way to *America*, without any sort of connection with *Tonningen*, it must be considered as one unbroken transaction. By the original orders from the consignors, they were to be sent from *Hamburgh* to the *United States*. Thither they were at first consigned. Whether direct or circuitous, that was the sole and real voyage. They were never intended to stop at *Tonningen*, for any mercantile purpose whatever. They were sent there merely to be shipped in a vessel which could not approach *Hamburgh*, on account of the blockade. It was one designated voyage from *Hamburgh* to the *United States*, and the goods were landed, warehoused, and paid duties only in furtherance of that voyage. If it was necessary to do so, the parties could not accomplish their original object without it, and that original object was never deviated from. If it was not unavoidable, it must have been done fraudulently, for the sake of colouring the real nature of the business. If these goods were brought through the mouth of the blockaded port, no matter whether in great, or in small vessels; they *then* broke the blockade, and were liable to the consequences till they arrived at their *final* destination, notwithstanding they may have touched, or even have been landed at fifty places. This final destination was the *United States*, the port of consignment. During the whole intermediate period from their quitting *Hamburgh*, to their reaching *Philadelphia*, they were liable to seizure and confiscation. It has however been argued, on behalf of the claimant, that whatever may be the case with such parts of this cargo, as belonged to merchants of *Hamburgh*, there were others which were brought from *Basle*, and other neutral places, and which were brought down to *Hamburgh*, merely for the purpose

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of shipment: these, it is said, cannot be considered as having broken the blockade of *Hamburgh*, which was intended to operate only upon the commerce of that place, and not of remote and inland places. It may be observed, in answer to those arguments, that the trade of any place is not confined to the produce and manufactures of the town itself, or of the country where it is situated. *Hamburgh*, in particular, is the centre of commerce, for a large portion of the continent. Great part of the business, and of the profits of the merchants there, arise from this trade, of consignments from a great number of other places. But the blockade is not limited to any one particular species of commodities, or mode of trade. It is a prohibition of all intercourse whatever, and the commission trade is as much its object as where the merchants are the proprietors of the goods. There are other goods which have been brought from inland places within the dominions of the enemy to *Tonningen*, not through *Hamburgh*, or any other blockaded port, but either by land, or through open neutral ports, and belonging to neutrals.

It has been argued by the counsel for the captors, that these are liable to condemnation under the order in council of the 11th *November*, 1807, which declares all trade in articles which are of the produce or manufacture of the enemy's country to be unlawful. But this decree was generally revoked by the order of the 26th *April*, 1809, except as therein is expressed, and although some parts of that order are revived, this clause is annulled by the general revocation, and was not re-enacted. It has been argued, likewise, that this trade is comprehended under the clause in the latter order, by which all *places*, as well as all ports, under the go-

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vernment of *France*, are declared to be subject to the same restrictions in point of trade, *without any exception*, as if the same were blockaded; and that therefore all such trade with inland towns belonging to *France* is prohibited. Yet certainly the order is not capable of that construction. The words, "*places under the government of France*," must be taken together with the rest of the order, which evidently relates only to a blockade by sea. The line of blockaded places is marked out by the sea board, as far north as the river *Ems* "from the ports of *Orbitello* and *Pesan*". The ports and places are to be subject to the same restrictions as if they were actually blockaded by *his Majesty's naval forces*; and it speaks of vessels trading to and from them; expressions which cannot in any manner apply to inland towns.

The general principles which I have discussed, considered in their application to the cargo of this vessel, may be thus shortly recapitulated.

That all such goods as may have been brought from *Hamburgh*, or any other blockaded port, to *Tonningen by sea*, are liable to condemnation.

That all such goods as have been brought from *Hamburgh*, or any other blockaded port, by *land*, or *inland navigation*, and such as have been brought from ports *not blockaded*, or from the *interior* of the continent, whether hostile or neutral, provided they belong to neutral proprietors, are intitled to *restitution*.

Nothing therefore remains but the particular application of these principles to each of the numerous claims which are before the Court; according to the measure of evidence which is afforded by the case itself in this stage of it, independent of the proof of property, which is admitted to be deficient from

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the want of knowledge in the master, after a laborious examination of the immense mass of papers, amounting to above a thousand, which have been made *exhibiti*, it appears to me, that considered in their relation to those points, the claims may be reduced to four classes.

1. The first consists of seventeen claims. In all these there is proof that the goods came from *Hamburgh*, or other blockaded ports; but it does not appear by what mode of conveyance. These are subjects for further proof, upon that head, as well as is the question of the property. (The judge then specified the claims.)

2. The second class, which amounts to about fifteen claims, is of those goods which were shipped at *Tonningen*, but it does not appear from whence they came. These likewise require further evidence.

3. The third class is, where it is in proof that the goods were sent by land carriage, or inner navigation. These are intitled to restitution on the proof of the property; but I can discover only one claim of this description.

4. In the fourth, which consists of only one claim likewise, and is a case for restitution, the articles are proved not to have come from *Hamburgh*, or any other blockaded port.

Having thus far disposed of this cargo, I proceed to the vessel. The voyage in which this vessel was taken was *primâ facie* lawful; *Tonningen* was an open port. Can then a vessel be guilty of the breach of a blockade, without entering the blockaded port? Most certainly it may. Suppose a vessel lay just off the mouth of a harbour, and received a cargo from boats or lighters: if this is admitted to be a violation of a blockade, the mere circumstance of

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distance is perfectly immaterial, whether the vessel was stationed at one, two, ten, or twenty leagues; for, in truth, it is not the entrance, or the departure of the vessel, which it is the object of a blockade to prevent, but it is the trade, the exports, and the imports; if the distance is nothing, it cannot signify whether a vessel is lying in a neighbouring port or out at sea. This point has been already determined by the cases before cited, in which ships lying in open ports, for taking on board cargoes from blockaded ports, were held liable to condemnation. Those cases are decisive as to the present case, if the fact is proved, unless there are any general favourable circumstances to distinguish it. Whether the cargo has actually broken the blockade, is not yet ascertained, but it depends upon the farther proof to be brought in. The only question now to be considered is, whether, supposing that fact to be proved, the ship would be subject to condemnation. Because, if it would be so liable, the ship must wait till the further proof arrives, before it can be decided upon; but if the vessel would not be subject to condemnation, notwithstanding the facts should turn out unfavourably for the cargo, it would be unnecessary to wait for the farther proof, which could not then affect the ship, and the owners would be intitled to immediate restitution.

Although it should be proved that some of this cargo has been brought by sea from *Hamburgh*, still it has been argued, on behalf of the claimant, that the ship would not be involved in the consequences of that offence. Three grounds of distinction, between the cases before mentioned, and the present case, have been pointed out to destroy their applicability, and it has been argued besides, that the master was not cognizant of the offence.

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It has been said, that in the other cases, the vessels had sailed from the blockaded port in ballast; here the ship never entered the blockaded port. This circumstance can be of little avail. The sailing out of the blockaded port in ballast, in those cases, was admitted to have been innocent. It could not therefore become otherwise, unless by being coupled with an illegal act; two innocent acts cannot make a guilty one. The sailing out in ballast could not change its legal nature, unless the subsequent act was *in se*, and substantially illegal. It was therefore the mere lading the goods in the open port from the blockaded one, which constituted the whole illegality in those cases.

It was said next, that those vessels sailed under a charter-party, which was a more solemn instrument, and brought the whole transaction and all its consequences more home to the parties. This is a distinction without any foundation, because there are bills of lading in this case, and instructions for the owners, which are sufficiently formal to attach any criminality which may belong to the case, to the owners. They are both of the nature of contracts between the laders and owners of ships. A bill of lading for a part of a cargo is as effectual an instrument, as a charter-party is for the freight of a whole vessel. They differ in extent only, not in kind.

The warehousing of the goods I have already considered, and if no distinction can be raised upon it, respecting the cargo, I do not see how it can be applied as affording a favourable circumstance in the case of the ship, unless it should have prevented the master from knowing the preceding part of the transaction.

These circumstances, in reality, are immaterial as

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to constituting the offence; but they may be important in another point of view, namely, as affecting the proof of the master's *privity* to the transaction. Where a ship had departed from a blockaded port, under a charter-party to take the goods on board at the open port, goods too which were put on board lighters, and which accompanied her from the blockaded port itself, it could not be doubted whether he was cognizant of the fact. For it is necessary, before the ship can be affected by the breach of the blockade, by the cargo, "that the master should have taken it on board, *knowing it* to have come from *Hamburgh*, in breach of the blockade, and under an engagement to carry it to the ultimate port of destination." If then it should be proved that a breach of the blockade had been committed by the passage of these goods from *Hamburgh* towards the *United States*, the case of the ship must depend upon there being evidence that the master or owners of the vessel had no knowledge of it. It is not necessary that this should be proved by the same circumstances precisely, as in the other cases.

I think then there is sufficient evidence, that if the blockade was broken, it must have been with the full knowledge of the master and owners, whose vessel was the instrument by which it was effected. There appears to have been something not perfectly correct in the very commencement of the voyage from *America*, because the original orders to the master have been concealed. The owners corresponded with *Parish* at *Hamburgh*, through whose hands the whole business passed, and the master had constant communication with him, and the other consignors. He continued ten months in the country without having favoured us with any account of the manner in which he employed his

time. There was a connection with *Hamburgh* at the very beginning of the business. The vessel and the outward cargo, which belonged to the owners of the vessel, were consigned to Mr. *Parish*, at *Hamburgh*. It was under *Parish's* directions during its whole continuance at *Tonningen*, and in the *Eyder*. A large part of the cargo came from *Hamburgh*. He was not, as has been alledged from the numerous shipments, a mere common carrier master, who took on board promiscuously such goods as might be accidentally found at *Tonningen*, for the whole arrived there during his stay, and was sent for the express purpose of being laden on board for this individual ship. There are letters even from *Basle*, *Bremen*, and *Nuremberg*, which state that goods were to be sent from thence, through *Hamburgh*, to be shipped in this vessel by name. It appears that he had more customers at *Hamburgh* than he could find room for; there were many candidates for his favour, whom he was obliged to reject. In all these transactions numerous communications must have taken place between the master and the consignors. In short, the whole concern of this ship and cargo, the consignments and the shipments are as much an *Hamburgh* transaction, as if the vessel had been lying in a port of that city, and it is utterly impossible that the master could have been ignorant of every particular relating to the cargo, its nature, and objects.

Since then, if the blockade has been broken, the consequences of it cannot fail of attaching most fully upon this vessel, I reject the prayer of the claimants for its immediate restitution, and direct the case to stand over till further proof has been brought in respecting the mode in which the cargo was brought to *Tonningen*.

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Upon the further proof it appeared satisfactorily; that the whole of the cargo, which came from *Hamburgh*, had been brought in waggons, and therefore such parts as were proved to be neutral property were restored, as was the ship likewise.

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The Schooner SEVERN, *P. Bradford*, taken by the TARTARUS, Captain *Pascoe*.

Slave Trade.

THE Master claimed for *Nathan Bardine* and *Samuel Blake*, of *Bristol, in Rhode Island*, in the *United States*, both ship and cargo; the latter, consisting of 7 or 8 hhds. of tobacco, 1300 gallons of rum, 2 barrels of currant wine, 10 or 15 casks of gunpowder, 8 or 10 casks of butter, 5 or 6 tierces of rice, 30 or 40 half barrels of beef, 2 of pork; 5 or 6 barrels of flour, 5 bales of dry goods, a few boxes of soap and candles, and several shook chests.

He swore, "that he was sent on a trading voyage to the coast of *Africa*, that he loaded at *Bristol*, was to proceed to *Sierra Leone*, and there dispose of as much of the cargo as possible. If not able to sell the whole there, he was to proceed with the remainder along the coast of *Africa*, either to the southward, or the northward, and to barter the remainder with the natives. In return he was ordered to procure by barter from the natives, gum-arabic, ivory, bees'-wax, and other articles; but he was strictly forbidden to have any concern in the trade for slaves or to purchase negroes; and he had no intention whatever to engage in the traffic for slaves."

They had two iron guns (one-pounders) and four muskets, to protect themselves against the natives.

SENTENCE.---Dr. *Croke*.

The general principles of the law of nations, and the fact, that the slave trade is prohibited by the

laws of the *United States*, have been established in the cases of the *Amedie* and the *Fortuna*. A claimant cannot recover property employed in a course of trade which is against the laws of humanity, and in defiance of the laws of his own country.

It is not necessary to have slaves actually on board: it was laid down in the *Fortuna*, that it was sufficient if the unlawful traffic was either incipient, progressive, or complete.

All we have to do here is to establish the fact of trading. This may be proved by direct evidence, or by circumstances. Where the slaves are not actually on board, it may often be difficult to find direct proof. This trade requires concealment. The persons concerned in this inhuman traffic, must have proper instruments to conduct it, who must necessarily be more unfeeling and unprincipled. They must have masters hardened, and qualified to go thoroughly through the business. Little attention can be paid to the evidence of such men, when the circumstances are decisively against their testimony.

An examination of this vessel and cargo has taken place, by persons nominated by the claimants themselves. They have reported, that this vessel and cargo are well adapted to the slave trade, and they state many reasons in corroboration of it.

The *African* society has published a report, in which they have described seven characteristic circumstances of a slave voyage. *Five* of them occur here. There have been found on board a number of small arms, a great quantity of water, rice, and slaves' provisions, mess kits and shackles. The two other circumstances stated in the report, as being often found in such vessels, namely, bulk-heads and main-deck gratings, would be unnecessary in a small vessel like the present. It must have been

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known to merchants, that the slave trade is considered in an unfavourable light. If the vessel was really going for gum, ivory, and the other innocent articles stated, what can account for their having on board so many things peculiar to the slave trade, but totally unnecessary for the other species of commerce? It would be contrary to all reason, and inconsistent with probable suppositions. I consider the fact to be sufficiently proved, and I condemn this vessel and cargo.

Oct. 25th, 1809.

The Brig AMERICAN, *William Worthington*, Master.

JUDGMENT.---*Dr. Croke.*

Certificates of origin, ground of confiscation. *N. B* Since otherwise, by the Court of Appeal.

THIS vessel and her cargo, consisting of sugar and campeachy wood, were taken by the *Atalanta*, Captain *Hicky*, upon a voyage from *Baltimore* to *Tonningen*, and have been claimed, as the property of *William Cole*, of *Baltimore*.

The property in the ship is clear, and the cargo is a subject for further proof, as the orders and the letter of advice to the consignee do not appear, though the letter is referred to, and the master is but little acquainted with the affair.

The blockade of the river *Eyder*, which was imposed by the order in council, of the 2d of *October*, 1807, was discontinued on the 13th of *July* last, and consequently above a month before this vessel sailed from *America*, which was upon the 31st of *August*.

The only question which remains, therefore, for the Court to decide upon, respects the certificate of origin which was on board. There is a letter from the *French* Consul at *Baltimore*, to the *French* Con-

sul at *Tonningen*, inclosing the certificate of origin, "conformable (he says) to the circular of the Minister of External Relations, of the 20th of *April*, 1808. The cirtificate states, that the cargo is the produce of *Martinique*, *St. Jago de Cuba*, the *Havanna*, and *New Orleans*. It specifies in what ships it was imported into the *United States;* and the *French* Consul further certifies, "*Que les dites marchandises ne proviennent point de la Grande Bretagne, ni de ses colonies, ni de son industrie, ou de son commerce*," and it bears date on the 30th of *August*, 1809.

Upon general principles, all aid given to the *French* government, to enable it to carry into effect the decrees which prohibit all commerce with *Great Britain*, and in the produce and manufactures of that country, under an assumption of power, not justified by the law of nations, is a departure from the duties of neutrality; such is sailing under the protection of the certificates which have been found on board this, and many other vessels. They professedly have been procured by *American* merchants, and granted by the *French* Consul, in obedience to the directions of the *French* government, and their object is, by particularly specifying the place of growth and manufacture, and that no goods of *British* origin are amongst them, to exclude all articles of *British* produce or manufacture, from the general commerce of the world. It is, in fact, an extension of the power of the *French* government, beyond their own dominions, into neutral countries, and to make the subjects of those countries instruments to carry into effect their unjust and novel mode of hostilities. All persons, who place their property under the protection of such instruments, are guilty of a departure from their neutrality, may properly be considered as the agents of the *French* government, in

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their designs against *Great Britain*, and vessels so situated, might be lawfully confiscated. But these principles, however just in themselves, had never been acted upon, and no property was condemned upon them, till they were called into life and efficacy by His Majesty's order in council of the 11th of *November*, 1807. After stating that they were an expedient directed by *France*, and submitted to by merchants, as part of the new system of warfare against the trade of this kingdom, the order declared, that "if any vessel should be found carrying any such certificate, such vessel should be adjudged lawful prize, together with the goods laden therein."

If this order is still in force, there can be no doubt but that this vessel and cargo are liable to condemnation. The question, therefore is, whether it has been since repealed. The whole of that order was in force till *April*, and formed the basis of the negociation between Mr. *Erskine* and the *American* government. If it has been revoked, it must have been by the order of the 26th of *April*, 1809.

It has been argued on behalf of the claimants that it has been revoked, that the words of the order of the 26th of *April*, are general, "If his majesty is pleased to revoke and annul the said several orders, except as herein after excepted "That the order of the 11th of *November*, having been before mentioned, is comprehended within this repeal, and is not excepted, or revived, in any of the subsequent clauses.

It may, I think, be justly doubted, whether such can be the true construction of the order. It must be observed, that the order of *November* is not one simple regulation, and relative only to one subject, but it is a series of orders, consisting of eleven different articles, various in their nature, and applying to dif-

ferent subjects. The nine first articles establish the blockade of all ports from which the *British* flag is excluded, and all trade in articles, the produce and manufactures of the same countries, with a variety of exceptions, limitations, and instructions: but that part of the order, which relates to certificates of origin, is contained in the two following articles, the 11th and the 12th, quite distinct from the others. Now, the order of *April*, in the preamble, recites only that part of the order of *November*, which imposes the blockade, and prohibits trade in certain articles, but totally omits to recite, or refer to, the following part of the same order which relates to certificates of origin. If the subsequent repealing clause was therefore conceived in words, as general as possible, yet, if it refers at all to the recital in the preamble, it might fairly be questioned, whether it could be understood, as repealing more than what was before actually specified, and recited, namely, those parts of the order which relate to the blockade and commerce. And that they do refer to the preceding recital is evident, because the words are, "Whereas it is expedient, that *sundry parts and provisions* of the said orders should be altered and revoked, his Majesty is therefore pleased to revoke and annul the said several orders." If parts only of the said orders were to be revoked, what parts is it natural to understand, but such as have been recited in the preamble, and to which alone the subsequent provisions, substituted in their place, exclusively correspond? If the recital consisted only of a general reference by the date, or of a general description of the order, however short or imperfect, it might be supposed to comprehend, at least by implication, the whole of the order; but it contains a minute and particular recital of the two great

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branches of which the first part of the order consisted, namely, the blockade and the commerce, without any reference to the latter part about the certificate, which formed a distinct subject. That latter part does not, therefore appear to have been in the contemplation of the *British* government, and there is no reason to believe that there was any intention of repealing it.

Neither does the repeal of this part of the order appear to come within the object and meaning of government, or declared in the preamble and other parts. It professes, that his Majesty "was desirous not to subject those countries which were in alliance, or in amity with His Majesty, to any greater inconvenience than was absolutely inseparable from carrying into effect his determination, to counteract the designs of his enemies" "And whereas in consequence of divers events which have taken place, affecting the relation between *Great Britain* and the territories of other powers, it is expedient that sundry parts and provisions of the said orders should be altered and revoked." And the only order substituted in the place of the former relates only to the blockade. Now it is evident that the inconvenience to neutrals here alluded to, can have been nothing else but the very extensive blockade established. The "events which had taken place, affecting the territories of the other powers," could refer only to the same point, and the relief granted by restricting the blockade within the proposed limits, was commensurate with the inconveniences complained of, and adequate to the relief of them. To open the blockade, therefore, comported with every object then stated, and the repealing of that part which related to certificates of origin, seems to have no concern or connection with it.

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It was, however argued, that it was a material benefit to neutrals, to repeal this part, because by the regulations of several countries, which have adopted the *French* regulations, neutral vessels could not enter their ports, without such certificates. This is not generally the fact, it is true only of *France* and *Spain*, which have enforced *Buonaparte's* decrees, but no other countries have adopted them; *Denmark* for instance, to which this cargo was going. Besides, though *Great Britain* might be willing to yield something for the convenience of neutral nations, to confine for instance, her blockades, much within the boundaries to which she would be justified in extending them; yet it would be too much to expect, that for any little casual advantage to them, by allowing these certificates of origin, she should give effect to measures calculated totally to ruin her commerce. If the *French* seize and confiscate vessels for not having certificates of origin, it is an open act of injustice; and *Britain* is under no obligation, even by the strictest relations of amity and friendship, to prevent such unjust acts on the part of *France*, at her own expence, and by so great a sacrifice. Since this is scarcely to be expected or required, I cannot understand that this part of the order in council, which is so strongly worded, and is accompanied with such solid reasons, should be revoked, without the most express words to that effect, and without any direct reference to it.

It may be something to discover from subsequent acts of government, in what light this latter order was considered. If we look at posterior orders of council, they speak of the order of *November* "*as altered*" only by that of *April*, and the words "*revoked*" or "*repealed*" never occur. Thus the order of the 24th *May*, 1809, speaks of the blockade *as con-*

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tinued from the former order, and as "*altered*" by the latter order

The impression upon my mind therefore, is that these two articles, the 10th and the 11th of the order in council, of the 11th of *November*, 1807, have not been repealed, and that this vessel and cargo are therefore liable to confiscation. I must confess, at the same time, that there is an obscurity in the order which renders me far from being perfectly satisfied, that this is the true interpretation of them; and I would therefore recommend to the parties, to refer the question to that high tribunal, which, being composed of His Majesty's ministers, is best qualified to explain the acts of His Majesty's government.

N. B. By the subsequent decisions in the court of Appeals, in this and some other cases, which came before them, the lords were of opinion, that the order relating to certificates of origin, was repealed by the order of the 26th of *April*, and therefore in all subsequent cases, though certificates of origin were frequently found, they were not considered as affording ground for condemnation.

Nov. 5th, 1811.

The Brig EXPRESS, *Simeon Hasket*, Master.

Order of 7th Jan. 1807, not to trade between two enemies ports, applies only to vessels, taken betweenthe two ports, not merely intending so to trade. Blockade of Copenhagen did not extend to other Danish ports, under the order of the 4th May 1808. Copper going to a port of naval equipment confiscable. False destination.

THIS vessel was bound from *Boston* to *Denmark* with a cargo of copper in pigs, hides, &c. She was claimed, together with the cargo for *Messrs. Gray*, of *Boston*. In the claim the master alledged that he was "bound to *Kiel*, a port in *Denmark*, with directions from Mr. *Gray* to touch at *Copenhagen*, and receive instructions from Messrs. *Ry-*

bourg, and Company there, and with the proceeds he was to purchase linen and other goods."

The Brig Express. Nov. 8th. 1811.

JUDGMENT---*Dr. Croke.*

Four points have been made by the captors.

First. That this vessel was proceeding to trade, between two enemy's ports, in violation of the order in council of the 7th of *January*, 1807. But there is no proof whatever of any intention of such trading; because if we take the claim, as affording evidence of the voyage, the cargo was to be disposed of at *Kiel* only, and if we credit the hypothesis of the captors, that the real destination was *Copenhagen*, that state of the case supposes that the cargo was to be deposited there and that *Kiel* was introduced merely as a deception. If the facts were made out, still the law would fail them. The order authorizes the seizure and condemnation of such vessels only, as are found coming from any port of the enemy, and destined to such another port. The mere intention would not in any case constitute the offence.

It was argued, secondly, that the port of *Kiel* was blockaded, under the notification of the 4th of *May*, 1808; that though that port was not mentioned by name, the blockade of the port of *Copenhagen*, and the other ports of *Zealand* must be understood, to comprehend all other ports in *Denmark*, which were beyond them, since it was necessary to pass by them in their way; and it might not be too much to contend, that, in an enlarged sense, and, consistently with the apparent intention of the blockade, the two passages of the *Sound*, and the *Belt*, might not improperly be considered as coming within the description of the ports of *Zealand*. These arguments will not hold good, the notification establishes only the blockade of the port of *Copenhagen*, and the other

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ports of *Zealand*, it is not a blockade generally of all *Denmark*, or of the entrance into the *Baltic*. A blockade cannot be extended by inference, and supposition. It is one of the severe rights of war, which are liable to a strict and rigid interpretation. The order cannot be pressed beyond the plain, and definite words. As to a mere blockade, *de facto*, without public notification, there is neither evidence of an investment of the port of *Kiel*, or of notice given to the vessel, both which would be necessary to charge the parties with the breach of it.

Thirdly. Copper is said to be a contraband article, this copper was in pigs, and though there are so many cases, relating almost to every species of goods, upon which the question of contraband can arise, I am not aware of any decision upon copper, in its unmanufactured state, independent of treaty. If it were in a state, which was immediately applicable to the fabric of ships, as in sheets for sheathing, or in the proper form for making bolts, or other necessary parts of vessels; there could be little hesitation in pronouncing it confiscable, unless it were clearly intended for the purposes of mere mercantile navigation. In its rude state it must be considered upon the same footing, with iron or steel, as an article *promiscui usus*. In the construction of the *Swedish* treaty of 1803, by which all manufactured articles, immediately serving for the equipment of ships of war, were declared to be contraband, copper in sheets was condemned; what was doubtful as to its use, was reserved, and the remaining part, which was not fit for that purpose, was restored.*

So, in the treaty with *America*, 1795, copper in sheets only, is enumerated amongst contraband arti-

* Charlotte Focks, Rob. 5. 275

cles, as serving directly to the equipment of vessels. These treaties in themselves, being matter of compact, do not affect the present question; but, together with the construction put upon them, they point out the general understanding of the law of nations upon this point. The cases, in which wine, cheese, and other articles, in themselves perfectly innocent, were condemned, were all cases, in which they were *directly* applicable to the fitting out of fleets and ships of war.

Copper in pigs is not indeed immediately useful for any purpose, but it may be converted with the greatest facility, in any manufacturing country, to any use which may be required. The same criterion may be properly adopted here, which has been laid down in so many other cases of contraband, the employment of the port to which the article was destined. If it were a mere commercial port, this metal must be presumed to be intended for mercantile purposes, the usual traffic in that article, and the fabric of merchantmen. If, on the contrary, it were going to a port of naval and military equipment, where a supply of copper, for many purposes, is absolutely necessary; since it is highly presumable, that it will be manufactured, and applied to the fitting out of ships of war, the other belligerent has a right to intercept and confiscate it. Now it has never been understood that *Kiel* is a port of naval equipment, though *Copenhagen* is undoubtedly so. The fate of this vessel depends therefore, as far as this question is concerned, upon the actual destination.

As one of those ports is blockaded, and the other is free, the destination becomes the main question likewise, upon the fourth point, made by the captors' counsel, and which I now proceed to consider.

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The notification of the blockade of *Copenhagen*, has not been revoked by the repealing order of the 26th *April* 1809. That was not a general revocation of all blockades which had been before established, but of certain specific blockades, which had been directed by particular orders in council there recited. The order of the 4th of *May* 1808, is not comprised amongst them, and therefore this blockade is not affected by it.

The master states in his claim that he was bound to *Kiel*, a port in *Denmark*, with directions from his owners to touch at *Copenhagen*, and receive instructions from Messrs. *Rybourg* and *Company* there.

It has been laid down as a general rule in the *British* Courts of Prize, that no excuse or pretence whatever, short of the most insurmountable necessity, shall be admitted as an adequate justification for a vessel's proceeding to a blockaded port. Whatever other reason is assigned, it is presumed she is going there to trade, to which the commercial state of blockaded ports afford large temptations, and readily suggests a fraudulent colouring. The present case does not rest merely upon this legal presumption, for I think that there is as clear proof, as a case necessarily involved in disguise can be supposed to afford, that the ultimate destination was to *Copenhagen*.

The Master in his instructions is directed to touch at *Copenhagen*, to deliver a letter to Messrs. *Rybourg*, and request them to name a good house at *Kiel*. "On your arrival at *Kiel* deliver your cargo to the house they recommend." So in the letter to Messrs. *Rybourg*, "I have ordered Captain *Hasket* to wait upon you, and to request you to name a good house at *Kiel*." Now it seems

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very improbable that Mr. *Gray* should know the state of commerce at *Kiel* so well as to send a cargo thither, without being acquainted with a single commercial house there to which he could make the consignment. Many vessels, it appeared, had lately gone from the *United States*. He might have found out by inquiring the names of the most respectable houses there, and it is strange that he should not have known from his own information and experience, since it appears in these letters that he had been much engaged in trade to the *Baltic*, and had a son settled at *Petersburgh*. Aware as he must have been of the danger of going to *Copenhagen*, the inconvenience, at least, to which the vessel was exposed, from holding out a primary destination thither, from the almost certainty of being stopped by the squadrons cruizing off those coasts; is it probable that he should not have availed himself of these opportunities of finding out a proper consignee at *Kiel*, or that he should have directed the proper inquiry to be made at some free ports, rather than have incurred these risks, by directing the vessel to touch at a port which was strictly blockaded, unless he had other views which were connected with the blockaded port itself?

To confirm this supposition, look at the evidence of some of the witnesses and the letters on board. Something more than touching at *Copenhagen* is there alluded to. In his information the master happened to forget that he was going to *Kiel*; he says, "he was bound for *Copenhagen*, and was steering for that port, that is, she was making the best of her way for that place." He did not mention any further destination to *Kiel*. The Mate deposes, that the vessel was bound to *Kiel*, or *Copenhagen*, in the alternative, and he adds, that he

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shipped to go from *Boston* to *Copenhagen* and back. The mariners' contract is to one or more ports in *Europe*. In a letter from a Mr. *Wild*, he says to his correspondent, "You will hear more particularly of the Express at *Copenhagen*." Mr. *Gray* writing to his brother at *Petersburgh*, says, "That he sent his letter by his brig *Express*, for *Copenhagen*." Mr. *Gray* requests *Rybourg* at *Copenhagen* to supply the master with funds to pay the said duties, or for any other purposes, and to do all in his power to promote his interest, but as to any instructions relating to *Kiel*, how they are to proceed there, or any one particular whatever, none such is to be found. There is no appearance that any other place than *Copenhagen* was in the contemplation either of Mr. *Gray*, the Master, the Mate, or any person who had any concern in the voyage.

The very nature of the cargo is strongly corroborative of this destination. The whole of the *Danish* fleet had been captured and the Danes were endeavouring to supply the loss. Great efforts were making to build vessels at *Copenhagen*; copper was absolutely necessary. There it could be manufactured into every form which the exigency required. A price corresponding to the demand would of course be obtained. Taking together the whole of this evidence, the circumstances of the case, and allowing for the necessity of holding out a lawful destination, every mind must be perfectly convinced that this vessel was captured upon a voyage to *Copenhagen*, a blockaded port, and with a cargo which was perfectly adapted and designed to enforce the naval strength of the enemy.

I condemn ship and cargo.

The Patty.

May, 14th, 1812.

Instance Court.

To avoid the embargo not a sufficient excuse for entering a *British* port, other alledged necessarily not sufficient.

FOR illegal importation. The Master stated that he sailed from *Portsmouth* in *New Hampshire*, and fled from the Embargo, to the *Isle of Shoals*, destined to *St. Bartholomew*, a *Swedish* Island. On sailing, the vessel proved very leaky, and changed her course to Halifax. Ship claimed for *E. Blandel* of *Portsmouth*, chartered to *J. Haven* and *W. Garland*, of the same place, who are owners of the cargo.

Sentence.---*Dr. Croke.*

This vessel sailed from *Portsmouth* in *New Hampshire*, to the *Isle of Shoals*, to avoid the embargo; she held out an ostensible destination to *St. Bartholomew*, and changed her course to *Halifax*, under two different pleas of distress.

The first reason assigned for coming to *Halifax*, was, that the vessel could not return to her own port, without a certainty of being detained there under the embargo.

This affords no lawful excuse, a necessity to justify the breach of a law must be an immediate natural necessity, not a mere remote moral necessity. It must be an imminent danger of perishing, not a mere wish to avoid the inconveniences of the laws of his own country. If the government of the *United States* will make laws to put their own subjects to inconvenience, they must abide by it, and they afford no reason for the breach of the municipal

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laws of other countries. If it could be admitted as a justification, the embargo laws of the *United States* would in fact operate as a repeal of the laws of *Great Britain.*

2dly. The ship is alledged to have been leaky, and the wind stormy and adverse. This is the only question, and it depends upon the evidence, whether they were compelled to go to *Halifax*, and could not get back to a port in the *United States*, if unable to prosecute their original voyage.

1. The Master in his claim merely states that the vessel being unfit to perform her voyage, and being apprehensive, if he entered a port in the *United States the embargo would detain her*, he determined to make for *Halifax*, this is the only reason assigned by him. He does not alledge any impossibility to get back.

2. Upon his subsequent examination, and in that of the mate, they speak faintly as to the possibility of getting back, they *doubt* only and do not directly assert any impossibility, or imminent danger.

But even this slight assertion applies only to the time *after the storm*, one says "after the gale," the other "after the storm;" but the course was changed before the storm came on.

3. On the other hand, *Green*, a passenger, swears "they might have made an *American* port, but were afraid of the embargo," which agrees with the Master's claim.

4. The log is conclusive, at *six* o'clock they sailed. At *eight*, the pilot left them. At *ten*, they took their departure from the *Isle of Shoals*. At *twelve*, the Captain changed his course for *Halifax*. Except that they found the ship leaky, no other reason is alledged. The storm had not begun. It

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is absurd to suppose that a vessel could not get back after leaving her port only two hours before.

The excuse is not proved. The condemnation of the vessel and cargo must follow.

The counsel for the claimant moved for the restoration of the flour and other parts which might have been imported under the Governor's proclamation of the 14th of *March*, 1812.

Sentence.—Under the 28th *Geo.* indeed, only the ship and noxious articles are confiscable, but here all are noxious. The Governor's proclamation not being founded on any Act of Parliament is void. The Act (49 *Geo.* III. *c.* 49.) expired the 25th of *March*, 1812; this vessel imported in *April*.

Instance Court.

July 31st, 1812.

The Brig, DART, *James Ramage*,

Not war till authorised by his Majesty. Property found in the country at the commencement of war not liable to be seized. Where the property of the enemy is protected he may appear in a court of juttice. Questions of importation.

THE brig *Dart* was seized *by the Collector*, with a cargo consisting of 355 bales of cotton, and 2187 bars of lead. There was a *claim* for the ship by the master, for *Joseph F. Gray* and *John Taylor* of *New Orleans*, and for the *cargo*, for Messrs. *Taylor* and *Gray*, *Gustavus* and *Hugh Colhoun*, and *Peter Graham* and Co. of *Philadelphia*. The claim stated, that the vessel was bound from *New Orleans* to *Philadelphia*, sailed the 16th of *April*, arrived off the capes of *Delaware* the 17th of *May*, where the master received a *letter* from his owner's agents by a pilot boat, which had been waiting for him two weeks, informing him that an embargo had been imposed

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upon all *American* vessels, and therefore directed him to proceed with the brigantine and her cargo to the port of *Liverpool* in *Great Britain*, and deliver the same to Messrs. *Forde* and company at that place. That there not being on board a sufficient quantity of provisions or water, for that voyage, and the crew refusing to proceed, the deponent dispatched the same pilot boat to *Philadelphia*, and informed Messrs. *Gray* and *Taylor* of the circumstance, and requested them to give the deponent instructions for his future directions. That the brigantine continued off the capes of *Delaware*, waiting for the return of the pilot boat, until the 22nd day of *May*, when it returned with a new crew and *further instructions* from Messrs. *Gray* and *Taylor* to procure provisions from some vessel on the coast, and proceed to *Liverpool*, and, if this respondent could not obtain provisions in that way, to touch at *Halifax* for them, and then proceed to *Liverpool*, and they also sent a certificate from His Majesty's Proconsul General, as follows: "To all to whom these presents shall come, I *Thomas William Moor*, Esq. His *Britannic* Majesty's proconsul for the middle and southern states of *America*, do hereby certify that the brig *Dart*, on her arrival off the capes of the *Delaware*, was ordered by the owner's agents, in consequence of the embargo, to proceed with her cargo to *Liverpool*. As it is impossible, without incurring severe penalties, to procure her provisions from this place for her intended voyage, intends touching at Halifax for the purpose of procuring supplies." That the respondent not being able to get supplies from any vessels on the coast, *and not entertaining the slightest doubt from the said certificate*, but that he should be permitted to take in provisions and water for the said voyage, proceeded to *Halifax*, where he arrived in

the evening of *Sunday* the 6th of *June*, and anchored in the harbour, and on the *Monday* following informed *T. N. Jeffrey* the collector, of the aforesaid circumstance, who seized the brig. The Brig DART. July 31st. 1812.

Upon the admission of the claim.

SENTENCE.—Dr. *Croke.*

This *American* vessel was seized by the collector of the customs in the port of *Halifax*, upon the 7th of *June*, for an importation into *Nova Scotia*, contrary to law. Since that period, namely upon the 20th of *June*, the government of the *United States*, by a public instrument, has declared war against *Great Britain.*

In consequence of this event, before the Court can consider the question of importation, there are two more material points to determine. By the declaration of war, it is said, that the claimants are become enemies, and the ship and cargo enemy's property. That not only the parties therefore are disqualified from appearing in a *British* court of justice, but that the seizor is entitled to retain the ship and cargo, of which he has the *bonâ fide* possession, by the title of occupancy, as belonging to an alien enemy.

Here are therefore three questions to consider, first, whether by the declaration of war on the part of the *United States*, without any declaration made by *Great Britain*, *American* subjects are become enemies, and, secondly and thirdly, supposing them to be enemies, whether nevertheless such consequences as are alledged by the captors would attach upon their property and persons in the present case.

What shall constitute a state of war between two countries has been often debated, and the doctrines which have been laid down in our *English* law books

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may seem at first sight to be at variance with each other. If we look at the older authorities, we find it to be an established maxim, that no war can subsist without the concurrence of the king, that if all the subjects of *England* should make war with a king in league with the king of *England*, without the royal assent, such war is no breach of the league.* "That is a time of hostility," says Lord Chief Justice *Hale*,† "when war is proclaimed by the king against a foreign prince or state. *This and this only renders them enemies.*" It is not however to be understood to be necessary that war should be *solemnly declared* by the King of *England*. If a war *de facto* subsists between *Great Britain* and any other country, without a regular declaration, the subjects of that country would be alien enemies. But I apprehend that where there is no express declaration of war, the hostilities exercised on the part of *Great Britain* must be sanctioned by the sovereign, or there must be some acts, or other proceedings, which shew his intention of placing the country in a state of hostility in respect to any given country. If not an express declaration, there must be something equivalent to it. Whatever declarations of war therefore may be made by foreign powers, whatever hostile acts may be committed by them, or whatever means may be adopted to repel them by the sole authority of the subjects in virtue of the right of self-defence, the state of mutual and reciprocal hostilities between any country and the *British* dominions cannot legally commence till the king, in whom solely the power of peace and war is vested, either by express declaration, or by some other manifestation of his hostile intentions, such as having recourse to arms, has placed his dominions in a state

* 4 Inst. 152. † *Hargrave's* Tracts, vol. i. p. 245.

of warfare. When such manifestation is made, and not before, the complete legal state of hostilities exists, with all its consequences, and since, the moment a man becomes an enemy, all his antecedent rights are annihilated, it must of course operate upon all preceding transactions. None of the cases which have been cited are inconsistent with this doctrine. In the case of the *Noyade*,* in the High Court of Admiralty, where it was said that it was not necessary that both countries should *declare* war, there was proof that though *Portugal* had not declared war in form, yet war actually subsisted on both sides, and a *French* agent of prisoners was resident in *Portugal*. In the *Eènighéd*,† the *Fortune*,‡ and other cases in the courts of prize, and in the case of *Oom* v. *Bruce* in the king's bench, reported in *East*, vol. xii. p. 225, in all those cases actual war on the part of *Great Britain* had followed the declaration, and the acts of the enemy, and the intermediate time had retrospectively acquired an hostile character. The old doctrine of the *English* lawyers has never yet that I know of been considered as superseded by any more modern decisions. What measures will be taken by the *British* government in consequence of the declaration of war by the *United States*, and whether any corresponding declaration may be made, or hostilities commenced, has not been ascertained. But most certainly no authority to detain, or condemn, *American* property has been transmitted to this Court. Till some signification of His Majesty's intention has been made, I cannot consider the subjects of *America* as alien enemies, to every purpose of law; I cannot absolutely say that they are disqualified from appearing in a *British* court of justice, or that their pro-

* Rob. iv. 253. † Rob. i. 210. ‡ Ibid.

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perty is liable to be treated as enemy's property, without a sanction from the *British* government. They may possibly be declared to be enemies in future, but their present situation is ambiguous. Whilst this uncertainty continues, the Court cannot reject the claim of the parties, or condemn their property. Neither in this state of semi-hostilities with the *United States*, would it think itself justified in restoring goods, which may have been already declared to be the property of an enemy. If the whole of this case turned therefore upon this point, I should direct it to stand over till His Majesty's instructions have been received from *England*.

But it may not be necessary either to decide this point, or to wait for instructions. Even taking it for granted that the subjects of the *United States* have now fully acquired an hostile character, it may still be questioned whether this ship was seized under such circumstances as would render it liable to confiscation, on account of hostilities, or whether the claimants would be disqualified from appearing here. The ship entered this port and was seized before the declaration of war by the *United States*. They have ever since been in the custody of the officers of this Court, under a detention which on the part of the owners was involuntary. It was found in the country therefore in time of peace, and at the commencement of the war. Whether we consult the writers upon the law of nations, or the municipal laws of this country, the person and effects of an enemy so situated cannot be detained. Proceedings of this nature, which arise out of a state of hostility, are to be governed by the law of nations.* That law, in cases to

* Lord *Mansfield*. *Doug*. 625. *Cornu* v. *Blackburn*. 1 *Liv*. iii. c. 4. § 63.

which it applies, is part of the law of *England*. Whatever might formerly have been the case, it is now settled as an established principle of public law, as it is stated by *Vattel**. "That a sovereign cannot retain the subjects, or the effects of the enemy which are found within his dominions at the commencement of a war, that they come upon the public faith, and the sovereign by permitting them to enter has tacitly promised the liberty of returning in safety." In the *British* law, it was provided as early as Magna Charta, that "if merchants are of a land making war against us, and such be found in our realm at the beginning of the wars, they shall be attached without harm of body or goods until it be known, how our merchants be intreated there, in the land making war against us, and if our merchants be well intreated there, theirs shall be likewise with us." In the statute of the Staple, 27th *Edward* III. c. 17. "In case of war, merchant strangers shall have free liberty to depart the realm with their goods freely." It was more recently resolved by all the judges "that if a *Frenchman* brings goods into *England* before war proclaimed, neither his person or his goods can be seized."† The same doctrine may be traced through the whole current of legal authorities to the present time. It being clear then that this ship was not liable to be seized on account of the commencement of hostilities if it had been lying in the port in the usual course of commerce, the situation cannot be made worse by the seizure of the collector. If indeed the seizure should prove upon the trial to have been made upon good grounds, the vessel would have been liable to forfeiture, for a breach of the law, even if peace had continued; but if the seizure should prove

* *Jenk.* 201. pl. 22.

† *Law of Nations*, B. iii. ch. iv. § 36.

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to have been made without reason, the parties would be intitled to have their property restored in the same state in which it was at the time of seizure. If the seizure was improperly made, the owners by such tortious possession cannot be injured in their rights. The seizor can gain no additional advantages from such a possession. If the parties were not guilty of a breach of the laws, they were innocent, and their coming into this port was a lawful entry. The seizure cannot make it otherwise. No advantage can be taken of the delay, because it was not the act of the owners but compulsory. The question of the breach of the revenue laws, and the right of seizing the property of an enemy are perfectly distinct. The collector cannot say, "It is true I seized this vessel for controverting the *British* laws, but I will now retain it as enemy's property," because he had no original right whatever to seize it as enemy's property. If not to seize neither can he have any right to retain. It is however said, that if the owner is become an alien enemy he cannot appear as a party in this Court to claim his property.

I know that there is no doctrine more certain than that an alien enemy cannot appear as a party in a *British* court of justice. Whatever doubts might have before prevailed from the cases of *Ricord* and *Betenham*,* of *Cornu* and *Blackburne*,† and other cases, it seems now indisputably settled by the case of *Brandon* v. *Nesbit*,‡ that no action for, or in favour of, an enemy can be maintained.

But to this rule there are many exceptions. Whenever an alien enemy is under the king's protection the disability is removed. If he comes under a safe conduct, if he is a captive or a prisoner of war, if he

* *Burrow.* 3. † *Doug.* 619. ‡ 5 *T. R.* 23.

comes before a war, and continues by the king's leave, either express or tacitly, he may sue his bond or contract.* It is true that all these cases suppose the alien to be commorant here, and not abiding in his own country, and that those privileges are allowed him in consequence of the protection afforded to his *person;* but the same principles will apply with equal force to every case where his *property is protected.* If property belonging to an alien enemy, which is found here at the commencement of a war, cannot be seized, it is under the protection of the law. With respect to such property the owner is in league and amity, and in the king's peace; as far as that property is concerned he is not an enemy. But if his property is thus under the protection of the law, how is that protection to be extended to it but by the intervention of courts of justice? If the owners cannot apply there for redress, whenever their rights in such property are infringed, the protection is a mere name. To tell foreign merchants, "your ships and goods it is true cannot be seized, but if they are seized you cannot institute a suit in law to recover them, if they are prosecuted criminally you cannot appear to defend them," would be a mockery upon justice itself. It would be a palpable violation of the law of nations, and of the public faith.

Accordingly we find, that, in the High Court of Admiralty, alien enemies, though resident in the enemy's country, are allowed to claim vessels and cargoes which are protected by license, which are employed as cartels, or which come under flags of truce, or safe conducts. Licenses indeed are an express authority from His Majesty, but the other cases depend upon the general law, and upon common usage,

* *Wells* v. *Williams.* Lord *Raymond* 1. 282.

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they therefore prove fully, that where the *property* of an enemy *is protected,* his residence in an hostile country does not disqualify him from becoming a party in a *British* court of justice, and that the protection granted to his property gives him *quoad hoc a* persona *standi in judicio.* The decision of the courts of common law, where it was held that foreigners so resident could not appear, related to contracts which were merely of a peaceable nature, and had no reference to the state of war, such as insurances. But the protection claimed by alien enemies for property found at the commencement of a war, is a right founded in the laws of war itself, a right given them by the universal practice of all nations, and of the *British* law; *in consequence of, and with relation to war itself,* such rights are not affected by the existence of a state of war.

I conceive that this claim may be supported upon these broad and liberal grounds, but if mere matter of form were still required to give a colour to it, it might be observed, that the claim is in reality given, not by the alien enemy himself, though ultimately for his benefit, but by the master of the vessel, who, as being actually in the country, and bound to a local allegiance, is entitled to all the privileges of suing in the king's courts. Whether this might be sufficient to satisfy the strict rules of law, I scarcely think it necessary to inquire.

I am of opinion therefore that whether the subjects of the *United States* are to be considered as enemies, or otherwise, this property is not liable to seizure on account of the intervention of hostilities, and that the claimants are not disqualified from appearing as parties in this Court. I admit the claim therefore, and direct this case to be proceeded in upon the principal questions.

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Upon the Final Hearing.

SENTENCE—Dr. *Croke.*

This allegation is not proved, and would not amount to a justification if it were.

1. The best evidence must be produced. A reference is here made to certain instructions to the master from his owners, a letter and further orders when he was off the capes of the *Delaware,* by which he was to prove that it was not the design of his owners to import the cargo into *Nova Scotia,* but that his coming in was merely from the want of provisions. He has not produced them.

Two inferences must be drawn from the omission. First, That this claim is not supported by the evidence; and, secondly, that these papers were so material to his defence if they supported it, it must be concluded from his not bringing them forward, that they would contradict his allegations.

2. It would not be a justification if proved to be true. Nothing short of a necessity can justify his entering; but there was no necessity for entering the port of *Halifax;* it was his own voluntary act. The original voyage might have been completed, which was to *Philadelphia:* it was matter of choice, of mere prudence, to fly from the embargo at *Halifax.* Entering the port *primâ facie* is an importation *(Eleanor, Hall*)* unless it can be justified.

It cannot be explained away by any *illegal* design. To take in provisions, not from necessity, is an *exportation,* and contrary to law.

Therefore the first presumption stands good, and this is an importation.

Condemn.

* See p. 171 *Supra.*

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The Curlew, Magnet, and other Vessels upon Petition.

As all the facts in these cases, and the petitions themselves are fully stated in the sentence, it is unnecessary to transcribe them here.

JUDGMENT—Dr. *Croke.*

The ordnance and naval departments in the colonies have no pre-emption as to military and naval stores, or any right to purchase them before condemnation. Cases of necessity form an exemption.

THESE petitions have been presented on the behalf of the lieutenant governor of the province, and of the admiral and commander in chief of the ships upon this station, praying, that certain vessels, some oak timber, and a quantity of small arms, now held in the custody of this Court, may be delivered over to the proper officers for His Majesty's use, upon the terms there stated.

Considering these applications, in some respects, as of an unusual nature, the Court wished to hear the arguments of counsel in support of them. His Majesty's advocate, and solicitor general were heard upon a former day, when the Court took time to deliberate upon some questions which were of considerable importance, and it has now to give its final opinion upon them.

The Court of Admiralty has not an arbitrary power of delivering up the property intrusted to its care, but it must proceed according to the *course of admiralty and the law of nations,* which is the obligation imposed upon it by the commissions under which it is constituted. However high and eminent may be the persons on whose behalf these petitions are exhibited, if the prayers are not consistent with

the legal powers of this Court, it is its duty not to accede to them.

The situation of all the property applied for in these petitions, inasmuch as concerns the proceedings of the Court, is the same, and therefore as far as any questions turn upon that point, it may be proper to consider them together; adverting afterwards to any differences which may in other respects appear.

This then is property which has been seized and detained, in consequence of a declaration of war made by the *United States* against *Great Britain*, but before any orders have been given by His Majesty in council for general reprizals, and before any commission had been issued to require this Court to adjudge and condemn such ships, vessels, and goods, as shall belong to the *United States*. Monitions have been executed, but no farther proceedings have been had. The law, therefore, by which the Court must be guided, is such as attaches upon captures in the intermediate time, after the seizure and monition, and before the cause is heard.

By the law of nations, as universally received and practised in all civilized countries, before captures can be considered as prize, they must undergo a sentence of condemnation, after a regular judicial proceeding, in which all parties claiming an interest may be heard. Till a capture becomes thus invested with the character of prize, the right of property is in abeyance, and the possession of it by the country which has made the seizure, is a sacred trust, a mere custody for the benefit of those who may be ultimately intitled to it. The suits which are prosecuted in those courts are proceedings *in rem*, and the party who obtains a decision in his favour is entitled to the ship or goods themselves, agreeable to the rule of the civil law, si in rem actum sit coram judice, si

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contra possessorem judicaverit, jubere ei debet, ut *Rem Ipsam* restituat.*

Till adjudication, therefore, the capture being in a mere state of legal sequestration, cannot be alienated or disposed of, in whatever hands the laws of the country may place it, or whosoever may be ultimately entitled to the perquisite of prize. Neither the government of the country nor the captors can apply it to their own use, or employ it in their own services; nor can it be discharged from that custody either by sale, or upon security, without the consent of all parties interested, (upon the maxim of *volenti nulla fit injuria,*) or for the evident benefit of all parties, (which affords a presumption of such consent) as in the case of perishable and perishing commodities, or of the probability of a great length of time intervening before the ultimate decision. It does not then seem that a Court of Admiralty upon the *general principles* of the law of nations, to which it is bound to adhere, can, generally speaking, decree the delivery of property so situated, unless upon very particular and special grounds. The enforcement of this rule is ever provided for in treaties which have been entered into between *Great Britain* and other countries, as in that with *Russia,* and which was acceded to by *Sweden* and *Denmark*; "That the goods in litigation cannot be sold or unloaded before final judgment, without an urgent and real necessity." Art. 4. add. The provisions of the various acts of parliament, and the practice of the courts will be found to be perfectly conformable to the law of nations as before stated.

By the Prize Acts, in case of captures brought into *Great Britain,* the custody generally remains

* Just. Inst. Lib. 4. tit. 17. § 2.

with the captors as a trust, with the strictest injunctions not to break bulk, and subject to the order of the Court of Admiralty. In His Majesty's dominions abroad, under the directions of the Court of Vice-Admiralty, they are besides under the joint care and custody of the officers of the customs, and of the captors and claimants. There the last prize act (45 *Geo.* III cap. 72. § 31.) says, that prizes shall stay, without breaking bulk, until the same shall, by final sentence, have been either cleared and discharged, or adjudged and condemned as prize; or such order as is there directed shall have been made for releasing or delivering the same. The only interlocutory orders to that effect, directed by the acts, are those upon further proof, or upon appeal. No authority whatever is given to the Court to release or deliver the capture, either on bail, by sale, or by any other mode, before the hearing of the cause. In the intermediate time, it is indeed subject to the directions of the Court of Vice-Admiralty, but those directions are controuled by the positive provisions of the act, that the captures shall without breaking bulk remain in custody till sentence, or till the other two cases occur. The power of giving directions is limited to the care and safety of the captures, for better maintaining the custody, and performing the trust of safe keeping. Where indeed a cargo is in danger of perishing, the Court may direct it to be sold, because it is for the benefit of the parties to preserve the value of the goods, when the articles themselves would in effect be lost.

Let us now enquire into the *practice* of the Courts of Admiralty, and their decisions which constitute the common law of those courts.

I directed the registrar to search the records of this Court, whether there were any precedents to

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shew that prize ships or cargoes have been delivered upon bail, or sold before hearing, except in the case of perishable goods. It is admitted that no precedents to that effect are to be found. Upon points of general practice, especially of the negative kind, and which are not disputed, decisions are rarely to be expected. It happens, however, that upon this question, a decision is to be found. In the case of the *Copenhagen, Mullins* (3 *Rob.* 178.) *Arnold* moved the Court to allow a cargo of *Batavian* produce to be taken on bail, before the hearing the cause, on a suggestion that it consisted of articles much wanted at *Copenhagen*, and for which the market here would not afford an adequate price. The Court asked whether it was opposed, or the captors consented; to which it was answered, that they did not consent. Upon which Sir *William Scott* said, "I know of no instance in which the Court has made such an order, unless where all the parties are consenting to it."

It is evident from what he subjoins, that the substance of the petition in that case has been imperfectly stated in the report. He adds, that "the proper remedy for the inconvenience stated in the petition would be a commission for appraisement and sale." Now the only inconvenience stated in the reported case is, "that the *English* market would not afford an adequate price." A commission of sale under which the articles could be sold only in England so far from being a remedy would produce the very evils apprehended, and therefore it is clear that there must have been a suggestion that the goods were of a perishable nature, in which case the Court might have issued such a commission.

No doubt the prayer of these petitions might be granted with the consent of the parties interested. But who are they?

1. The captors have at this time no known interest, present or future; though it is possible that they may acquire, or even may have already acquired, a title to prize from the bounty of the Crown. It was admitted that their consent was immaterial, or if the Court thought otherwise, that this consent might be obtained.

2. In the present state of things there is a possibility of a foreign neutral interest which may be asserted by a regular claim. Besides other countries really neutral, till the *British* Government has declared the subjects of the *United States* to be enemies by its order for general reprisal, and by a warrant to condemn their goods, this Court cannot consider them as enemy's property.

Even an order from the *British* Government to seize and detain vessels, would not have that effect. That might be only provisional, and must depend upon subsequent explanation having a retroactive power.

Nor is the declaration of war by the enemy any authority to condemn their property. It is only a challenge which the *British* Government may not think proper to accept. It may still look to a revocation of that declaration, and not have recourse to arms. It may not authorize reprisals. Seizures made may be declared to have been only on the footing of a temporary sequestration. The property never having acquired the character of hostile may be restored to the *American* owner, who is not yet disqualified from claiming by any act of the *British* Government.

3. The other party is the King, to whom all prize originally belongs, *jure coronæ*, as a part of his ancient fiscal prerogatives, and his right not having been transferred to the captors, he is a party whose consent is required.

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And this consent is necessary whether that might be at present actually vested, or only inchoate and requiring some further act before it becomes a complete interest. This consent no person here has any authority to give on behalf of His Majesty.

If the consent of parties is an indispensable requisite, before the Court can deliver up the capture, the want of that consent must be an insuperable obstacle to granting the prayers of these petitions.

But admitting the general law to be as I have stated, it was argued that where the ships or goods were wanted for His Majesty's service this formed particular exceptions, and that upon two grounds: first, that prize belongs to the Crown; secondly, upon a right of pre-emption.

The argument on the first ground was thus stated: "Prize, it was said, vests absolutely in the Crown immediately upon capture, without any intervention of courts of law. The necessity of resorting to prize courts was only in consequence of the King's proclamation, by which prize is given to captors after condemnation. The condemnation enures only to *their* benefit, and can give the Crown no more right than it had before. The property therefore being absolutely in the Crown in its private capacity, and completely at its disposal, the Court, upon the application of the King's officers, in his public capacity, ought to transfer it to them, giving such security that the King would be no sufferer."

Now, in the first place, the very basis upon which all this argument rests, however ingenious, is unfounded, and it is perfectly clear that the King has no vested right till condemnation.

The King's right to prize is founded upon the rights of the nation itself, and which therefore depends originally not upon the municipal laws of *Eng-*

land, but of the law of nations. I have already shewn that by the system of conventional rules established among civilized nations, no right is held to vest till condemnation.

It is equally clear by the law of *Great Britain*. In the case of *Lindo* against *Rodney*, the nature of prize was fully considered, and Lord *Mansfield* decided, that it was "the end of a prize court to suspend the property till condemnation*," that is, in other words, that it does not vest till that period.

It was said, that "condemnation was not necessary to vest the property before the prize acts, and that they were passed only in consequence of the grant of prize to the captors, which was not given to them till after condemnation." On the contrary, this was the old doctrine of the *British* laws long before any prize acts existed. The first of these acts was passed in the reign of Queen *Anne*. But in the case above referred to †, Lord *Mansfield* quoted some ancient treaties, one as early as the year 1498, to prove that "the jurisdiction of the Admiralty was formerly pretty much the same as it is now, and that no property vested in any goods taken by a ship or her crew, till a sentence of condemnation as good and lawful prize; which continues law to this day."

So in the case of *Goss* against *Withers* ‡, "property was held not to be changed till a sentence of condemnation in a foreign court." But if the property had

* "The end of a prize court is to suspend the property till condemnation, to punish every sort of misbehaviour in the captors; to restore instantly, if upon the most summary examination, there don't appear a sufficient ground; to condemn finally, if the goods really are prize, giving every body a fair opportunity to be heard." *Doug. Rep.* 592.

† *Lindo* v. *Rodney*.

‡ 2 *Burr.* 694.

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been held to have vested in the capturing country immediately upon capture, the property would then have been changed.

It appears therefore that the King in his proclamation disposes to the captors only of such right as he has, namely, the capture after condemnation, and this clause contains no limitation but what before existed in the Crown itself.

2. But supposing that the Crown had a vested right, the Court could not dispose of it, even for public purposes. Could it be done in the case of a private person, and are the rights of the King less sacred than those of his subjects, or of foreign claimants?

It is said that this property is demanded by the King's officers, for his own service, and that it is only taking out of one pocket and putting into another. But the property belongs to the King as his private patrimony, the service for which it is now required is the public service of the state. This service is provided for by parliamentary grants, and no part of the King's patrimony can be applied to it without his consent.

It was in some measure admitted that the Court could not, generally speaking, dispose of the King's property, but another ground was resorted to, that of a right of pre-emption in the King's officers.

The acts of parliament shew that no such right exists.

By the clause of the Prize Act referred to (45 *Geo.* III. c. 72. § 28.) "the navy victualling boards are empowered to purchase naval stores found on board "foreign ships without proceeding to condemnation." But this is limited by the words of the act, to vessels brought into the ports of *Great Britain*.

From this clause two conclusions may be drawn, both adverse to the argument.

One is, that it was not the institution of the legislature to extend this power to the colonies.

The other, that without such express authority they could not be purchased or sold before condemnation, even in *Great Britain.*

By a former Prize Act (37 *Geo.* III. cap. 109. § 6.) the pre-emption of prize ships was to be offered to the Navy Board, and of guns, arms, and ordnance stores, to the Ordnance Board, to be paid for by bills or debentures according to a valuation. This act expired, and the clause has not been since renewed. But whilst it was in force it extended only to sales, *after condemnation,* and it is to be concluded from it, that even then, His Majesty's officers in those departments, would have no right of pre-emption without such power given them.

In truth then, the King's officers, and the official boards in the various departments of service, naval and military, with respect to prize property, stands precisely upon the same footing with other persons. They are not entitled to take such property upon bail, or to have it sold to them, at any periods of the proceedings in prize causes, *when such delivery or sale, could not be legally made to any other persons;* they have *no right of preference in pre-emption,* at any period, when prize property, *may lawfully be bailed, or sold, but must come in upon the same terms, and upon a perfect equality with every other indifferent person.* No distinction is made in their favour with respect to captures brought into the colonies, by any law, statute, practice, or precedent with which I am acquainted.

It is clear then that this Court has no power of selling or bailing prize property previous to a hearing of the cause, to any departments in His Majesty's service, in the ordinary course of that service, or for

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their ordinary exigencies. But there are certain cases of necessity, in which the right of self-defence, the first law of nature and of nations, supersedes all inferior rights, and dispenses with the usual modes of proceeding. To provide for such extraordinary cases, a directionary power must of necessity, and from the nature of things, be entrusted to those to whom the application and the execution of those laws is committed. Such cases must form exceptions to the general rule of the law of nations, by which the mere *custodium inutile* is assigned to the capturing nation before the decision of the proper tribunal. They must form a case which must be fairly understood to be comprehended under the directionary power given to the Court of Admiralty, either by the general law, or the provisions of the acts of parliament.

Do the present circumstances of this province present such a case as is stated upon these petitions, or is of public notoriety?

At the time when *Great Britain* was exerting every effort to conciliate the friendship of the *United States*, at the very moment when the principal subject of dispute had been removed, and negociations of a pacific nature were still carrying on, a party at the head of affairs in that unhappy country, without the usual forms prescribed by the law of nations, and observed by all civilized countries, suddenly declared war against *Great Britain* and her dependencies. No sagacity could foresee, nor could the most cautious prudence think it necessary to guard against an event so unexpected. No extraordinary preparations could have been made by the mother country for the defence of this remote province. The army and navy could not have been reinforced and placed upon an establishment adequate to the state of hostilities. Attacked on all sides and threatened with an invasion

from an enemy situated almost within sight of our own shores, our coasts and our vessels exposed to plunderers, there is occasion for every exertion and for the employment of every possible means for the protection of the country. This certainly does constitute a strong case of necessity and self-defence, and calls upon this Court to lend its aid by every mode within the compass of its legal powers. Under these circumstances a petition is delivered into this Court on behalf of the governor of the province and the commander in chief of the military forces, stating "that small arms at present are very much and immediately wanted for the defence of the province, and that a quantity of small arms are now on board the ships of war and privateers belonging to the United States of *America*, and now held as prize in the custody of this Court in consequence of the *United States* having declared war. He therefore prays that the Court will order the said small arms and accoutrements to be delivered for His Majesty's use and service to the ordnance storekeeper at *Halifax*, upon the proper officers in that department paying into the Court for the use of whoever hereafter appear to be interested, whatever sum or sums of money it shall appear the said arms are worth upon a fair valuation thereof, to be made in the usual and customary manner."

I am of opinion that the prayer of this petition under all the circumstances may be complied with. The mode of valuation and payment being previously approved of by the Court.

The next petition is on behalf of Vice-Admiral *Sawyer*, commander in chief of His Majesty's naval forces upon this station.

It states that "there is at present a great want of oak timber in His Majesty's naval yard at *Halifax*;

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that there is a quantity of ship timber now laden on board of the schooner *Traveller*, a vessel which is held in the custody of the Court as prize to His Majesty in consequence of the United States of *America* having declared war against *Great Britain*. Which timber is much wanted and immediately for His Majesty's naval service. He prays therefore that this Court will order all the timber laden on board the said schooner to be delivered for His Majesty's use and service to the naval storekeeper at *Halifax* upon the proper officer's depositing in this Court for the use of whoever may be hereafter interested, the full value of such timber when ascertained in the usual and customary manner."

To this petition no objection can be made, upon the condition mentioned as to the last application.

A third petition is from Vice-Admiral *Sawyer*, likewise stating "that in consequence of the *United States* having declared war, it has been necessary for His Majesty's service that a prison ship should be provided for the safe keeping of prisoners of war, who are now become very numerous, that a ship called the *Magnet*, which is now held in the custody of this Court as a prize taken from the *Americans* is a ship well calculated for a prison ship, and that His Majesty's service requires the said ship to be immediately employed for that purpose, there being no other suitable vessel to be now obtained. He therefore prays that the said ship may be delivered over to such officers as the said vice-admiral shall appoint to take charge of her for his majesty's use, upon the same terms as proposed in the other petition."

This petition depends upon the same principles. A fourth petition is on behalf of the vice-admiral likewise, stating "that the *United States* having suddenly declared war against His Majesty, there are

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not at present under his command a sufficient number of ships of war to protect the trade of His Majesty's subjects against the depredations of the numerous ships of war and privateers which the enemy have fitted out, and great and heavy losses daily take place in consequence of the weak state of the squadron under his command. That His Majesty's ship *Acasta* has lately captured and sent into this port a private ship of war called the *Curlew*, which is now in the custody of this Court as a prize taken in war from the enemy, that the said vessel is well calculated for a cruiser against the enemy, and if immediately fitted out and sent to sea, would render good service to His Majesty as well in protecting the trade of His subjects as annoying the enemy. That proposals have been made to the admiral for immediately fitting out, manning and sending this vessel to sea to cruize against the enemy. He therefore prays that the said privateer brig, with her guns, provisions, ammunition, tackle and apparel may be ordered to be delivered to the persons whom the admiral shall appoint to receive her, and fit her out as a cruizer, when the full value thereof upon an appraisement being made in the usual manner shall have been deposited in the Court for the use of whoever may hereafter appear to be interested, and that the said vessel is immediately wanted for His Majesty's service."

This petition is of a very different description from the others. The vessel is not applied for to be employed in *His Majesty's immediate service*, but to be delivered over to certain persons, who have made proposals to the admiral to fit her out, to man her, and to send her to cruize against the enemy; namely, the *United States* who have just declared war; that is, in short, to be fitted out *as a privateer*.

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Though the benefit which would accrue to His Majesty's service, in protecting the trade of his subjects, and annoying the enemy, may be a ground for this application, yet the thing proposed to be done, must be lawful in itself, before the Court can accede to it. By the law of nations, as well as the municipal law of this country, no private vessel can cruize against the enemy but under a lawful commission. The power of granting such commission is the right only of the Sovereign, or of those to whom he has deputed it. The lord high admiral, when there is one, and the lords commissioners of the Admiralty, who when there is no lord admiral are invested with his general rights, are the only persons to whom it is usual for the King to give authority to grant such commissions, by themselves or by such persons as they shall appoint. This commission to the Admiralty board is special, and is usually issued upon the order for general reprisals against each particular enemy. Under this commission the lords of the Admiralty direct their warrants to the governors of the colonies, and the Courts of Vice-Admiralty, authorizing them to grant letters of marque. No such warrant has been transmitted to this country. I am not informed therefore that there is any power in this country to authorize such hostile proceedings against the *Americans* as the fitting out of privateers.

By the law of nations: If any private subjects cruize against the enemy without such commission they are liable to be treated as pirates*. How then can the Court grant the prayer of a petition, the professed object of which, is the performance of an act contrary to law? It is the pride and glory of *Great*

* Les subjects ne peuvent agir d'eux-memes, et il ne leur est pas permis ne commettre aucune hostilité, sans ordre du Souverain.

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Britain that her conduct has always been guided by the strictest attention to the law of nations. Other states may have equalled her in bravery and military fame, but the justice of her views, and the scrupulous delicacy of her proceedings, places her upon an eminence highly exalted above all other nations. I hope that her purity will never be sullied by any departure from those principles, or that she should ever afford a just ground to the malignity of her enemies, who are too apt without any foundation to charge her with the violation of public law and acts of piratical nature. Whatever temporary inconveniences may ensue, it is far better to submit to them, than to endeavour to prevent them by any objectionable means, such as sending out private vessels to cruize without a lawful commission.

I feel it therefore to be the duty of that station in which I am here placed, to refuse the prayer of this petition.

On the Petition of Sir *John Warren*, and Others.

November 4th, 1812.

JUDGMENT—Dr. *Croke.*

Vessels and cargoes detained upon the American declaration, and under the order in council 31 July 1812, could not be sold or hailed previous to adjudication, unless perishable; Reasons insufficient.

A PETITION has been presented on behalf of Admiral Sir *John Warren*, the commander in chief on this station, Vice-Admiral *Sawyer*, the late commander in chief, and all the officers on this station, who have sent in prizes since the declaration of war by the United States of *America;* praying, that upon certain grounds therein stated, the Court would order the cargoes of these vessels to be unladen, and sold immediately; and the ships, together

Petition of Sir J. Warren, &c.

November 4th, 1813.

with the proceeds of the cargoes, to be placed in a state of security, until His Majesty's pleasure shall be known as to the ultimate disposal thereof. There is likewise a separate petition for delivering a vessel and cargo upon bail.

This is a general application, and extends to all the prizes in the harbour; but I am now informed by the king's advocate, in answer to the question, whether the consent of the claimants had been given, where there were claims, that it is meant to be confined to cases only in which there is no claim.

The general question of delivering property upon bail, or selling it, in the intermediate time before the hearing of the cause, has already been fully considered in the case of the *Curlew*, and the other applications of a similar nature. It was there decided, upon principles of the law of nations, from the uniform practice of courts of Admiralty, and particularly upon the authority of the case of the *Copenhagen, Mullens*,* that it was not the usage of the Court to grant such petitions without the consent of all parties. No proclamation having issued, and no prize act passed to transfer the right to prize from the Crown to the captors, they have not yet acquired, and judging from the experience of former wars, it is even probable they never may acquire, any interest in many of these captures. They are not, therefore, such parties as by their consent could justify the Court in departing from the established practice. No such authority is given to the Court by the order in council, of the 31st of July, which directs, that the commanders of His Majesty's ships shall detain, and bring into port all *American* ships, and that the utmost care should be taken for the preservation of

* 3 *Rob.* 178.

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all and every part of the cargoes. To detain and preserve them the Court is bound; but to deliver up, either upon bail, or by sale, is not only not directed, but appears to me to be directly contrary to the orders. The Court cannot, upon any suggestion that it would be ultimately beneficial to the parties who may eventually be intitled, take upon itself to deviate from the orders, and to substitute something else in the place of what is there clearly enjoined. Upon general grounds, therefore, the Court would not feel itself authorized to accede to the prayer of this petition. But there may be special reasons, founded upon the particular state and situation of the vessels and cargoes, which may alter the case, and take them out of the general rule.

But no circumstances, however inconvenient, and even imperious, which naturally *arise out of*, and *are unavoidably incident* to the execution of the order in council, can justify a deviation from it; because all such circumstances must necessarily have been foreseen when the order was made, and must therefore have been comprehended within its scope and intention. Thus every detention of vessels and cargoes must be attended with some *risk and danger*, from winds, seas, and fire, and innumerable other accidents to which they are liable; the greatest care can scarcely prevent *embezzlements; charges and heavy expenses* must be incurred in the detention and preservation of the property; a loss by missing the proper times and seasons for a *market* would be very probable; and since *insurance*, in any case, may be matter of prudence and discretion, not of necessity, the impossibility of obtaining it, or the extravagance of the premium, cannot take a case out of the general rule, since the parties may stand, as is not unsual with merchants, their own insurers.

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These principles, which I trust are solid and well founded, will apply to the greater part of the allegations in this petition. To the *second*, that the risk will be much increased during the winter, as the ship keepers must have a constant fire on board. To the *third*—That there is good reason to believe the embezzlement already has been very great in some instances which have been discovered, and that this evil will undoubtedly greatly increase though every possible precaution should be taken. To the *sixth*—that the change of waiters and ship-keepers on each vessel, in some instances, amount already to a large share of the gross value of the ship and cargo, and in all cases now amounts to a large sum of money, and will cause an enormous expense. To the *seventh*—that the greatest part of the prize cargoes, if sold, must be exported, as the province does not afford a consumption for the same, and the winter season is fast approaching, which will prevent such export before the spring, and should a sale of this property be made in the winter, the loss in point of value would certainly on that account be great. And to the *eighth*, that it is doubtful if insurance on the ships and cargoes in their present state could be effected, but if it could it certainly would be a most extravagant premium.

But there are other parts of this petition which demand the most serious attention of the Court, under that clause of the order in council; which directs that the utmost care be taken for all and every part of the cargoes on board, so that no damage or embezzlement whatever be sustained. The preamble of the petition states, that the prize ships and their cargoes, now lying in the port of *Halifax*, are not, in the petitioners' opinion, in a state of safe keeping. In the first article, it states that the ships are moored

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at anchor in the harbour of *Halifax*, and are daily subject to the risk of being driven on shore by gales of wind, and ice, in a particular manner during the winter; that the constant attending to the mooring of the ships, and preventing them from getting foul, has been already a heavy expense as well as trouble; and when the ships of war go to sea for the winter, it will be impossible to get men to perform that duty, so that the risk throughout the winter will be much increased, and indeed almost certain, for if one vessel should get adrift, she must run foul of others, so that it is almost impossible to calculate the extent of the danger, particularly when the bad and insufficient state of the cables belonging to many of the said vessels is considered. In the fourth article, that the length of time that the sides and decks of the vessels have been exposed to the weather has made many of them leaky, and this is an evil daily encreasing, and must be highly detrimental to the cargoes on board, which are constantly receiving damage. In the *fifth*, that most, if not all of the cargoes, are of that description that they will take great damage from being kept any length of time in a ship, and if continued, the event must be ruinous.

The captors have certainly done their duty in bringing these circumstances before the Court; it is proper that they should be thoroughly examined into, and every precaution used for the safety and preservation of the vessels and cargoes, which their nature and situation may require. I apprehend, therefore, that the Prince's order may be executed according to its true meaning and intention, effect given to each of the clauses contained in it, and that the Court would likewise be performing its general duty, by issuing commissions for the purpose of ascertaining the exact state of the property, and by making such further orders as may be necessary.

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1st. I decree, therefore, a commission to proper persons of whom the master shipwright, and the master attendant of His Majesty's naval yard to be two, to inspect and examine the several ships and vessels so captured and brought into the harbour of *Halifax*, respecting the several matters and things alledged in the said petition, and to report in writing respecting the same, stating the present state and situation of the said vessels, whether they are in a state of safety or otherwise; and whether in their opinion any other, or what places may be found for their better security, within the harbour of *Halifax*, the bason, or elsewhere; and whether any, and what precautions ought to be employed for their better preservation and security.

2dly. A commission, or commissions, to examine the state of the cargoes, and to report which of them may be safely entrusted on board the vessels, and which from the leakiness of the vessels, or other reasons, ought to be unladen and deposited in stores.

3dly. And, thirdly to ascertain what cargoes or parts of cargoes, are in a perishable and perishing state, and therefore ought to be immediately sold.

Upon the return of these commissioners, the vessels were directed to be removed to a part of the harbour recommended by the commissioners, and to be safely moored; and new cables, and whatever else was wanting to be purchased. A considerable part of the cargoes being found to be perishing was ordered to be sold, a few more put into warehouses, and the remainder were left on board the vessels. Commissioners were afterwards appointed by the crown to the care and management of these vessels, which having been taken before the order for reprisals (13th of *October*,) belonged to His Majesty *jure coronæ*. *See Post, Case on the Petition of* William Douglas, &c.

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Violation of a flag of truce. Captor condemned in costs, &c.

THE King's Advocate and Crofton Uniacke for the Captors.—This ship has been captured under the Prince Regent's order for the detention of *American* property, and no restitution of her can take place unless she can divest herself of her *American* character by means of some official license or passport of protection. She was proceeding with a cargo of provisions from *New York* to *Lisbon* when detained by His Majesty's schooner *Alphea;* and it will perhaps be contended on the part of the claimants, that at the time of capture, the *Alphea* was sailing under a flag of truce to protect her against the cruizers of *America*, and was therefore bound to refrain from any hostile attack of the ships of that country. But a question may arise how far the *Alphea*, being a ship of war, acting under the orders of her government, could have been justified in refraining from this capture. She left *England* completely equipped for hostility, and has never departed from that character. The *American* government by affording her a passport or protection, could not change that character, especially as such protection was afforded more for the benefit of that government, than from any view of urbanity or reconciliation towards *Great Britain*. By an act of congress, all vessels carrying dispatches between the two countries, were entitled to favour and protection, but that act did not pass upon the application, or with the knowledge of the *British* Government; it was created solely for the convenience and advantage of *America;* under this act the *Alphea* received her passport, and was suffered to remain a short time at *New York*, but sailed without

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any dispatches from *New York* for *Halifax*, and had none on board when she captured the *Zodiack*. She carried letters, it is true, to *New York* from *Falmouth*, in the capacity of a packet, but without any knowledge of the war, until her arrival at *New York*, where the passport or flag of truce were in some measure imposed upon her. The commander of the *Alphea* entered into no compact with the *American* government to refrain from hostilities, nor could such forbearance be required of her upon any principle of strict national law, as in the cases of cartels, or ships of a similar description, acting under the mutual compact of good faith of two belligerent powers. But at all events, the property must be condemned to the King in the first instance, and to that quarter the claimants or their government, may regularly and perhaps successfully apply for redress, if the capture should be considered improper or dishonourable.

On the part of the claimants the Solicitor-general, and Robie.—This is a case in which the faith and honour of the *British* government are particularly implicated. A ship of war belonging to His Majesty, sailing under a flag of truce and protected against capture by a passport of the enemy, has thought fit to detain under the Prince Regent's late order an *American* ship bound from the port of *New York*, with provisions, to the port of *Lisbon*. Upon no principle whatever of national justice can a capture of the sort be justified, and so far from the rule which has been so faithfully applied to cartels and ships of like nature not applying in the present instance, it should be dealt to this claimant with double attention and indulgence. The *Alphea* had not only displayed her flag of truce for the very purpose of securing that treatment which, it seems, she was unwilling to grant to others, but the com-

mander of her had in his possession at the period of capture, a certificate of protection from the very nation to which the object of his aggression belonged. It is immaterial whether or not she sailed from *England* with hostile views, or when she heard of the *American* declaration of war. It is also immaterial in what mode, or under what act of the *American* government she obtained her passport, as the acknowledged statement of facts, as well as the depositions in the cause, put it beyond a doubt, that upon her voyage from *New York* to *Halifax*, she was using her flag of truce and passport for the purposes of protection. Nor is it of any moment to enquire whether or not she had any letters or dispatches on board at the time that she captured the *Zodiack*. She certainly availed herself of the character of a packet while at *New York*, and continued to in that character until her arrival at *Halifax*. Under these circumstances, therefore, so far from its having been the official duty of her commander to pursue a hostile line of conduct under the order of the Prince Regent, an imperative obligation devolved upon him from the honour of his own government, as well as the law of nations, to refrain from hostile operations of every sort against the property of *Americans*. With the *United States* he should have considered himself at perfect peace. Any capture therefore of an *American* ship by the *Alphea* while in this condition, must have been dishonourable, unjust, and illegal, and so strongly do the decisions in the support of this principle apply to the present case, that it is not in the power of legal ingenuity to raise a distinction in favour of the captors. The case of the *Mary, Folger,* (5th *Rob.*) contains the fullest reasoning in aid and explanation of this

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important doctrine. (It was the case of a rescue of *British* prisoners while under cartel.) It is there said by the learned judge: "Here is a *surprising* and *retaking* that has been effected through a violation of contract, by persons pretending to act upon rights which they had parted with, as well by their own engagement, as by the nature of the situation in which they were placed. Such an act is essentially invalid, and can have no legal consequence attached to it, either for the benefit of those persons themselves, or for the benefit of others who may claim through them." This judicial remark is also a direct and forcible answer to the objection, on the part of the captors, that the property should at all events, be condemned to the King, upon whose mercy or generosity the claimants may rely for future redress. But the act of capture being "essentially invalid and illegal," the property is not only not liable to forfeiture in any way, but is entitled to an immediate decree of restitution that it may be restored without delay to its former state of safety. If this be the law and justice of the case, of which there can be little or no doubt, the claimants are also entitled to damages for the losses, costs, and expenses they have incurred by the illegal detention of this ship and her cargo. Against this demand neither ignorance nor necessity can be pleaded, and, although, by the gross management of the ship after her capture, the claimants have suffered materially from shipwreck, as well as other disasters, they are not disposed to be vindictive in this pursuit, all they require is a fair and full compensation for the actual loss and expenses they have incurred, and this it is hoped, they will obtain, for the honour of the *British* government, under whose authority this Court sits for the ad-

ministration of national justice, even to an enemy who has been aggrieved by an undue exercise of the rights of war.

The King's Advocate in reply.—However inclined the Court may be to restore this ship and her cargo to the claimants upon the grounds adopted by their counsel, it cannot legally sustain the claim for damages—such claim is an action which no enemy can be allowed to pursue in any tribunal of the *British* dominions.

Judgment.—Dr. *Croke.*

The *Zodiack* was taken by his Majesty's schooner the *Alphea,* commanded by Lieutenant *Jones,* upon a voyage from *New York* to *Lisbon,* with a cargo of flour and rice. A claim has been given by *James Hague,* the master, for the vessel, as the sole property of *Jonathan Ogden,* of *New York,* a subject of the *United States;* and for the cargo, generally, on behalf of Mr. *Ogden,* and all such persons as shall appear to be interested; not being able to speak positively to the ownership, the shipment having been made by *F. J. Sampayo,* a natural born subject of *Portugal,* and consigned to a *Portuguese* house, at *Lisbon.*—He proceeds to state, "That the schooner by which he was taken, was a vessel which had carried dispatches from the officers of government at *Halifax,* to the *American* Government, and had, for many days previous to the sailing of the *Zodiack,* enjoyed the rights and privileges of a flag of truce, under the Act of Congress protecting vessels of her description from seizure, by *American* ships of war, and he believes that she sailed under a protection from the *American* government; being thereby secured against capture by any ships belonging to the United States of *America,*" and he concludes by praying restitution and damages.

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If this was merely a claim as for *American* property, this Court would certainly not proceed to adjudicate upon it, because in the hostile, or, at least, ambiguous state of the two countries, under his Royal Highness the Prince Regent's Order in Council, to detain and bring into port all vessels belonging to citizens of the *United States*, without giving any authority to condemn them, no property of that description could either be condemned or restored. But upon the master's allegation, that the capturing vessel was sailing under a passport, or flag of truce, a question of a very different nature arises, not whether *American* property, as such, is liable to seizure, condemnation, or otherwise; but whether the *Alphea*, under the circumstances in which she was placed, had any right to detain this vessel, and to bring her into port in any case, either generally, or even under the Orders in Council, which issued before the capture, but were not known to Lieutenant *Jones*. This is a question of an interlocutory kind, previous to any adjudication upon the property; and if it shall appear that the capture was improperly made and ought to be restored, the Court will decree restitution, or otherwise it will remand the ship and cargo to safe custody under the order for detention.

It has been said, on behalf of the captor, that if this capture should prove to have been illegally made, still that the claimant, as an enemy, could not be entitled to receive it, but that as in other cases of captures where the captor was disqualified from taking, it must go to the King, with whom it would remain to make restitution to the claimant. That the claimant in this case, as an enemy, is not incapacitated from suing, or receiving restitution, has already been determined by the Court upon the former hearing, upon the return to the monition to proceed

to trial, and likewise with respect to the propriety of an intervention on the part of the Crown. I shall only observe therefore at present, that there is an essential difference between the cases of non-commissioned vessels and of forfeitures for misconduct, which have been now referred to, and this case, inasmuch as that in those cases, the general right to make the capture from the enemy was not called in question, a general condemnation was supposed, and the only point was to determine to whom the condemned property should belong. In this case it is the question whether a condemnation could take place at all. If the vessel was illegally captured, neither the captor nor the Crown can have any right or interest in it. Those were municipal questions as between *British* parties, this is a question upon the law of nations, between country and country.

It has been denied likewise that the Court could give, or the claimant could recover damages. But, surely, if the Court has cognizance of the principal cause, it must have equally a jurisdiction over all the incidents connected with it. If the party is not disqualified from recovering his property, he must be equally capable of receiving a compensation for an injury done to it.

The first and principal point, in this case, is to ascertain the real character of the *Alphea*, as it appears in evidence.

Upon the standing interrogatories, *Hague*, the master, swears "That the schooner, at the time of capturing his ship, was actually sailing under a flag of truce, with dispatches from the *American* Government to the *British* Government."

George Brown, the first mate, has been examined upon the claim, and he deposes, "To his having seen a passport in possession of Lieut. *Jones*, which was

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signed by Mr. *Monroe*, the Secretary of State to the Government of the *United States*, which deponent read; the substance and purport of it was to protect said schooner *Alphea*, on her return from *New York* to *Halifax*, with dispatches for the Government at *Halifax*, and he believes that she had for several days previous to the sailing of the *Zodiack* enjoyed the rights and privileges of a flag of truce under the Act of Congress protecting vessels of her description from seizure by *American* vessels. He is clear and positive the *Alphea* sailed under the protection of the *American* Government, from Mr. *Jones* permitting him to read the passport, and from his, Mr. *Jones's*, declaration of being so protected by it, as well as the vessel under his command."—He farther says: "that on the day preceding the arrival of the *Alphea* in this port, to wit, on *Wednesday* the fifth of *August*, they were chased by an *American* privateer schooner, which they supposed to be the *Teazer*, and Lieutenant *Jones* finding that the said privateer was coming up with the *Alphea* very fast, called the deponent up from below, and told him the privateer was then in chase of him, but that he, Lieut. *Jones*, could not take her, if she came up, nor the privateer take him, as the *Alphea* was sailing under a flag of truce.—The deponent observed at the time, that the white flag was bent already to hoist on the haulyards at the foremast, but deponent did not see it at any time hoisted at the masthead, nor did he ever see it but on this occasion, which was the first time they saw an *American* ship. Lieut. *Jones*, some time after the privateer was gaining on him, ordered the flag of truce to be got ready, in the hearing and presence of deponent, and then ordered this deponent, and all the crew of the *Zodiack* below, and some time after, as deponent has since been informed, the white flag was

hoisted at her foremast head, and kept there till the privateer sheered off, when he was called up and found the privateer steering away.—He further says, that the only time Lieut. *Jones* informed him that the *Alphea* was a flag of truce, or permitted him to read the passport, was when the privateer was in chase of them."—This is confirmed by the deposition of *William Ray*, the second mate, with the additional circumstance, that "*the white flag was hoisted before he was ordered below.*"—An affidavit has been made by Vice-Admiral *Sawyer*, then Commander in Chief upon this station.—He states, that, "In the month of *August* last, his Majesty's schooner *Alphea*, commanded by Lieut. *William Jones*, arrived in this harbour, having a passport from the *American* Government to protect her from the ships of war of that nation.—That the said schooner, as the said Lieut. *Jones* informed deponent, was protected, and in every respect considered, while remaining in *New York*, as a flag of truce, and this deponent also considered the said schooner, to all intents and purposes, to be a vessel of that character, and description.—That upon the said Lieut. *Jones's* informing him that he had captured the said ship, the deponent expressed in strong terms his surprise and displeasure at the improper conduct of the said Lieut. *Jones*, for so doing, and on the arrival of the said ship *Zodiack*, at *Liverpool*, in this province, the deponent directed that every possible step should be forthwith taken for the immediate restitution of the said ship and cargo."

Besides these depositions, there is a statement of facts which has been agreed to on both sides. It admits "That the schooner *Alphea* is an armed cutter belonging to the King, and commissioned as a vessel of war in his Majesty's service, and commanded by *William Jones*, a lieutenant in the Royal Navy.

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That the schooner *Alphea*, in obedience to an order from the Admiralty, received the *June* mails from the General Post Office at *Falmouth*, with an order to deliver the same at *Bermuda*, *New York* and *Halifax*. That when Lieut. *Jones* sailed from *England* he knew nothing of the United States of *America* having declared war against *England*, nor was it known at *Bermuda*, when he arrived there, and delivered the mail for that island; and that he sailed from *Bermuda* without any knowledge of the war with *America*. That on going into *New York*, he heard of the *American* war, being boarded by an officer belonging to a ship of war of the *United States*, and, after having his papers examined by the officer, he was informed, the day after his arrival, that as he had brought a mail from *England*, the Government of the *United States* would allow him to deliver the same, and to remain without molestation; that, in a few days afterwards, he received a mail for *Halifax*, together with a passport from the Government of the *United States*, allowing him to depart, and to pursue his voyage to *Halifax*, without molestation from the ships of war, or privateers of the *United States*, until his arrival at *Halifax*. That shortly afterwards he sailed from *New York* to *Halifax*, captured the ship *Zodiack*, in the course of his voyage, and arrived safe at *Halifax*. That the said schooner had during the whole of the aforesaid voyage, the usual number of guns and arms on board, that belonged to vessels of her class, with ammunition and warlike stores of all sorts, proper for such a vessel in his Majesty's service."

Before I proceed further to the consideration of this evidence, I must dispose of some arguments which have been advanced in favour of the captor; that it was his duty in every case to take *American*

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ships by his general commission as an armed vessel, the *United States* having declared war, and likewise under the Orders in Council, to detain *all American* property. Now, not to mention that Lieut. *Jones* had no commission or authority against the *United States*, as the declaration of war was not known in *England* when he sailed, and that the orders were not known to him, having issued only the day before the capture, upon broader grounds it is evident that commanders of armed vessels are bound to execute their commissions only according to the usual practice of war, and that the Orders in Council, like all other laws and authorities given, must be subject to the usual modes of interpretation. There must be many tacit exceptions to the orders for detention. They could not command impossibilities, either natural or moral. It never could be understood to be the intention of the Prince Regent to authorize any proceedings in violation of the law of nations nor would they afford any justification for them.

It is not necessary to consider the original state of this vessel. The question is not, under what orders she sailed from *England*, or arrived at *New York*, but what was her character at the time of making the capture.

By the whole tenor, then, of this uncontradicted testimony, it is fully established, that at the time of seizing this vessel, the *Alphea* was sailing under a passport, which had been granted by the proper authorities of the *American* Government, which had been accepted, and has been distinctly admitted, by the commander of the vessel. That he had availed himself of the benefit of it, not only whilst he continued at *New York*, where he would otherwise have been seized, but likewise upon his voyage to protect himself against an enemy's cruizer. And that the

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validity of the passport has been acknowledged by the Commander in Chief upon the station.

Under facts so clearly proved, this case becomes subject to the application of those principles of public law which relate to captures made by vessels having a passport, or safe conduct.

What these are in general, is so well, and so commonly understood, that it is scarcely necessary to enter into any long discussion concerning them. No officer in his Majesty's service can be ignorant of them. It is universally known that, by passports, privileges are granted by nations at war to particular ships, for their mutual convenience. They are highly useful, since they contribute to soften the severities of war, and to promote the restoration of peace. They are therefore observed by all civilized nations with scrupulous delicacy and correctness. They are certainly in the nature of compacts, because there is something to be done, or submitted to, on both sides, and one nation cannot, by any acts, bind another, without its own consent. They may be therefore, and frequently are, the subject of treaties, which must then be punctually observed. But it is not necessary that there should be any express agreement between the two nations in question, much less any particular contract entered into with the persons immediately concerned. They are founded upon a compact of which the terms are partly expressed, and partly understood from general usage, and they depend upon the established conventional law of nations. To a vessel thus employed, in a communication between the two countries, with a passport, protection from capture is granted by the one nation, and the other engages that the vessel employed shall abstain from all acts of hostility. These must be the conditions necessarily understood, for otherwise such

vessels would thereby be only enabled, under the protection, to annoy more effectually the protecting country, and without those conditions, understood or expressed, no passports would ever be granted, and nations at war would lose the benefit derived from them.

Since then to effect the intended object the privileges must be mutual, as far as the vessel bearing a passport, and all vessels which she may encounter, are concerned, all rights of war must be suspended, and a partial state of peace must reciprocally exist. In case of a violation of these privileges there must be the same mode of redress on one side, as on the other. If a cartel, or a flag of truce is taken, it is admitted that they may be restored, by a Court of Admiralty, to an enemy claimant. If a vessel of that description should make a capture, the owners of the captured property would be intitled to the same remedy. A Court of Admiralty must be the proper tribunal in both cases, and the capacity of the claimant to obtain restitution is founded in each of them upon the same principles—a partial cessation of hostilities, and his being, *quoad hoc*, in the King's peace.

A capture then, made in breach of these conditions, is a wrong done to the party, and to his nation, and is a departure from the public faith. The laws of war are as sacred as those of peace, and in the execution of the delicate trust committed to this Court, of sitting in judgment between its own country, and every other nation in the world, it is its duty, with the most unbiassed impartiality, to administer the same rule of justice to the enemy, as to the most friendly or allied nation. But to do so is only to act in conformity to the universal practice of *Great*

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Britain, to a mode of conduct which has ever f i the basis of her peculiar character and glory. However unjustifiable may be the proceedings of other nations, though they may commence an unjust war against her, in denying her the right of self-defence against hostile measures professedly aimed at her destruction; in refusing her the common right of claiming the services of her own subjects in the time of danger, in virtue of that allegiance in which they have been born, educated, and protected; if they should have charged her with malicious and unfounded calumnies, still, even under such provocations, I trust she will ever exhibit the same fair example of undeviating justice, and unshaken magnanimity.

In a case therefore like the present, in which a young and inexperienced officer, through inadvertence, has been guilty of infringing a solemn duty, it is the office of this Court to remedy the evil as far as is in its power, and to place the injured party, as near as may be, in the same state as if no such capture had been made, by a restitution of the property, and a liberal compensation for all losses occasioned by the capture and detention.

In estimating those damages, if the first error was occasioned by inadvertence, I am sorry to be under the necessity of observing, that the same excuse cannot be extended to the subsequent proceedings since the capture. Vice-Admiral *Sawyer* deposes, that "upon the arrival of the ship *Zodiack* at *Liverpool*, in this province, he *directed* that every possible step should be forthwith taken for the immediate restitution of the ship and cargo." There was nothing to have prevented their being immediately restored by the consent of the captors. If any doubts or difficul-

ties had presented themselves, they might at once have been removed by an application to the Court—Instead of complying with these directions of the admiral, three months have been suffered to elapse since the capture. It has indeed been attempted to set up an excuse for the delay which has occurred, by a statement that the vessel and cargo, with her papers had been delivered up to the master with permission to go away, but that he afterwards refused, and insisted upon damages. This proceeding aggravates, rather than alleviates, the propriety of the captor's conduct. If a restitution by consent was intended, it should have been done under the authority of this Court, which would have been attended with little or no delay. Such clandestine proceedings, without bringing captures before a proper tribunal, after they have been brought into port, is contrary to the established practice of civilized nations, and is prohibited under severe penalties by the laws of the country.

The vessel then was taken on the 1st of *August*, and she arrived at *Liverpool* on the 9th. On the 28th a petition was brought in for an order for the unlivery of the cargo, on account of the leaky state of the vessel, yet the papers were not brought into the registry, or a monition applied for, till the 2d and 3d of *September*. The captor not having given an allegation, a petition was filed upon the 28th of *September* for a monition to compel him to proceed to adjudication, stating: "That the cargo was suffering, and great expense incurred, that the claimant had filed his claim, and had every reasonable expectation that the captor would have consented to a decree of restitution without further delay, as hopes to that effect had been given them on account of the avowed illegality of the capture; but to this measure, the

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King's advocate, on behalf of the captors, refused to accede, because the petitioner insisted upon prosecuting his claim for damages." The King's advocate appeared to this monition, and moved to be discharged from it, upon grounds then stated, which were overruled by the Court, and the cause now comes on upon the claimant's monition. Of the unnecessary delays which have taken place in this cause, especially as it appears upon an uncontradicted affidavit, that they were employed to induce the claimant to recede from pursuing this just claim for damages, this Court must express its decided disapprobation.

This vessel upon her capture was ordered to proceed to *Halifax*, but the master swears, that "The prize-master being very young and inexperienced, he has reason to believe that in consequence thereof, and of the bad management on board the ship, she struck on *Ragged Island* reef, and received so much damage that she was obliged to put into the port of *Liverpool*, in this province. It was found upon examination that she had received so great damage that it became necessary to take out part of her cargo, and to keep the pumps going. In this state she remained until the 18th, on which day the ship was delivered up to the claimant, when he sailed from *Liverpool* with part of her cargo, the other part being brought to *Halifax* in vessels hired for that purpose, it being necessary to lighten her. Since her arrival the residue has been taken out and placed in stores; that a considerable part of it has been destroyed by the breaking down of a store—From all which losses and accidents, the voyage of the said ship, and her original destination, has been totally lost, and great damages and expenses have been incurred, and large sums of money required for re-

pairs." This statement is fully confirmed by the deposition of the first mate, and, as far as he had opportunity of observing, by the second mate, and is uncontradicted by any evidence on the part of the captor. Where a capture is unjustifiable upon the face of it, the claimant is entitled to a compensation for such damages as may have happened in consequence of it, even by unavoidable accident. But in this case there is a stronger ground, for the injury to the vessel and cargo appear to have been occasioned by the unskilfulness of the prize-master, for whose misconduct, negligence, or ignorance, the captor is specially answerable.

Considering then the manifest illegality of the original capture, and likewise that the delay has been solely owing to the captors themselves, they can have but little reason to complain of an undue severity, if the Court decree to the claimants the restitution of this ship and cargo, together with a full compensation in costs, damages, expenses, and demurrage, for the losses which have been sustained, and which it awards, not upon the score of a vindictive penalty, but as a mere measure of common justice; not to punish the offender, but to save harmless the innocent sufferer;—not to bestow a boon upon the enemy, but to vindicate the honour of *Great Britain*.

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The Schooner PATRIOT, *William Reardon*, Master, taken by the ACASTA.

Ransom Act, 22 *Geo.* III. c. 25, and Prize acts do not extend to repurchases of vessels not seized as prize. Domicil constituted by three years residence and a longer uncertain continuance.

A CLAIM was given by *Oswald Lawson*, as a subject of his *Britannic* Majesty, and as master of the vessel on behalf of himself for the schooner and cargo, being flour, peas, and beans. He stated that he was born at *Newry*, in *Ireland*, which he left three years ago, and proceeded to *Virginia*, for the purpose of settling the estate of *David Lawson*, his brother, who died there; that the estate still remains unsettled, but as soon as it is settled he intends to return to his native country.

In *January* last he purchased the schooner at *Norfolk*, in *Virginia*, from *Richard Billings*, an *Englishman*. In *January* took on board at *Norfolk* a cargo of tobacco, naval stores, &c. on freight, the owners residing at *Norfolk* appointed him consignee, and directed him to proceed to *Barbadoes*, there he sold the principal part of the cargo; the remainder with other articles taken on board at *Barbadoes*, he carried on freight to *Guadaloupe*, in part of payment; took more on board on freight; sailed for *Halifax* about the 20th *May*, but not having received any information from the owners of the cargo at *Norfolk*, as to the names of the persons at *Halifax* to whom he should deliver the sugar, he resolved to go to the mouth of the *Chesapeake* bay, and dispatch one of his own crew to *Norfolk*, with a letter to the owners of the sugar, to inform him to whom he should deliver the sugar at *Halifax*. There she was seized on the 24th *June* by an *American* revenue cutter from *Norfolk*, and was libelled in the district

court of *Virginia*, for a breach of the non-importation act.

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On the 9th of *July*, in a Court at *Williamsburgh*, it was agreed that the vessel should be sold by the Marshal, and the proceeds lodged in the Registry. She was sold, and purchased in for him, on the 25th of *July*, by *William Thompson* his agent, who received a bill of sale from the Marshal, and then *Thompson* executed a bill of sale to the deponent. The sugar, belonging to merchants at *Norfolk*, was delivered on bonds. The remainder belonging to merchants at *Guadaloupe*, was sold, and the proceeds deposited. In *August* he purchased this cargo (to proceed to *Lisbon*) with funds in the hands of his agent *Thompson*. To prevent suspicion of the ship and cargo's being *British* property, the mate signed the bills of lading, and cleared out as the master.

The commander of a *French* privateer having threatened to capture him, to deceive him, as well as to escape *American* privateers, he procured two invoices, one stating it to be *American* property, and belonging to *Thompson*, the other, which is the true invoice, states the cargo to be the deponent's.

William Reardon, the ostensible master, swears that he believes *Thompson* to have been chief owner of the vessel, and of the cargo, as he attended to the lading of it. So the *Mate* deposes.

There were on board a *British* plantation register, granted at *Barbadoes* the 20th of *April*, 1812, to *Oswald Lawson*, "at present of *Bridge Town*, in *Barbadoes*." A bill of sale executed before *J. Hamilton*, the *British* Consul in *Virginia*, the 12th of *February*, 1312.

Account of sale by the Marshal to *Thompson*,

The Schooner PATRIOT.

November 21st, 1812.

14th of *August*. And a bill of sale from *Thompson* to *Lawson*, 17th of *August*.

On the part of the Captors the King's Advocate, and Uniacke contended,---That the claimant, who appears a *British* subject, in this cause, cannot be considered as such, his domicil having been paid for several years, in the *United States* of *America*. He was engaged in trade as an *American* at the time of the capture, and was then sailing under *American* colours, though possessed of a *British* register, in which he appears to be the owner of the ship. There is much deception in every part of the case; the papers are in general false, and the whole concern is enveloped in mystery and double dealing. Added to all this, the ship was seized at *Norfolk* for a breach of some law or regulation of the States, or perhaps as *British* property, claimed by *Mr. Lawson* as an *American*, and afterwards virtually ransomed by him in violation of the Prize Act. Upon these several grounds he cannot be entitled to restitution or further proof.

The Solicitor General for the Claimant contended, That admitting the claimant to have been residing two or three years in *Norfolk*, previous to the *American* declaration of war, such residence was for a particular and temporary purpose, unconnected with views of trade, and not completed at the time of the declaration of war. That the claimant is a *British* born subject, and should be allowed a reasonable time for making his election in the present ambiguous state of affairs, either to remain in *America*, or to prepare for a return to his native country, in the event of war being declared by his own government against the *United States* of *America*. That should a determined war exist be-

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November 2d, 1812.

tween the two countries, he has declared his intention of returning home, and indeed, this is, at all events, his resolution, when the business which carried him to *America* is completed. The deception and mystery alluded to in this case are perfectly consistent with designs of innocence and good faith on the part of the claimant. The falsity of his papers as well as his flag was intended as an imposition upon *American* cruizers. The fraud, therefore, is justifiable, and the claimant entitled to further proof, upon all these points, if not to the restitution of his property. With regard to the alledged ransom of the ship, no act of the claimant in that transaction can be termed a ransom, which can only apply to cases of prize captured by the enemy.

JUDGMENT---*Dr. Croke.*

This vessel and cargo are claimed as *British* property. If they shall prove to be so the party will be intitled to restitution, otherwise they must be remanded to safe custody under the Orders in Council, as *American* property.

All arguments deduced from the register may be at once dismissed. Whether this document has been improperly obtained, or whether the vessel was intitled to it, are immaterial considerations, for all the Acts of Parliament by which registers are regulated, relate only to the commerce within the *British* dominions, not to a trade like this between foreign countries.

It was argued on the part of the captors, that the repurchase of this vessel after it had been seized in the *United States* amounted to a ransom, and came within the provisions of the Act 49 *Geo.* III. and indeed, under the authority of the case of

The Schooner Fanny.

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Havelock against *Rockwood* (8 T. R. 268.) I should hold that a repurchase of a vessel before condemnation, under the interlocutory decree of a Prize Court must be considered as a ransom, and would subject the party to all the effects of that statute. But it applies only to cases where the vessel has been *seized as prize*, on account of hostilities, not where the seizure has been made upon other grounds, as for a breach of revenue laws for instance. Now in the present case the Master swears that she was seized for a breach of the Non-Intercourse Laws. It does not appear from the proceedings amongst the papers, on what ground the prosecution was commenced, and therefore I think the Court is not sufficiently in possession of the facts, to decide upon them, if it should be necessary.

Very great doubts may be entertained with respect to the real property. From the mode in which the vessel was repurchased from the mariners, in which *Thompson* managed every thing relating to the cargo, and from the evidence both of the master and the mate, there is great reason to believe that he was owner, in part at least. But without entering into this point, allowing the facts to be as stated in the claim, and that *Lawson* was the undisputed owner of ship and cargo, it becomes a question upon his national character, this is clear. A *British* subject may, indeed, have a temporary residence in the enemy's country, for a special purpose, and *Lawson* swears that he went to *America* merely to settle his brother's affairs, and intended to return when they were completed. But no instance can be found in which property was restored, where a man had resided for three years, with an indeterminate period of future residence to

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be added to it. He has likewise been engaged in traffic unconnected with his brother's concerns. He bought this vessel, and employed her in freighting *American* goods. If, indeed, he had intended to return to *Great Britain* in this voyage, he might have invested his funds in a cargo, for the purpose of withdrawing it, with himself, to his native country. But no such design appears; he does not intimate that such was his intention, and as he states that he proposed to continue in the *United States* till his brother's affairs were wound up, which was not yet done, it was evidently his intention to return with his vessel to the *United States*, which was still to continue in carrying on an *American* trade, not connected with his brother's concerns, and after hostilities had commenced.

I condemn the ship and cargo.

The ABIGAIL, *Johnson*

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Licence. Exporter neither lader or owner. Salvage not due for rescuing a ship which had been seized for a breach of the laws of its own country.

ON the part of the Captors, the *King's Advocate*, and *Crofton Uniacke*.---This ship is claimed by the enemy, under a protecting licence granted to *Samuel Williams*, Esq. of *London*, and not to any one of the several claimants of the ship or cargo. She was captured by an *American* Privateer, on her voyage from *Liverpool* to *Norfolk*, on the ground of her having the licence on board as a *British* passport, and was recaptured by Sir *John Beresford*, in the *Poictiers*, who brought her to this port for adjudication. At all events, the captors are entitled to salvage, the property having been put in jeopardy by the capture. It is true *Mr. Ma-*

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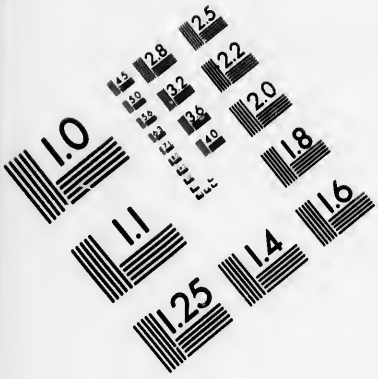
dison has submitted all cases of this nature to the consideration of congress, but there exists a strong probability that *American* ships availing themselves of an enemy's protection will, in the courts of their own country, be adjudged liable to condemnation. If so, there is a merit in the re-capture, for which the captors are entitled to be paid. But it may also be contended that the licence itself can afford no protection to the ship, it not having been granted upon the application of the claimants, and it not appearing to have been obtained even on their account. The construction of such licences cannot be too strict, as it is the intention of the government to grant them only to those with whom the indulgence may be safely trusted. *Mr. Williams* is here the only grantee, and yet the shippers are all merchants of *Liverpool*, apparently unacquainted with that gentleman. They cannot, therefore, have the benefit of a licence not intended for them. A question may also arise, as to the capture on the part of the privateer, whether that event does not destroy the effect of the licence.

The Solicitor General for the Claimants observed, that no question could arise as to the validity of the licence. This protection has been granted upon solid grounds of national policy, and should be construed with the most extensive liberality. It is totally immaterial whether the claimants be the real applicants or not, as the main object of the licence is to permit and protect the transportation of *British* merchandize by the merchant whoever he may be, to a port of the *United States* of *America*. This licence, it is true, is granted to *Mr. Williams* alone, but it is equally obvious that he has acted in the affair as the mere agent of certain *Liverpool* merchants who are the shippers of the

cargo. It is granted in favour of *British* commerce, and is entitled to support by every fair and liberal construction that the words and spirit of it will warrant, and more especially as the faith of government is pledged by it to the enemy merchant who is now suffering under the use, and not the abuse of it. While sailing under its protection against *British* cruizers, the ship is captured by a privateer of her own country, and being afterwards re-captured by the *Poictiers*, is brought into this port for adjudication, and an attempt is now made not only to obtain salvage for re-capture, but to condemn the ship and cargo as the property of the enemy for an abuse of the licence. Upon the principal ground the captors cannot be serious in the prosecution, and as to the question of salvage, so far from any merit appearing in their conduct upon which to found it, it was the duty of the *Poictiers* to have facilitated the continuance of the ship's voyage, after the re-capture, as the licence was still in operation and the capture by the privateer could not affect its validity. Indeed, the interference of the *Poictiers* was no boon to the ship, for the prize crew of the privateer were carrying her to a port of the *United States*, in which their differences would have been adjusted, and, if she were now restored, she must pursue her voyage to the very port, perhaps, to which the privateer's crew were conducting her. But no injury would have been sustained by her, even through the laws of her own country (a question in which the re-captor has no concern), as *Mr. Madison* has recommended the peculiar situation of these licensed ships to the consideration of Congress. This is certainly a case, upon the point of salvage, *primæ impressionis*, but not attended with much difficulty, there being



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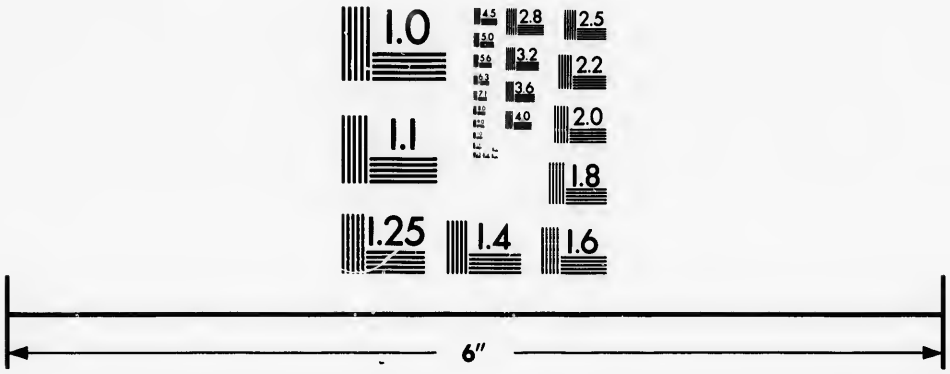

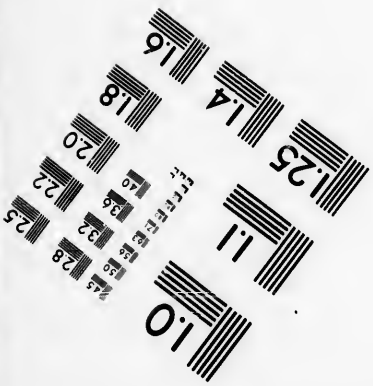

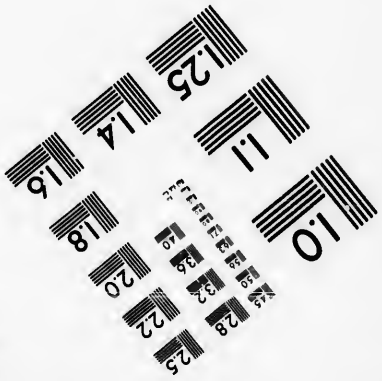

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no fact upon which any claim of meritorious conduct, on the part of the re-captors, can be founded, consistent with those equitable rules which have been established in all general cases of reward for services rendered by re-capture.

JUDGMENT.---*Dr. Croke.*

This ship was taken by the *Poictiers*, Sir *John P. Beresford*, commander. She was claimed by the Master for *Paul Simpson* of *Newbury Port*, and the cargo, consisting of dry goods, salt, earthen ware, and coals, loaded at *Liverpool*, for *Paul Simpson*, Messrs. *Leach* and *Graham* of *Virginia*, and others. She sailed on the 12th of *August*, 1812, bound to *Norfolk* in *Virginia*, under a licence from the *British* Secretary of State. On the 16th of *September* she was boarded by an *American* privateer, called the *First Consul*, which took possession of her, sent an officer and men on board, and directed them to proceed to *Portsmouth* in *New Hampshire*. On the 21st of *September*, she was retaken by the *Poictiers*, and sent to *Halifax*.

The licence was dated the 23d of *July* 1812, and signed *Sidmouth*. It was granted to *S. Williams*, and the operative words were "we do hereby permit *them* to export on board the *American* ship *Abigail*, from *Liverpool* direct to any port of the *United States*, a cargo consisting of such goods as are permitted by law to be exported (being either *British* or *American* property) and protecting the said vessel, and the goods as aforesaid from capture or molestation, by any ship of war or privateer, on account of any hostilities that may exist during the time of the said voyage, and during her return to *Liverpool*, with the said cargo, in case she should not be permitted to land in the *United States*. Pro-

vided the vessel shall clear before the 15th of *August*, and to last for one voyage only". Indorsed was a clearance from the Custom House at *Liverpool*, dated the 8th of *August*, and annexed was the order in council for the licence of the 23d of *July*, and likewise a release by the Marshal from the embargo imposed on the 31st *July*, under the order of the 1st of *August*, as to licensed ships.

There are two distinct questions in this case. First, whether the ship and cargo are liable to seizure and detention, under the Prince Regent's Orders in Council, notwithstanding a licence which was on board; and, secondly, if not liable to detention, whether the captors are entitled to salvage for recovering the property from an *American* privateer.

Upon the first question it has been argued that it is doubtful whether this is the vessel for which the licence was granted, on account of a variation in the tonnage between the licence, and the certificate of the Custom House at *Liverpool*, which is indorsed upon the back of it. In the licence she is described as a vessel of 309 tons, in the certificate 295 tons. The difference is only fourteen tons, and when it is considered that various modes of measuring lead to different results, and that even in reducing to practice the same rules of admeasurement, though in theory mathematically exact, some small error may be committed without any intention of fraud, the variation is too trifling to support a conclusion that this is not the vessel to which the licence was granted. The identity of the vessel is sufficiently proved upon other grounds. The *Abigail* is proved to have been always her name, and the same master who is specified in the licence, was appointed to the command before the voyage commenced in the *United States*. She ap-

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pears to have been under the directions of the person who obtained the licence, during the time she was in *England*, and the shortness of the period between the date of the licence and the clearing out, being only a fortnight, precludes all possibility of fraud, or that any improper application could have been made of the document.

It has been likewise contended, that Mr. *Williams*, to whom the licence was granted, was not the exporter of these goods, and that name does not appear in the bills of lading. This question depends upon the words of the licence, and the legal interpretation to be put upon them.

In the late war, and in the earlier part of the present, licences were considered as privileges granted to individuals for their own benefit, and in which the nation at large was but little, or remotely interested. They were therefore held liable to the same strict construction with other similar grants. Yet this rule was never applied in a narrow captious manner, and if the apparent intention of government was complied with, and there was no suspicion of fraud, a sufficient liberality was allowed in the construction. Of late, when the extraordinary mode of warfare carried on against this country had required new expedients to counteract it, licences to a great extent have been granted to relieve the stagnant trade of the country, and this measure so highly beneficial, or even necessary, has been facilitated by the adoption of a still more liberal latitude of construction.

We have only to enquire, therefore, into the apparent intention of government in this permission *to Mr. Williams to export*.

It is pretty evident that it was not the object to confine the exportation to Mr. *Williams*'s own pro-

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perty. For though, generally speaking, a licence to export is understood to mean that the goods shall be shipped upon the exporter's own account, yet this inference is destroyed when other words descriptive of the property are added. If it was intended to have been confined to his property, a clause in the alternative would not have been subjoined, " either *American* or *British* property," because Mr. *Williams* being well known to be originally an *American*, but for many years settled and acting as a merchant in *England*, his national mercantile character was evident, and a latitude in that respect would have been unnecessary. But the description of the property in the licence has been perfectly complied with, it might have been either *British* or *American*, it is claimed, and it has not been disputed, to be the property of a citizen of the *United States*.

As little can it be said, that it was necessary that Mr. *Williams* should have been the actual lader, that is, that he should have put the goods on board in the character of shipper. This is an immaterial part of the business of supplying a cargo, which is usually transacted by ship brokers and agents, and indeed it is evident from the licence, that it must have been in the contemplation of those by whom it was granted, that he should not himself perform this office. He is described as a merchant of *London*, and the goods are directed to be exported from *Liverpool*.

If then it was not required that Mr. *Williams* should be either the proprietor or the actual shipper of these goods, what must have been the intention of government in this permission to him to export. It must have meant that the exportation should be

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made under his directions, controul, management, or agency.

Of this fact, respecting the goods claimed for *Paul Simpson*, the owner of the vessel, there is sufficient proof. The master deposes, that the vessel has been under the management and directions of Mr. *Williams*, during the time she was in *England* with respect to her employment in trade, and that he corresponded with him on the concern of vessel and cargo. That he left the money arising from the freight of the outward cargo in the hands of Mr. *Williams*, and drew on him for the payment of these goods. Here is full proof that these goods were exported under the authority of Mr. *Williams*, and therefore that the terms of the licence have been complied with.

As to the rest of the cargo, though I think this amounts to an indirect proof, and presumption, that all the goods on board were shipped under his permission at least, as he had the whole management of the vessel. If it were necessary to send across the *Atlantic* for further proof, perhaps it might not be required to put the parties to further delay and expence for that purpose; but as the master is here, his affidavit may be satisfactory upon that head.

I restore therefore the vessel and *Simpson*'s part of the cargo, and direct further proof as to the remainder. (The master's affidavit, which was afterwards brought in, having been held to be satisfactory, the rest of the cargo was restored.)

I proceed now to the second question, whether the recaptors are entitled to salvage?

Many cases are reported respecting recaptures of *British* property, and of the property of allies and neutrals from the enemy, but the present I be-

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lieve to be perfectly new and unprecedented. It is the recapture of a vessel and cargo belonging to subjects of the enemy, from a cruizer of their own nation. But if these particular circumstances are novel, they may be referred to principles which are old and well established. For though the ship and cargo belong to an enemy, they are placed by the licence in a state of temporary neutrality. They are entitled to all the rights, and are liable to all the obligations of that state, and in deciding this question the Court will apply the same rules as are applicable to vessels of a neutral character. Whilst sailing under this protection, if a *British* vessel has rendered this property such services as would be a subject for salvage in a neutral case, the recaptors would undoubtedly be equally entitled in the present.

Without any particular reference to the relations of peace or war, nothing is more conformable to justice and equity than that. Where property has received a material benefit, as, for instance, by being saved from loss, the salvors should receive a fair compensation for their services. The only point for investigation in this case is to ascertain whether the property by the recapture was preserved from any real hazard of being lost to the owner, and that the risk was of such a nature that a salvage can reasonably be claimed.

The facts which relate to this claim were these. This vessel being bound to *Norfolk* in *Virginia*, was captured by an *American* privateer, and under the charge of an officer and men was directed to proceed to *Portsmouth* in *New Hampshire*. Meantime she was retaken by the *Poictiers* and sent here. To determine the question of salvage we have only to enquire what danger of loss the property

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would have been liable to from this first capture, if the privateer had succeeded in sending it into *Portsmouth*.

As the capture was made not by a piratical vessel, but by a ship of war, duly commissioned, the danger is not to be estimated by any vague suppositions of lawless violence, but from the effects of a lawful power and authority applied to the case of seizure, to the consequence which would have ensued from a prosecution in the courts of the *United States*, after their arrival in port.

Upon what legal grounds then was the seizure made, and would a confiscation have necessarily followed? The master deposes, "that he believes that she was seized on suspicion of having *British* property on board." Now, on this ground it is clear that it was perfectly secure, because after the investigation which has taken place here, there is no proof, or even supposition, that the property is otherwise than American, as it is claimed.

Neither was the property liable to have been condemned as having been implicated in a trade with the enemy. As the vessel, and the funds with which the cargo was purchased were in *England* at the declaration of war, the parties had a right to withdraw their property, and indeed it appears from the case of the *Monsoon*, and other vessels, which have arrived in the *States* under similar circumstances, that they have not been proceeded against upon that ground.

It only remains therefore, that a prosecution could have taken place against this vessel and cargo, for trading with *Great Britain* in violation of the non-intercourse laws.

Supposing then, for the present, the fact that they would certainly have been confiscated, the case

would stand thus: The property of a subject of the *United States*, being found in the act of breaking the laws of his own country, is seized by a lawful authority of that country for the purpose of exacting the penalty, but is rescued by a *British* vessel. I do not see how a foreigner can be justified in thus interfering between the laws and the subjects of another country, or at least on what ground he can claim a reward for so doing. It was their own affair. It was the effect of municipal laws to which the party himself had given an implied assent by the constitution of his country. To prevent the operation of the laws of a state, and thus to become accessary to the violation of them, if not an immoral and unjustifiable act, yet certainly does not compose a case of such moral and legal merit as to be entitled to a direct sanction from any tribunal which is guided by the general principles of justice and equity. The state of hostilities does not affect the question, because it bears no relation to the internal regulations of the enemy's country, which are in no respect the object of any of the operations of war. This court cannot, indeed, inforce the laws of other countries, but there is a very material difference between giving them effect, and granting a reward for impeding their operations. If a *British* vessel was seized by the officers of the customs of an *English* port in the act of smuggling, and was rescued by a foreigner, could a court of justice be found in any civilized country, which would award salvage for the recovery? In that case, as in the present, the service might have been beneficial to the party, but it would not be of such a nature as to lay a foundation for a judicial reward.

But it does not seem that any great danger of confiscation was to be apprehended, since the par-

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ties themselves had voluntarily exposed themselves to the full hazard of it, by their original voyage. For it is admitted that the vessel and cargo would have been equally liable to confiscation if they arrived at *Norfolk* according to their destination. Nay, it is even now alledged by the parties, that if this vessel should be released, it is their intention not to avail themselves of the permission in the licence to return to *Liverpool*, but to pursue their original voyage to *Norfolk*. And this is not improbable, because several vessels which have been discharged by this court, under the same general circumstances, have actually proceeded to the *United States*. In fact, it appears that they had good reason to presume upon their safety. The president in his last message to congress, of the 4th *November*, having taken into his consideration, the case of vessels like the present, which had been in *England* when the revocation of the orders in council took place, and were laden with *British* manufactures, under an erroneous impression that the non-intercourse act would immediately cease to operate, states expressly not only that "the treasury department was vested with powers to mitigate forfeitures, but that congress would interfere to make further provisions in their favour." But whatever was the degree of probability of confiscation, the admission before stated seems to me to be absolutely conclusive in the case. If in pursuing their original intended voyage, before they had been seized by the *American* vessel, they had been met and taken by a *British* cruizer, could the captor have claimed salvage for rescuing them from a danger which they had voluntarily chosen to risk? Since then this vessel was not in greater danger of confiscation from being seized by an *American* privateer than if

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she had peacefully proceeded upon her original voyage, when she would have been equally liable to have been seized by the officers in her own port, where was the service of the re-capture? The capture by the privateer had made her situation neither better nor worse, than it was previously. In both cases she was subject to the operation of the same laws, was liable to the same forfeiture, and had the same prospects of release. The re-capture therefore, by the *Poictiers* rescued her from no danger which had been incurred by the first capture, and consequently can afford no foundation for salvage.

This vessel having been found in the possession of an armed force of the enemy, it was the duty of the captors to have brought her in. As Mr. *Williams*'s name, as the exporter of the cargo, did not appear in any of the papers, there was *prima facia* reason to conclude, that the terms of the licence had not been complied with. This is another justification of the captor's conduct, which arising from the parties' own neglect, precludes all reason for complaint. I shall therefore direct the captor's costs to be paid by the claimants.

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The SALLY ANN, *James Day*, Master.

Licence granted by an ambassador to an enemy, to trade with the *British* dominions, for the supply of troops, void.

ON behalf of the captors. The *King's Advocate* and *Uniacke*.---In this case, it becomes a question of great importance whether the licence of Mr. *Foster*, the only support of the claimant's title to restitution, can have the legal effect of protection. It is an ascertained truth that volumes of such licenses have been obtained from the same source, and that much abuse and imposition has been practised with them. The licence has no seal of an of-

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ficial nature, nor is it in the king's name; but if it were complete in all respects of form and authenticity, it is defective upon principle, and is therefore of no validity whatever. An indulgence or protection of this nature can be granted by His Majesty only, as has been repeatedly adjudged in the High Court of Admiralty, and the act of the 48th of His present Majesty, which authorizes the Prize Council to grant licences of protection is a confirmation of this principle. It is a power which the king cannot delegate. An ambassador *virtute officii*, can have no such authority, but allowing for a moment, that he possessed it, as the representative of His Majesty in a foreign state, the exercise of it must have been ineffectual, in the present instance, as Mr. *Foster*'s functions in his capacity of ambassador or envoy in the *United States*, had ceased before the day on which he granted the licence.

The *Solicitor General for the claimant contended*--- That there were certain exceptions to the principle alluded to by the king's advocate upon the subject of licences. Strictly speaking, it was the peculiar province and prerogative of His Majesty to grant them: but, in distant parts of the world, and under particular and pressing circumstances, it was upon many grounds politic and proper, that the power in question should be delegated to persons in high official situations, who are in fact, as to many purposes, the representatives of Majesty. In the appointment of cartels, flags of truce, and other similar arrangements, the authority of His Majesty's officers has never been doubted; and there seems no reasonable objections why an assumption of the royal authority upon the present occasion should not be allowed and sanctioned. The motive and object of such an assumption were beyond a doubt, most laud-

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able and politic, as Mr. *Foster* had in view the securing of supplies to our troops, through the assistance of those *Americans* who were inclined to venture their property for the profit such voyages would afford them, under the protection of *British* licences. He therefore thought fit to pledge the faith and honour of his government in granting those licences, and those persons who have obtained them have reposed their confidence in the legal validity of them, which by the grantor and grantee was considered unquestionable. No question, therefore, ought to arise, but from the abuse of this licence if any has been practised, and if the ambassador, whose functions it seems had not altogether ceased, has done an act, which, by a rigid construction of his authority, was not strictly warrantable, it should still be considered as an act of his government; for the impropriety *he*, and not the claimant, is responsible. The act of the 48th of his present Majesty cannot apply to the question arising in this case. A particular infirmity in His Majesty rendered it expedient that the power of granting and signing licences of protection should be vested in the Privy Council; but no inference can be drawn from that act which militates against the position contended for, on the part of the claimant, that the present case is an exception to a general rule, which in this instance cannot be enforced without a direct violation of national honour and good faith.

JUDGMENT.---Dr. *Croke*.

This is the case of a vessel bound from *New London* in *Connecticut*, according to the ostensible paper, to *St. Bartholomews*, but by the master's evidence, and other documents to *Barbadoes*. A claim has been given in for both ship and cargo, as the

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property of *John Mallom* and *William Williams*, of the same port, as being protected by two licences, one from Mr. *Foster*, the *British* ambassador in the *United States*, and the other from *James Stewart*, described as a *British* consul there. The cargo consists of 900 barrels of flour, and 800 barrels of Indian corn, which were specified in Mr. *Foster's* licence; a quantity of tobacco, licensed by Mr. *Stewart*, and some other articles not mentioned in either licence.

Mr. *Foster's* licence is conceived in this form:—

"By *Augustus J. Foster*, his *Britannick* Majesty's Envoy Extraordinary and Minister Plenipotentiary to the *United States*.

"To the Admirals, Captains, and Commanders of His Majesty's Ships of War, &c.

"Whereas the United States of *America* have thought proper to declare war against the United Kingdom of *Great Britain* and *Ireland*, and His Majesty's other dominions. And whereas a supply of live bullocks and flour is necessary for His Majesty's service at *Barbadoes*, and the other islands to leeward. I have therefore thought it proper and necessary to grant permission to *James Day*, master of the *American* schooner *Sally Ann*, to proceed from *New London* with nine hundred barrels of flour, eight hundred bushels of corn, no bullocks, to the island of St. *Bartholomew's*, and I do hereby request and require that you permit and suffer without capture or molestation, the said schooner *Sally Ann* to proceed to the island aforesaid, with the said cargo, to be delivered to His Majesty's contractor for live bullocks and flour, and

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I do further request that the said schooner *Sally Ann* may be permitted to return to these States. Given under my Hand and Seal, at *New York*, this seventh Day of July, 1812.

(L. S.) " AUG. J. FOSTER."

Upon the master's evidence, in which he has stated, that he believes the whole or some part of the cargo to belong to Mr. *Stewart*, the late *British* consul in the *United States*, there has been some discussion relating to the national character of that gentleman; if it were necessary to decide upon that question from the evidence that appears in this case, I should certainly be disposed to hold him to be domiciled in the *United States*, because the master deposes that he transacts more business there than any merchant in *New London*, but as no claim has been given for him, the court has only to determine upon the claim now before it, for persons admitting themselves to be Americans.

This cargo consists of articles of three different kinds; those which are specified in Mr. *Foster's* licence; those which are comprehended under the licence of Mr. *Stewart*; and some goods of small value which are included in neither.

The whole of the property is liable to detention under the *British* orders in council, unless it is protected by licence.

The licence, or certificate granted by Mr. *Stewart* has been abandoned as ineffectual, and therefore the two latter parts of the cargo are disposed of. The only question remaining therefore respects the articles specified in Mr. *Foster's* licence, consisting of flour and Indian corn.

I do not think there is much foundation for the objections which have been made to the authen-

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ticity of the licence itself, either from the seal, the form, the blanks, or other circumstances. There is not only the internal evidence of Mr. *Foster's* undisputed signature, but the additional testimony of a certificate from the *British* consul, through whom the parties received it. And though other articles have been put on board which may be liable to forfeiture; yet, under the principles which have been laid down in various cases in the High Court of Admiralty, they cannot affect the goods which are specified in the licence, or deprive the parties of the benefit of it as far as it goes. Nor can much be inferred from some apparent contradictions in the master's evidence, with respect to the reality of the intended voyage to *Barbadoes*, since they may very naturally be accounted for from his having cleared out with papers for Saint *Bartholomew's*, and which are acknowledged to be false, from the impossibility of clearing out from the *United States* to an enemy's port, a falsification which has never been considered as materially affecting the good faith of a transaction.

The *validity* of this licence depends upon Mr. *Foster's* power of granting it. The *effect* of it is to enable an alien enemy to trade with the *British* dominions. To grant such a licence is an high act of sovereignty, since it is a partial suspension of hostilities. It is founded upon the right of making peace and war, and it depends upon the same principles as granting licences to *British* subjects to trade with the enemy. In the case of the *Angelique, Streug*, before the Lords of Appeal, it was decided that "as it was in the power of the crown alone to declare war, so it rested with that authority only to dispense with the operations of war;" and they held that even the Governor General of India had

no authority to grant licences to that effect.* When His Majesty's unhappy infirmities rendered it inconvenient to obtain his sign manual, the great law officers were consulted upon the important question, whether His Majesty could delegate the power of granting licences, when they declared unanimously, that "granting licences to trade with the enemy is an high act of prerogative, and they could not hazard an opinion that His Majesty should be advised to delegate it, unless under the sanction of parliament."† It was properly in consequence of their opinions that it was thought necessary to pass the act of the 48th *Geo.* III. to enable the secretary of state to sign licences.

I know of but *five modes* by which this power can be vested in a subject; *by an express authority* from His Majesty, conferred by an *act of parliament, by an order in council,* or by a particular *commission;* and these may pass either antecedently, to authorize the act, or subsequently, to confirm it when done: or it may be granted by *a tacit, or implied authority;* as where it has been the usual, known, and continual *practice* to issue such instruments, or where the granting of them is *essentially connected with any given office,* and necessary to the due performance of it, so that it must of course be implied in the appointment itself. If the power of granting such licences is not proved to have been conferred by His Majesty by some one, or other, of these modes, I am at a loss to discover upon what foundation they can rest.

Act of parliament there certainly is none which can apply to this case; neither has any order been made in council, or at least none has been trans-

* 3 Rob. Appendix B. † Reeves on Shipping, 368, Ed. 2.

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mitted to this country, to the effect of a precedent, or confirmatory authority for these licenses. No special, or general power, under a commission, or instructions from His Majesty, are stated either in the licence itself, or in any plea, proof, or even argument, on behalf of the claimant, upon whom it is incumbent to establish his own right. Neither has it been proved to be the usual practice, and indeed it could not well have been so proved, since the very circumstances to which it applies are new and unusual.

If this induction be correct, one only mode by which this power may be presumed to have been conferred remains to be considered; whether it is a power so necessarily connected with the office which was occupied by the gentleman who granted it, that it must be implied in the appointment of the office itself. Now, since protecting the property of the enemy is so high an act of the royal prerogative, the communication of it to any officers of His Majesty's government, however high their station, is not lightly to be supposed, and only in cases where the connection of it with the nature of the office is natural and evident, and where it has the sanction of general usage. Powers of a similar nature are certainly vested in some superior officers without any express authority. Thus commanders in chief can agree to truces, and suspensions of hostilities, may grant passports, and establish cartels; but these are all powers *intimately belonging to their offices*, and necessary to the due performance of them How far the power of granting these licences may be presumed to have been vested in an ambassador must be deduced from the usual powers, and the nature of the office itself. It is necessary, or even useful, to the execution of the proper functions of an ambassador; it may be

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presumed to have been conferred upon him by the sovereign; but if, on the contrary, it is found to be inconsistent with his duties, and obligations, it may safely be concluded, that no such power can have been intended to be conferred.

An authority to grant such licences does not at first sight, appear to have any immediate reference to the diplomatic character. An ambassador is a minister sent to maintain the relations of peace and amity between two countries. How it can be any part of the functions of such a person to provide for the support of the troops of his own country, then become hostile, is not very easy to conceive. But an ambassador has not only certain functions to perform on behalf of his own country, but he has duties to observe towards the country to which he is sent. As he is privileged and protected, in the most sacred manner, so he is bound by the law of nations to abstain from all practices which are in any manner injurious to the country of his residence.

As he ought even to conform himself to the usages and laws of that country, so he is bound not to be concerned in, or to encourage any proceedings in derogation of them. It is his duty, therefore, not to employ, or to support, the subjects of the country in any illegal acts, contrary to their general duties, or to the regulations of the municipal laws. But *this licence* gives encouragement, and employment to *American* citizens, to break the non intercourse laws, and to violate their allegiance by trading with an enemy.

Again, it does not accord with the friendly and peaceable nature of an ambassador to engage in any transactions of an hostile character, in favour of his own country, against the state where he resides. Direct acts of war would occasion the for-

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feiture of his privileges and protection. Any other proceedings, which, though not directly hostile, yet are of *an hostile nature and tendency*, are certainly not less injurious, and as little consistent with the pacific character of a public minister, and the spirit of his duties, as those which are accompanied with force, and direct aggression. In case of the breaking out of a war between the two countries, such is the providing of arms, or of provisions for the support of the armies of his sovereign, now become the enemies of the country, where he resides; and, more especially if those armies are in the neighbourhood, and, from their situation, designed, or at least, well adapted, to act against the country. Under this description are comprehended the present licences, which are professedly formed upon the recent state of hostilities between the *United States*, and *Great Britain*, which is stated in the preamble; and its object is the supply of certain articles, which were necessary for the support of His Majesty's troops at *Barbadoes*, and the *Leeward Islands*, some of the nearest places, where *British* forces were stationed,

I am far from imputing any impropriety of conduct to the respectable public ministers, from whom this document proceeded. Such papers are frequently granted inconsiderately, at the pressing solicitation of parties; and merely upon the footing of *valeant quá valeant*, without any warranty from the grantor, and in this instance, most certainly with the best intention of benefiting His Majesty's service. But, undoubtedly to issue a licence of this nature, for the supply of *British* forces, hostile to the *United States*, and in their immediate vicinage and to engage *American* citizens in an employment, prohibited by their laws, and contrary to their alle-

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giance, does not appear to me to be a proceeding so much connected with the known duties of a diplomatic character; and so consistent with its obligation as to support a presumption that it has been authorized by any powers conferred by His Majesty.

It has been stated and argued, that by the declaration of war the office of the *British* ambassador entirely ceased, and was determined, and that he was therefore reduced to the mere state of a private *British* subject only continuing in the *United States* by sufferance, and divested of all diplomatic rights and powers. Upon this head in practice under the law of nations there is a well known distinction observed. The *Functions* of an ambassador may be at an end, but his general *right* to protection, and his corresponding *duties* to the country where he resides, continue to his departure, and until he has returned to his own Sovereign. Though Mr. *Foster* therefore had ceased to be the appointed instrument of diplomatic communication between the countries, his person was still sacred and his obligations to observe the respect due to the nation of the *United States* still continued with unabated force. If he could be considered as a private subject, he would have had no power to grant licences; if he was still bound to preserve the restrictions imposed upon the character of an ambassador, such licences were not conformable to those known obligations.

Unless the parties could have undertaken to bring evidence of a direct authority from His Majesty, either precedent or subsequent, or even of a common usage, to grant them licences; this court can only be guided by such general principles. Under the presumption which arises from them, it conceives it to be its duty to pronounce against the validity of the

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licence, and to condemn this ship and cargo to His Majesty.

It is the business of parties who obtain documents, to satisfy themselves of their efficacy, either from their own knowledge, or from the advice of persons better informed. They take them at their own risk, and no imputation of blame can be thrown upon those, by whom they are granted, in case they should prove insufficient for their protection. Yet as it might be considered as a case of some hardship, if the claimants should have acted *bonâ fide*, under a supposition that the public faith was engaged, by the intervention of so high a person, though an error of that nature cannot give effect to an instrument, which in itself is a nullity, I shall direct their costs to be paid out of the proceeds.

N. B. This vessel and cargo, upon an application from Mr. *Foster*, to Lord *Castlereagh*, were given up by the Lords Commissioners of His Majesty's Treasury, to the owners, upon a report of the King's Advocate General, in which he says, "in obedience to your lordship's directions, I have considered the case of the schooner, *Sally Ann*, and have the honor to report, that the judgment of the Vice-Admiralty Court, has been correct and proper; as His Majesty's ministers abroad do not possess authority (unless such a power is specially given to them) to grant licences, or to afford protection from the ordinary consequences of hostilities; and it cannot fail to be attended with inconveniences, if such power is assumed, otherwise than under particular exigencies, not admitting of previous communications with His Majesty's government."

"But under the circumstances of these cases, I am humbly of opinion, that it will be proper that all

rights which may have accrued to His Majesty, by the seizure of these ships and cargoes, under the embargo, should be released by orders from the Lords Commissioners of His Majesty's Treasury."

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The STOCKHOLM, *Chaplain*, Master.

Dec. 9th, 1812.

THIS vessel sailed from *St. Bartholomews*, after the declaration of war made by the *United States* against *Great Britain* was known there. The proof of its being *Swedish* property was held to be sufficient. The passport from the governors of *St. Bartholomews*, not being the form prescribed verbatim in the treaty of 1661, Article XII. and omitting the most essential parts of it, the ownership of both ship and cargo, and that they belonged only to *Swedish* subjects, the captors were justified in bringing in the vessel for examination, and were held to be entitled to their costs.

A *Swedish* passport not conformable to the treaty of 1661. Article 12, not sufficient.

The MALCOLM, *Jordan*, taken by the BELVIDERA, *Byron*.

Jan. 13th, 1813.

JUDGMENT.—Dr. *Croke*.

THIS vessel is claimed by the captors, under His Majesty's proclamation for distribution, she was taken upon the 24th of *June*, and consequently before the order for general reprisals against the *United States*.

If this were a new case, the elaborate argument of counsel on behalf of the captors would not be

Kings' ships not intitled to captures made before the order for general reprisals, *Oct.* 13th, 1812, under the proclamation for distribution.

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without their due weight upon the mind of the Court. Though the construction attempted to be put upon the order for distribution may be plausible, in supposing that the words "it is our will and pleasure that all prizes taken be given to the takers," and afterwards "all prizes which *are*, or *shall be*, taken," comprehends all vessels which had been brought into port before the order issued, however disposed the Court may be to favour an highly deserving description of persons, it is an interpretation which cannot be admitted.

These expressions must be understood with a reference to the former part of the order, and the whole must be taken together. The preamble states it to be the Prince Regent's object to "give due encouragement to His Majesty's faithful subjects who *shall* lawfully seize the same." These words are in the future tense, and therefore can only relate to such captures as should be made after the order in council for distribution issued, the only authority under which the captors can claim, and which was upon the same day with the order for reprizal the 13th of *October*. The Proclamation by which the order for distribution was made known to His Majesty's subjects did not issue till afterwards, and though if the words "all prizes taken, or are taken" have a past sense, they have a corresponding subject to which they are applicable, namely, such captures as had been made subsequent to the order for distribution on the 13th of *October*, but before the Proclamation. They are given likewise to all persons who shall lawfully seize the same. Now no person could lawfully take vessels as prize but those who were authorized by the order for general reprisals upon the same day. The vessels which had been previously de-

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tained, were merely brought in either under a discretionary power in the commanders, or by the order of the 31st of *July*, and were therefore merely detentions under an embargo, and not lawful seizures *as prize*.

But whatever construction this Proclamation may be capable of, considered in itself, the Court cannot enter into that question. There is an authority from which it is not at liberty to deviate, the construction which has been put upon proclamations of the same nature by the High Court of Admiralty, and the Court of Appeal. The words in this proclamation are *totidem ceteris*, the same with those which have been used in all the proclamations for distribution of prizes in the present wars, against every enemy with whom we have had to contend. In the decision upon those proclamations, they have uniformly, and without question or hesitation, been held to give to the captors the interest in *such prizes only as they had captured since the Orders in Council for general reprizals*.

However great therefore may be the merits of the squadron upon this station, and whatever may be the intention of His Royal Highness towards it, this court can only form its judgement of that intention from the words of the document by which it is signified, interpreted according to former usage and practice. If his Royal Highness's meaning had been different, it is to be presumed that it would have been made known in another form of expressions. It is my duty to decide according to law, that the captors are not entitled to such prizes as they have taken before the 13th of *October*, and it remains with the parties themselves to enforce such claims as they may con-

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ceive themselves have, upon the ground of merit, or equity only, to the fountain of mercy and beneficence, where no doubt they will receive every attention which they deserve.

Jan. 20th, 1813.

The LITTLE JOE, *Fairweather*, Master.

First Case.

The king's proclamation for distribution, does not extend to vessels commissioned by the governor of a province, without warrant from the admiralty.

ON the claim of the Privateer *Liverpool Packet* to this vessel, under the Prince Regent's Proclamation for distribution:

For the Liverpool Packet the Solicitor General.—This is a question of some interest to the Colonial Authorities of this province, as the captors are claiming under a commission which they conceive to have issued from a legal source; but which, if invalid, leaves them in the predicament of non-commissioned captors, not entitled to the distribution of this prize. The commission in question was granted under the seal of this province, and was intended to operate to the full extent of a Letter of Marque and Reprizal. In distant colonies, with which the mother country, in cases of emergency, can have no immediate communication, it is certainly adviseable that a discretionary power should rest with the King's Representative to take such measures for the safety and welfare of His Majesty's subjects, as his own judgment, with that of his appointed council, may direct. A sudden and unexpected event has taken place in the *United States* of *America*, a declaration of war against *England*, with which the *British* government could not have been made acquainted within a period of time during which the colonies might have mate-

rially suffered. The governor of a *British* province in the neighbourhood of those States, officially informed of this hostile declaration, and of depredations being committed under it upon the property of its inhabitants, has thought fit to sanction an offensive retaliatory measure, by granting a commission of reprizal. It is true such commission was not granted under any authority from the Lords Commissioners of the Admiralty, nor in the mode by which Letters of Marque and Reprizals are usually issued in the mother country: but the want of that formality, existing *ex necessitate rei*, will not render a commission of the sort absolutely void, to the great injury and discomfiture of an innocent party who has been acting upon its assumed validity. The king, from the origin of the *British* colonies, has been in the habit, by his commissions and instructions, of delegating very high and important parts of the royal prerogative to governors of his provinces. Generally speaking, all constitutional acts of the Royal power can now be legally exercised by persons in those elevated situations, unless they are restricted by the particular directions of His Majesty, or unless they use an exertion of power totally inconsistent with the conduct and designs of the parent state. The governor of a province cannot declare war against a nation at peace with the King, nor, *a fortiore*, declare the province at peace with a nation that is at enmity with the King; and yet the following instruction was thought necessary to prevent the exertion of so extensive a power, under the governor's general authority, and seems virtually to confirm the general right and practice of granting Commissions of Marque and Reprizals in the colonies. It is in these words: "And there having been great irregularities

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in the manner of granting commissions in the plantations to private ships of war, you are to govern yourself whenever there shall be occasion according to the commission and instructions granted in this kingdom, but you are not to grant Commissions of Marque or Reprizal against any prince or state in amity with us, to any person whatsoever without our special command." Now it can be reasonably inferred from the latter part of the instruction, that the governor of this province is authorized by His Majesty to grant Commissions of Reprizals, *provided they are not issued against nations at amity with the King*. The instruction is of an ancient date, and has been acted upon throughout the colonies; and in this province, previous to, and since the *American* revolution, in a way conformable to the construction contended for, on the part of the captors. In the neighbouring province of *New Brunswick*, commissions similar to the one in question, have been of late years granted, and approved of by the administration of the mother country. To refuse them if required, or to pronounce them invalid, when granted, would be a denial of justice on the one hand, and a breach of the constitutional faith on the other. This commission is under the seal of the province, granted by the governor, by and with the advice of his council, and accompanied by the usual bonds, and other formal papers, requisite upon such an occasion. The privateer has been fitted out, at a great expence, under the authority of that commission; and as his Royal Highness the Prince Regent has, by his late proclamation, given all prizes to the *takers*, the owners and crew of the *Liverpool Packet*, are legally and justly entitled to receive distribution of the *Little Joe*, and her cargo.

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The King's Advocate, on the part of the Crown, contended—That whatever might be the legal effect of the commission, it could not extend to the giving a right of distribution of this prize to the captors. As far as it respects the claim of the *Liverpool Packet,* the commission is to all intents and purposes invalid, as there could be no other legal mode of granting letters of marque and reprisals but through the Admiralty. There are many of His Majesty's important prerogatives delegated to the governors of his provinces; but that of making war or peace, of which the granting letters of marque and reprisals is a serious branch, could never have been warranted by the general commission, or the instructions accompanying it. The particular instruction alluded to, affords reasonable conviction, that, although an irregular practice of granting commissions of reprisal may have prevailed in the colonies, His Majesty intended to restrict his governors to the commissions and instructions granted in the parent kingdom. Notwithstanding such instruction, the same irregular practice may have continued in some of the colonies, but it has never established itself in this province; and it has been the invariable practice of late, to grant letters of marque and reprisal, under a warrant issued for that purpose to the governor, from the Lords Commissioners of the Admiralty. The commission, therefore, under which the *Liverpool Packet* has made this capture, being irregular and invalid, that vessel must be considered as a non-commissioned ship, and the claim of the captors of course rejeced.

JUDGMENT—Dr. *Croke.*

This vessel was captured upon the 17th of *October,* by a privateer fitted out at *Liverpool* in this province,

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called the *Liverpool Packet*, and commanded by *John Freeman*. The ship and cargo have both been condemned as *American* property, under the order of the 13th of *October*, and the Court has now to determine who is entitled to the prize.

Two parties appear as claimants—the King, and the owners of the privateer; and on behalf of His Majesty, the question is reserved, whether he is intled to it *jure coronæ*, or as a droit of admiralty.

It is incumbent upon the owners of the privateer to prove their own title, which depends solely upon His Majesty's proclamation for the distribution of prizes. They claim, under a commission which was issued by the governor of this province, upon the 20th of *August* 1812, by which the captain was authorized "to take, apprehend, and seize, all vessels belonging to the *United States*." This commission was granted by the authority of the lieutenant governor alone, without any warrant from the Lords Commissioners of the Admiralty, and indeed before the order in council for general reprisals, which was not issued till the 13th of *October*.

In the arguments on behalf of the privateer, it has been attempted to dazzle the eyes, and to suspend the functions of the Court, by a splendid display of the dignity of the governor of the province. It has been said that he is the representative of His Majesty, and of the Lord High Admiral, and that a solemn instrument, granted in the most formal manner, under his signature, and under the seal of the province, ought not to be disputed, and cannot be invalidated. Little indeed would it become this Court, and far from my own inclination, to treat so great an office with disrespect, but it must be recollected, that no man, in a free country like *Great Britain*, however high, is above the laws, and that the acts even of His

Majesty himself are liable to be questioned, and examined in courts of justice, much more of any officer, appointed by him, however dignified his station. If this is true as a general principle, still stronger will it hold good, where, as in the present case, those acts are brought forward by private individuals, in support of claims set up *in opposition to, and in derogation of His Majesty's own rights.* Besides, the present question does not affect the general validity of the commission itself, as an authority to make captures, but merely whether it will entitle the privateer to the prize under the proclamation.

The words of the proclamation are these: After stating as a preamble, that the Prince Regent had ordered general reprisals, " so that as well His Majesty's ships, as also all other ships or vessels that shall be commissioned by letters of marque or general reprisals, or otherwise by the commissioners for executing the office of Lord High Admiral of *Great Britain,* shall and may lawfully seize all ships belonging to the *United States;*" it proceeds to state that it was His Royal Highnesses intentions, that " the neat produce of all prizes taken, be given to the takers; that is to say, that all prizes taken by ships and vessels having commissions of letters of marque and reprisals may be sold and disposed of by the merchants, owners, fitters, and others to whom such letters of marque and reprisals are granted."

The order for distribution recites and refers to the previous order for general reprisals. When it gives the right in prizes to certain commissioned vessels, it must be understood to mean only such vessels as are before described, namely, such as are commissioned by the Lords of the Admiralty. It must relate to such vessels as by the previous order

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are alone authorised to make captures, that is, to vessels so commissioned.

The form of the present proclamation is the same which has been adopted in former wars, in the respective proclamation, and prize acts. The decisions in cases which arose upon those documents are conformable to this interpretation. In the *Rebecca, Thompson,** it was held, that "all title to sea prize must be derived from commissions under the Admiralty, which is the great fountain of maritime authority."

In the *El Conde de Galbez, Artaza,* of which I have a manuscript note, the lords declared, that "under the prize acts, no other vessels are entitled to share but those which are authorized *under the Lord High Admiral.*"

I am therefore of opinion that the *Liverpool Packet* not being commissioned by the authority of the Lords of the Admiralty against the United States of *America,* is not comprehended within the proclamation by which His Majesty's bounty has been extended to captors, and I therefore reject the allegation given on behalf of the master and owners of the privateer, and condemn this ship and cargo to His Majesty, reserving the question, in what capacity.

* *Rob. I. 235.*

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SENTENCE—Dr. *Croke*.

THIS vessel with a cargo of brandy, wine, silks, and other goods, the produce and manufacture of *France*, sailed upon the 7th day of *June* 1812, from the port of *Rochelle*, on a voyage to *New York*. Both ship and cargo were *American* property, and they were seized upon the 8th day of *July* 1812, by His Majesty's ship of war the *Guerriere*, commanded by Captain *Dacres*, under the order in council of the 26th *April* 1809.

The order of the 23d of *June*, void by the *Americans* not complying with the conditions, and the subsequent order for general reprisals and condemnation.

It is there ordered, "that all ports and places under the government of *France* shall be subject to the same restrictions, in point of trade and navigation, as if the same were actually blockaded by His Majesty's naval forces in the most strict and rigorous manner, and that every vessel trading from and to the said countries, together with all merchandize on board, shall be condemned as prize to the captors."

An absolute right to this prize after condemnation is hereby vested in the captors, unless the order itself was repealed, or its effects suspended at the time of capture, or at the present time, by the subsequent order of the 23d of *June* 1812. The clause in that order by which it was declared "that the former order be revoked from the first day of *August*," is inapplicable to the present seizure, which was made upon the 8th of *July* preceding, and it can only be affected by the two following clauses, which relate to the intermediate time between the 20th of *May* and the 1st of *August*.

It is unnnecessary to consider how far a right to

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prize, thus clearly given, could have been divested by an order in council made subsequent to the capture; yet it may be observed, that even in that case, the crown, till condemnation, might have suspended the adjudication, and might have directed the property to have been released at any time before adjudication; His Majesty is both *dominus litis* and *dominus rei litigatæ*.* But this order in council was issued previous to the capture, and therefore was then in full operation.

This repealing and suspending order of the 23d *June*, was not absolute, but it was conditional; and contained in it a clause of defeazance. If the conditions, therefore, have not been performed, the order is void; and, by the general rule, that if a law that repeals another is itself repealed, the first law is thereby revived, the order of the 26th *April* is again in force, and all rights arising upon captures made under it will become valid.

I shall consider first the clause of general revocation, and afterwards the particular clause which relates to the period before mentioned.

It says, " whereas by certain acts of the Government of the *United States*, all *British* armed vessels are excluded from the harbours and waters of the *United States*, the armed vessels of *France* being permitted to enter therein, and the commerce between *Great Britain* and the *United States* is interdicted, the commercial intercourse between *France* and the *United States* having been restored, His Royal Highness is pleased to declare, that if the Government of the *United States* shall not, as soon as may be after this order shall have been duly notified by His Majesty's Ministers in *America* to the said Government,

* *Elzebè, Maas. Rob.* V. 173.

revoke, or cause to be revoked, the said acts, this present order shall in that case, after due notice signified by His Majesty's Ministers in *America* to the said Government, be thenceforth null and of no effect."

The nullity of this order depends upon three things. 1st, A notification by His Majesty's minister in *America*: 2nd, The non-revocation of the acts; and 3dly, Due notice.—With respect to the *first*, It is proved by the order for reprisals of the 13th *October*, which states, that such notification had been made. As to the *second*, the fact is notorious, that so far from having, as soon as might be, revoked the said acts, that they are since extended still further by the declaration of war, and that the *American* Government has continued, and still continues, to seize and condemn all *British* vessels, not only in their own ports, but wherever they may be found. And it is stated in the order for reprisals, that "they have not thought fit to recall the declaration of war, but have proceeded to condemn, and persist in condemning the ships and property of His Majesty's subjects, have refused to ratify a suspension of arms, and have directed hostilities to be recommenced." The fact therefore of the non-revocation of the acts, within a reasonable time, is fully proved from the highest authority.

It is the *third* requisite that due notice shall be signified by His Majesty's minister in *America* to the said Government. It is impossible that this condition should be literally complied with, because after the declaration of war, His Majesty has had no minister in *America*, and the impossibility arose from the act of the *American* Government itself. But a *public* notice has been given by the Prince Regent himself in a most authentic and solemn act of the state, which is at least equivalent to a notification through an am-

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bassador, namely, the Orders for General Reprisals, and for the condemnation of all *American* property to the captors.

It is evident therefore, the *British* Government having performed every thing which was required on its part, and the *American* Government not having complied with the conditions of the order, that it has become thenceforth null, and of no effect, according to the provisions expressly contained in it.

There is a particular clause in the order which relates to captures made subsequent to the 20th of *May* and prior to the 1st of *August*. The words are, that " all *American* vessels and their cargoes being *American* property that shall have been captured for a breach of the orders in council alone (that is, of the 7th of *January*, 1807, and the 26th of *April*, 1809) shall not be *proceeded against to condemnation*, till further *orders, but shall*, in the *event of this order not becoming* null and of no *effect, in the case aforesaid, be forthwith liberated* and restored."

Here condemnation is suspended, either till further orders, or till the order of the 23d of *June*, is rendered valid by the performance of the conditions.

With respect to the latter direction it falls to the ground, because, as before proved, the order is null, and for another reason, that the *Americans* are now become enemies, and the property cannot be liberated and restored to them. The object therefore of this clause no longer exists, since the performance of it is a legal impossibility, and as the purpose for which the suspension of the adjudication was directed is thus done away with, any farther suspension would be nugatory. It was however directed by the former part of the clause, that " such vessels should not be proceeded against till further orders." Now by the order for reprisals, and the warrant to this Court and

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from the Lords Commissioners of the Admiralty, a general order is issued, to take cognizance of, and judicially to proceed upon *all and all manner of captures* of all ships and goods, and to *condemn all such vessels and cargoes as shall belong to the United States.* This order being general must comprehend all *American* property whatever, except what is there expressly stated, and under whatever title, or upon whatever ground it may have been seized, and amongst the rest, all property captured under the former order in council of the 26th of *April.* I am of opinion therefore, that the order of the 13th of *October* to condemn *all American* property is such a further order as is intended, and does authorise this Court to proceed to the condemnation of this vessel and cargo.

It has however been argued on behalf of the Crown, that if this property is condemned under the order for reprisals, it is not condemned upon the order of the 26th of *April,* but, as having been taken before hostilities commenced, would belong to the Crown, not to the captors. I cannot accede to that representation. The order for reprisals does indeed authorise the Court to proceed to condemnation, but it does not destroy all distinction between captures as to the grounds upon which they were made. If the captors have acquired a right to the prize from other quarters, it cannot be affected by a general order to condemn *American* property.

By the order of the 26th of *April,* the captors acquired a right subject only to a sentence of condemnation. The effect of that order was suspended by the order of the 23d of *June.* The order of the 23d of *June* has become null and void, both by the general clause of defeasance, and in the particular directions relating to such captures. The suspending order becoming void, the original order of the 26th

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of *April* revives again in full force, and all captures comprehended under it, are to be condemnedas prize to the captors.

I condemn this vessel and cargo to the *Guerriere*. *See Appendix*, A. B. and F.

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The LITTLE JOE, *Fairweather*, Master.

(Second Case.)

THE claim of the capturing privateer having been rejected in the former case of this vessel, several questions arose in the case of the same ship, the nature and grounds of which are so fully considered in the able judgment which follows, that any elaborate detail of the arguments would be unnecessary. Upon the points reserved, whether the prize should be condemned to the King *jure coronæ*, or as a droit of admiralty, and who were the proper receivers,

For the Crown, the King's Advocate contended; that although the commission could not be effectual as a regular letter of marque entitling the captor to the prize, it was an instrument of high authority, under which the privateer had been acting, not altogether as a lawless captor, but as a vessel commissioned by the representative of His Majesty for the good of the state. Whatever she captured in this capacity should therefore be adjudged *a droit of the Crown* and not of *the Admiralty*, as a prize taken not without authority, but with the permission and on behalf of His Majesty under a commission, that may be said to have issued in furtherance of the Prince Regent's order of detention.

For the Admiralty, the Solicitor general, contended,

that the claim of the *Liverpool Packet* having been rejected upon the ground of the commission, under which she acted, being illegal, it cannot be seriously argued that the same commission is valid for any other purpose. The capturing ship being a non-commissioned vessel, the prize therefore becomes a droit of admiralty to be delivered to the agents of the receiver-general of droits in virtue of the power lately transmitted to them.

For his Excellency the Lieutenant-governor--Uniacke contended, that if the property in question be condemned as a droit of admiralty, the lieutenant-governor, *virtute officii*, under the several commissions of governor and vice-admiral was entitled to receive it, on behalf of His Majesty.

SENTENCE—Dr. *Croke*,—

This vessel and cargo have been condemned as American property, and the claim of the master and the owners of the *Liverpool Packet* has been rejected. It now remains for the Court to decide to whom they of right belong.

Three allegations have been given in, one on the behalf of His Majesty, another for Sir *John Coape Sherbrooke*, lieutenant-governor of this province, and a third by the agents to the receiver-general of droits.

Upon these allegations two distinct questions arise.

The first is, whether His Majesty is entitled to this prize in right of his Crown and royal prerogative, or as a droit and perquisite of admiralty.

If this prize should be decreed to be a droit of admiralty, then arises the other question, who is entitled to receive and to have the custody of it, on behalf of His Majesty.

In both cases the property would ultimately centre in the King, but it is important to determine *in which*

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capacity; because his rights *jure coronæ* and the droits of admiralty are perfectly distinct, they rest upon different foundations, and travel through different roads. The King, who is originally the owner of all property taken in war, has granted certain portions of it to the lord high admiral, and which he now reserves again to himself upon appointing commissioners to execute the office. With respect to those perquisites, His Majesty now stands precisely in the place to the Lord High Admiral. The King's title upon these different grounds is kept as separate as if the rights were vested in different persons. In the High Court of Admiralty, and in the courts of appeal, upon every occasion where they appear, they are set up in opposition to each other, and are contended for by the respective officers of the Crown; and they are always most attentively discriminated in the decisions of those tribunals. Whatever therefore may accidentally be the consequence to other parties, it is incumbent upon this Court to decide the question, according to law. To do otherwise would be a breach of its duty, and the violation of a solemn oath; and an error, in this respect, would be as much an object of appeal as any other grievance.

The droits or rights of the Lord High Admiral were granted by his patent, and established by prescription, but they were accurately defined by the orders in council in the year 1666. The present ship and cargo are claimed under the second article of those orders; "That all enemies' ships and goods casually met at sea, and seized by any vessel not commissionated, do belong to the Lord High Admiral." Three things are here required, that the ship and goods shall belong to the enemy, that they shall be casually met at sea, and they shall be seized by a vessel not commissionated. If these three facts are

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proved by evidence, this ship and cargo must be condemned to His Majesty as droits of admiralty.

War was declared upon the 13th of *October*, and this capture was made upon the 17th of that month. Under whatever title therefore this seizure was made, the ship and cargo were at the time of seizure enemy's property. It was taken not in port but upon the high seas.

The two first requisites are therefore clearly proved, and the only question which can be raised respects the other part of the article, that the seizure must be made by a non-commissioned vessel.

This case, in another point of view, has already undergone an examination, and has been decided upon by the Court, so far as respects the title of the captor to the prize. But that decision rested upon different grounds and by no means precludes the present question. The subject of enquiry there was, whether this was such a vessel as is included within the words of His Majesty's proclamation for distribution; the present question is, whether it is so commissioned as to oust the Lord High Admiral of his droits.

If this vessel was entirely without a commission, if she had no commission against the *United States*, or her commission was not granted by a competent authority, she is equally a non-commissioned vessel.

This vessel had a letter of marque against *France*, but it is a decided point, that notwithstanding such commission, without a letter of marque against the *United States*, she was, as to *American* captures, a non-commissioned vessel.

It is admitted that no warrant had been transmitted from the Lords of the Admiralty, by the authority of His Majesty's commission under the great seal, to issue letters of marque against the *United States*; though such warrant has since been sent.

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But it has been alledged on behalf of His Majesty, that this vessel was commissioned by the Prince Regent's order in council of the 31st *July*, 1812, or by an instrument under the seal of this province, which has been produced, and bears date the 20th *August*, 1812, either under the authority of the Prince Regent's order before mentioned, or of the general powers vested in the lieutenant governor of the province by his commission as lieutenant governor, and commander in chief, and vice-admiral, and His Majesty's instructions which accompany them.

The question therefore resolves itself into four points.

1st. Whether the vessel became a commissioned ship by *the order in council alone.*

2nd. Whether she was commissioned by the *instrument granted,* upon the supposition that it *was authorised by the order in council.*

3rd. Whether *by that instrument itself,* independent of the order in council, as a mere embargo authority.

4th. *As a letter of marque and reprisals.*

1. In the first point of view. What is a commissioned ship? It is a vessel authorised by an express commission emanating from a competent authority, directed to its commander *to exercise hostilities* against a particular country, or confining it to private ships, as it is described in the Prince Regent's order for distribution; such a vessel as has a commission of letters of marque and reprisal. But the order is not designed for the exercise of hostilities, it is only to detain and bring into port. It is of the nature of a provisional embargo, and was so considered by the Prince, in the subsequent order of the 13th *October.* An authority for any other purpose than to take as prize, is foreign to the question, it must be a commis-

sion to take *jure belli*. Neither could a vessel be said by this order to be commissioned. It was a general order, and no particular commission was in fact issued under it, or directed to be issued.

2. If the commission from the governor was founded merely upon this order, it could have no further authority, and could be subject to no other construction than the order itself, and therefore could have no further effect in commissioning the vessel.

3. It was argued that this instrument was not a letter of marque, or warlike commission, but a mere authoritity to make a peaceable seizure, something in the nature of an embargo, and which was a measure which every governor of a province, as of common right, had full power to have recourse to whenever occasion required. But an embargo is of a very different nature. It is a temporary detention of vessels *within the ports of a country*, and consequently within the operation of the municipal laws and power of the country. To seize the vessel and goods of the subjects of another country, *upon the high seas*, whatever may be the ultimate object of it, is *primâ facie* an hostile act, and though merely provisional, can flow only from the same powers which can declare war, and order general reprisals.

4 This instrument in its form is a letter of marque and reprisal. The operative part of it is couched in the same words. "I do hereby authorise and direct you *John Freeman*, master of the ship called the *Liverpool Packet*, to apprehend, seize, and take, any ship, vessel or goods belonging to the *United States*, or the subjects thereof, or inhabiting within the territories thereof." No distinction can be made between this instrument and a letter of marque as to its powers and the authority necessary to issue it. A commission to apprehend, seize and take, is an autho-

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rity to commit reprisals, although the ultimate disposition of the property may depend upon future contingencies.

The question then becomes reduced to this, that the only ground upon which this can be maintained to be a commissioned vessel, must be founded upon the powers granted by His Majesty to the governor of this province, to issue letters of marque and reprisals by the commissions, and instructions set forth in the allegation.

I should be extremely unwilling to enter into any discussion respecting the powers and authorities of his excellency the Lieutenant-Governor; but they have been brought into question by the parties and their counsel, who may be considered, in some measure, as at issue upon them; and their examination is necessary to the decision of the present case. With the greatest reverence therefore for the high station itself, and the sincerest personal respect for the worthy and eminent person who occupies it, I must follow where my duty leads; with firm but cautious steps; with the reserve and decorum which becomes such subjects, but with the freedom of truth, the strictest adherense to sound legal principles, and the accuracy required in a judicial enquiry.

To consider the general nature of these commissions:—

It is the prerogative of the Sovereign only to determine what part of the public or private force of the state shall be employed in the operations of war. No subject can undertake any offensive expedition against the enemy, either by land or sea, without a particular commission, measures of self-defence not being comprehended under that description. Sea commissions are of two kinds, those which are given to vessels which are the property of the Sovereign,

and therefore are called King's ships, and those which are granted to persons who equip vessels at their own expense, and are reimbursed by a share, or the whole of their plunder, as may be conceded to them by his His Majesty, from whose free grant alone they can be entitled to it. The latter, as to their *constitution*, are as much public vessels as the former, and their commissions can be derived only directly or indirectly from His Majesty.

The royal prerogative is usually exercised not promiscuously through the medium of any of His Majesty's ministers or officers, but through the known, established, and appointed channels. Naval military commissions, whether to King's ships, or private vessels, are issued through those officers, to whom it seems properly to appertain, that is, the Lord High Admiral, or the Lords Commissioners, who are invested with his authority. That such was the exclusive practice from the earliest times might be proved by a reference to many ancient documents upon record.

This branch of the royal prerogative, of commissioning private vessels, or as it is more usually called, of issuing letters of marque and reprisals, is carried into effect in the most solemn manner. Upon an order made in council by the Sovereign in person, a commission passes under the great seal, to the Commissioners of the Admiralty, authorising them, or any person by them appointed to issue letters of marque. In consequence they grant, in *England*, a special warrant for each applicant to the Judge of the High Court of Admiralty to issue the letter of marque, and, in the colonies, they transmit a general warrant to the governor, to authorise the Judge of the Court of Vice-Admiralty to issue these instruments, in the same

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manner as in *England*, and under the securities, and with the regulations prescribed.

The reason why so many formalities and precautions should be observed is obvious. There is no mode of warfare more liable to abuse, and to degenerate into a species of piracy, none which has given more occasion of complaint to neutral nations than the employment of privateers. It has therefore become a part of the law of nations, and has often been introduced as an article of convention between many states, particularly in several treaties to which *Great Britain* is a party, that adequate securities should be given, and every precaution adoped to prevent a misapplication of the privilege.

As this was the ancient, so it continues to be the modern practice, and at the commencement of a new war, warrants are sent from the Admiralty board to the governors of provinces; as has been done since the breaking out of the present hostilities. The regular transmission of this authority, though not amounting to a direct proof, because there is a *possibility* of a concurrent authority elsewhere, yet certainly carries with it a strong presumption, that without such warrant the governor was not possessed of such authority. Because, upon the contrary supposition, the warrant would be useless and nugatory, and it is not to be supposed that His Majesty's government would exert itself in acts of supererogation.

This presumption is further strengthened by the order of the thirteenth of *October*. The words of this order as to the hostilities to be exercised against the *United States* are as extensive as possible, for *general* reprisals are granted against them; yet when it proceeds to designate by what vessel these general hostilities are to be effected, it specifies only His Majesty's ships, and such as shall be commissioned by

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letters of marque, or otherwise, by His Majesty's commissioners for executing the office of Lord High Admiral. No other vessels, however commissioned, are authorised to commit hostilities upon the enemy. And these words are used, not as seeming to introduce any new limitation, but rather to refer to a known and usual limitation of the right of making captures in war, to a supposed established principle, that it was necessarily confined to those two species of vessels only. If this was considered as *a previously existing limitation* it would be conclusive, that no authority to commission vessels subsisted any where but in the Admiralty. If it was introduced as *a new restriction*, it may, I think, reasonably be doubted, whether it would not annul any power of that kind which had been previously granted; for by this order the Prince Regent not only makes the declaration of war, but he specifies the only vessels by which it shall be carried on. It is from this order alone that both are deduced; without this order, *no* vessel could exercise hostilities, with the order, *none* can exercise them but those two kinds of vessels. Independent of the order *no* vessels have authority; by virtue of the order, only those two classes of vessels are authorised.

But an examination of the governor's commissions themselves, will, I think, reduce these presumptions to a certainty, and shew clearly that no such power is vested.*

No doubt can be entertained but that His Majesty may, by commission under seal, depute to any of his subjects the rights and the exercise of almost any branch of his royal prerogative. But questions may arise upon any of His Majesty's commissions, as to what power he has granted. And there is one established rule of law to direct the enquiry, that no part

* See Note I. p. 422—424 *infra*.

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of the royal prerogative, especially of the higher branches of it, can be transferred without the most express words to that effect.

The first commission which I shall examine is that of the Vice-Admiral as apparently most connected with the case, and it may be necessary, for illustrating the subject, to enquire a little into the nature and history of the office itself, as derived from that of the Lord High Admiral; since it appears not to have been well understood.

It is clear from those learned antiquarians who have extended their researches into the usages and laws of former times, and particularly Mr. *Selden**, that the office of lord high admiral originally comprised *civil* rather than *military* duties, and that the peculiar object of it was not so much the command over the fleet, *qua hostibus per mare resisteter*, but for guarding the sea, against pirates and other lawless persons, and the protection of commerce, *de ipso mari tuendo*, having the same power at sea as other magistrates had upon land. Their usual style was that of *custodes maris*, and they were said in the old language of parliament to be appointed "for the keeping and sure defending of the seas against all persons, for the entercourse of merchandize safely to come and pass out of the same." They were intrusted with *la gard de la pees de la meer, ou la saufgard de la mere*. For this purpose they had a general jurisdiction in all affairs, civil and criminal, upon the seas, and as incident to jurisdiction, they were intitled to various droits, rights and perquisites. This was the *ordinary* power of the high admiral; the military power, to carry on warfare at sea, was an *extraordinary* power, given to him occasionally by special commission, or other temporary authority. It is not surprising therefore that

* *Selden, Mare Clausum, &c.*

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the commission of this high officer, which has been continued in the same form for many centuries, should specify and relate to those duties and rights, which are derived from his original authority, and are of a civil nature, and so little as to their military or accessary duties; and that the ancient law books should be so full as to the one kind, so deficient and barren as to the other.

For the better performance of these civil and maritime duties, the High Admiral was authorised by his patent, as the Lords Commissioners are at present, to constitute vice-admirals under him. It was the usual practice formerly to appoint many of these officers in *England*, with jurisdiction over particular districts. I apprehend that there was a vice-admiral for each of the maritime counties, who exercised much of the same judicial powers as are now delegated to the Courts of Vice-Admiralty in instance causes, either by himself or his deputy. They were besides the collectors of the droits and perquisites of the admiral, and his ministeral officers for the seizure of prizes, and other disputed property, which came within his jurisdiction. This office in regard to maritime affairs seems to have resembled that of sheriff or a justice of peace. There is a letter extant from a very eminent person, Sir *Leoline Jenkins*, who was judge of the admiralty, secretary of state, and ambassador at the treaties of *Nimeguen* and *Cologne* in the reign of *Charles* the Second, which shews pretty much the nature of this office, when it was in *viridi observantia*.

It is addressed to the honourable Mr. *B.* a vice-admiral. It seems that a salvage case of a vessel which had met with some casualty near the coast, had been brought before him. His deputy had decreed very unreasonable salvage, and had directed

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the vessel to be sold for the payment of it—the opinion of Sir *Leoline* was taken, and he determined that the contract of sale was absolutely void, on account of the unreasonableness and extortion. He expresses himself with great warmth, as to the case itself, which is immaterial to the present question, but in answer to some observations of the Vice-Admiral he proceeds to say, "as for your objections, sir, that you have undertaken a very ill province, if your commission of vice-admiral entitles the merchants to your service at a hackney rate; I have this to say, that a justice of peace on land hath but a very meagre employment in the several parts of his duty, especially those for preserving the public peace and men's particular properties, against riots and routs, and yet they (men of honour and probity I mean) never complain of it; a vice-admiral is plainly such another officer in relation to the sea, and under the same obligations with those at land; that is, represents the King's part in preserving his subjects and allies from violences, most especially in their distresses. Yet in some things every vice-admiral will confess that he hath a better prospect to a lucky hit, than a justice of peace at land hath; besides, vice-admirals in *England* in ancient times being persons of great figure in their country, used to lay out themselves and their pains, for saving the King's subjects, their allies, and their goods respectively, as men who were appointed to relieve the miseries of strangers, and that regarded the peace, the honour, and the justice of the nation*."

Upon the establishment of colonial governments it was thought proper to invest the governors with the same civil and maritime powers, and therefore it became usual for the Lord High Admiral, or the

* *Jenkins*, Vol. II. p. 718.

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Lords Commissioners, to grant a commission of vice-admiral to them. The office thus conferred upon the governor was precisely the same with that of the vice-admirals in *England*, and was confined to the civil and maritime jurisdiction, which was the original branch of the admiral's authority. This is evident from the commission now produced. It gives the vice-admiral cognizance in all civil and maritime causes, offences, and crimes; to enquire into the usages of the sea, wreck, and other forfeitures, goods waved, flotson, jetson, lagon, and other casualties and perquisites; to take recognizances, to fine and punish offenders, to preserve the public streams and waters; to reform nets, and unlawful engines, with other similar duties, but not a single clause which confers any military naval power whatever.

In *England* the office has fallen into disuse, no vice-admirals have been for many years generally appointed, and their functions have been performed by the High Court of Admiralty and its officers. In the colonies, patents of vice-admiral are continued to be granted to the governors: but most of their duties are in practice superseded by the general establishment of Courts of Vice-Admiralty; many of the rights to which they relate have become obsolete, or have been abolished, and other modes, more convenient for use, and better adapted to the modern state of the world, have been adopted for the enforcement of *a maritime police*.

So much for the nature of the office in general. With respect to the power of commissioning ships, and issuing letters of marque, it must be either inherent in the office itself, or conveyed to it by the express words of the patent. But the Lord High Admiral, or at least the Lords Commissioners, have no inherent power of this nature. By their patent they are only

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authorised to build, repair, fit, furnish, arm, victual, and set forth, (by which I understand to commission) *such ships and fleets as they shall receive directions for, either from His Majesty or his privy council.* and with respect to privateers in particular, not to mention the usage that no commissions or letters of marque are ever in fact granted, till the Lords are authorised by a commission under the great seal; it is expressly laid down by the high authority lately quoted, Sir *Leoline Jenkins**, *That the Lord Admiral gives this power to private men of war, not* virtute officii, *but by a special commission.* Since the Lord High Admiral himself has no power *virtute officii* to commission ships, neither can the Vice-Admiral, who derives his authority from him. No such power has been given him by special commission from His Majesty, since it is not contained in his patent, or other instruments.

I shall proceed now to consider whether this is a commissioned vessel under his Excellency's commission as lieutenant-governor, and His Majesty's instructions which accompany them.

It may, I think, previously be observed, that a letter of marque being an authority which extends to the whole ocean, and enables the vessel to make captures all over the world, does not seem very naturally to be comprehended in the powers of a governor, whose commission is expressly confined to a particular province, and the maritime parts thereof.

Next, that a letter of marque is a *naval* commission and constitutes the vessel to which it is granted a ship of war. It seems improbable therefore that no such power should be given in the naval commission of vice-admiral, and yet should be contained in the civil and military commission.

* *Jenkins*, Vol. II. p. 765.

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That no such standing powers exist in any subject in *Great Britain*, not even in the Lord High Admiral with whose office it is most connected, without a special, occasional and temporary commission under the great seal, and this being a power not necessary for the defence of a province, it is not probable that so high a power should be permanently and perpetually conferred.

In examining the instruments themselves it must be remembered that in law all commissions are *stricti juris*, and cannot be extended beyond their plain and express words*.

The first clause relied upon, gives a power of arming and employing all persons, to march or to embark them, *for the resisting and withstanding of all enemies, pirates, and rebels*, both at sea and land, and such enemies, pirates, rebels, if there shall be occasion, to pursue and prosecute in or out of the limits of the province. This is evidently the power of raising and employing the militia for the defence of the province, either upon the land or the sea.

The next clause refers evidently to the former, which having authorized the execution of martial law *on land*, this proceeds to give the same power *at sea*, in case of any embarkation under the former clause. The preamble states "that forasmuch as divers mutinies and disorders may happen by persons shipped and employed at sea, evidently referring to the former clause, to the end that they may be better governed and ordered, His Majesty grants the power to constitute and appoint captains and other officers, and to grant to such captains commissions to execute the law martial.

No doubt under this commission vessels may be

* See Note I. p. 422—424 *infra*.

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fitted out *for the defence of the province*, and captains and other officers commissioned to command them. It has been so done whenever the state of affairs required it. There are many commissions of this nature remaining in the secretary's office. But a commission *to vessels in the service of government to resist and withstand enemies, pirates, and rebels*, is very different from a commission to private ships to apprehend, seize, and take generally, any ships and goods belonging to the enemy, or in other words, to issue letters of marque and reprisals. The powers specified are for defence against attacks by arms, to resist and pursue hostile forces; letters of marque are for offensive hostilities to seek out all over the world, and to take peaceable property, to plunder the ships and goods of merchants and other persons not in arms, or engaged in hostilities against the country, a mode of warfare, the very legality of which has been denied by many modern writers, and which, to say the best of it, is too often exercised in an unjustifiable manner.

Amongst the extensive military powers given for the defence of the province, the issuing of letters of marque is not to be found, either expressly by name or by words of the same meaning. Letters of marque and reprisal are well known in the laws of *Great Britain*. Unless therefore they are mentioned by their legal appellation or clearly described by expressions tantamount, the commission cannot extend to them. And since they extend far beyond every measure of defence, they seem as little to be comprehended under their spirit and intention, as under their express definition.

His Majesty's *instructions* to the governor refer to the commission and create no new powers. The clauses relating to this subject are evidently not to

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enlarge, but to restrict those powers, and the preamble states, that great irregularities had prevailed in the manner of granting commissions in the plantations." The governor therefore is directed " to govern himself whenever there shall be occasion," that is, when it shall be necessary to exercise the powers vested in him, of commissioning vess for the defence of the province as authorised by the commission; or to issue letters of marque, when so authorised, in the usual mode, then to " govern himself according to the commissions and instructions granted in *Great Britain*." But though self-defence might authorize defensive measures against princes or states in amity with His Majesty in case they attacked the province, so that it should be expedient to commission vessels for *that* purpose, yet he was " not to grant *commissions of marque and reprisal*, against such princes or states in amity with His Majesty, without his special command," evidently making a distinction between commissions to private ships generally, and commissions of marque and reprisal.

Taking the commissions and instructions therefore together, the meaning is obvious and plain, and there is evidently no power given in them to issue letters of marque and reprisals without a special authority.

If any doubts arise upon patents of this nature, the intention is best explained by the practice and usage. Diligent searches have been made, both in the office of the Registrar of the Court of Vice-Admiralty, and of the province, as to what letters of marque have been granted from the commencement of the province to the present time, and the mode of issuing them. It was very possible that many irregularities might have occasionally taken place, in a series of years, under a great variety of governors and officers, as is stated in His Majesty's instructions to have for-

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merly happened, and which being clearly deviations from the established practice, could not be drawn into precedent, but the result of these researches has been, that the commissions and instructions have been understood and *uniformly* executed, according to the principles before stated.

From the earliest times there are many instances of commissions granted to the captains of vessels, in the *actual service of the government*, by the authority of the governor only; but *none* to private ships commissioned, or letters of marque, without a particular authority from His Majesty.

In the war which began in 1756, in which is the first trace of vessels of this description, many letters of marque issued by the authority of the governor. But it is stated in the preamble to them, that "His Majesty King *George* the Second had been pleased by his declaration of the 17th *May*, 1756, to declare war against *France, and had commanded* him (the governor) to do every thing in his power to encourage his subjects to fit out privateers, and so forth." I believe there was no Court of Vice-Admiralty established in the province at that time, the letters specify that bonds had been given, and they were accompanied by instructions from His Majesty.

These issued therefore under a special command and authority from the King.

In the next war, which began in 1776, near sixty letters of marque issued, in the most regular way, by the Judge of the Vice-Admiralty Court, authorized by warrants from the lieutenant governor, and it is expressly stated, that they were granted in conformity to the act of parliament, (I suppose the 17th of the present King) and to His Majesty's instruction.

In the last *French* war which succeeded, a com-

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mission under the great seal issued to the Lords of the Admiralty to empower them to grant warrants for letters of marque, but no warrant was sent by them to the governor of this province. In consequence of a letter received from the secretary of state, in the time of Sir *John Wentworth* upwards of fifty *certificates* as they were called, *in lieu of letters of marque*, were issued. They state that they were founded upon a special authority given by His Majesty, that "no authority having arrived to the governor to grant letters of marque, in the mean time he assured the master conformable to His Majesty's pleasure, signified to him by the Right Honourable *Henry Dundas* and the Duke of *Portland*, that His Majesty will consider him and all others concerned, as having a just claim to the King's share of all such vessels and property which may make prizes of being first condemned as lawful prize to His Majesty, and that the governor had received His Majesty's commands to encourage all His Majesty's subjects by every means in their power to distress and annoy the trade of the enemy."

It is unnecessary to consider whether these certificates were real commissions, or merely a release of His Majesty's share of such prizes as they should capture, and which in law belonged to His Majesty, as being taken by non-commissioned vessels, which is certainly all that their form implies. But it is more material to the present question, that before this letter was transmitted from the secretary of state, no such instruments were issued, and therefore that they were granted, whatever was their nature or effect, not under the authority of the governor's commissions or standing instructions, but under a special authority given by His Majesty. They furnish therefore no precedent whatever that the governor had

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issued letters of marque upon the authority of his two commissions and standing instructions, but they furnish a proof, that without such special authority, the governor did not think himself authorized to issue them.

The practice and usage, therefore, has been conformable to the construction which I have put upon these commissions and instructions, and it is clear that to issue letters of marque, without warrant from the Admiralty, or a special authority from His Majesty, is without precedent.

The date of this commission is a very material ingredient in affecting its validity; it was issued on the 20th of *August*, before the order for the reprisals on 13th of *October*. Whatever may be the power vested in the governor as to granting letters of marque and reprisal, they must be limited to the time of war, both from their very nature and from the words of the commission and instructions.

To declare war is the exclusive prerogative of His Majesty; orders for reprisals and the issuing of letters of marque have been substituted in modern practice for the more solemn denunciation of war. Whatever may have been the conduct and provocations of another nation, till His Majesty thinks proper to declare war, the state of peace still subsists. Lord Chief Justice *Hale* is decisive: *That is a time of hostility, when war is proclaimed by the King against a foreign Prince or State; this, and this only renders them enemies.** Till the order then for reprisals upon the 13th of *October*, though the *United States* had declared war, the relation of amity was not broken with respect to *British* subjects; this is implied in the Prince Regent's order, in which it is

* *Hargrave's* Law Tracts, p. 245. Pleas of the Crown, &c.

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declared, that though the *United States* had declared war, and had issued letters of marque, he had foreborn previously to the 13th of *October*, to direct letters of marque and reprisal to be issued against them. So that this commission was granted not only before the declaration of war, and consequently whilst the relation of peace and amity with the *United States*, as far as related to *British* subjects, by the laws of their own country, still subsisted—but during a period in which the sovereign of the country, with a view to induce the *United States* to revoke their hostile measures had thought proper that no letters of marque and reprisal should be issued against them.

Nor is any authority given by these commissions which intrenches upon the doctrine of the common law; for there is no part of them which have even the appearance of giving such a power, before hostilities declared. In all the clauses which relate to this question, the limitation of the time of war is express. The respective powers are given in the first clause, "for resisting and withstanding enemies, pirates, and rebels." In the next, the expression "during the time of war," is introduced no less than four times, and almost at the end of every sentence, to prevent any possibility of mistake. In the instructions, there is the strongest injunction, "not to grant commissions of marque or reprisals against any prince or state in amity with us, to any person whatever without our special command."

It is true that all persons who are placed in the situation of Commanders in Chief, particularly in remote parts of the empire, from the importance of their charge, and the impossibility of receiving instructions upon every emergency, are necessarily intrusted with large discretionary powers, for the

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protection and benefit of those whom they are appointed to govern. But though it may be difficult, in particular cases, to draw the fine line by which this power is defined, some limits must exist. In extreme cases they would be evident, and it would seem that to authorize private subjects to commit reprisals upon the unarmed inhabitants of a country in amity with *Great Britain*, not being in a measure of defence, may fairly be ranked amongst them.

It is true likewise that in urgent necessities, or for some great and decided advantage to the country, acts are not unfrequently done which are not sanctioned by law, and which are not only justifiable in policy, but may meet the approbation of the Sovereign. But the law notwithstanding remains unaltered, and in full force. Acts of Parliament frequently became necessary in such cases to shield individuals from the penalties incurred, and no such acts can be so far valid as to affect the rights of third parties, which is the only point of view in which these powers becomes the subject of discussion in the present case.

After the extensive view which I have thought it my duty to take of this question, in all its bearings, after the most diligent researches, and the most mature deliberation, according to the best of my imperfect judgment, I am of opinion that this instrument, purporting to be a letter of marque, and having issued before the order for general reprisals, is not so far authorised by any commissions, or instructions, directed by his Majesty to the Lieutenant Governor of this province, which have been produced in evidence, as would constitute the *Liverpool Packet* such a commissioned vessel as to deprive the Lord High Admiral of his droits. And I therefore con-

demn the vessel called the *Little Joe*, and her cargo, as droits and perquisites of His Majesty in his office of Admiralty.

This question being decided, another arises upon it. There are two parties before the Court, who each of them claim a right to have this property delivered to them as receivers on the part of His Majesty. The Lieut. Governor, Sir *John Coape Sherbrooke*, and the other parties are jointly *Samuel Hood George*, *Edward Brabazen Brenton*, and *Brenton Halliburton*, Esquires. The former in pursuance of the provisions contained in the several commissions of Captain General, Governor in Chief, and Vice Admiral, as set forth in the allegation. The latter, as officers and agents duly authorised to recover, seize, collect, and take, the rights and perquisites of Admiralty, by the Receiver General of Droits.*

With respect to the Lieutenant Governor, his claim rests entirely up the commission of Vice Admiral, which is granted, by an express power in their patent, from the Lords Commissioners of the Admiralty. The Receiver General of Droits is likewise appointed by the Commissioners of the Admiralty, according to the power granted to them, and he is directed to appoint agents at all such ports and places as he shall find necessary. The power and authority therefore of the governor and of the receiver, or their agents, is derived from the same source.

I think upon the most diligent perusal of the commission of vice-admiral, that it is far from being clear that the power of receiving droits of admiralty is there given. The word "droits," or rights,

* *See* Note II. p. 424—426, *infra*.

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though well known in the laws and proceedings of the Admiralty, does not there occur, or any general words which might comprehend them. The only part which seems applicable, is where "perquisites" are mentioned. But this term being classed in the same clause of enumeration with amerciaments, issues, fines, mulcts and pecuniary punishments alone, which are all profits of a judicial nature, and seemingly limited to such as happen, or are imposed, assessed, presented, forfeited or adjudged, *before the vice admiral, or his lieutenant or deputy;* it may be doubted whether such droits, as the goods of enemies are there intended, or any other than perquisites of judicial proceedings in the vice admiral's own limits. Yet the power of collecting these droits seems so perfectly conformable to the general nature of the office itself, and it is so expressly mentioned in the patent of the Lords Commissioners, that "all droits be taken, collected, and received by the vice admiral;" and again, in the instructions to the Receiver General, that the right cannot be doubted, and that by usage at least, it properly belongs to them, I mean general usage, for there is no instance of the vice-admiral's having received the droits in this province.

On the other hand, the right of the receiver and his agents is equally clear. The patent to the commissioners directs that the droits shall be received by the vice admiral, and "*other officers of or belonging to the Admiralty,*" and *every of* them respectively. It speaks afterwards of vice-admirals, "or *other collectors, receivers,* or any commissioners authorised by the Court of Admiralty, as you the said commissioners or any three or more of you shall approve of," and it gives them the power of nominating to all offices and places. It has been the immemorial prac-

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tice to appoint receivers, and in his commission the receiver is constituted and appointed "*to be the receiver general of the revenue to arise by all or* any of the rights and perquisites of Admiralty, and to ask, demand, recover and receive all and all manner of rights, seized and taken in war." In the instructions, enemies ships casually met at sea by non commissioned vessels are particularly specified.

The vice admirals are made accountable to the receiver. In the patent of the Lords Commissioners it is directed that "the vice admirals and others shall *account* for the same droits unto or before the commissioners, or such *persons as any three or more of them shall appoint.*" In the 9th article of the instructions to the receiver, it is thus contained, "You are from time to time to require all our vice admirals to give up their accounts of all such droits, duties and perquisites as they have received, and to acquaint us with any abuses, neglects, corruptions, or encroachments whatever, which you shall find or understand to be committed by any vice admiral.

It is clear then, that both vice admirals, and the receiver general, have each an *original and immediate power* and authority to demand and receive droits, from all persons whatever, and that there is no reservation of the rights of the vice admiral in exclusion of that of the receiver, but that the vice admirals are accountable to the receiver.

Both then being invested with the same power, and by the same authority, how is the Court to proceed upon those hostile, and unreconcileable applications?

I shall first proceed upon the supposition that both parties are invested with the full powers, the one

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of a vice admiral, and the other of the receiver general.

Since then both these commissions issue from the same authority, and both on the same terms, namely, during pleasure, the powers given in either commission may undoubtedly be revoked by *express words*, by the same authority which conferred them. It is equally evident that there may be a *tacit* revocation, where it is impossible that both can be executed, or take effect, and therefore that one must give way. This is the case at present, if the droits claimed are paid to one, it is impossible to pay them to the other, which then may it be presumed to have been the intentions of their lordships should yield the right to the other ?

1.

The rule of law in such cases is, that of two powers, both being revocable, and proceeding from the same authority, the former shall be superseded by the *latter*.

Which then has the priority in point of time ? This is not to be ascertained by the date of particular commissions, but from the institution of the offices themselves, or the date of the original first commissions.

The commission to the receiver, which as to its form is evidently of ancient date, speaks of vice admirals as an office previously existing. Under this rule of decision between conflicting rights, and under this view of the two offices, the receivers seem to have the best title.

Another rule is, that a general and doubtful authority should yield to a clear and special one. The power of the vice admiral is obscure and vague, that of the receiver is decisive, and is accompanied with special instructions, extending to every part of his

duty, so that it seems to have been the intention of the Lords of the Admiralty to make him the most efficient officer.

As the vice admiral is accountable to the receiver, the receiver as far as the droits are concerned must be considered as the superior officer. It would be absurd to direct payment to be made to the vice admiral, in preference to the receiver, to whom he is bound immediately to account. When the superior officer comes into the place, or district, of the inferior officer, or appoints an agent there, who fully represents him, the superior officer having an original and immediate power of receiving from all persons, in the first instance, if he chooses to exercise that power, it must supersede that of the inferior officer.

In an another point of view, when it is impossible to comply with both applications equally founded in right, a discretionary power is vested in the Court, to act as is most for His Majesty's benefit. *Cæteris paribus*, therefore, it would prefer a shorter and simpler, before a more complicated and circuitous mode of conveying the property to His Majesty's purse; and a less expensive method, before another which was more chargeable. Here both have a direct power to receive, but as the vice admiral is accountable to the receiver, in the one case the property would go through two channels, and would be charged with a double commission; in the other, through one office only, and subject only to a single remuneration.

If both applicants were fully authorised, the Lieutenant-Governor, as vice-admiral, and the agents, as representatives of the Receiver-General, by these, or some such principles, must the Court endeavour to find its way through the perplexities arising from apparently equal and conflicting rights. But although,

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from the powers given in the respective instruments above stated, it is clear that the agents, as to the right of asking and receiving droits, stand in the place of their principal, yet I think it is not pleaded, or at least is not proved, that the lieutenant-governor of the province is either a vice-admiral, a lieutenant, or deputy to the vice-admiral, or in any way whatever invested with the rights and powers of that officer.

The commission of vice-admiral is directed to Sir *George Prevost*, the governor and commander in chief only, with the power of deputing and surrogating deputies, but without mentioning the lieutenant-governor. The commission of Sir *John Coape Sherbrooke* appoints him only lieutenant-governor of the province of *Nova-Scotia*, and authorises him to exercise and perform all the powers and directions contained in *the commission to the governor-general*, captain-general, and commander in chief, but does not mention his other commission as vice-admiral. Neither has any appointment as deputy from the vice-admiral been produced. Whatever therefore may be the rights and powers of a vice-admiral, or his deputy, it is not established in evidence that they have devolved upon the lieutenant-governor of this province.

Upon both these grounds therefore, and more especially upon the latter, I reject the allegation given on behalf of Sir *John Coape Sherbrooke*, so far as relates to his claim to receive these droits, and pronounce for the allegation given by the agents for the receiver-general of droits.

NOTE I.

Extract from the Commission of the Governor-General.

"AND we do hereby give and grant unto you the said *A. B.* by yourself or by your captains and commanders by you to be

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authorised, full power and authority to levy, arm, muster, command and employ all persons whatsoever residing within our said province of *F.*— and other the territories under your government; and, as occasion shall serve, to march them from one place to another, or to embark them, for the resisting and withstanding of all enemies, pirates and rebels, both at sea and land, and to transport such forces to any of our plantations in *America* if necessity shall require, for the defence of the same against the invasions or attempts of any of our enemies; and such enemies, pirates, and rebels, if there shall be occasion to pursue and prosecute in or out of the limits of our said province and plantations, or any of them; and if it shall so please God them to vanquish, apprehend and take, and being taken, either according to law to put to death, or keep and preserve alive, at your discretion; and to execute martial law in time of invasion, war, or other times, when by law it may be executed; and to do and execute all and every other thing and things, which, to our captain-general and governor in chief, doth or ought of right to belong,

And forasmuch as divers mutinies and disorders may happen by persons shipped and employed at sea during the time of war, and to the end that such as shall be shipped and employed at sea during time of war may be better governed and ordered, we do hereby give and grant unto you the said *A. B.* full power and authority to constitute and appoint captains, lieutenants, masters of ships, and other commmanders and officers, and to grant to such captains, lieutenants, masters of ships, and other commanders and officers, commissions to execute the law martial during the time of war, according to the directions of an act passed in the twenty-second year of the reign of our late Royal Grandfather, intituled, "An act for amending, explaining, and reducing into one act of parliament the laws relating to the government of His Majesty's ships, vessels and forces by sea;" and to use such proceedings, authorities, punishments, corrections and executions, upon any offender or offenders who shall be mutinous, seditious, disorderly, or any way unruly, either at sea or during the time of their abode and residence in any of the ports, harbours or bays of our said province and territories, as the case shall be found to require, according to the martial law, and the said directions, during the time of war as aforesaid."

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Extract from the Governor-General's Instructions.

"And there having been great irregularities in the manner of granting commissions in the plantations to private ships of war, you are to govern yourself whenever there shall be occasion according to the commissions and instructions granted in this kingdom, but you are not to grant commissions of marque or reprisal against any prince or state in amity with us to any person whatsoever without our special command: and you are to oblige the commanders of all ships having private commissions to wear no other colours than such as are described in an Order in Council of the 7th of *January*, 1750, in relation to colours to be worn by all ships of war."

NOTE II.

Extract from the Vice-Admiral's Commission.

"And to ask, require, levy, take, collect, receive, and obtain for the use of us, and to the office of our High-Admiral of *Great Britain* aforesaid for the time being, to keep and preserve the said wreck of the sea, and the goods, debts and chattels of all and singular other the premises, together with all and all manner of fines, mulcts, issues, forfeitures, amerciaments, ransoms and recognizances whatsoever, forfeited or to be forfeited, and pecuniary punishments for trespasses, crimes, injuries, extortions, contempts, and other misdemeanors whatsoever, howsoever imposed or inflicted, or to be imposed or inflicted, for any matter, cause or thing whatsoever in our said province of *F.*— and the territories depending thereon, and maritime parts of the same and thereto adjoined, in any court of our Admiralty, there held or to be held, presented or to be presented, assessed, brought, forfeited, or adjudged; and also all amerciaments, issues, fines, perquisites, mulcts, and pecuniary punishments whatsoever, and forfeitures of all manner of recognizances before you, or your lieutenant, deputy or deputies in our said province of *F*—and the territories depending thereon, and maritime parts of the same and thereto adjacent whatsoever, happening or imposed, or to be imposed, or inflicted, or by any means assessed, presented, forfeited, or adjudged, or howsoever by reason of the premises, due or to be due in that behalf to us, or to our heirs and successors."

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Extract from the Patent to the Commissioners for executing the Office of Lord High-Admiral.

"And whereas all wrecks of the sea, goods, and ships taken from pirates, and divers droits, rights, duties and privileges have been, by express words or otherwise, heretofore granted to our said High-Admiral, and to former admirals, for their own benefit as duties appertaining to the office or place of our High-Admiral aforesaid; now our further will and pleasure is, and we do hereby charge and command, that all casual duties, droits and profits be taken, collected and received in all places where they shall happen, by the Vice-Admirals and other officers of or belonging to the Admiralty, in such sort as they formerly were or ought to have been taken, collected and received by them, and every of them respectively when there was an High-Admiral of *Great Britain*; and the said vice-admirals and others so taking, collecting or receiving the same, shall account for the same, and every part thereof, unto or before you our said Commissioners, or any three or more of you, or unto such other person or persons in such manner and form as you, or any three or more of you, shall to that purpose appoint, but to our only use and behoof, and not otherwise. And whereas we conceive it just and reasonable that those who have or shall truly and faithfully account for what they receive, should have sufficient discharges for the same, our will and pleasure is, and we do therefore by these presents give and grant to you our said Commissioners, or any three or more of you, full power and authority to issue forth discharges, releases, and *quietus ests*, upon such accounts, for all duties, droits and profits whatsosver received, or to be received, by the aforesaid vice-admirals or other collectors, receivers, or any commissioners authorised by the Court of Admiralty."

Extract from the Commission to the Receiver-General of Droits.

"Whereas all wrecks of the sea, goods and ships taken from pirates and enemies, and divers tenths and other droits, rights, duties and privileges, which have been heretofore granted to former Lord High-Admirals for their own use and benefit, as duties appertaining to the office or place of Lord High-Admiral, are by His Majssty's commission to us, appointed to be taken, collected and received, in all places where they shall happen, in such sort

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as they formerly were or ought to have been taken, collected and received, when there was a Lord High-Admiral of *England*, but for His Majesty's only use and behalf; and we have a good account of your experience and integrity, in which we very much confide, we do according to the power granted unto us, constitute and appoint you the said —— —— to be our Receiver-General of the revenues arisen or to arise, by all or any of the rights and perquisites of Admiralty, under what denomination soever the same have arisen, or shall or may arise, in the room of —— ——, deceased; and we do hereby nominate and constitute you to be our Commissioner to ask, demand, recover and receive, to and for His Majesty's use, all and all manner of rights and perquisites that have been or shall be seized and in time of war or otherwise."

Instructions to the Receiver-General af Droits.

1st. Directions how to appoint agents.

2d. *Inter alia*, to inform himself of and demand all enemies' ships and goods casually met at sea, and seized by any vessel not commissionated.

9th. You are from time to time, as there shall be occasion, to require all our vice-admirals to give up their accounts of all such droits, duties, and perquisites as they have received, and to acquaint us with any abuses, neglects, corruptions or encroachments whatever, that you shall find or understand to be committed by any vice-admirals or their officers, in the taking, collecting, seizing or embezzling, disposing or meddling with any ships, vessels, goods, merchandize, or any Admiralty droits, and to take such course for the reformation thereof as may best conduce to the bettering and advancing the due rights and benefits of the Lord High-Admiral; and you are to acquaint us with any neglects, abuses, corruptions and encroachments that either have, or that you shall find may be committed by any person whatever, to the prejudice of the office and perquisites of the Lord High-Admiral.

In the Business of Mr. SNOOK's Petitions.

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The powers granted by the *American* commissioners to their agents not sufficient.

THE Lords of the Treasury appointed certain commissioners to take charge of *American* property. By an instrument bearing date upon the 3d of *November* 1812, and signed *S. B. Burnaby, Beeston Long, and Samuel Hancock,* in virtue of the powers vested in them, the commissioners appointed *John Dougan,* Esq. "to take charge of all *American* ships and property that may be already detained, or that may hereafter be brought into the ports and places named in the margin, (viz. *Halifax, Bermuda, Bahamas, Newfoundland,* and all ports and places on the coast of *British North America,)* under the orders in council of the 23d of *June* last." And it proceeded to direct—"And upon receiving this our appointment, you will immediately present the same before the Collector and Comptroller of the Customs; or where there is no comptroller, then to the naval officer of the port or place where the several prizes shall be brought, and in virtue of these our instructions you will require of them, in behalf of the Crown, to render you possession of all ships and cargoes, and portions of cargoes, which have been detained under the above mentioned embargo, and all such ships, &c. as have not yet been brought to adjudication, you will cause to be proceeded against without loss of time in the Vice-Admiralty Court, within whose limits each specific prize shall be brought.

"And in case you have to encounter any impediments to the obtaining immediate possession of the said property, by persons who may have assumed con-

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troul over the same before this or appointment shall have reached you, you will not fail to make instant application thereon to the superior civil, military, or naval officer of the port or place where such obstructions are opposed to you, and we are persuaded you will obtain ample authority from them to protect the interest of the Crown. In such cases as you shall deem it necessary to appoint any sub-agent or sub-agents, to carry into effect any of the powers hereby entrusted to you, you are further authorised to make such appointment."

This was certified to be a true copy of the original by the Registrar of the Court of Vice-Admiralty at *Bermuda*, attested by the Judge of that court.

By another instrument, dated at *Bermuda* on the 25th of *January*, Mr. *Dougan* appointed Mr. *Thomas Snook* his agent or sub-agent to the purposes above stated, for the ports of *Halifax*, *Newfoundland*, and all ports and places on the coast of *British North America*. This was signed by Mr. *Dougan*, and witnessed by *James Huchans*, but not in any other manner authenticated.

A petition was given on behalf of Mr. *Dougan* and *Snook* by the King's Advocate, shewing, that the said *John Dougan* was on the 3d day of *November* last appointed agent to the commissions appointed by the Right Honourable the Lords Commissioners of His Majesty's Treasury, to receive, take, and dispose of all the ships and vessels with their cargoes, which has been condemned in the Vice-Admiralty Court of this province, as droits of His Majesty; and that the said *Thomas Snook* has been duly appointed sub-agent, for the purpose aforesaid, by the said *John Dougan*.

That the said *Thomas Snook* has demanded from *Hartshorne*, *Boggs*, and Co. *Willian Ayre*, *Andrew*

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Wright, Thomas Godfrey, Thomas Heaviside, George Redmond Hulbert, and *Thomas Maynard,* Esqrs. agents for the capturing ships; and from *Charles Hill* the younger, Esq. Deputy Marshal of this worshipful Court, possession of the brig *Malcolm,* (then followed a list of forty-nine ships) together with the cargoes, all which have been, by the decrees of this Court, condemned as droits to His Majesty; and the said prize agents and deputy marshal have respectively refused to deliver the same to the said *Thomas Snook:* wherefore, they pray that a monition may issue, citing the said *Hartshorne,* &c. to appear to shew cause why they have refused to deliver up the same.

This petition came on for hearing on the 17th of *February* 1813, and was argued by the King's Advocate on behalf of Mr. *Snook.*

JUDGMENT.—Dr. *Croke.*

The monition prayed for in this petition is not a matter of course. The party applying first must shew that he is intitled to it by the powers vested in him, and likewise that the other parties mentioned are proper persons against whom it ought to be directed.

In the first respect, Mr. *Snook* states himself as "agent to the Commissioners appointed by the Lords Commissioners of His Majesty's Treasury, to receive, take, and dispose of all ships and vessels with their cargoes, which have been condemned in the Vice-Admiralty Court of this province, *as droits to His Majesty.*" To prove the authority so stated, Mr. *Snook* has produced an instrument by which he is appointed "to take charge of all *American* ships and property which may be already detained, or that may hereafter be brought into port under the orders of

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His Majesty's Council of the 23d *June*." Between the petition and the instrument produced to support it, there is a complete variation. A power to receive all vessels condemned as *droits to His Majesty*, is very different from a power *to take charge of vessels detained under a specific order in council*; the petition is therefore not supported by the documents. The Court cannot consider what the agents would be entitled to upon this petition, because the whole foundation upon which it rests is not established; neither can it act upon the powers described in the appointment itself, because they form no part of the petition.

As to the other point, the persons against whom the monition is prayed;—they are the agents for the capturing ships, and the deputy marshal of this Court; and the ground work of the application is, that Mr. *Snook* had demanded from them possession of certain ships and cargoes there stated, to the number of forty-nine, which had been condemned as droits to His Majesty; and that they had respectively refused to deliver the same: wherefore he prays that a monition may issue, citing them to appear to shew cause why they have refused to deliver up the said ships and cargoes to the said *Thomas Snook*. Now the marshal is the officer of this Court, he has possession under the authority of this Court, and his possession is the possession of the Court itself; without an order from the Court he could not deliver up the possession, he would be guilty of a breach of his duty if he did, and would be liable to all the penalties and consequences, which as a public officer, he would thereby incur. Even where property is condemned to the captors or others, the marshal cannot deliver up the property, even upon the production of the sentence of condemnation, without a

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special order from the Court to that effect. The object of the prayer of this petition is therefore to call the officer of the Court to account for not having complied with a demand, which he would have been guilty of a violation of duty if he had obeyed. With respect to the prize-agents the same observations will apply to them, as they are likewise in some measure officers of the Court, or at least under its controul, and could not part with the custody but under the authority of the Court; nor does it appear from any thing stated in this petition, or any affidavits which accompany it, that the prize agents are in possession of the property. It is stated that the ships and cargoes have been condemned to His Majesty,—the right of the captors' agents to the custody had therefore expired, it is to be presumed that they had given it up, and that it remained solely with the marshal. If indeed the petitioner had established his right, and it appeared by affidavits or otherwise, that the captors' agents without any right did hold and detain this property, the Court would issue a monition against them, requiring them to surrender it; but no such fact is alledged.

It appears to me that the agent has begun at the wrong end. He should have made his first application to this Court for an order for the delivery of such ships and cargoes as he conceived himself intitled to. To this petition it is impossible for the Court to accede, and I recommend to the agent to begin *de novo*, in such manner as his counsel shall advise.

A *second petition* was afterwar given in on the 22d *February* 1813, stating Mr. *Dougan's* and Mr. *Snook's* powers according to their appointment, and praying the Court to order all such *American* vessels and property, now in the custody of the Court, as

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the said commissioners are authorized to take charge of, to be delivered to the petitioner as sub-agent of *John Dougan*. This petition was admitted by the Court, but the agent was directed to specify the particular vessels and cargoes which he claimed. This was done in a *third petition*, dated the 25th of *February*, in which it was prayed, that the brig *George, John Robertson* master, captured on the 8th of *July* 1812, and condemned to the captors for breach of His Majesty's order in council of the 26th *April*—and the brig *Malcolm, Ichabod Jordan*, master, which was captured on the 24th of *June*, and had been condemned to His Majesty, as having been captured previous to the declaration of war, might be delivered up to him, and that the claim of the captors to have the ship *Marquis de Somerueles*, captured on the 10th *July* last, and the brig *Phœbe*, captured on the 19th *September* last, both now under adjudication, might be rejected; and that they might be condemned as prize to His Majesty, and delivered to the Petitioner.

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JUDGMENT—Dr. *Croke*.

These vessels have been selected from three classes of ships and cargoes, which stand under different circumstances, to obtain the judgment of the Court upon each of them respectively, to lead the decisions upon the other cases in each class.

The first class of vessels and cargoes, both with respect to the time of capture and their number, is that which is represented by the brig *Malcolm*. She was capured on the 24th of *June* last, and has been condemned to His Majesty; she was bound on a voyage from *Madeira* to *Portland*, and was condemned as *American* property, captured previous to the declaration of war.

This vessel having been condemned to His Majesty

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has become absolutely his property, and he may dispose of it as he pleases. He may appoint any persons whatever to demand and to receive it on his behalf. The Treasury is the usual office for the receipt of His Majesty's dues, and if any person appears here properly constituted by that board for that purpose, this Court is bound, without delay or hesitation, to deliver up His Majesty's property to them. In the mean time, until a proper authority is given, this Court is the constitutional trustee and guardian of the property on behalf of the Crown; to part with the custody to any persons not authorised would be a violation of its duty, and it is therefore incumbent upon it, when a demand like the present is made upon it, to examine scrupulously the powers of the party, not only as to their foundation, but as to their extent. A power, given to receive one kind of property, is no authority to receive property of another species.

Mr. *Dougan* is appointed "*to take charge of all* American *ships and property that may be already detained, or that may hereafter be brought into port under the orders in council of the* 23*d* June *last.*" I must confess that there is a considerable obscurity in this appointment. No vessels were directed to be detained or brought into port by *that order*, but on the contrary, it was merely a conditional *revocation* or *suspension* of the former orders for detention of the 7th *January* 1807, and of the 26th *April* 1809; I am not disposed to defeat what should clearly appear to be the intention of this appointment by a literal adherence to the mere words of it, but rather to give it full effect by the most liberal construction. The order of the 23d *June* therefore must be taken in conjunction with the orders to which it refers, and we may then understand Mr. *Dougan's* powers to

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extend to such vessels and cargoes as have been detained under the two former orders, the operation of which has been restrained by the order of the 23d *June;* now the *Malcolm* was not captured under any of those orders, not having been engaged in any trade with the enemy's ports, or those described in the order of the 26th *April,* but was employed in a voyage from *Madeira* to *Portsmouth* in the *United States,* two neutral or allied ports. They were seized therefore, not under the orders in council, but by the discretionary orders of the admiral upon this station, as some other vessels of this class were taken under the embargo order of the 31st *July,* merely as *American* property; as such only they were condemned, under the order of the 13th *October,* and to His Majesty, as having been taken previous to the declaration of hostilities, and therefore Mr. *Dougan's* powers do not comprehend these vessels.

Many arguments however have been employed, chiefly founded upon the want of precision in the appointment, to prove that it was *the intention* of Government that these agents should take possession of all vessels, captured in the period before the order for general reprisals on the 13th *October.* Every mode of ingenious torture has been exercised upon this instrument of appointment to give it that extent: supposed omissions have been supplied, imagined surplusages have been retrenched, and recondite meanings have been brought to light, but I fear the words themselves will admit of no such construction.

I have looked at the proceedings which have been had before in similar cases. The cases respecting the *Dutch* commissioners can afford no precedent, because their powers were constituted by an act of parliament which could create rights, as well as regulate them. But the *Danish* war resembled the present

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American war in many features. An order for the detention of *Danish* vessels issued on the 2nd of *September* 1807, precisely similar to that of the 31st of *July* for *American* property. The order for general reprisals was declared on the 4th of *November*, and commissioners were appointed to take charge of *Danish* property captured in the immediate time. But the words in those appointments were perfectly clear, the agents were directed *to require possession of all ships detained before the letters of marque were issued against* Denmark, *viz. on the 4th of last month.* If the same power was intended to be given to the present commissioners or agents, the same or equivalent words would have been used, corresponding to those which had been employed in a similar business so very recently. What authority has been given to the commissioners does not appear, as their commission is neither recited or produced, and the Court can judge only from what is to be found in Mr. *Dougan's* appointment. If the powers of the original commissioners are more extensive, the agent can be authorised only as far as those powers have been deputed to him, and I am of opinion that he is not intitled to demand or receive vessels which were not taken under the order in council of the 23d of *June*, and the preceding orders to which that refers.

The next case to be considered is the brig *George*, *Robinson* master. This vessel was captured on the 8th of *July* 1812. She was bound upon a voyage from *Rochelle* to *New York*, and was seized for a breach of his Majesty's order in council of the 26th of *April*, and therefore certainly comes within the description of vessels in Mr. *Dougan's* appointment. But she has been already condemned to the captors. The treasury board may have authority to appoint receivers of His Majesty's property, but it can give

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His Majesty no rights which he did not previously possess. The King's controul over prize before condemnation, and his absolute right to it when condemned to him are perfectly clear; but when prize has been condemned to the captors, under a title derived from His Majesty, they have a vested interest of which they cannot be deprived by any authority from the treasury. This vessel was taken under the order of the 26th of *April* 1809, which directs that every vessel so taken "shall be condemned as prize to the captors." This question was fully discussed in the present case as between the Crown and the captors, and the Court was of opinion, that the suspending and revoking order of the 23d of *June* was become null and void, under the clause of defeasance contained in it, applied to the facts which had since occurred; therefore it held the order of the 26th of *April* to be in full force, and condemned the property to the captors. The further consideration which has been given to this question of law, has satisfied me of the correctness of that decision. But whether right or wrong, the captor has acquired a vested right under it, subject indeed to be suspended by appeal, or to be defeated by a reversal of the sentence; but, no such appeal having been entered, the captor's right is *primâ facie* too much attached, to leave the property liable to be taken possession of by the authority of agents appointed by the treasury.

This appointment of Mr. *Dougan* has undergone much discussion. It certainly seems to have been drawn up with some inaccuracy, and by persons not very conversant with the subject to which it relates. I scarcely imagine that it could have proceeded from the pen of Dr. *Burnaby*, who is an eminent advocate in the High Court of Admiralty. I have already pointed out some want of precision and obscurity,

but the person by whom it was drawn up seems not to have been informed of the existence of such a thing as a Court of Vice-Admiralty; which, besides its authority to condemn prizes, which indeed is mentioned, is likewise intrusted by the law, and by various acts of parliament, with the exclusive jurisdiction, custody, and controul, of all prize property. For, except where the agent is directed to proceed against all such vessels as have not yet been brought to adjudication, those Courts are not once referred to in the appointment. "If the agents should have to encounter any impediments to the obtaining immediate possession of the property, by persons who may have assumed controul over the same before the appointment could reach them," (To what persons this may allude is not so clear, unless the controul of the Court of Vice-Admiralty or its officers is to be understood, the only persons who in law, and fact, do assume any controul; but be they who they may) the agent is ordered to apply, *not* to the Court of Vice-Admiralty, which possesses the lawful authority to compel the production and delivery of all prize property, in whatever hands it may be, and is invested with the most ample powers for that purpose, but he is to apply to the *superior civil, military,* or *naval officer* of the port, or place, where such obstructions are opposed to him, and the commissioners declare that "they are persuaded that he will obtain ample authority." Whether any property, which he may think himself entitled to receive, is withheld from him rightfully or wrongfully, he is to obtain possession at the point of the bayonet. This might be well calculated for obtaining summary justice in the kingdom of France, but seems little conformable to the more orderly mode of proceeding in the tribunal of a free country.

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So the agent is to present his appointment, and to require possession of these vessels and cargoes, not to the Court of Vice-Admiralty, (in whose custody they are by law) but "before the collector and comptroller of the customs, or where there is no comptroller to the naval officer." Now it happens that these officers of the customs have no possession or custody of prize property whatever, either before or after condemnation, but solely by the Prize Act, the45th *Geo.* III. cap. 72. which does not extend to the war with *America*, or to *American* property captured. If that act *did* apply, captures under it are to stay there subject to the discretion of the Court of Vice-Admiralty, *until sentence* or interlocutory orders for releasing or delivering it up. So that if the act does *not apply* to *American* property, of which I think there is little doubt, these officers of the customs could have had no custody or possession whatever; if it *did apply*, they could have had neither possession or custody of such ships and cargoes as had been *condemned*, and of those not *adjudged*, they could not have delivered up the possession without an authority from the Court of Vice-Admiralty. Yet these are the only persons to whom the agent is directed to communicate his *plein pouvoirs*, and of whom alone he is to demand possession. The Court of Vice-Admiralty seem to have escaped their recollection. In the instructions to the *Danish* commissioners, which seems to have been drawn up by persons who know what they are about, it is said correctly, and printed in italics to direct the attention of the agents more particularly to it, that *the jurisdiction of the marshal of the Court of Admiralty continues until condemnation takes place, when only, that of the commissioners commences.*

With respect to the other two vessels, the *Marquis*

de Somerueles and the *Phœbe*, which were seized under the same order in council the 26th of *April*, but have not yet been adjudicated upon, an allegation has been given on behalf of His Majesty as well as of the captors, and those cases now stand ready for hearing upon them, I admit the petition as far as relates to those two vessels, and reject the remainder.

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On motion of the King's Advocate on behalf of Mr. *Barnett* the sub-agent of Mr. *Dougan*, several papers and letters, which had been received by the *March* packet, were brought in upon affidavit, and an application was made thereupon for the delivery of the vessels, according to the former petition.

May 5th, 1813.

JUDGMENT.—Dr. *Croke*.

Further documents brought in by the agents for the *American* Commissioners, and the vessels and cargoes ordered to be delivered to them.

SEVERAL additional documents are now brought in, which it is argued are sufficient to establish Mr. *Barnett's* right to receive the vessels which he before petitioned for, and which petition was directed to stand over till further authorities should arrive. There has not been time for any answer to have been given to the communication made by these agents respecting the proceedings here, and therefore no new power of attorney from the *American* commissioners has been sent. But the present documents consist of a correspondence carried on by the King's advocate of this province with the treasury, and of certain letters and papers transmitted in consequence of it to Mr. *Dougan*.

The first paper is a copy of a letter written by the King's advocate on the 2d of *February* last to Mr.

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Harrison, the secretary of the treasury, inclosing a list of all *American* vessels brought within the jurisdiction of the Vice-Admiralty Court at *Halifax*, since the 1st of *June* up to the date of the proclamation which gives His Majesty's right of prize to the captors, that is up to the 13th of *October*. Annexed is the copy of the list referred to. The next paper is Mr. *Harrison's* answer of the 15th of *March*, in which he says, "I am commanded by the lords commissioners of His Majesty's treasury to acknowledge the receipt of your letter of the 2d ultimo, transmitting a list of *American* vessels condemned as prizes in the Vice Admiralty Court *Nova Scotia*, and to acquaint you that they have directed the same to be transmitted to the *American* commissioners for their information." Then on behalf of the *American* commissioners, Mr. *Hayton*, their secretary, informs Mr. *Dougan*: "I am directed to transmit an abstract of the *American* vessels and cargoes carried into *Halifax*, and proceeded against in that court as droits to the Crown, which you will observe are classed under specific heads to faciliate your following the directions in the commissioners' letter of instructions to their agents, as to the transhipment of such property to *Endgland* as is calculated for the *European* markets." Upon examining the list thus transmitted to Mr. *Dougan*, it appears to consist precisely of the same ships which are contained in the list sent by the King's advocate to Mr. *Harrison*, and by him referred to the *American* commissioners, with the exception of the *George* and the *Marquis de Somerueles*, which were stated in the King's advocate's list to have been condemned to the captors under the order of the 29th of *April*.

Taking all these documents together they certainly do exhibit a sort of chain of communication from the

lords of the treasury, who have the disposal of His Majesty's prizes, to the agents who now claim. A list of the same vessels which are now applied for is sent by the King's advocate, to the treasury, this is transmitted from thence to the *American* commissioners, who have now sent it to their agents, with directions to proceed against the vessels there mentioned, as droits of the Crown, according to the instructions before given. But it must be admitted that this is very far short of a direct authority, and a very lame mode of supplying the defects in their power of attorney. The Court had a right to expect a direct power of attorney. It cannot however I think now be doubted but that the vessels which were captured before the 13th of *August* were those which have been entrusted to the care of the *American* commissioners, and that it was the intention of those commissioners to depute their agents to the management of them. It must be remarked that the real powers which appear to have been thus intended to be vested in those gentlemen, are so totally different from those which are expressed in their power of attorney, that the list now transmitted to them is confined to the captures made before the 13th of *October*, which the power of attorney does not mention, and that the only cases omitted in that list, are the captures made under the order of the 26th of *April*, and, by implication, under the order of the 23d of *June*, the only captures to which the power of attorney extends. The commissioners have been guilty of great negligence in sending out those gentlemen with such insufficient powers, by which all this delay has been occasioned. It is a serious thing for this Court to part with the custody of His Majesty's property without sufficient authority. But these vessels and cargoes are daily deteriorating.

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Great expences are incurring, the most advantageous time of disposing of them will speedily elapse, and the whole property will be shortly frittered away. To prevent these losses, the Court must take upon itself the responsibility of acting upon the imperfect authority under which those agents appear. I direct therefore that decrees for delivery be made out to them.

The Amanda, *Elijah J. Bangs*, Master.
Taken by the Æolus, Lord *James Townshend*, Commander.

Judgment—Dr. *Croke*.

Articles of an ambassador shipped in the name of an enemy's consignee restored. Proceedings after sentence when captors refused to consent to restitution.

A PETITION has been filed in this case from Mr. *Black*, on behalf of *Andrew Doschkoff* of *Washington*, Envoy Extraordinary and Minister Plenipotentiary of His Majesty the Emperor of all the *Russias* to the *United States*, stating that he had lately received a letter from the said ambassador, authorising him to claim for him the several articles of merchandize specified in the invoice annexed, and that the said articles were shipped on board the *Amanda* at *Bourdeaux*, by *Blandin Freres*, to be delivered to Mr. *Francis Breuil* of *Philadelphia*, for the use, and on the account of the said *Doschkoff*, who is the real, *bonâ fide*, and sole owner thereof, and he prays the same may be restored to him.

The invoice states the articles to have been shipped by the order, and for the account, of *Francis Breuil*, and they consist of Champagne, and other delicate

wines, mustard, olives, anchovies, capers and vinegar, to the amount of 5,369 francs. Mr. *Doschkoff's* letter states that these articles of wines and provisions are his own, and was shipped by the house of *Biandin*, directed to Mr. *Breuil*, to whom he had given the orders for them. He expects they will be released, and authorizes Mr. *Black* to draw on Mr. *Astor* for the expences.

Here is likewise a letter from Mr. *Foster*, His Majesty's ambassador in the States, to Vice-Admiral *Sawyer*, transmitting a letter which he had received from the *Russian* minister, respecting these articles, adding his request to Admiral *Sawyer*, and hoping "that he would not find it inconsistent with the rules of the service, to permit the articles to be returned to M. *Doschkoff*." M. *Doschkoff*, in the letter transmitted, after stating the case, as before, adds: "Je prie votre Excellence d'employer votre intercession auprès les authorités requises à *Halifax* pour faire relacher ces provisions, qui sont ma proprieté et de les faire delivrer à la personne qui se presentra murié de mes ordres pour les recevoir, comme ministre de S. M. l'Empereur de *Rusie*. J'apprecierai en cela les principes d'equité de V. E. personnellement. Je verrai dans ce procedé votre desir de m'obliger, que je recevrai avec autant de reconnoissance que de plaisir."

Though M. *Doschkoff's* name and interest did not appear in the original papers, and the articles were stated in the invoice to have belonged to Mr. *Breuil*, a subject of the enemy, upon this claim, if it had arrived in time, the party would have been intitled to immediate restitution. The word of a person, in the eminent station of the ambassador of a friendly and allied power, would supersede the necessity of any farther evidence. The nature of the articles corres-

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ponds perfectly to the application itself, and it is utterly impossible to suppose that an ambassador would thus pledge his honour for the purpose of being concerned in a fraudulent concealment of the property of the enemy, and to so small an amount. But it happens unfortunately that this claim has not been made till after the articles in question have been condemned as enemy's property, with the ship and the rest of the cargo, being so stated in the ship's papers and in the parole evidence, and there being no ground whatever to entertain any suspicion to the contrary. The sentence of condemnation is completed, and has passed the seal of the Court, though no order for delivery to the captor's agents has issued. The sentence cannot now be revoked, and the Court has no longer any authority to dispose of this property, however it may be inclined to shew that comity which is due to so illustrious a personage, and which it certainly will shew to the full extent of its powers.

The authority of the Court having expired, as to the first instance of the cause, there are only two modes by which these articles can be restored. By the consent of the captors themselves, or by the interposition of an appeal.

When I consider the usual and unbounded disinterestedness and liberality of the gentlemen of the navy, and their high sense of the honour of their country, which they must be sensible is involved in the present case, I have no doubt but that no difficulty will be made to prevent the captors from consenting that a small allotment of wine and other articles, for the personal use of an ambassador's table, and of no great value, shall be immediately restored. I direct the petition therefore to stand over till they have been consulted.

On a subsequent day, it was stated that Admiral

Sawyer, before his departure from his station, had agreed to give up his share in the capture, and had expressed his wish that the whole should be restored. The agent however appeared on behalf of Lord *James Townshend*, the captain of the *Æolus*, and said that he had his lordship's express orders to refu e his assent to the restitution, and praying the goods to be delivered to him.

Upon which the Court directed an appeal to be entered on Mr. *Black*, on behalf of M. *Doschkoff*, and intimated that, upon an application, it would deliver the property to his agent upon bail.

The MARQUIS DE SOMERUELES.

February 26th, 1813.

JUDGMENT—Dr. *Croke*.

THIS vessel took in her cargo at *Civita Vecchia*, and was captured upon a voyage from thence to *Salem*. Two allegations have been given in this case, one on behalf of the Crown as *American*, or *French* property, the other by the captors, as having been taken under the order of the 26th of *April*, by the *Atalanta*, Captain *Hickey*.

Goods, brought from the blocked ports by water, to ports not comprehended in the Order in Council, constitute a breach of the blockade.

The Court having already decided in the case of the brig *George*, that the captors are entitled to all such prizes as they have made under the order of the 26th of *April*, there is only one question in this case. *Civita Vecchia* is not a port comprehended under those orders, being to the southward of *Orbitello*, to which the blockade is confined, but if the allegation given for the captors is proved, that the cargo, or any part

The Marquis de Somerueles

February 26th, 1813.

of it, was brought by water from other ports within those limits, under the authority of the *Lisette, Heg,** and other cases, it will be equally liable to confiscation. Of this fact there is sufficient proof. In the paper No. 13, is an account which states various charges for shipping the articles there specified, at *Leghorn* for *Civita Vecchia,* addressed to *John Gardner,* the supercargo of this vessel, and which compose part of the present cargo. There are several letters between Mr. *Fillichi,* a merchant at *Leghorn,* and Mr. *Gardner,* relating to those shipments, besides other evidence which it is unnecessary to particularize. The fact is therefore fully proved, and the consequences of it must attach upon the owners, under the established law relating to agents and principals, and from the orders given to Mr. *Gardner* in the paper No. 56, by which he is invested with full power to act as he thinks proper.

I therefore condemn this vessel and cargo to the captors as having been taken under the Order in Council of the 26th of *April.*

The brig *Phœbe* was condemned on the same grounds.

March, 1813.

The Economy, *Holmes.*

Licences from the Governor of *Nova Scotia* to the enemy void.

THIS was the case of an *American* vessel sailing under a licence granted by his Excellency Sir *John Coape Sherbrooke,* Lieutenant-governor of *Nova Scotia,* protecting her against capture, from a port of the *United States,* with provisions to the

* *Rob.* 6. 387.

port of *Halifax*. A question arose, as in the case of the *Sally Ann*, upon the validity of the licence, and after a full hearing upon this point, the Court gave so comprehensive a judgment that it is almost unnecessary to detail the arguments of counsel.

The King's Advocate and Uniacke, on the part of the captors, contended, that the late decision of the Court in the case of the *Sally Ann* precluded all legal possibility of restitution in the present case, that the licence upon which the claimant relied, was not granted by competent authority; and, though it proceeded from a very high and respectable source, the principle would still apply against its validity, that such indulgences can be granted by the King alone, who has not the power of delegating his authority. That, as the question had arisen in the case, it must be decided upon principle and not policy, and as no law could be found upon which to support the legality of the licence, the property of the claimant, being admitted to be *American*, must share the fate of all enemies' property.

The Solicitor-General for the Claimant.—Notwithstanding the judgment which has been recently given by the Court in the case of the *Sally Ann*, there are distinctions of importance between that and the present case, which may probably lead to a contrary decision. The licence of the *Sally Ann* was granted in an enemy's country by an official character, whose functions had in a great measure ceased. That of the *Economy* takes its rise from an authority of the highest consideration and respect in this province, representing the regal power, in all colonial cases, at least, to the fullest extent. This licence has been granted by the governor of the province, with the advice and consent of His Majesty's council, in order to facilitate the importation of provisions into this

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March 1813.

colony, in strict compliance not only with the words and spirit of the 49th of *Geo.* III. but with the intent and directions of His Majesty's ministers who have expressed the strongest desire that a friendly and commercial intercourse should be preserved with the neighbouring states of *America*. It can be argued for the claimant, that the importation of this cargo was allowable under the order in council of the 8th of *April* last, which makes it lawful to import, into *Halifax*, the articles in question, in any *ship or vessel except a vessel belonging to France*, without, specifying to whom the property may belong. The spirit of the order is, therefore, clear and discernable, and can mean nothing less than that, if neither the importing vessel nor the *cargo* be *French*, though both belong to any other *enemy*, the importation may be considered as lawful. Since the publication of that order, the states of *America* have become the enemies of *Great Britain*, and the present licence has been obtained *ex abundante cautelâ*, but the Court in considering its validity, should keep in view the spirit of the 49th of *Geo.* III. and the important order of *April*, as the statute, the order, and the licence, are all tending to the same wholesome object, the ready supply of this province with articles of the first necessity. It may be said that the order of *April* cannot authorise the trading with the enemy, that the license cannot give that permission, though under the hand and seal of His Majesty's representative of this province, and as was also contended in the case of the *Sally Ann*, that the King, upon such an occasion could not delegate his authority. Against these positions, it may be contended, that the order of *April* does *totidem verbis* permit a trading with the enemy in ships, and, virtually, *in goods*; that the governor of the province, for the safety or protection of the province,

can pledge the faith of the government in a measure of this sort, and hold himself responsible to His Majesty for so doing; and as to the power of His Majesty to delegate his prerogative upon these occasions, it may well be said, that that power has been fully exercised by His Royal Highness the Prince Regent; who, by his Order in Council, of the 3d *October*, *retrospectively* confirming the licence in question, has authorized and delegated the governor to grant such licences, notwithstanding the ships and cargoes shall belong to the citizens of the *United States*, or be the property of *British* subjects trading with that country. Upon the good faith, the honour, and the policy of supporting the measure of this licence, there cannot be a doubt. There is almost an indelicacy in raising a question upon it, more especially when it is considered in what a pure and respectable source it originated, how much the comfort and welfare and protection of the province may depend upon such indulgences, and when granted to an enemy, how much the honour and honesty of our government are implicated in the sanction and confirmation of them.

Judgment was given by Dr. *Croke* to the following purport:

This capture was made by the *Liverpool Packet*, a private armed schooner of *Liverpool*, in this province, on the 17th *November*, 1812. The master has given in a claim on behalf of himself, and of *John G. Ladd*, of *Alexandria*, both citizens and subjects of the *United States of America*, as the sole owners and proprietors of the brigantine; and on behalf of *William Ladd*, of *Boston*, the owner and proprietor of the cargo, as the sole property of an *American* ci-

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tizen. The cargo is claimed as consisting of flour, corn, and rye. But it appears from the manifest, that there were also six barrels of cigarrs. The vessel cleared out at *Alexandria* for *Boston*, and is alledged to have been destined for the port of *Halifax*.

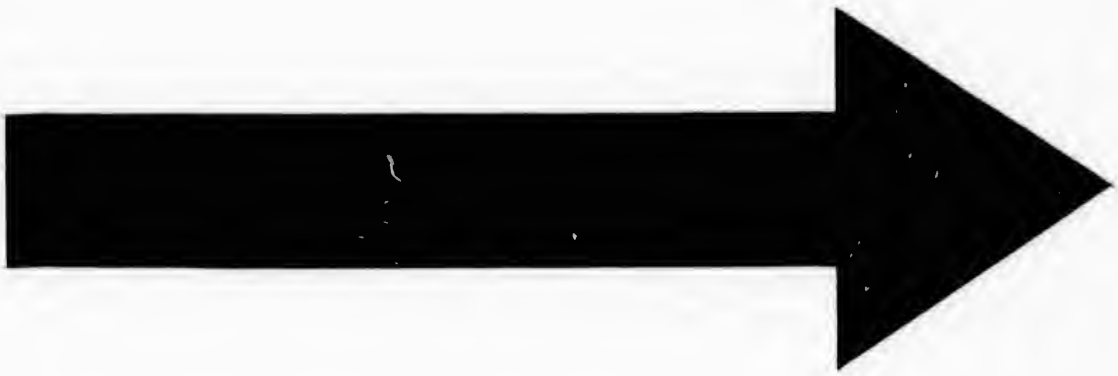
This case has been twice argued. At the first hearing it was the wish of counsel, in which the court concurred, that it should be argued, and decided if possible, without bringing forward any question as to the validity of the licence.

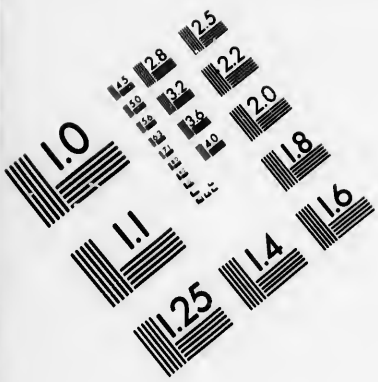
In that stage of the cause, there were two questions principally made by the king's advocate, arising upon the facts alledged. It appeared that the licence, upon which all the claimant's case depended, was not produced, or made known to the captors, at the time of seizure, and did not make their appearance till the master had been separated from his vessel, and had been at *Boston*. I agree with the king's advocate, and can hardly think that this is a sufficient compliance with the condition of the licence, which directed that "the party should take care that the licence should be always kept on board the said vessel with the cargo." The plain object of this clause must have been, that the licence should be always on board ready to be produced, and that it should have been communicated to such persons as had a lawful right to demand it, and particularly to *British* cruizers. It could answer no purpose to keep it concealed. *De non apparentibus et non existentibus eadem est ratio.* But the non-appearance of this paper, when it ought to have been exhibited, and when its being exhibited was probably the reason that the vessel was seized, renders very doubtful the fact of its being on board

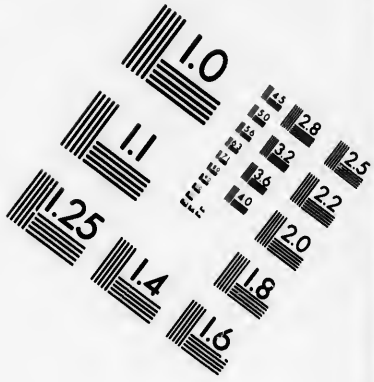
at all. By this alledged suppression the claimants' case labours under considerable difficulties as to the evidence necessary to establish so material a fact.

The first and clearest proof that the licence was on board, would have been supplied by the immediate production of it; a very inferior degree of evidence is now offered in lieu of it: namely, the mere oath of the master, after he has been separated from his ship, and has been in the *United States*---and it is a mode of proof highly objectionable, inasmuch as it would open the door to the greatest frauds. It was admitted by the counsel for the claimants that this evidence was not sufficient to entitle them to restitution, and it was prayed that they might be suffered to bring further proof. But the court could not accede to the offer, in that stage of the cause, because it would have admitted, that every question of law which could arise upon the facts alledged, was decided in their favour, and that to ascertain the particular facts was all that was required to intitle them to restitution. It was to decide without question or argument, their competence to claim, and the validity of the licence, the most important features in the case.

There was another question of fact which affected the very foundation of the claims, but which stood much upon the same footing. It was properly argued by the King's Advocate, that very strong doubts might be entertained upon the evidence, whether the vessel was really bound to *Halifax* or not. No inference against it could be drawn from the destination expressed in the ostensible papers, because the vessel could not clear out for a *British* port. But none of the papers which expressed a destination to *Halifax*, were found on board the vessel, or produced to the captain. In strictness of law, these







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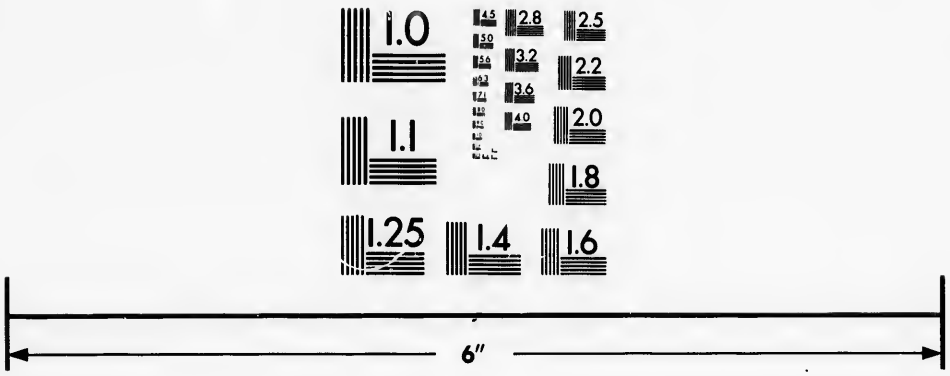

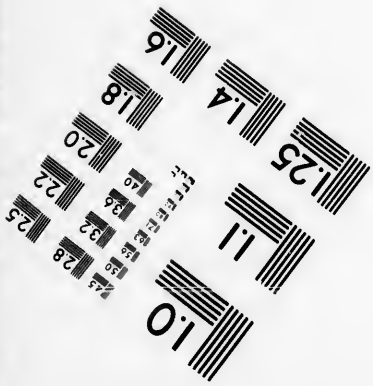

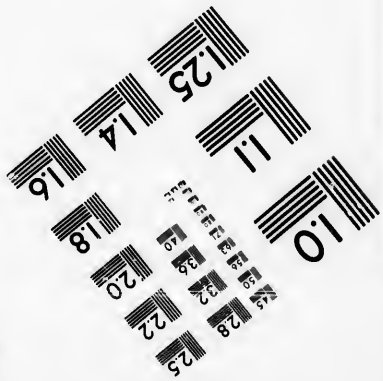

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papers are not admissible, as evidence in the first instance, and have been introduced only by the consent of the captors. Being so introduced, and not till after the master had been at *Boston*, very little credit can be attached to them. On the other hand, the mate swears that her voyage commenced at *Boston*, that she sailed from thence to *Alexandria*, where she discharged her cargo, and took on board the present cargo, which was to be delivered to *William Ladd*, at *Boston*. But the vessel was steering for *Boston* at the time of capture, and had never altered her course. Arguments likewise were deduced from the entries in the log-book, from the winds, and the courses the vessel steered, that such must have been her destination. But as this depends upon points of navigation, which the Court cannot take upon it to decide, it would refer them, if necessary, to persons properly qualified by their knowledge of the sea, for their report upon it. That such was the destination, is not in itself improbable. It is well known that the northern *States* of *America* are supplied with the articles which compose this cargo from the southern ports. Licences, for importing them into *Halifax*, would afford a complete protection to this coasting trade from *British* cruizers, because the voyages in both cases, are always in a northern direction, which might suit either destination. That they are employed to cover the coasting trade of the *United States*, or for other fraudulent purposes, is evident, because of above one hundred licences which have been granted within the last eight months, not more than twenty have found their way, with cargoes of corn and provisions into the port of *Halifax*. The destination therefore requires further proof, which could not be then admitted for the reasons above stated. Some other points were likewise discus se

which were immediately connected with the licence itself, and related to its effects, application and transferrable quality. It seemed unavoidable therefore, under all the circumstances to enter upon the consideration of the licence itself; the court directed a second argument, and it has now to give its decision upon the whole case.

The claimants are avowedly alien enemies, and are therefore incapable of appearing as parties, in a *British* court of justice, unless their disability is removed by an exercise of His Majesty's undoubted prerogative of extending any of the privileges of the state of peace, to the subjects of countries at war with this country. This exemption from the general rule of law, is claimed by these persons upon a licence granted by the governor, of this province, in these words:

By his excellency Lieutenant General Sir John Coape Sherbrooke, Knight of the most honorable Order of the Bath, Lieutenant-Governor and Commander in Chief, in and over His Majesty's Province of Nova-Scotia, and its Dependencies, Vice-Admiral of the same, &c. &c. &c.

To Messrs. *W. K. Reynolds*, and *Co.* merchants,

Greeting:

By virtue of the power and authority in me vested, I do by these presents, by and with the advice and consent of His Majesty's council for this province, authorize and licence you, the said *Wm. K. Reynolds* and *Co.* of *Halifax*, merchants, to import and bring into the port of *Halifax*, from any port of the *United States* of *America*, in any ship or vessel, a cargo of flour, meal, corn, or provisions of any kind, and also pitch, tar, and turpen-

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tine, taking care that this licence shall be always kept on board the said vessel with the cargo, and also taking care to enter the same cargo at His Majesty's custom-house at *Halifax*, and to deposit this licence in the said custom-house when the said entry shall be made at *Halifax*.

Given under my Hand and Seal at Arms, at *Halifax*, this 5th day of *September*, 1812, in the 52d Year of His Majesty's reign.

J. C. SHERBROOKE.

By his Excellency's Command,
H. H. Cogswell, Dep. Sec.

The captains and commanders of His Majesty's ships and vessels on this station are hereby required not to molest the vessel, having this licence on board, while in the prosecution of her voyage.

H. SAWYER, Vice Admiral.

This licence. as extending to vessels of every description, is in opposition to the system of navigation laws, and, as protecting the property of an enemy, is contrary to the established maxims of law. The navigation laws can only be dispensed with by the same authority by which they were created, namely, the British Parliament; and there is no power either in the crown, or in any persons appointed by it, to grant exemptions from their operations. His Majesty by his prerogative may allow an enemy to trade with his dominions. Upon these respective authorities must this licence depend for its efficacy.

The original act of parliament upon which this licence is founded is the 49th *Geo.* III. *c.* 49. which has been continued by 52d *Geo.* III. *c.* 20, to the 25th March 1815. It enacts "That it shall be

lawful in any ship or vessel in any manner owned or navigated, to import into and export from any port or ports within the province of *Nova Scotia* or *New Brunswick*, which shall be specially appointed for that purpose by His Majesty, by order in council, any goods or commodities which His Majesty by order in council shall specially authorize and allow." By virtue of the powers vested in His Majesty by this act, his Royal Highness the Prince Regent, by an order in council, upon the 8th of *April* 1812, was pleased to order, that "during the continuance of the said acts, until further order made thereon, it shall be lawful in any ship or vessel except a vessel belonging to *France*, to export from the port of *Halifax*, to any port belonging to the *United States* from which *British* vessels are excluded," certain articles there described, and "also to import into the port of *Halifax*, from any of the said ports, wheat and grain of any kind, bread, biscuit and flour, pitch, tar and turpentine, such articles being of the growth, produce or manufacture of the said States."

1st. It is not alledged that the licence, which bears date upon the 5th of *September*, 1812, at the time when it was granted, had any other validity than what is derived from this order in council. Since that order extended only to bread, biscuit and flour, pitch, tar and turpentine, the other articles specified in the licence, meal, and corn, unless the word corn should be supposed to be synonymous with grain, and provisions of any kind, are not comprehended under the order in council, and their importation being against acts of parliament, no permission could legally be granted to that effect. But although the licence could afford no protection to other articles than those in the

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Order in Council, yet I am not absolutely prepared to say that the extending of it to those illegal articles would render it void as to the other articles which might lawfully be imported; or that the importation of cigarrs, or tobacco, though unlawful, and though those articles are liable to confiscation, would deprive the parties of the benefit of their licence, or of other privileges to which they are intitled, as to the other articles.

With respect to the articles specified in the order in council, and of which this general cargo consists, no doubt, before the declaration of war on the 13th of *October*, they might have been imported without any licence at all. The permission is general, no licences are declared to be necessary, or are directed to be granted, nor is any power or authority given to grant them. With respect to those articles a licence therefore was nugatory, and unauthorized. It could be considered merely as *declaratory* of the order of the 8th of *April*. Mr. *Reynolds* under this licence had no more privileges than he himself, or any other person, had without licence, by the order in council. Nor by any transfer of this licence, if it were transferrable, could he convey to any other person, a greater privilege than they were before entitled to: Unless therefore this licence, by any subsequent authority, acquired an efficacy which it did not possess at the time of granting it, and which I shall afterwards consider, we must refer to the order itself by which the permission to import, whatever it was, was really given. The general order in council is the real licence.

Having thus cleared the case of all unnecessary considerations, it reduces itself to two questions, namely, whether the order in council of the 8th of

April, in itself can authorize an enemy to import a cargo into this port; and secondly, whether that order and the licences granted under it, not having originally such a power, have been *so extended by the order of the 13th of October*, as to authorize such importation.

The first question seems to me to be determined by several decided cases.

The first cases I shall mention are those upon the act of the 39th *Geo.* III. c. 98. for allowing the importation of *Spanish* wool. That act declared it "lawful to and for *any person or persons* to import into *Great Britain, Spanish wool* from any port or place whatever." We were then at war with *Spain.* It was a general permission, like the order of the 8th of *April*, and the words are most comprehensive, *any person*, the subject matter too was expressly the produce of the enemy's country, *Spanish* wool. Yet doubts were justly entertained whether his Majesty's subjects could purchase of the enemy and import *Spanish* wool, and whether the same would not be subject to confiscation as the property of his Majesty's subject trading with the enemy; and an order in council, besides the act of Parliament, was thought necessary to authorize such trading. It was clear therefore that those general and most comprehensive words in the act did not render a trading with the enemy lawful, and consequently would not authorize an enemy to trade with the *British* dominions. In the case of the *Hoffnung, Berens*,* whatever arose upon this act, it was said by the court, "I apprehend that unless there are very express words to this effect to be found in the licence, I am to consider its meaning

* *Rob.* II. p. 162.

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as not going to that extent, (of giving an enemy liberty to import) but as giving such a liberty only to subjects of this country; it is a licence to *British* subjects to import, and, as I understand it, on their own account; and if it appeared that the importation was on the account of other than *British* Merchants, I should hold that under the terms of this licence, it could not be considered to be a legal importation."

In the *Bearse Von Koningsberg*,* on a licence under the same act, the claimant had not negatived enemy's interest, and the court held that the words "any person" in the act did not authorize the importation of enemy's property.

There is a very late case which was decided, after every extension had been given to licences by a very enlarged construction, that of the *Cousine Marianne*, *March* 13th, 1810.† Sir Wm. *Scott* said, "this court has never yet restored the property of the enemy, except in those instances where the words "to whomsoever the property may appear to belong," are introduced into the licence; where those words occur they have been held to exclude all enquiry into the proprietary interest; but they are not found in the licence on board this vessel, and the court therefore is not at liberty to depart from the general rule."

In the present case, in describing the vessels by which the importation shall be made, words to that effect do occur, "any ship or vessel in any manner owned," which would extend to enemies vessels, but respecting the cargo no such words are to be found, but merely general expressions "it shall be lawful to import." Which are scarce so

* *Rob.* II. 169.

† *Edw. Lic. Ca.* p. 20

comprehensive as the words "any person" in the acts and orders before stated.

That his Majesty's government understood this to be the settled law upon the subject is evident from the order of council of the 13th of *October*, 1812. They clearly supposed that by the declaration of war upon the 13th of *October* against the *United States*, all communication with that country, which had hitherto been allowed under the order of the 8th of April, would be precluded. And therefore as it was thought expedient, that the exportation and importation should notwithstanding the present hostilities continue, the Governor was authorized to grant licences accordingly, *notwithstanding the ships and cargoes shall belong to citizens of the United States*, or be the property of *British* subjects trading with the country. Recognizing with respect to this order in council of the 8th of *April*, the same principle which had before been acted upon in the orders of Council respecting the importation of *Spanish* wool, and which had governed various decisions of the court of Admiralty, *that mere general words would not authorize an enemy's trade, without an express authority to that effect.*

Secondly, such then being the understanding, and such the intention of government, on the same day upon which war was declared by the order for reprizals; to legalize a trade which was no longer lawful under the former orders of the 8th of *April*, the other order of the 13th of *October* was issued. And it has been argued that a licence granted under the former order, though originally it might not have been sufficient to protect a trade with the enemy, by a retrospective power in the order of the 13th *October*, is rendered valid, and effectual to the full extent of

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that subsequent order, so as to cover an importation of *American* property. But there is no ground for such a supposition. The words of the order are in no part retrospective, they are couched in the future tense, "the Governor or other persons administering the government shall be authorised and impowered, and they are hereby authorised and impowered to grant licences accordingly." There are no expressions to give further effect to any licences which they might have already granted. The powers under the former order, on which the licence issued, are totally different from those of the order of the 13th of *October*. The one is general to all persons without a licence, the other requires a special licence. The one is limited to *British* subjects, or at least to alien friends, the other extends expressly to enemies in the *United States*. The latter order therefore is not a mere continuance of the former order, extending the powers to *American* citizens in their new relation of enemies, but it is a new regulation altogether; new as to the persons to whom the privilege is granted, and new in the mode by which it is to be carried into effect, though it refers as to some particulars of description to the former order. But this licence is not even founded upon the former order, which opened the trade generally, and neither directed, nor authorised any licences to be granted.

It never could have occurred to His Majesty's Ministers, that such unauthorised licences had been granted, and therefore it could not have been in their contemplation to confirm them. It never can be taken without express words to that purpose, that licences, which in their origin were unauthorised and a mere nullity, should receive a life, much less vigour, which they did not originally possess by a subsequent

order merely prospective. A trade like the present can be protected only by a licence issued in pursuance of the authority given by the Order in Council of the 13th of *October*, and in the form transmitted therewith, from which this licence varies in many material respects; in the enumeration of the articles, in the authority and powers stated, and in not being limited to any specific time.*

If this licence is ineffectual in itself, it can derive no additional validity from the authority of *Admiral Sawyer* annexed to it. Whatever respect it may be the duty of the captains of His Majesty's ships and vessels under his command to pay to his directions, they are not binding upon others, and can give no legality whatever to a traffic otherwise unlawful. All *American* vessels and cargoes of grain and flour proceeding from the ports of the *United States* to *Spain* and *Portugal*, which are furnished with passports granted by *Admiral Sawyer*, are indeed by an order in Council of the *26th October*, 1812, directed to be allowed to proceed without molestation, and if brought in, to be forthwith liberated and released; but this order extends to no other cases.

Before I conclude, it may not be improper to advert to a strain of argument which has been employed at the bar with a considerable degree of warmth, and to exculpate myself from what might appear to be an inconsistency of conduct. It is stated in the licence, that it was granted with the advice and consent of His Majesty's Council of this province. As I have the honour of a seat at that board, lest it should be imagined that I had advised a measure in one capacity, which I may now pronounce to be illegal in another, I think it necessary to avow, that I am not comprehended in the number of those gentlemen by

* See the Orders in Council referred to, in the Appendix, B.

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whom that advice was given. The learned counsel for the claimants has indulged himself in much declamation, in the course of which he has affected to treat all discussion respecting this subject as an indelicacy: and he has most strongly deprecated a decision of this court against the validity of the licence, as a breach of the national faith, and as destructive to the conveniences and comforts, the policy, and the commercial interests of this province, upon what has been stiled a dry point of law. It might be a short answer to all this reasoning to say, that a court of justice is not to decide by considerations of that nature, but by positive laws, that parties can be intitled to no farther privileges than those laws have defined, and that they can blame themselves only if they have used such instruments under circumstances very different from those under which they were granted. Yet there may be no impropriety in my proceeding still further to observe, that whatever respect is due to persons in high stations, and certainly this court is not disposed to trespass upon that respect, some consideration likewise is owing to the inhabitants of this province, and even to the enemy; and that, instead of being kept in darkness respecting the effect of documents for which they are paying large sums, and upon which they are embarking property to a considerable amount, it is materially for their benefit that the validity and extent of those instruments should be fully examined, and distinctly understood. And with respect to some other of those assertions, no man can entertain more zealous wishes for the prosperity of this province than myself. To promote the happiness of my fellow creatures, at all times, and in all places, is the sublime precept of that holy religion which I profess, and an attachment to this province in particular,

from a long residence here, has animated my general sense of duty by my own personal feelings in its favour. But I have always been of opinion that this desirable object may be most effectually accomplished, not by hastily giving way to every crude suggestion, not by adopting every plausible but ill-digested proposal, not by yielding to every fancied difficulty, or by gratifying the private interests of individuals at the expence of the general good, but by pursuing, invariably, and without deviation, the sound, permanent, and well considered principles of an enlarged policy, which should embrace the good of the whole, as well as of each separate part. Upon such principles of an extensive policy, are formed the navigation laws of this empire, and none were ever better calculated to promote the real happiness of those for whom they were designed. Instead of representing those laws as being in opposition to the true policy of this country, it would be more conformable to truth and to justice to assert, that upon investigation they would be found to conduce to the same objects: and, for that reason, a decision of this court, founded immediately upon what are said to be rules of strict law, will receive a farther corroboration, if it should appear likewise to be consonant to genuine principles of policy, and contributory to the real advantages of the province.

I have no hesitation in professing that I am a friend to the system of navigation laws. Their declared object is of the first importance to the *British* Empire, and the experience of a century and an half has demonstrated that they are adequate to the purposes for which they were designed. From its insular form, from the situation of its numerous territories scattered over the face of the ocean, in the four quarters of the globe, a maritime superiority is not only

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necessary to its prosperity, but essential to its existence; a commanding navy can be created only from a most extensive establishment of mercantile shipping, and this can be best secured by confining, as far as possible, all commerce with the *British* dominions to *British* vessels. Nothing can be clearer than these principles: yet strange to say, in a period when the beneficial effects of this system have been most sensibly felt,—when *Great Britain*, secure in her naval power arising from that system, has defied the whole *United Continent of Europe*, most unnaturally combined against her,—at a time when I think it would not be going too far to assert, that the salvation of the world has depended upon the navigation laws of *Great Britain*,—many persons are to be found, and in the very heart of the Empire, who can condemn that system as confined, narrow-minded, illiberal and oppressive, and who can employ every engine open and direct, as well as secret and clandestine, to subvert or to undermine it, in whole or in part. If we are insensible of its value ourselves, we might derive the useful lesson from our enemies, whose never-ceasing and virulent abuse of our navigation laws is a demonstration that *they* discern their importance to our national prosperity, that *they* feel most sensibly that they are a principal impediment to the success of their designs against us.

Some theorists indeed have objected to these laws as being in some measure unfavourable to commerce. It is not denied however that commerce has flourished under them, to a degree unknown before those laws were passed, and to a degree never experienced in countries where no such laws exist: that they secure to us all the profits of freight, the employment of an infinite number of *British* subjects,

and the very extensive trade of ship-building, with all the numerous classes of arts connected with it; that they render us independent of the assistance of foreign shipping, and give us the unlimited command of all the markets in the world; and that it is proved by facts, that, in proportion as foreign vessels have been employed, our own shipping has sunk and dwindled. I am far from being convinced that they are at all injurious to commerce, but if they were more detrimental than I think they have been proved to be, for such an object no sacrifice can be too great. The commercial loss is a trifle in comparison to the counterbalancing advantages. Nothing more is done in this case than what is willingly submitted to in many others. For their protection, the subjects of a country readily bestow a part of their income in taxes for the support of armies and navies. The surrender of some advantages in trade under the navigation laws is merely contributing a small part of commercial profits to the maintenance of a naval defence which cannot otherwise be obtained.

It may be a good general rule that trade should be left perfectly free, but there are numberless exceptions to it, even with a view to the benefit of trade itself. It is a rule which might be proper to adhere to, if trade was the only object of importance to the councils of a nation, and to which every other ought to give way. But there are other objects which equally affect the welfare of the state, and which ought to have their weight in public deliberations. Amongst these, such as immediately concern the safety and the defence of the nation are of the very first consequence, and all minor considerations must yield to them. Trade itself will be fleeting, and the wealth derived from it insecure, without

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due means are used for their protection. To give up security for mercantile profit is to risque the destruction of both.

As this system is of such importance to the whole Empire, *the colonies* in particular receive more benefit from it than any other parts. Besides that it is for their particular advantage not to depend upon foreign shipping, or the caprices of foreign merchants, and that in the northern colonies ship building is a staple article, a maritime defence is more necessary to them than it is to the mother country. If the oaken ramparts of the *British* islands should even decay, a numerous population, full of resources, might resist with success an invading army. But the colonies, weak and defenceless in themselves, must immediately fall to the first enemy who can command the seas. But for the navigation system, this country might at this moment have presented the melancholy spectacle too often exhibited upon the continent of *Europe*, plundered and ruined, and the flower of its inhabitants drawn away by conscriptions to shed their blood as engines in the hand of a tyrant for enslaving their fellow creatures. Notwithstanding any plausible arguments which may be brought against them, by prejudiced, artful, self-interested, or well meaning, but inconsiderate persons, from any general maxims relating to the rights and the unrestrained freedom of commerce, the indefeasible claims, and the profit of the colonies, and I know not what other popular topics; whatever inconveniences, whatever privations, we may suffer from those laws, let us ever hold them fast, and cherish them, as the support of our best interests, and as the palladium of every thing that is dear and valuable to us.

Cases of necessity indeed may arise which may

fully justify a temporary deviation from them, but if we are truly sensible of their importance we should take care that such cases are real and not imaginary. For by giving way without sufficient cause, upon every occasion, and to every local and temporary emergency, the whole may be insensibly frittered away. If the hand of heaven, in the ordinary course of its providence, afflicts us with natural calamity, let us kiss the rod, and let us endeavour to alleviate our distresses by the readiest means in our power. But all the alledged pressures of the present times arise immediately from another cause, from the hostile machinations of the enemy. It is his peculiar object to ruin our commerce and shipping, to deprive us of all the benefit which the operation of the navigation laws for so many years has procured us, and to compel us to weaken, to depart from, and even to abandon that system which he has found to be the only bulwark which he could not subvert. To give way to the difficulties imposed upon us with that view, and by yielding to them to surrender those ancient principles of policy, is to gratify the wishes of the enemy, to promote his views, and to confederate with him in the plots laid for our own destruction. Every deviation from this system, whether voluntary, or from irresistible necessity, every licence to admit foreign vessels into *British* ports, is a nail driven into the coffin of the *British* empire.

Whenever the necessity is clear, great and otherwise insuperable, such deviations cannot be condemned, however they may be lamented, provided they do not extend beyond what the necessity really demands. His Majesty's ministers no doubt had sufficient reason for the measures which they have adopted in various laws and orders in council under

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the stagnation which the commerce of *Great Britain* experienced, but I must own that I have never seen sufficient proof, or have been privy to any circumstances which have satisfied me, of the existence of any necessity in this province for issuing licences to authorize importations beyond what those laws, and his Majesty's orders in council, have permitted.

Those laws and orders are the result of much deliberation, and of more extensive information that can be here procured, and they are formed upon wide and extensive views of the subjects in all its various relations. To meet the real exigencies of this country, the liberty of importing wheat, flour and grain, articles of indispensible necessity, unrestrained to any particular description of vessels, and not confined as to ownership, first without licence during peace with the *United States*, and after the declaration of war limited by the necessity of special licences, and confined within certain periods of time, might not be inexpedient, since this country does not at present afford a sufficient supply of these articles for its own consumption, and *British* ships are excluded from the ports of the *United States*. But as to the articles allowed, these licences were not necessary under the first order in council, and they were neither supported by, nor conformable to the latter order. With respect to the clause which extends beyond the articles enumerated, to provisions in general, the case is far different. They have never been allowed by any law, or order in council, and their admittance could only be justified by a paramount necessity. Yet with cattle of every denomination this province is amply furnished. The stock is daily increasing even beyond the demand, which has been greatly enlarged by a multiplying population and consider-

able addition to the military and naval establishments. It is well known that the markets were never better supplied than for the last twelve months, and so far from standing in need of any importation of those articles, during the last year very considerable exportations have been made. Under these circumstances, licences for the importation of provisions, instead of being necessary, cannot but be injurious to the agricultural interests of the country. It appeared to me therefore that at the time of issuing these licences, one part of them was nugatory, and the other part an infringement upon the laws of navigation not founded upon sufficient reasons.

These are the principles by which I have been actuated in forming an opinion upon this subject, independent of the rules of law, and I have been compelled to state them, from the line of argument which was adopted at the bar, and because I thought it necessary to correct some misconceptions which seemed to have been entertained, and to efface some unfavourable, but erroneous, impressions which might have been formed. I trust too that these considerations will not be altogether without their use in this application, to the decision I am about to make, and will shew that to support the navigation system, and in so doing to pronounce against the validity of this licence, is not only to adhere to the strict maxims of law, but to promote the best interests of the province, properly understood.

I condemn this ship and cargo as a droit of *Admiralty* to his Majesty, having been taken by a non-commissioned vessel.

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Licences granted by Mr. *Allan*, the *British* Consul in *America*, void.

THE *King's Advocate for the captors*, contended, that the enemy was here claiming, under a licence, ostensibly, from Vice-Admiral *Sawyer*, but, in fact, granted by Mr. *Allan*, late consul of His Majesty in *Boston*. That gentleman's functions, equally with those of Mr. *Foster*, had effectually ceased, upon the declaration of war, by *America*, against *England*; and, if they had not, he has assumed an important power, not warranted by his office, or by any authority delegated to him.

It is true that Admiral *Sawyer*, from the best and most judicious motives, wrote a letter to Mr. *Allan*, directing him to give certificates of protection, to any vessels that might be inclined to load with provisions, for the ports of *Spain* and *Portugal*; and, assuring him, that those certificates would be respected by His Majesty's cruizers. But this was the exercise of an authority, on the part of the Admiral, for which there was no legal foundation, and, at all events, it could not be delegated to a person residing in the enemy's country. It is said however, that this licence is confirmed by His Royal Highness the Prince Regent's order of the 26th of *October*, by which His Majesty's Ships, and the Courts of Admiralty, are directed not to interrupt or detain any ships in possession of such licences.

But this is not one of the licences, within the contemplation of that order. Admiral *Sawyer* has granted passports of various descriptions, but the one in question is more properly a licence granted by Mr. *Allan*, which cannot be confirmed, either by the words, or spirit of the order. The licence is therefore invalid, and a condemnation must ensue.

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The Solicitor General, on the part of the claimants. After the rigid decisions that have lately taken place, in this court, upon the subject of licences, it would be needless to contend, upon principle or precedent, for the validity of the present one. This is certainly the licence of Admiral *Sawyer*, and not of Mr. *Allan*, who has been the mere instrument of carrying into execution the good intentions of the admiral. It cannot even be considered to have been granted in the enemy's country, as the Admiral's letter to Mr. *Allan*, the foundation and very essence of it, was written in *Halifax*, and transmitted to that gentleman, at *Boston*, in order that the enemy shipper might there receive an authenticated copy of it. It was, therefore, no delegation of the Admiral's authority, and no assumption of power on the part of Mr. *Allan*. Upon the faith of its protection, the enemy has ventured his property in a good cause, and he is now interrupted in a pursuit, favourable to the views and policy of the *British* government, by a prosecution in direct opposition to those views, and inconsistent with that policy, which Courts of Admiralty, in cases of this sort, are justified in considering, though such policy may militate with the rigid principles of national law. But there has been an express confirmation of this licence, on the part of the government. The Prince Regent's order of the 26th *October* contemplates the very licence in question, and could have none other in view, as not one of this description has been, or could have been granted in any other way. If the order has not a direct reference to the licences granted under the letter of Admiral *Sawyer* to Mr. *Allan*, it can have no object whatever, and is therefore, totally ineffectual to any purpose. The truth is, that in all these cases in which the *summum jus* of

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national law may be correctly, though harshly administered, the government of the mother country feels itself in honour bound, by confirmatory orders or otherwise, to give effect to those official acts of his Majesty's commanders, in distant parts of the world, which are founded on good policy, as it respects the parties who are interested in the confirmation of them. Indeed there seems no reasonable objection against the same line of conduct being pursued in the judgment of our courts of admiralty.

JUDGMENT.---*Dr. Croke.*

This vessel was claimed as *American* property. Her voyage was from *Salem* to *Lisbon*, with flour, peas, and fish, under an alledged licence. She sailed the 9th of *October*, 1812, and was captured by the *General Smith* privateer, of *New Brunswick*, on the 10th of *October*, and was carried into *St. John's*.

The licence was granted by *Andrew Allan*, Esq. His Majesty's late consul for the *Northern States* of *America*, and was as follows:

"To the commanders of any of His Majesty's ships of war, or of private armed vessels belonging to subjects of His Majesty.

"WHEREAS from the consideration of the great importance of continuing a regular supply of flour and other dry provisions to the ports of *Spain* and *Portugal*, it has been deemed expedient by his Majesty's government, that notwithstanding the hostilities now existing between *Great Britain* and the *United States* of *America*, every protection and encouragement should be given to *American* vessels laden with flour and other dry provisions and bound to the ports of *Spain* and *Portugal*.

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"And whereas in furtherance of these views of His Majesty's government, *H. Sawyer*, Esq. vice-admiral and commander in chief of His Majesty's squadron on the *Halifax* station, has directed to me a letter under the date of the 5th *August*, 1812, (a copy whereof is hereunto annexed); wherein I am intrusted to furnish a copy of his letter certified under my consular seal to every *American* vessel so laden, and bound to any *Portuguese* or *Spanish* ports, and which is designed as a safeguard and protection to such vessel in the prosecution of such voyage.

"Now, therefore in pursuance of these instructions, I have granted the *American* brig, *Reward*, *Amos Hill*, master, burthen one hundred and eighty-two tons, now lying in the harbour of *Salem*, laden with a cargo of flour, and bound to *Lisbon*, in the kingdom of *Portugal*, the annexed document only to avail in a direct voyage to *Lisbon*, and back to the *United States* of *America*, requesting all officers commanding His Majesty's ships of war, or of private armed vessels belonging to the subjects of His Majesty, not only to suffer the said brig *Reward* to pass without molestation, but also to extend to her all due assistance and protection in the prosecution of her voyage to *Lisbon*, and on her return thence to the *United States* of *America* laden with salt or other merchandize, not exceeding the nett amount of the outward cargo, or in ballast only.

"Given under my Hand and Seal of Office, at *Boston*, this seventh day of *October*, one thousand eight hundred and twelve.

(L. S.) "ANDREW ALLAN, Jun.
"His Majesty's Consul."

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Office of His Britannic Majesty's Consul.

"I, *Andrew Allan*, jun. His Britannic Majesty's consul for the state of *Massachusett's*, *New Hampshire*, *Rhode Island*, and *Connecticut*, do hereby certify that the annexed paper is a true copy of a letter addressed to me by *Herbert Sawyer*, Esq. vice-admiral and commander in chief of His Majesty's squadron on the *Halifax* station.

"Given under my Hand and Seal of Office, at *Boston*, in the State of *Massachusett's*, this seventh day of *October*, in the year of our Lord one thousand eight hundred and twelve.

"ANDREW ALLEN, Jun."

"His Majesty's Ship *Centurion*,

Halifax, *August* 5th, 1812.

"SIR,

I have fully considered that part of your letter of the 18th ult. which relates to the means of ensuring a constant supply of flour and other dry provisions to *Spain* and *Portugal*, and to the *West India Islands*, and being aware of the importance of the subject, concur in the proposition you have made.

"I shall therefore give directions to the commanders of His Majesty's squadron under my command, not to molest *American* vessels so laden, and unarmed *bona fide* bound to *Portuguese* or *Spanish* ports, whose papers shall be accompanied with a

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certified copy of this letter under the consular seal.

" I have the honour to be,
" Sir,
" Your most obedient humble Servant,
" HERBERT SAWYER, Vice Adm."

" *To Andrew Allan, Esq.*
" *British Consul, Boston.*

It is well understood, and admitted, that this licence can have no validity from the authority of Mr. *Allan* alone, and the protection afforded by the letter of admiral *Sawyer*, can avail no farther than as it has been recognised and confirmed by the Prince Regent's order in council of the 26th *October*, 1812.* It may be necessary to state the origin, and history of these licences.

Vice-Admiral *Sawyer*, when he had the command upon this station, being sensible how important it was that the *British* troops in *Spain* and *Portugal* should be supplied with flour, and other provisions, very properly took upon himself, as far as it was in his power, to protect vessels engaged in that service by licence. From the guarded manner in which those licences are expressed, he seems to have been fully aware of the extent of his own powers. It was evident that he could not legalize the enemy's trade, and he therefore merely gave directions that the commanders of His Majesty's squadron under his command, should not molest *American* vessels so laden, and so destined. These directions, all officers under his command were bound to obey, and perhaps commanders of vessels upon other sta-

* See Appendix, D.

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tions might think proper to respect them; but they were no further binding, and could afford no protection in law, if vessels were detained and brought before a Court of Admiralty. On the 26th *October*, 1812, his Royal Highness the Prince Regent was pleased to order in council, that all such *American* vessels, and cargoes of grain and flour, proceeding from the ports of the *United States* of *America* to *Spain* and *Portugal* as should be furnished with passports or certificates of protection, granted by vice-admiral *Sawyer*, commanding His Majesty's ships on the *Halifax* station, should be allowed to proceed, and that if they should have been detained, they should be liberated and restored.

It appears by these papers, that vice-admiral *Sawyer* did not confine himself to licences issued immediately by himself. A proposition was made to him by letter from Mr. *Allan*, the *British* consul in the *United States*, for further means of ensuring a constant supply of those articles for *Spain* and *Portugal*. In this proposal vice-admiral *Sawyer* concurred, and in his answer to Mr. *Allan*, he says, "I shall give directions to the commanders of His Majesty's squadron under my command, not to molest *American* vessels so laden, and *bona fide* bound to *Portuguese* or *Spanish* ports, whose papers shall be accompanied with a certified copy of this letter under the consular seal." So that besides the admiral's own licences, an authority was thus given to Mr. *Allan* to multiply certified copies of the admiral's letter, and to grant protections to any extent.

The only question then is, whether these documents granted by Mr. *Allan*, are within the Prince Regent's order in council, by which alone they can be rendered effectual.

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It is evident that they do not come within the *direct words* of the order. They are not *passports* or *certificates, granted by vice-admiral Sawyer*, or under his signature, but they are *licences, or certificates, granted by Mr. Allan.*

Let us examine whether they come within the meaning and the intention of the order.

Mr. *Allan* founds his authority for issuing these certificates upon admiral *Sawyer's* letter, a copy of which is annexed to them. The order in council not having expressly and immediately sanctioned them, the real question seems to me to be, whether vice-admiral *Sawyer* could depute to any other person a power of granting licences, with which he had been retrospectively invested by the order in council, without an express authority to enable him.

The effect given to vice-admiral *Sawyer's* licences, is that of legalizing the enemy's trade and protecting his property from capture, to which it is liable by the laws of *Great Britain*, as well as that of nations. This order, therefore, confers the power of exercising one of the highest prerogatives of His Majesty's crown, that of placing an alien enemy under the protection of the law. I do not see how an instrument which confers such a power can be extended by any supposed liberality of construction beyond the plain import of the words, nor how the exercise of it can be deputed by the person to whom it is granted, without an express permission from the sovereign, from whom it proceeded. Arguments have been deduced in favour of this case from the decisions which have lately taken place in the High Court of Admiralty and the Court of Appeals, where in consequence of the unprecedented state of the commercial world, the most extensive

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construction has been given to licences, far beyond the literal terms in which they are conceived. Between those cases and the present there is a material distinction. Where a licence proceeds from an *undisputed authority* the intention and object for which it was granted may be allowed to controul and prevail over the literal sense of the words. But where the question depends upon the very *constitution of the power* under which they are granted, when that power besides is the delegation of a high branch of the royal prerogative, no such latitude can be indulged, and no powers can be understood to be conveyed beyond what is most expressly defined.

It is true that this is a species of traffic intended for the benefit of a very important service in which the *British* nation is now so meritoriously engaged, and is therefore intitled to great favour and allowance, but still it must be understood to be confined within some bounds of law and reason. Now the *British* government has authorized licences for this object as far as appeared expedient; many restrictions are still imposed upon them, and the permission is far from being general and unlimited. The nature of the service cannot supersede every principle of law.

Good reasons may be imagined why the order in council should not be intended to extend beyond the respectable person to whom it has been granted. Though so high a power might safely be intrusted to an officer in the conspicuous station of a commander in chief, with so great a responsibility attached to his situation, yet perhaps it might not be so advisable to commit it to the free discretion of a mercantile consul. The worthiness and respectability of Mr. *Allan's* character, indeed, was a sufficient security against any improper exercise of the

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power as far as he was concerned, but the best men are liable to imposition, and a fraudulent use might be made of instruments which had been granted with the best intentions, and the most perfect integrity. It is well known that from the multitude of licences which have been issued from various quarters, the whole coasting trade of *America*, and a considerable part of its general commerce, have been protected from *British* cruisers Whether their vessels were sailing northward, or southward, eastward, or westward, some sort of licence was always to be found on board to cover the voyage, and to disappoint the hopes of the sailors. The knowledge of these practices was very likely to have induced his Majesty's ministers to draw a line as to the persons by whom licences had been granted.

It may be observed likewise that this licence of Mr. *Allan* goes beyond the letter of Admiral *Sawyer*, upon which it is founded. The letter only mentions his Majesty's ships, but the licence extends its protection against private ships of war. The letter is confined to the outward voyage, but the licence protects the vessel upon its return voyage, and with a return cargo.

It has been said that these licences were more useful than those of Admiral *Sawyer*, and therefore that it was probable that government would probably confirm them; that as vessels engaged in this service were freighted in the *United States*, and the communication with this country was very much impeded by the non-intercourse acts, it would have been difficult to have procured licences from Admiral *Sawyer* to answer the various emergencies of those expeditions, and therefore that it was expedient that there should have been some persons upon the spot

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to issue them. The nature of this trade must have been perfectly well known to his Majesty's Ministers, and they must have been fully aware of that inconvenience. These certificates of Mr. *Allan* must also have been known to them. Admiral *Sawyer* officially, and of course, reported his having granted licences, and the authority which he had given to Mr. *Allan* to issue them. The order in council must have been made in consequence of these reports. Since government then was perfectly acquainted with these certificates, if it was intended to give them validity, they would have been expressly mentioned by name, in the order of council. Not being there mentioned, under these circumstances, the just conclusion is, that it was not the intention of government to confirm them.

It has been asked, if these licences are not confirmed, to what did the order in council apply? And it was said that it would be in a great measure nugatory and inefficient. This objection has been fully answered by His Majesty's Advocate, by stating that the great number of licences granted directly by Vice-Admiral *Sawyer* supplied a very ample subject matter for the order to act upon, and afforded very sufficient grounds for its having been made.*

Guided then by what I conceive to be correct maxims of law, and by the apparent intentions of His Majesty's Government, as far as it can be collected from the words of the order in council, the conclusion which alone I feel myself authorized to draw from them is, that this licence does not afford a protection to this vessel and cargo, and therefore I condemn them to His Majesty, in right of his Crown,

* See the Order in Council confirming Admiral *Sawyer's* licences. Appendix, D.

having been taken before the order for general reprizals. If it is conceived that His Majesty's government had other intentions than those which I have attributed to it, the parties may intitle themselves to the full benefit of those intentions, by an application to that court; which, being composed of His Majesty's Ministers, is best qualified to interpret their own acts and meaning.

NOTE.—The following order from Sir *Robert Calder* had been sent to the Captains and Commanders upon the *American* station, but had not been communicated to the Court of Vice Admiralty at the time of this decision.

(COPY.)

Salvador del Mundo, in Hamoaze,
11th Dec. 1812.

GENERAL MEMORANDUM.

The Lords of the Council having signified the opinion to the Lords Commissioners of the Admiralty, that vessels claiming protection from the licences issued by Mr. *Allan*, his Majesty's Vice Consul at *Boston*, or by the *Spanish* minister in *America*, ought not to be exempted from British capture, and that such papers should not be respected by His Majesty's cruizers. In pursuance of an order from the Lords Commissioners of the Admiralty, the captains and commanders are to govern themselves accordingly.

(Signed)

R. CALDER.

To the respective Captains and
Commanders, &c. &c. &c.

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In the case of the *Hope*, the High Court of Admiralty, confirmed the validity of Mr. *Allan's* licences, 19th February, 1813, a decision which was not known at *Halifax* when this case was decided.

April 21, 1815.

The MARQUIS DE SOMERUELES.

Second Case, upon the Petition of Mr. Black.

THE petition was supported by the Solicitor General, and opposed, though not strenuously, by the King's Advocate, the captors not consenting to the restitution of the property.

Dr. Croke.

This petition is of a different kind from what usually engages the attention of the court. It prays, that certain paintings and prints, which were captured on board the *American* vessel called the *Marquis de Somerueles*, may be restored to the petitioner on behalf of a scientific establishment at *Philadelphia*. The ground of the petition is contained in a letter annexed to it, which states: "That in the *Somerueles*, from *Italy*, was taken a case belonging to *the Academy of Arts* in that city, containing twenty-one paintings and fifty-two prints; that they were presented to the academy by Mr. *Joseph Allen Smith*, who has already given most objects of the statuary, paintings, and prints which they possess; indeed this is the remnant of what he collected for the purpose of assisting in its formation. The value we know not, but in this country, and in an infant establishment, every accession is important. The Academy is now preparing an application for them, which will be handed with an accompanying letter

The MARQUIS DE SOMERUELES. 1812.

from *Anthony St. John Baker*, late Secretary of Mr. *Foster*, who has examined into the circumstances--- knowing that even war does not leave science and art unprotected, and that *Britons* have often considered themselves at peace with these, we are not without hopes of seeing them."

Heaven forbid, that such an application to the generosity of *Great Britain* should ever be ineffectual. The same law of nations, which prescribes that all property belonging to the enemy shall be liable to confiscation, has likewise its modifications and relaxations of that rule. The arts and sciences are admitted amongst all civilized nations, as forming an exception to the severe rights of warfare, and as entitled to favour and protection. They are considered not as the peculium of this or of that nation, but as the property of mankind at large, and as belonging to the common interests of the whole species. Not to mention innumerable cases of the mutual exercise of this courtesy between nations in former wars, even the present governor of *France*, under whose controul that country has fallen back whole centuries in barbarism, whilst he has trampled upon justice and humanity, has attended to the claims of science. Besides other instances, there was one which came within my knowledge. A gentleman, a fellow of the royal society, was unfortunately one of the persons so unjustly detained at *Paris* at the commencement of the war. Considerable interest was exerted, through the medium of the *British* government, to procure his release, but without effect. Yet to an application from *Sir Joseph Banks*, as the president of the royal society, in favour of a member of that useful institution, *Bonaparte* paid immediate attention, and in the handsomest manner permitted him to return to *England*. If such cases were un-

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heard of, every *Briton* would be anxious that his country should set the honourable example; but I trust that every *British* bosom would blush with shame, if his country should be found inferior to the lawless government of *France* in obeying the dictates of liberality. We are at war in the just defence of our national rights, not to violate the charities of human nature.

In thus favouring an institution of this kind, besides contributing to the maintenance of such a reciprocal exchange of civilities with our enemy as is consistent with the state of hostilities, we shall perhaps at the same time promote most effectually our own best interests. There is a natural connexion between all the arts and sciences, as well material, as intellectual. It is impossible for a nation to improve in the polite arts without a corresponding amelioration in the practical science of human nature. It is a school-boy quotation, but not the less true for being trite, that

> Ingenuas didicisse fideliter artes
> Emollit mores: nec sinit esse feros.

This observation is founded in nature, for what is usually called taste is only good sense applied to the polished ornaments of life; and correct ideas in morality are the same good sense directed to human actions. All absurdities, and deviations from rectitude, are nothing more than a bad taste influencing human conduct. The public standard of morals will therefore always rise with the advancement of the polite arts. Minds, accustomed to the contemplation of picturesque excellence, cannot fail of being disgusted with any departure from the sublimer form of moral beauty.

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In the *United States*, such improvements are not improbable, or perhaps very remote, and cannot fail of being advantageous to both countries. They have shewn themselves not incapable of producing genius in these departments. The very eminent artist who now presides, with so much credit to the country, and so much benefit to the students, in the royal academy of *Great Britain*, owes his birth and earlier education to that country. The time may shortly come when in an advanced state of the arts, to which this very institution, which is now before the court as a petitioner, may contribute its share, new *Wests* may arise to revive the school of Rafaelle in the wilds of *America;* and when likewise, by a corresponding improvement in moral feeling, the public taste may be too highly cultivated to bear with such hideous deformities as the picture of a country priding itself upon its liberty and independence, yet submitting to be the tool of a foreign despot; so cowed by faction that no man is bold enough to stand up and avow himself *the friend of the land of his forefathers;* so destitute of all sense of honour and generosity, as to spurn, with indignity, the hand of fraternal benevolence repeatedly held out to it, and to throw itself into the embraces of the common enemy, who despises and insults it:—when such an improved state of society shall take place, there can be no doubt but that the two nations of brethren on the opposite shores of the *Atlantic*, will be united in the indissoluble bonds of friendship, as well by inclination as by a common interest; they will cultivate in unison the advantages of an enlightened commerce; they will labour together in the furtherance of the useful arts; and will experience no other enmity than a liberal rivalship in every elegant and manly accomplishment.

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Not to disappoint the expectations which have been entertained of the liberality of this country, and to give every encouragement to an infant society, whose views and objects are so laudable and beneficial, with real sensations of pleasure, and the sincerest wishes for its success and prosperity, in conformity to the law of nations, as practised by all civilized countries, I decree the restitution of the property which has been thus claimed.

June 2d, 1813.

The FREDERICK AUGUSTUS.

When a licence had been burnt under a mistake, upon proof of the fact the vessel was restored.

THE King's advocate, on the part of the captors, contended that this ship having been indulged with a protecting licence from the *British* government on a return voyage from *Cadiz* to a port in the *United States*, and being the avowed property of the enemy, could not be restored unless the licence were produced, or satisfactorily accounted for. The master alledges that he burnt it from an apprehension that the capturing ship was an *American* privateer: but as this was an act of his own by which he has deprived his ship of her neutral character, the court will at all events require the most rigid proof in support of this declaration. The solicitor general, on the other side, observed that the destruction of the licence under the circumstances of the case did not deprive the ship of the protection she had originally received from it.* It was incumbent on the master to prove the fact of his having burnt it, and this he has done to the fullest extent, not only by his own affidavit, and

* See the Jonge Frederick, Classen 1, Edwards, 357.

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the deposition of one of his seamen, but by the certificate of Sir *Thomas Hardy*, who has candidly assisted the master in establishing the truth of his assertion, that he had the licence in his possession when the ship was boarded by the *Ramilies*.

JUDGMENT.---*Dr. Croke.*

This vessel sailed upon a return voyage from *Cadiz* to the *United States*, with salt, under a licence from the *British* government. She had been boarded by Sir *Thomas Hardy*, in the *Ramilies*, and upon the production of the licence had been permitted to go on. About a mile from the *American* coast, the weather being thick, a vessel came near, under *American* colours, and fired a shot. Taking her for an *American* privateer, and being so near the shore, he burned the licence. He was taken on board the privateer, and was then told that she was *American*, upon which he denied having any licence. The vessel however proved to be the Sir *John Sherbrooke*, a privateer of *Nova Scotia*, which immediately captured her. These facts were sworn to, and there was a certificate from Sir *Thomas Hardy*, which stated that she had been boarded by an officer under his command, and that her master having produced a licence regularly signed by Lord *Sidmouth*, and Viscount Chetwynd, she was permitted to proceed. It was dated *Ramilies*, off *Block Island*, 19th *April*, 1813.

Restored on payment of the captors' expences.

June 2d, 1813.

The EXPEDITION, *Brooks.*

Licence to trade between two ports of the enemy void. Claimant's expences allowed under favourable circumstances.

THE Solicitor-General endeavoured in this case to support a licence, granted upon grounds of political expediency, by *Admiral Sawyer*, commanding on the *Halifax* station, to the claimants, for the purpose of protecting them, in their accustomed trade between *Boston* and *Eastport*, both ports of the enemy. He argued merely upon the policy of the measure, and the invariable indulgence which had been shewn to the claimants, from a due respect to the licence, by His Majesty's cruizers, until the present capture.

JUDGMENT.---*Dr. Croke.*

This vessel was claimed, under a licence from vice-admiral *Sawyer* to run as a packet between *East Port*, in the *United States*, and *Boston*, and to carry provisions to *East Port*, and a cargo of Plaister of Paris, or other articles, from thence back to *Boston*. The licence was dated 20th of *August*, 1812, and the schooner was taken by the *Ratler*, Captain *Gordon*, on the 11th of *April*, 1813.

This being a trade between two ports of the enemy, the counsel for the claimants does not consider the case as defensible, but as it appears that this vessel had been permitted to run for the convenience of the neighbouring provinces of *New Brunswick*, and *Nova Scotia*, as well as of *East Port* and *Boston*, and had been tacitly connived at by the *British* cruisers for a considerable time, the court directs the claimant's expences to be paid out of the proceeds.

The HENRY, *Gardner*, Master.

June 2, 1813.

THE King's advocate observed, that this was the case of an enemy's ship that had forfeited the protection of her license, by unfair and unneutral conduct. She had sailed from *Liverpool* under the faith of that license bearing an *American* flag, and bound to *Boston*, with a cargo of *British* merchandize, but she had not on board of her a single paper that could establish her national character, or serve to prove that she was the property of any inhabitant of that country whose flag she bore. She had no register, no sea letter, no certificate of ownership, nor any document of the usual kind by which to ascertain if she were in truth the vessel intended by the license. There is reason therefore to apprehend an unfairness in the transaction which at all events should require the fullest explanation. Upon another point of still more importance, the Court must hesitate before restitution can pass. This ship received at *Liverpool* an indiscriminate bag of letters to the number of thousands, among which were public dispatches from the *American* ministers in *Russia* and *Sweden* to the *American* government, and also several manuscript extracts from *London* papers, giving intelligence of certain military arrangements on the part of the *British* government. The receiving letters to so great an amount without the knowledge of any public officer, who might have taken the precaution to inspect and examine them, is in itself a breach of that good faith which vessels of this description are above all others bound to observe. By several of them it appears that it is now the universal

Neither carrying common letters, extracts from newspapers, or the dispatches of an enemy ambassador residing in a neutral country, are a violation of a license.

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practice to open and examine all letters at the Transport Office that are sent by cartels, and there is every reason to suppose that the same regulation must exist with regard to all other vessels. The master of this ship has acted most negligently, (to say the least of his conduct,) in not having complied with so material a regulation, in the enforcing of which the safety of the *British* government is in a great measure implicated. The carrying of public dispatches to the enemy is a cause of forfeiture; and, *à fortiori*, it is a ground of condemnation to be the bearer of information so extremely noxious as that which is contained in the extracts of newspapers alluded to, which the writer has taken the pains to copy for their more ready and safe conveyance. It was therefore submitted by the King's Advocate that, upon these two points, and particularly the latter one, the Court could not decree restitution of the ship and cargo to the claimants.

On the part of the claimants, *the Solicitor General*. —It cannot be seriously contended on the part of the captors that upon either of their adopted grounds this ship and her cargo are liable to condemnation. Their chief, and perhaps only object in this prosecution is to secure themselves against a demand of costs and damages, to which the claimants conceive they are strictly entitled upon every principle of national justice. This ship is avowedly *American*, sailing under the flag of the *United States*, and navigated by an *American* crew; she obtained her license of protection from the highest source, and could not have procured a paper of that public importance without having submitted to every requisite enquiry upon the subject of her national character. She could not have passed the custom house at *Liverpool* in secret, her name, her flag, and her ownership must have

been ascertained at that office in which she cleared out in the usual public manner, and was considered as the *American* ship *Henry*, to which a license had been granted. With high official documents in proof of her *American* character, she sails from *Liverpool* for the port of *Boston*, and while at the termination of her voyage is interupted by a *British* cruizer, in defiance of the very terms of her license. It is true she had not on board at the time of her capture any one of the papers that compose the title deeds of a ship, but the license, and clearance, ought to have been considered by any cruizer as sufficient evidence of the national character of the ship. The fact of her being *American* property must have been fully ascertained before she quitted the port of *Liverpool*, and should therefore have been taken for granted by the captors, particularly when a certificate from the *American* consul was among the papers of the ship, by which it appears that the register and other usual documents were lodged at his office, agreeably to an act of Congress. He does not give his reasons for their being deposited with him; but an acquaintance with the act will shew that it was altogether owing to the former condemnation, and sale of the ship, in a *French* port, which renders it essential that a ship's papers in such case should be delivered up to be cancelled. But it is unnecessary to go into any explanation of this part of the case, as the license is of itself a sufficient proof of the character and identity of the vessel. Upon the other ground as little need be said in support of the claim. Were the letters in question of the most injurious or treasonable nature, the contents of them must in this instance have been brought home to the knowledge of the master.

In the case of the *Atalanta*, a most glaring case of unneutral conduct in the concealment of enemy's dis-

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patches, it was considered requisite to prove the persons entrusted with the care of the ship and cargo to have been concerned in the management and knowledge of the transaction. The letters of the *Henry* were taken on board in the ship's letter bag in the usual way, and it cannot be presumed that the master had even an intimation of the contents of any one of them. With respect to the subject matter of them, the dispatches for the *American* government came from countries in alliance with *Great Britain*, and the newspaper extracts gave intelligence of so public a nature that it would be absurd to impute treason or treachery to the authors of such notorious information. The letters no doubt were extremely numerous, but their quantity rather extenuates than aggravates the alledged imprudence of the master in taking them. It does appear that all letters sent by cartels are directed to be sent to the Transport Office for examination, but no such regulation has been established with regard to other ships. There was no office at *Liverpool* to which the master could apply for that purpose, no notice was published to this effect, and therefore no blame can attach to him for not having submitted the letters to official inspection. So that in this case there is not the slightest pretence for charging the claimants with an abuse of the license, in consequence of the master's having received on board his ship a bag of letters to be conveyed from *Liverpool* to *Boston*, among the number of which not one can be found of an improper or injurious tendency. Indeed if any of them had been of that class, no other inconvenience would have resulted to the claimants than the payment of the captor's expences. But, situated as the case is, upon both grounds of accusation, the captors are so far from being entitled to their expences, that there is good

reason for awarding to the claimants both costs and damages, for the capture and detention of a ship which the captors have thought fit to interrupt, while in the prosecution of a voyage sanctioned by the licence and authority of the *British* government.

JUDGMENT.—Dr. *Croke.*

Every enemy, who claims a protection for his property under a license, must prove that he has complied with the terms of it. The claimant in this case is said to have failed in two respects; that he has not proved his property to be *American* or *British*, which was one of the conditions of the license, and the other, that he has taken on board certain letters and papers which by law he ought not to have taken.

I shall consider the latter question first, because it may be conclusive. A vessel which sails under a a license is bound to the observance of certain duties. The master is not to be guilty of any practices injurious to the country which grants it. The effect of a license is that of neutralizing the vessel, the same inoffensive conduct is required of such a vessel as of a neutral, and it might not be unfair to apply the same rules which have been adopted in neutral cases. It is alledged that this vessel had on board an immense bag of letters, to the amount of some thousands, and that amongst them were contained information respecting various matters in *England*, which were of an improper nature, and also some dispatches from the ambassador of the *United States* in *Russia* to his own government. I know of no restriction to prevent neutral or licensed vessels from carrying letters. There is indeed a regulation respecting cartels, which is well known, and which appears in the correspondence produced, that no

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letters or newspapers can be taken on board without a previous examinination. But those vessels are of a public nature, and under the immediate eye of government. The masters of licensed vessels are not required to submit their papers to the inspection of a secretary of state, the Transport Board, or any other office that I know of. Nor is there any limitation as to numbers; a master may take letters to any amount without any violation of his duty. It is true that he takes them under a responsibility. If they are of an improper nature he must be answerable for the consequences. The greater part of these letters are of an innocent kind, a mere mercantile correspondence. Whatever may be said from theory of the impropriety of a communication between *England* and the *United States* in time of war, *in fact*, there are numbers of *Americans* residing in *England* by permission, there are many *British* merchants who have had, and still have various connections in the *United States*, and who have many affairs to transact there. There surely can be nothing contrary to duty in communications between persons in such situations in the two countries respectively.

One letter has been selected of a different description. It contains extracts from newspapers relating to various military operations of the country, and which might be of importance to the government of the *United States*. If this vessel has abused the privilege granted her to purposes detrimental to the country which has conferred them, if it has treacherously covered hostile transactions under the mask of commerce, she would certainly forfeit the benefit of her protection. The same conveyance of intelligence which would hang a spy would condemn a vessel. The information here conveyed is certainly injurious enough to *Great Britain*, and beneficial to her

enemy. It contains the result of experiments as to the effect of guns of different weights of metal, by which it was ascertained that the heavy twenty-four pounders, used by the *United States*, take effect at a much greater distance than the light guns of the same calibre used in the *British* navy. It contains the names of the regiments embarking for *America*, and the state of the small vessels just sailing for the river *St. Lawrence*. This information is malignant enough in its tendency, and if it had been procured by spies, or in any clandestine manner, I should have held it sufficient to have worked the condemnation of this vessel. But it consists merely of extracts from newspapers, the account of public matters, universally known in the ports where they took place, from thence circulated in *English* prints through the whole country, and wherever those papers are diffused, which may be said to be nearly all over the world. So many opportunities would present themselves of transmitting them to *America*, through agents of government and a thousand other channels, that it would be impossible to prevent their free transmission. I cannot think that the communication of such very public intelligence can be considered as of an highly deleterious nature, or that it would subject this vessel to confiscation.

The other part of the contents of the bag, the dispatches of the *American* ambassador at *Petersburgh*, appear to me to come precisely within the decision in the *Caroline Doah*.* In that case, dispatches were going from the *French* minister in *America* to the departments of government in *France*. The grounds of the decision are there fully considered, and whether these dispatches be supposed to

* 6 Rob. 461.

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be proceeding from *Russia*, merely through the intervention of a *British* port, or immediately from *England*, it does not appear to vary the case.

Having disposed of the first ground of objection, I proceed now to the other, the want of proof of property. The license required it either to be *British* or *American*. But it is not enough merely to satisfy the conditions of the license. A party appearing as a claimant must shew that the property belongs to him. Now it is scarcely possible to conceive a vessel so imperfectly documented as the present. There is not one paper whatever which shews the ownership. If we enquire into the history of the vessel from the master, we are informed that she was originally *American*, that she was seized at *Naples*, and sequestered, by which I understand, condemned, and sold. She is said to have been there purchased jointly by the agent of *Wells* the claimant, and of a Mr. *Robertson;* that she then went to *England* in the year 1811, where Mr. *Robertson's* agent transferred his share to *Wells*, who then became possessed of the whole. This may be true, but there is not one single document to prove it, no sentence of condemnation, no bill of sale, no register, no passport. There is indeed a certificate of the *American* consul, that the register, sea letter, and certificate of purchase were deposited in his office on the 12th of *November* 1811, but there are no copies of them, and the consul neither refers to their contents nor says a word of the ownership. By the condemnation, which the master states, she was in the hands of the enemy by admission, and there should be proof of a transfer from him. This may be a fair case, but it would be departing from every rule of Courts of Admiralty, to restore under such a total defect of documents, and I shall permit the parties to bring further proof of

their property. There is another observation which remains to be made. This vessel was to clear out on or before the 28th of *February*. The clearance is dated on the 3d of *February*, yet the vessel did not sail till the 19th of *March*. Neither the master in his claim, nor the counsel have attempted to give any explanation of this extraordinary delay of six weeks. Unless it can be accounted for in a satisfactory manner, it excites a suspicion that some fraudulent use may have been made of the license in the intermediate time; and such a protracted departure can scarcely be considered, without being accounted for, as a fair compliance with the terms of the license. I require the parties therefore to explain this circumstance.

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Farther Proof.

The captors being afterwards satisfied of the fairness of the case, the ship and cargo were restored by consent, on the payment of captors' costs.

The Orion, *Jubin*, Master.

June 30th, 1813.

For the Captors—*The King's Advocate.*
For the Claimant—*The Solicitor General.*

Judgment—Dr. *Croke.*

AS this is the first case which has arisen on the *American* blockades, I felt it to be my duty to give it the fullest consideration. I have examined scrupulously all its circumstances, I have weighed

Discussion of Orders in Council. The effect of licenses to be deduced from the intentions of government.

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attentively the arguments which have been advanced by the counsel on both sides; I have searched out, and have carefully applied to the present case, all the former decisions of the higher Courts which I conceived to have any bearing or relation to it; and I have now to make known to the suitors in this Court, the result of my enquiries.

The facts in this case are few and undisputed. The vessel, having on board a cargo of flour and *Indian* meal, sailed from *New York*, on the 15th *May* 1813, bound to *Lisbon* under a license from the *British* Secretary of State, bearing date upon the 11th *September* 1812, and which was comprized in these words.

To all commanders of H. M. ships of war and privateers, and all others whom it may concern,

Greeting:—

I, the undersigned, one of His Majesty's principal Secretaries of State, in pursuance of the authority given to me by His Majesty by order of council, under and by virtue of powers given to His Majesty by an act passed in the forty-eighth year of His Majesty's reign, intitled, "An act to permit goods secured in warehouses in the prort of *London*, to be removed to the outports for exportation to any port of *Europe*, for empowering His Majesty to direct that licenses, which His Majesty is authorised to make under his sign manual, may be granted by one of the principal secretaries of state, and for enabling His Majesty to permit the exportation of goods in vessels of less burthen than are now allowed by law, during the present hostilities, and until one month after signature of the preliminary articles of peace." And in pursuance of an order in Council hereunto annexed, I

do hereby grant this license for the purposes set forth in the said order in council, to *Cropper, Benson,* and Co. and others; and do hereby permit a vessel being unarmed, and not less than one hundred tons burthen, and bearing any flag, except that of *France,* or except a vessel belonging to *France* or to the subjects thereof, or to the subjects of any territory, town or place annexed to, or forming a part of *France,* to import into the port of *Lisbon,* from any port of the United States of *America,* a cargo of rice, grain, meal, or flour, without molestation on account of any hostilities that may exist between His Majesty and the said United States of *America,* notwithstanding the said cargo and ship aforesaid may be the property of any citizen or inhabitant of the said States, or to whomsoever the said property may belong, and that the master of the said vessel shall be permitted to receive his freight, and return with his vessel and crew to any port not blockaded, upon condition that the name and tonnage of the vessel, and the name of the master of the said vessel shall be indorsed on this license at the time of the vessel's clearance from her port of landing.

This license to remain in force for nine months from the date hereof. Given at *Whitehall* the 11th *September* 1812 in the fifty-second year of His Majesty's reign.

SIDMOUTH.

It is admitted by the captors that the license is good itself, and that the terms of it have been complied with, but it is alledged by them that the vessel and cargo are still liable to condemnation, notwithstanding the license, for having broken the blockade of *New York.*

There are two points therefore for consideration. The first is a question of fact, whether *New York*

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was blockaded at the time she sailed from thence. The second is a question of law, whether, supposing the blockade to be established, the license can protect the consequences of coming out of that port during its continuance.

The master has sworn roundly "*that he had no knowledge of the blockade.*" But there is full proof that the *notification* of it, which was made by Lord *Castlereagh*, by the authority of the Prince Regent upon the 20th *March*, was at that time known at *New York*. It is contained at full length in the *Evening Post*, a newspaper published in that city, of the 6th *May*, and consequently nine days before the vessel sailed; and it is morally impossible that information, of so important a nature to the mercantile inhabitants, should not have been universally intercommunicated amongst them.

It has been argued by the captors that this notification alone establishes a blockade. That being a public act, and proceeding from so high an authority, nothing more is required, and that it would constitute to all intents and purposes a blockade even if there were not a single vessel off the port; that the cases from which the contrary might be inferred were cases of notification from commanders in chief, and not by the public authority of the sovereign, and that in the blockade of the *French* coast it was never required that there should be any vessels stationed off the ports; that even if it were necessary to prove the fact of the ports being actually blocked by ships of war, the capture of this and many other vessels are sufficient evidence of it.

It has always been held by the *British* Courts of Prize, that to constitute a blockade, two things were required,—that the ports in question should be invested by a force adequate to the purpose of prevent-

ing egress and ingress without imminent danger of capture, and that notice should be given of it to all the parties who were to be legally affected by it. The actual investment is absolutely essential to constitute this state, and as early as the *West India* cases it was decided by the Court of Appeals, "that a declaration unsupported by the fact will not be sufficient to establish a blockade." In this respect there is no difference whatever between a public, and the most private notification. The object of both is the same, merely, *to inform the party who is to be charged with the breach of the blockade, that a blockade exists.* A notification given by a commander is as much under the authority of the sovereign, as if it were an act immediately proceeding from him, because commanders derive from him the power of blockading such ports as they may judge proper. The most formal and diplomatic notification between governments is only meant for the information of individuals. Public notifications, made to the government of a country, will affect the inhabitants of that country with the knowledge of it after a certain time, as a presumption *juris et de jure,* because it is the duty of governments to communicate to all their subjects: but whenever it can be proved that any individuals are acquainted with the existence of the blockade *by any other means,* the consequences will be to them the same. But under all modes of notification it is absolutely necessary that there should be the fact of an actual investment, without which *no* notification is effectual.

What has been called the blockade of the *French* coasts by the well known order of the 26th of *April,* forms no exception to the principles maintained upon this subject by the *British* nation. That was a measure perfectly different from a blockade. It did

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not profess to be a blockade, but on the other hand the words of the order were, "that those ports should be subject to the same restrictions *as if* the same were actually blockaded by His Majesty's naval forces in the most strict and rigorous manner." The word blockade was introduced not as a definition of the measure itself but by way of explanation of the mode in which it was to be executed; in the manner of an actual blockade. No investment was even supposed to take place, because it was impossible that there could be an investment to the whole extent of the coast affected by the order. It was not therefore a blockade, but it was a retaliatory measure to counteract the effects of an unjust and unlawful attempt to ruin this country by cutting off its resources. It was not directed against particular ports, but against the enemy's trade universally. It was a total prohibition of all commerce with the enemy, as he had prohibited all commerce with *Great Britain*, and it would have been ineffectual and futile, if it had not comprehended all the dominions of *France*, and if it had been limited within the legal boundaries of a blockade. As none of the rules of law relating to blockades, were therefore applicable to those orders which militated against their design, so no inference whatever can be drawn from thence, that the laws of blockade, before admitted in the *British* courts, have been in any manner altered or deviated from.

There is no necessity therefore to imagine, with the counsel for the claimant, that those orders have been abandoned by the *British* government either in *fact* or in *principle*.—They never have been *in fact* annulled. The supposed repeal was merely provisional, and the conditions not having been complied with by the *American* government, they are still in force, as has been decided in this Court in some

recent cases.* They can never be abandoned in *principle* till this proposition is admitted to be true, that "it is the duty of a nation to submit to the annihilation of its commerce and resources, when it is attempted by its enemy with a view to its final subjugation and destruction, without an effort of struggle or resistance, because that resistance may be some inconvenience to a third country." Our enemies, both open and in disguise, naturally are vehement in their outcries against the orders in council, because they have proved too successful in defeating their malevolent designs; but, as long as the right of self-defence shall continue to be the first law of nature and of nations, so long will those retaliating and defensive measures rest upon the solid foundation of eternal truth and justice.

It is necessary then to establish in this case, besides a notification brought home to the knowledge of the parties, which has been snfficiently proved, that a blockade *de facto* existed. It is indeed to be supposed from the notification itself, that orders would be given to carry the intended blockade into effect. Yet this is not so conclusive as to carry with it a presumption that it has been actually done. It was argued by the captors' counsel, that even if the high officer, who has the supreme command on this side the *Atlantic*, should refuse to execute the order, that the Court would be bound to execute it, and to enforce the law. But this is not a true state of the case. If it were possible that an officer should be guilty of a great breach in his duty in not observing orders sent to him by government, still, though he might be personally rsponsible for the neglect, yet that would not supply the want of the fact that a real blockade had

* The *Marquis de Somerueles*, the *George*, and the *Phœbe*.

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taken place. It has been held in the High Court of Admiralty,* that even where there was an actual investment, if any of the blockading ships have not enforced it, that the blockade is so far "virtually relaxed." There is no evidence that the port of *New York* has ever yet been in a state of blockade. It is not known as matter of notoriety, or from the capture of vessels. There is no special evidence of it afforded by this case. No vessels were seen off the port. The capture was made in the latitude of 40 degrees, and in the longitude of 70 degrees and 20 minutes, by the prize-master's affidavit, at the distance therefore of nearly one hundred and fifty miles from *New York*. There is no circumstance therefore to lead us to a conclusion that the port of *New York* was in a state of blockade. Where the existence of a blockade has been generally known and continued for some time, and by public notification, it is presumed *primâ facie* to continue till it is revoked.—In such case when a blockade has really existed, it has been held to be incumbent on the party alledging the relaxation to prove it. But in the present instance where it is not known that any blockade has ever commenced, I think it fair that the party who is to have the benefit of the blockade should establish it by evidence. If the case therefore depends upon that fact, I should direct the captors to bring further proof of it, and should allow the claimants at the same time to bring such other evidence as they may judge proper upon the point.

This however will be unnecessary if it should be found that, notwithstanding a blockade, this ship and cargo were protected by the license, which brings me to the consideration of the second point in the case. This license is dated on the 11th *Sep-*

* *Jaffrau Maria, Rob.* III. 135.

tember 1812, and the question is, whether it is annulled by the subsequent order for blockading the port of *New York*, as far as that or other blockaded ports are concerned; or in other words, whether under a license to import goods from any port in the *United States*, they can be exported from a blockaded port in that country. I have examined all the cases to be found which at all relate to this question. A recent case, that of the *Byfield, Forster*,* was the case of a vessel which was said to have had a license granted to certain *British* merchants, permitting a vessel to proceed from *any port in the Baltic* to any port in the United Kingdom. The vessel went into *Copenhagen*, then blockaded, and came out with her cargo with which she was sailing to *Liverpool*, when she was captured. It was laid down most strongly by Sir *William Scott*, that "a license expressed in general terms, to authorize a ship to sail from any port with a cargo, will not authorize her to sail from a blockaded port with a cargo taken in there; to exempt a blockaded port from the restrictions incident to a state of blockade, it must be *specially designated with such an exemption in the license; otherwise a blockaded port shall be taken as an exemption to the general description in the license.*" Nothing can be laid down more forcibly and generally than this doctrine. Yet it seems that there may be *exceptions* to it. In the *Hoffnung, Berens*,† *without any such express exemption in the license*, where it had been granted on the same day when the notification stated the blockade to commence, the learned judge "laid all question of blockade out of the case, for he thought himself bound to presume that *it was intended* the parties should have the full benefit of

* 1st *Edwards*, 188. † *Rob.* II. 162.

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importing the articles without molestation from a blockade, which could not be unknown to the great personage under whose authority the license was issued."

Another ground of exception was taken and admitted in the same case, for the judge concluded, that since "the blockade was not considered as a ground for withholding these licenses, he was led to suppose, that it was not *intended* to have the effect of suspending such as had already been granted."

In the case first cited, where the general doctrine was laid down so universally, but which must be understood with some little reference to the particular case in which it was stated, it was said that "as the vessel was lying at *Christiansand*, an open port at the time when the license bore date, and there was then no intention manifested of going to *Copenhagen*, the license could not be of a nature to prohibit the purchase of a cargo there, a transaction which was not *in contemplation* when the application was made," still referring for an explanation of the license to *the intention of government*. It may then from these three instances be fairly inferred as the judicial opinion of that great man, that notwithstanding there is no express provision in a license or a blockading order to that effect, yet wherever it appears to have been THE INTENTION of His Majesty, or of those who exercise his authority, that the permission given by a license should not be suspended by an order of blockade, that it is not affected by the blockades.

But before I consider the application of these principles to the present case it must be observed, that there is *in limine* a very material distinction between them. All those cases were of licenses granted to *British* subjects or neutrals, and the blockades were of ports belonging to third nations our enemies. This is the case of a license granted to the enemy,

and the blockade is of his own ports. These are such material circumstances that the other cases cannot in any manner be considered as directly applicable to the present.

For the truth is, that a blockade is not a measure which *legally* affects *the enemy* at all; it operates in point of law, only upon neutrals, upon them it has a real legal effect; it gives new rights to the blockaders —Without it neutrals might trade in safety to the port. It is the blockade alone which creates the right of capturing their vessels. But the vessels and the other property of the enemy would be equally liable to be captured and condemned, although a single blockade should never be established. It is indeed a disposal of naval forces which renders the capture of his property more easy to the blockading ships, and which distresses him by excluding neutrals, but this is all. As to the enemy's property, the blockaders acquire no new right by it. Before a blockade is established, they can seize and confiscate the enemy's property, whereever they find it, and during a blockade they can do no more. It affects then the enemy *de facto*, and not *de jure*. That a blockade affects merely neutrals, is evident from the form of *notification*. This is conceived always nearly in the same words. It is signified to the ministers *of neutral powers*, and it informs them "that measures will be adopted which are authorised by the law of nations, and the respective treaties between His Majesty and the *different neutral powers*." The *instructions* to the blockading vessels, by which the blockade is established, are, to stop all *neutral vessels* destined to or coming "out of the respective ports." No notification is made to the enemy, no instructions are given relative to the capture of his property, because it requires no spe-

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cial directions. Since then no orders are given to the blockaders respecting his property, it is left precisely as it was before the blockade; that is, liable to be captured generally, unless where it is particularly protected by orders from the *British* government, or other peculiar circumstances. Since the orders to the blockading ships specify, and relate only to *neutral vessels*, they cannot authorise the capture of *enemy's* vessels though protected by a license, which are *not neutral vessels;* although, to ascertain their general rights and duties, they have sometimes been considered in that light, in the way of analogy, and of a partial similitude, which does not hold good in every respect, but which might be estimated from the nature and object of the special protection so granted, and of the document by which it is conferred. Since a blockade creates no right of capturing enemy's property which did not before exist; if this general right of capturing his property has been suspended by a license, I do not see how it can be revived or renewed by a blockade, or how the cruisers can acquire from the blockade a right to capture the enemy's property, in a case where that right had been superseded by the act of his own government.

Neither does *the object* of the present blockade at all interfere with that of the license, but on the contrary, they are independent of each other, and both consistent. That of a blockade is to distress the trade of the enemy, but the design of the license is not to assist the trade of the enemy, or for the accommodation of any of the merchants of that country, but to relieve our own wants, and to promote an important and interesting service. If it was an object with the *British* government to victual our troops in *Spain*, that object is not affected by the blockade.

It is equally necessary that the soldiers should be fed whether *New York* is blockaded or not.

Adopting from *British* and neutral cases the principle, that the effect of licenses is to be deduced from the *intentions* of the *British* government, as far as it can be ascertained from circumstances, let us endeavour to discover what must have been its intention with respect to these licenses. I have just observed that the object of them was for the benefit of the *British* military service. The armies employed in the cause of liberty, were starving in *Spain*. Most of the ports of *Europe* were shut against *British* vessels. It was necessary to have recourse to the *United States*, as long as those necessities continued which these licenses were intended to remedy; it must be supposed to be the intention of government that the supply should be continued. The *existence* of these licenses themselves, unexpired, and unrevoked, is *primâ facie* presumptive evidence that those articles are still wanted, till that presumption is overruled by a declaration to the contrary. In the next place, though a license is general and extends to any port in *America*, yet in fact the blockaded ports of the *Chesapeake*, and other southern ports of *America*, are the only ports from which flour and corn can be exported. The northern countries of the *United States* do not grow enough for their own consumption, and are supplied from the southern ports. If government wishes therefore to be supplied at all, it is only from the blockaded ports that it can receive the supply.

Some evidence of their intention may be deduced from the form of the license.—It says that "these articles may be imported from any port of the *United States* without molestation on account of *any hostilities* which may exist between His Majesty and the

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United States of *America*." It might not be overstraining these expressions to interpret the words "*any* hostilities" to mean "notwithstanding any *mode* of hostilities which *Great Britain* may think proper to employ, whether by blockade or otherwise." It is true that this blockade was not established till many months after the date of the license, but it was not improbably in the contemplation of the *British* goverment. To carry on a war against that country by blockading their ports has always been a general and favorite idea. Something of the consideration of blockade must have been present to the mind of those who drew up this order in council, because it is thus mentioned.—"The master of the said vessel, shall be permitted to receive his freight and return with his vessel and crew to any port *not blockaded*." It seems to have been understood and intended, that the license could and should protect the master against breaking a blockade, or why else should it have been thought necessary to prohibit his return to a blockaded port? Understanding the licenses then to have been a protection from the penalties of blockade breaking, though they do not forbid coming out of and exporting the articles described from a blockaded port, it is a fair conclusion then that this was not intended to be prohibited. The reason of the distinction, as it is to be deduced from the present existent circumstances, and which were probably foreseen when the license was granted, on the grounds which I have just stated, is evident. It was only by coming out of a blockaded port that the license could be executed, and its object accomplished, because the provisions to be imported to *Lisbon* could only there be procured.

It may reasonably be doubted, whether by a license of this nature a kind of vested interest is not con-

ferred upon the grantee, of which he cannot be deprived capriciously, at the mere will of the granting nation, or *at least*, whether he can be dispossessed of it without an express declaration of the government by which it was granted. Since it is a privilege which is to protect the property of the enemy, and *for the benefit of the country which grants it*, not only the interest, but the good faith and honour of the country are implicated and pledged to respect them. They ought not to be revoked without full and timely notice. Adverse considerations ought not to be pressed too rigorously against them, but they should be supported by the most liberal interpretation. In case of doubt, the balance should incline in their favour; it is a contract for the benefit of one party in which the *British* government says, in fact "if you will import provisions to the army in *Portugal* we will protect your vessels from capture"—when the *Americans* are performing their part of the contract, it would be a trap to turn round upon them and tell them that the protection is withdrawn, without any previous notice having been explicitly given to that effect. In point of prudence by allowing the validity of these licenses little mischief can be done. As they were limited to nine months they have now nearly all expired, since it is understood that none have been issued since the beginning of *October*. The object of the blockade will not be defeated by allowing them. The departure of half a dozen flour ships will not materially relieve the distressed commerce of the *United States*, but the intercepting of them may be injurious to the *British* service in the Peninsula, and may be considered as not very creditable to the liberality and good faith of *Great Britain*. By restoring this property therefore, I conceive that this

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Court will but maintain the justice, the honour, and policy of the country.

Such is the view which I have been enabled to take of this subject. It were to be wished that public documents upon which the important interests of many individuals depend, should be clear and definite in their language, that nothing should be left to supposition, and that either in the license it should have been explicitly stated, that the exportation might, or might not, be made to a blockaded port, or that in the order for the blockade, it should have been declared whether it was to extend to licensed vessels. If this had been done we should not have been driven to the necessity of divining meanings and intentions. Parties, including captors, and claimants, commanders, and merchants, would not be placed in a state of doubt and anxiety, and this Court would be relieved from the painful duty, too often imposed upon it, of making its way amongst various difficulties, and opposite obligations, frequently with no other guide than probability and conjecture. If the parties are not satisfied with the decision of this Court, it is competent to them to apply to the superior tribunal, where the instructions and objects of His Majesty's government are known *à priori*, and not left to be determined by hazard and distant reasoning.

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JUDGMENT—Dr. *Croke.*

Prize forfeited for the misconduct of the captors in taking it out of the custody of the marshal.

THE question to whom this vessel was to be condemned, was reserved upon a letter which had been received from the Deputy Marshal at *New Brunswick*, complaining of the conduct of the captor, and reporting "that the prize had been removed from that port by Captain *Gordon*, or Captain *Godfrey*, of the royal navy, without any sanction on the part of the marshal, or any communication of their intention respecting the vessel." The Court therefore suspended this part of the decree, and directed Captain *Godfrey*, the commander of the *Emulous*, and the captor of the brig, to answer the charges thus made against him. He brought in an affidavit, in which he stated that "he had captured the *Cossack*, an *American* privateer, and carried her to *St. John's* in *New Brunswick*;" he states the steps he took for her safety before he went to sea again, and "that on his return he found she had been taken from the place he left her in, that she had her sails bent, and was at anchor in the stream, ready for sea. He made enquiry as to the reason, and was informed that the merchants of *St. John's*, having received intelligence that a privateer was off their harbour, had thought proper to fit the prize for sea. There was no person on board when he came in, and the vessel was in a situation of danger. He found on enquiry that one of the pilots had the keys of the vessel, which he delivered to the deponent, and recommended him to send some persons to take charge of the vessel, which he did, and the vessel remained in his pos-

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session for a week or ten days without any notice being given to him that she was in custody either of the marshal or the custom house; nor did either of those officers give notice to the deponent, that they claimed to hold the custody of the vessel; that being about to sail for *Halifax*, he directed his officer to get under way with him and proceed to *Halifax*, where he brought the vessel; that he could not believe that an officer of this Court would presume to make any use of a prize put under his care, and if the deponent can be considered as having taken the prize out of the custody of any person, it must be the merchants of *Saint John's*, who had got possession of her, and fitted her with an intention of sending her out to cruize."

An answer has been given to this affidavit by the deputy marshal Mr. *Hazen*. He states various steps taken when the vessel was brought in, not material to the present question, and he then proceeds to state, that "on the 4th or 5th of *May*, the said schooner remaining at the wharf, a message was sent from Lieutenant Colonel *Roberton* commanding the garrison, and from the principal merchants at *St. John's*, requesting permission to equip the *Cossack* to repel an enemy's privateer, that the deponent went to Colonel *Roberton's* quarters where he stated distinctly his inability to grant such permission; and that if the *Cossack* were equipped and removed it would be at the risk of the merchants, and he declined going to a meeting lest his presence should be construed into a consent. That in the morning he found the schooner had been removed, and that a petty officer and some seamen of the *Emulous* amongst others, were equipping her for sea; that the deponent was informed that Mr. *Reid* was to command her; and that Colonel *Roberton* would put on

board a party of the eighth regiment; and as the principal merchants had agreed, to the satisfaction of Mr. *Black*, the prize agent to the *Emulous*, to guarantee the full value of the vessel, the deponent, considering the public emergency, did not deem it to be his duty to oppose the employment of the schooner for a temporary purpose; that the same day the *Rattler* and another armed vessel came off the port, and the intention of sending the *Cossack* to sea was abandoned; that at this time he went to the custom house, and told the collector and comptroller that as the occasion for equipping the *Cossack* had passed, she ought to be forthwith ordered back to the wharf; that at this time she was moored in the stream just under the windows of the marshal's office, and within hail of the King's ships, where he conceived her to be safe, and expected to have her immediately returned to the wharf; that the schooner *Bird*, detained by the *Emulous*, and in his custody, had rode in safety near the same place; that on the 7th of *May* observing with surprize that the *Cossack* was not returned to the wharf, and apprehending that some mistake might arise respecting her, if the monition were removed from her mast at the time and in the hurry of equipment, he went off in the afternoon with two other persons, and having satisfied himself as to this particular, and as to her safety, he did not think proper to do any thing farther respecting her at that time, particularly as Captain *Gordon* the commanding naval officer had recently remarked to him upon the great expense attending admiralty proceedings, and that he wished him to allow the captors to perform the necessary labour of removal, unloading, &c. That one morning in the week commencing the 9th and ending the 15th of *May*, in which week the *Cossack* was removed from the port by Captain *God-*

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frey, he and Captain *Gordon* called at the office of the deponent, and requested permission to unload and dispose of the white oak staves on board the schooner *Bird,* as they would sell well; that the deponent answered he could not allow of such transaction without the order of the Court; that in answer to a question put, whether the *Columbia* were libelled, he read from his docket a list of vessels recently taken into custody, in which the *Cossack* was included, and he stated that a copy of the monition might be seen upon the mainmast, and that Captain *Gordon* observed to Captain *Godfrey,* that as he was going to *Halifax* he had better take steps to expedite the proceedings." This affidavit is accompanied with a letter from Captain *Gordon,* in which he says, that "he remembers the conversation in the marshal's office, though he cannot recollect that the *Cossack* was particularly mentioned; that it was generally understood that the *Cossack* was under a libel, and he has usually found the marshals tenacious as to the authority of the Court of Vice-Admiralty." There is likewise another letter from Colonel *Robertson,* respecting the application for the *Cossack* to be fitted out against the privateers, in which he states, that "the marshal pointed out to him, that he should not oppose what appeared to him for the good of the service, but security must be given for the vessel; and in consequence the principal merchants gave security; but from the squadron's returning into port, a stop was put to any further proceedings, and she was delivered up to the captors."

Such is the statement of facts on both sides respecting this complaint of the deputy marshal against Captain *Godfrey,* which I have read at length from their affidavits.

Prizes made at sea are not under the absolute dis-

posal of the captors. They form an important chapter in the law of nations, and not only the interests, but the honour of every country are materially involved in them: There may arise upon them not only questions which affect the property of neutral and friendly nations, and which may depend not only upon general rights but upon the stipulations of treaties, but even with respect to the enemy, there are many restrictions to be observed. To prevent the inconveniences and abuses which might take place if they were left entirely under the disposal of those who took them, and to restrain the irregular and piratical practices which might be apprehended; prizes are generally considered as the property of the nation at large, and governments have given the captors only a limited, and conditional interest in them, subject to all the rules imposed by the law of nations, and their own municipal regulations. To enact laws without any penalty for the breach of them would be nugatory; accordingly, by the old established law of admiralty, prizes are forfeited to the King for misconduct in the captors. Of late this rule has been introduced into the prize acts, that "upon proof of the breach of any of His Majesty's instructions, or of any offence against the law of nations, the prize shall be condemned to His Majesty's use."

To rescue a vessel out of the custody of the officers of the Court of Admiralty, and other officers to whom it by law belongs, is a very high offence. It is not an offence against the persons merely who happen to occupy these places, but the offence is against His Majesty himself, whose Court it is, and whose officers they are. It is a rebellious resistance to his authority, and a contempt of his royal dignity. If such a rescue has been committed in this case, unless a legal excuse can be found for it, there

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is no doubt but that the party is subject to the visitation of the law.

I shall enquire therefore, first, whether this vessel was in the custody of the marshal.

Secondly, whether it was taken away without his consent.

Thirdly, whether any justification has been proved for so doing.

The first and second points are scarcely contended, and are proved by the return of the monition now in Court, by which it appears that the marshal served the monition and took possession of the vessel in the usual way, and she was therefore under his legal custody, and by the admission of the parties, who do not alledge any authority whatever from the marshal for the removal from the port of *St. John's* in *New Brunswick* to *Halifax*.

The *substance* of the offence then is perfectly established, and the only question for consideration is, whether Captain *Godfrey* has set up a satisfactory justification.

The excuse which he pleads seems to relate to three points; first, that he was ignorant that the vessel was in the marshal's custody; secondly, that the marshal had abandoned the vessel, and she was not actually in his possession; and, thirdly, a recriminatory defence, charging the marshal with negligence and improper conduct.

Upon the first point, I am sorry to observe that the affidavit is rather evasive, for he does not take upon himself to assert that he did not know that the vessel was in the custody of the marshal, but merely that during the week or ten days in which he had officers and men on board, no notice was given him that she was in custody, and that there was no person employed by the marshal or custom house on board.

Now the marshal has sworn that the monition was standing affixed to the main-mast of the vessel a few days before the removal, when he went on board to ascertain it. The conversation between the marshal himself, Captain *Gordon*, and Captain *Godfrey*, a few days before in his office, shew that he was generally acquainted with it. But after all, without any particular evidence, who is the person who pleads this ignorance? It is the captor himself, who was bound in duty to put the vessel under the custody of the Court of Admiralty, and who would have been guilty of a breach of his duty if she were not in that custody.

It is evident then that Captain *Godfrey* knew that she was in the legal custody of the marshal, and this might be sufficient for the purpose, although the marshal might have no person actually on board, for which there might be good reason, without any imputation of neglect. But he seems to rest his defence upon the marshal's having given her up to go to sea, and having afterwards no person on board. The marshal was certainly not justified in giving any sort of consent that this vessel should be sent to sea: but it appears that, whether right or wrong, that proposal had the approbation of all those who might be considered as the representatives of Captain *Godfrey*, for Mr. *Black*, his agent, had consented, and agreed to the proposal that the merchants should guarantee the value of the vessel; and it was a petty officer and seaman of the *Emulous*, Captain *Godfrey's* own vessel, who were fitting her out for sea. But in reality this was a business which rested only in intention, and was abandoned before it was carried into effect, and Colonel *Roberton* expressly states, that, "when a stop was put to all farther proceedings, the *Cossack* was delivered up to the captors."

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If the marshal had no officer on board, and she was left in the undisturbed possession of Captain *Godfrey's* officer and men, it seems to have been in consequence of the suggestion of Captain *Gordon* himself, the commanding naval officer, and his wish that the captors themselves should perform all the necessary labour. If in compliance with the wish of the commanding officer, the marshal being desirous of saving expence, put no men on board, the care of the property devolved in consequence upon Mr. *Black*, the captor's agent, who resided in that port, and who by law was intrusted with the custody likewise. It is strange that an arrangement which seems to have taken place, by the suggestion of the commanding officer, for the benefit of the captors themselves, should now be brought forward as a charge against the marshal, and assigned as a reason for superseding his authority. But that the vessel was really in his custody is plain, from his going on board a few days before the removal to look if the monition was still affixed, and from his directing the officers of the customs to remove her to the wharf, only the day before Captain *Godfrey* carried her off.

It does not appear I think that the marshal was guilty of any culpable negligence, in not providing for the security of the vessel. She was placed in the same situation with other vessels of the same description, respecting which no complaints have been made; she was within sight of his own windows, and he had given orders to have her removed to a better place at the wharf. No proof has been brought that the vessel was ever in any state of risque or danger. But if the marshal had been guilty of the greatest negligence, still it was no reason that the vessel should be forcibly taken out of his possession, and sent to another port. If such had been

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actually the case, the captor should have stated the circumstances to the marshal himself; he should have remonstrated with him for his negligence, or bad conduct; he should have protested, or complained against it, and as the captors have a joint custody, and as Captain *Godfrey* had an agent at the port, the marshal's neglect of his duty might have been remedied by more particular care on the part of the captor himself. Nothing of this was done. Captain *Godfrey* was in the marshal's office a few days before, he said not a word to him upon the subject, but without further ceremony put his men on board and brought her round to this place. Though I can see no very culpable misconduct on the part of the marshal, yet his assent, though tacit, to the employment of the vessel against the privateers, was not according to his strict duty: and I must confess that there does appear to have been something of a want of activity in not sufficiently attending to the vessel, and to her removal to the wharf. But if it were greater negligence, it would afford no excuse for the conduct of Captain *Godfrey*.—I condemn the ship and cargo to His Majesty.

The Johanna.—*Newcombe*, Master.

July 14th, 1813.

Judgment—Dr. *Croke*.

Licence no protection to parties not specified in it. Evidence of voyage, license not on board.

THIS is an *American* vessel and cargo under a license from Sir *John Coape Sherbrooke*, under the Prince's order of the 13th of *October* 1812.

This case is indefeasible upon every point.

1. The license was not produced till after the cap-

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ture, and was not brought in till the master returned from the *United States*. The story which he tells is this, that he did not mention the license whilst he was on board the privateer for fear it should be *American*; that he was sent back to his own vessel, and there put into a boat and landed upon the *American* shore, which was near; that whilst he was passing the privateer in the boat, he held up the license in his hand, which was the first time he attempted to make it known to the captain of the privateer; that he came to this province from the *United States*, and brought the license. The license is granted to *Moody* and Co. and has no connexion whatever with this vessel or cargo in particular, and therefore, even admitting that it were a protection, it must be proved to have been on board. By not producing it in proper time to the captor, they have placed themselves in a suspicious situation as to the reality of its having been on board at all, and it would be necessary to establish that fact by better evidence than the mere affidavit of the master.

2. The vessel was taken half a mile from the *American* coast, and the master admits that he was steering for *East Port* in the *States*. He swears however that he meant only to touch there, and that his real destination was to *Halifax*. It may be doubted whether, adopting the principles which govern blockades, a vessel can be permitted to touch at a port not comprehended within the license, being such a port as that a suspicion may be justly entertained that the cargo was intended to be landed, which is evidently the case with all the eastern ports of the *United States*. This supposition is confirmed by the papers. The clearance and other ostensible documents of that nature profess a voyage to *East Port*, a deception which is usually admitted to be

justifiable. But there is an affidavit of the master to the same effect. This however is said to have been a mere form of office, and that he has now contradicted it upon oath, in his claim and examination to which faith ought to be given. It is not however denied that he really swore to that affidavit. Whatever allowances may be made for voyages of this nature, whatever necessity there may be for some deception, I cannot so far divest myself of all principles of morality, and all rules of evidence, as to think any commercial conveniences or official forms, a sufficient excuse for violating the most solemn and serious of all obligations, and to admit the credibility of a witness who has been guilty of such a crime. If the master has admitted that he has forsworn himself in the *United States* to deceive his own government, what reason can possibly be assigned why he should not practice the same art to impose upon a *British* Court at *Halifax?* The latter oath is full as likely to be false as the former. But there is likewise a charter-party on board for a voyage to *East Port*. This was not a necessary document. They were not obliged to produce this instrument to enable the vessel to clear out from *Boston*. It must have been entered into for the security of the parties themselves, and must have shewn the real nature of the voyage. It is inconceivable that parties should have laid themselves under the legal obligations of this instrument, if it was entirely false, and without any apparent purpose of advantage.

If these difficulties could be removed, the effect of the license itself remains to be considered. It is a license simply to Messrs. *Moody* and Company of *Halifax*. Though they are on the spot, they have not claimed in any capacity whatever. The claimants have not stated themselves to have any connexion, or

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privity whatever, with that house of trade, or even any transfer of the license from them. Nor indeed does their name occur in the claim. By the late decision in this Court, a license is a mere personal privilege which connot be extended beyond the parties specified in it. It has been alledged in argument, that the claimant might be able to clear up and prove all these points, that they might shew a connexion between Messrs. *Moody* and themselves in this intended importation, and which would likewise prove the reality of the destination to *Halifax*. Further proof can never be allowed where there is no ground laid for it in the original evidence. It is said indeed that this was a transaction of a covered nature, and therefore that the real facts could not appear in the original evidence. This may be true as far documents go, but the master must be or ought to have been acquainted with the truth. If such connexion had subsisted he must have been informed of it, and he had the opportunity of stating all such facts in his claim, which the Court might then have allowed the parties to establish by evidence. Here no circumstances of the kind have been pleaded, and yet the house of *Moody* and Co. was here to have intervened by a claim, and brought it to the knowledge of the Court.

I reject the application for further proof, and condemn the vessel and cargo.

The CUBA, *Thomas*, Master. *July* 14th, 1813.

JUDGMENT—Dr. *Croke:*

A CLAIM has been given for this ship by *Daniel L. Bishop* the supercargo, and *Enos Collins*, for *George Thomas* of *New York*, and for 100 barrels of flour as the property of *Freeman Allen, Moses Ward*, and *Bishop* himself, all of *New York*, and for 750 barrels of flour, as belonging to *Enos Collins* and *Joseph Allison* of *Halifax*.

Licenses no protection to persons not specified. No exception in favour of *British* subjects.

This case therefore in its general circumstances comes within the principles of decision in the *Johanna*, and other late judgments in this Court. It remained only for the claimants to shew if they could discover any material distinction between them.

The license is granted to *William K. Reynold* and Company of *Halifax*. The claim is for other persons, who are not alledged to have any privity or connexion with them.

Mr. *Collins* swears that *Freeman Allen* of *New York* had funds in his hands, from various mercantile transactions, and particularly the proceeds of a vessel called the *Amanda*. That being desirous of obtaining a remittance to this country, the present cargo of flour was laden in consequence of an agreement between *Moses Ward, Bishop, Collins*, and *Allison*. That a license had been procured and transmitted from hence, and which had expired, and that the cargo therefore was sent under the present license which was procured in the *United States*.

A difference has been taken between this and other late cases, that the property there belonged to ene-

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mies, in this a part is claimed as belonging to persons of this town, and it was therefore argued that they were entitled to greater favour and latitude. I cannot admit this circumstance to have any weight in the decision, because in all transactions with enemies, they are entitled to full as much good faith and liberality as are shewn towards our own countrymen. And so far from its being any special merit in *British* subjects to carry on a trade with the enemy, which is said to counteract all the inconveniences of war, and to continue the blessings of peace, it appears to me that the balance inclines rather the other way. If an enemy trades with this country, it is at his own open risk, if his property is seized, not being protected, it is confiscated, nothing farther. A *British* subject trading with the enemy, unauthorised, or beyond the limits of his privilege, is guilty in some measure of a violation of his allegiance, it is a high misdemeanor in communicating with and treating those as friends, whom the sovereign of his country has pronounced to be enemies, and it is decidedly unlawful. I admit that there is no appearance of fraud in this case, and I am extremely sorry that a respectable mercantile house in this place, without any bad intentions, should incur a considerable loss, but I fear that they must be involved in the consequences of the acts of those who have shipped these goods in the enemy's country, even without their knowledge, or approbation, under an insufficient license. I cannot however agree with their counsel that no sort of blame, or at least of inadventure, is to be attributed to them, and that the validity or invalidity of a license like the present was a nice point of law, with which mercantile men could not be supposed to be acquainted. For this was not a sudden unpremeditated measure, but a regular deliberate transaction,

the claimants had funds in the *United States* which it was their object to bring into this country by cargoes of flour. There were two grounds, upon either of which they ought to have known the insufficiency of this license for that purpose. The first is that of plain common sense, upon which all law is founded, and to which it may be ultimately referred. No person of business, I conceive, and of sound understanding, upon reading the license, could suppose that a privilege granted to certain persons by name, could be any authority to any other persons not mentioned, or that an instrument which has upon the face of it nothing of a transferable form, or import, could be hawked about from one end of the *States* to another; and, without even the ceremony of an indorsement, could serve to protect any cargo, the property of any person whatever, in any port to which it might find its way.

But in the next place, the restriction of licenses to the persons mentioned is no new doctrine. It was fully established ten years since in the case quoted at the bar, that of the *Jonge, Johannes*, 4 *Rob.* 263, where it was plainly laid down "that government was to judge of the particular persons to whom licenses were to be granted, and that when a license is granted to *one person* it cannot be extended to the protection of *all other persons*, who may be permitted by that person to take advantage of it." This case has been long published, and is familiar to all the gentlemen of the profession, who could have advised the parties if they had consulted them. If they had been so informed, either from those learned gentlemen, or even from their own good sense, they might have procured proper licenses in their own names, and should have cautioned their correspondents in the *United States*, not to risk their property except upon

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such licenses as were unexceptionable. They have acted therefore imprudently and incautiously, and however unwilling I may be to pronounce a judgment which may occasion loss to gentlemen of good character, and who have incurred no imputation of improper practices, after weighing deliberately all that has been argued in their favour, I think myself obliged to adhere to a rule of law, which if once broken in upon, would lead to abuses more extensive than can easily be conceived.

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The Eunice, *Riggs.*

JUDGMENT---*Dr. Croke.*

A vessel taking in a cargo at a port on her return from *Lisbon*, not protected by a licence, which was not complied with in other respects too. Ship and cargo condemned.

THIS is a case upon a licence granted by Mr. *Allan*, under the authority of Admiral *Sawyer*, similar to what was decided upon in the case of the *Reward*, in this court. The case of the *Hope* and others, has been quoted from a common newspaper, by the counsel for the claimants, in which it is stated, that the High Court of Admiralty had pronounced, that these licences came within the meaning of the Orders in Council, and had decreed restitution under them.

I see no necessity for the court to re-consider the principles of decision which guided it in the case of the *Reward*, or to enter into all the topics which have been argued in relation to that subject, because there are other grounds amply sufficient to enable it to pass judgment in the present case. But I may ob-

serve by the way, that most certainly the unauthenticated reports of newspapers cannot possess any authority in a court of justice, especially when the very inaccurate mode in which they are usually given, is taken into the consideration; I must however admit that some attention might be due to particular cases, upon the footing of common notoriety, and where they were accompanied with internal marks, or other proofs of their genuineness and correctness. And indeed the usual reports of all courts of justice, since there are no official reporters, depend for their weight and authenticity, solely upon the credit of the reporters, and other external and internal characters of veracity. Of considerable inaccuracy in the account of the case now offered to the court, there is abundant proof.

Neither am I prepared to say, that cases might not occur in which the court might not think itself called upon to deviate, however unwillingly, from the decisions of the High Court of Admiralty. It would adhere to those cases as a general rule, from the public advantage of an uniformity of decisions through all his Majesty's courts, and it would bow with the most submissive respect to the opinions of one of the ablest men who ever presided in a *British* or any other tribunal; but there will always be a question as to the applicability of reported cases, since it is difficult to find any two which are precisely similar in all points; all the facts in a case are seldom perfectly stated; exceptions from general rules must always be understood to exist, even where none are expressed; the greatest men may sometimes err, and neither judges nor reporters are exempted from the common lot of humanity. The decisions of the Lords of Appeal are in themselves conclusive, because they are judgments in the last

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resort: but the judgments of the High Court of Admiralty are subject to revision and repeal, and till they have been confirmed by the superior tribunal, or at least have acquired something of a confirmed authority from long acquiescence, they are not absolutely final. Though more extensive in the locality of its jurisdiction, that court has no farther powers or authority than courts of vice-admiralty, within their respective, though narrower limits, and they are both equally subject to the controul of the same superior tribunal. Though to be exercised with the greatest delicacy, and with the most guarded caution, this court may be allowed to have a judgment and a conscience of its own, and where in its own view of a question, the grounds of decision appeared to be strong and demonstrative, it would perhaps feel it to be its duty to be influenced by them, though not directly conformable to the opinions of the High Court of Admiralty. This might more particularly be the case, if it only adhered to a former decision which had been made by it after full consideration, before any decision of the High Court of Admiralty had taken place, or at least before it was known in this country; because, till a decision of the Privy Council had been obtained, the judgment of the High Court of Admiralty, as well as that of this court, might be revoked, and might be pronounced by the superior court to have been erroneous. It would be the less inclined to abandon its former decision, when it seemed to be supported by a direct order from the Lords of the Council themselves. For it has since appeared, though it was not known here when the case of the *Reward* was decided, that general instructions had been sent to all the captains and commanders of His Majesty's ships from Sir *Robert Calder*, dated the 11th *December*,

1812, in which he informed them "that the Lords of the Council having signified the opinion to the Lords Commissioners of the Admiralty, that vessels claiming protection from licences issued by Mr. *Aitan*, His Majesty's Vice Consul at *Boston*, or by the *Spanish* Minister in *America*, ought not to be exempted from *British* capture, and that such papers should not be respected by His Majesty's cruizers: in pursuance of an order from the Lords Commissioners of the Admiralty, the captains and commanders are to govern themselves accordingly."

In the present case, any difference of opinion respecting the validity of these licences would be immaterial; for, allowing the licence in itself to be perfectly valid, it cannot protect this voyage. The licence says in express words, that it is "to avail only in a direct voyage to *Lisbon*, and back to the *United States*." The words *direct voyage* must be understood to apply to the return, as well as to the voyage out. I do not enter into any discussion relating to the contract entered into at *Lisbon* with the *English* Commissary, to carry grain on freight to *Figuari* in *Portugal*, and to return back to *Lisbon*, which was performed, and which having been done under the authority of officers of the *British* government, and in the *British* service, the court would not be disposed very readily to consider as a deviation from the licence, especially it is now a past transaction; yet undoubtedly the vessel's sailing from *Lisbon* to *St. Ubes*, was not a direct voyage from *Lisbon* to *Boston*, which alone the licence permitted. It was rather a new voyage altogether from *St. Ubes*, as the vessel regularly entered there, took in a cargo, and cleared out from thence to *Boston*.

Neither did the licence allow of a return cargo, and the vessel should only have returned in ballast,

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or with a neutral freight. This is proved not only by the form of the licence, which gives no such liberty, but likewise by the Order in Council of the 13th *October*, 1812*, which states that it is expedient "that vessels which should arrive at *Cadiz* with certain licences, should be permitted to return with cargoes;" it therefore permits them accordingly. It is to be thence inferred, that without that Order in Council, vessels upon the usual licences could not return with cargoes.

This case is not within the permission granted by that order in many respects.---First, that order is confined to licences granted by His Majesty, or by Mr. *Foster;* nor does the order, which confirms Admiral *Sawyer's* licences, extend to return cargoes. Secondly, the permission is only to take the cargo on board at *Lisbon* or *Cadiz*, but this was shipped at *St. Ubes*. Thirdly, it is provided, that all vessels claiming the benefit of the order shall be provided with a licence from His Majesty's Minister at *Lisbon* or *Cadiz*, permitting the shipment of such cargoes of lawful merchandize, to be therein described. The claimant states that he applied to the Minister at *Lisbon* for a licence, which was refused him; and under whatever excuses he may endeavour to account for the refusal, it is clear that His Majesty's Minister acted according to his duty, in not granting a licence to take in a cargo at *St. Ubes*, which he knew was not allowed by the Order in Council.

I condemn this vessel and cargo.

* See Appendix, C.

The PILGRIM, *Baker.*

JUDGMENT.---Dr. *Croke.*

July 23, 1813.

Licence. Excuses of a leak and want of water not proved.

THIS vessel had a licence from Lord *Sidmouth* to import a cargo of provisions from any port in the *United States* into *Cadiz*. She sailed from *New Orleans*, and was captured not far from the *American* coast, as she was proceeding to *Martha's Vineyard*, or some other port in the *Eastern States* of *America*.

For this deviation from the voyage which was expressed in the licence, two excuses have been pleaded: the necessity of putting into a port in the *United States* from a leak, and from the want of water. The event which is alledged to have occasioned these circumstances, took place at the mouth of the *Mississippi*, on the 15th of *April* last. The vessel grounded upon the bar, and besides receiving some injury in her hull, they were obliged to start their water to lighten the vessel, and what they took in to fill up the casks, proved to be of a brackish nature.

To ascertain some facts which were connected with this claim, and which might be proved by mere inspection, the court issued a commission to the Registrar, with two competent persons, named by the parties; and they have now made their report, which has been read and argued upon.

And, first, with respect to the leak. It is stated in the *log-book*, that on the 16th of *April*, the day after they struck upon the bar, "they tried the pumps and found that they made considerable water." On the 29th, "they found the leak to increase to 120 strokes per hour. On the first of *May*

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it increased to 160 strokes; on the 8th it seemed much worse, and they found the seam in the lumber-port leaking very bad, in such part that it could not be stopped inside. On the 16th, they discovered a new leak in the bows, which kept the pump going every glass. On that day, finding the leak to increase, and the water short, they thought proper to try for *Newport* or the *Vineyard*."

It is to be remarked, that though the leak is again brought forward in the master's claim, yet upon his examination, he says nothing about it, and assigns only their being short of water, as the excuse for proceeding to *Nantucket*.

However alarming this accident may appear upon the log-book, upon an examination, which has been made of the real state of the vessel, by persons well skilled in seamanship, they have reported, in the most decided manner, " that the leaks of the vessel were not of so serious a nature, as to *justify* the master to bear up for a port, instead of prosecuting his voyage." The excuse of the leak is therefore proved to be entirely frivolous, and indeed was abandoned by the claimant's counsel on the last argument.

The plea of a want of water is not new in courts of Admiralty, to account for a deviation from a lawful voyage, and particularly for entering blockaded ports. It is a subject which has been frequently discussed, and the law relating to it has been settled, under almost every possible aspect. It may be laid down as a general principle, that the want of water is no legitimate excuse for a deviation from a lawful voyage, where it might have been prevented by ordinary prudence, or where the master might have obtained a supply without such deviation. We have only to apply this rule to the circumstances of the present case.

It appears from the log, that on the 15th of *April*, when they ran a ground, "the pilot gave orders to start the water, which was immediately done." If there was any doubt respecting the quantity of water which was discharged, it is cleared up by the claim, which states that "the pilot directed *all the water, except three casks*, to be started, in doing which some were stove. They came too as soon as possible to fill the casks. After filling two casks, they found the water quite brackish and unfit for use. After repairing their rigging, they then got under way."

If this account is true, it is clear that when they commenced their voyage from the *Mississippi*, upon the 15th of *April*, they had only three casks of good water. Now it is stated in the log, that they went upon allowance of water of three quarts a man, upon the second of *May*, seventeen days after leaving the river. Upon the 17th they overhauled the water and found about 300 gallons, which agrees likewise with the report of the inspectors. Now how is it possible, that if they had only three casks of water, after leaving the *Mississippi*, yet there should have been a sufficient quantity to have supplied a crew of sixteen men for about a month, half that time too without any limitation or restriction, and yet have left a surplus of three hundred gallons? This problem, which I stated to the counsel for the claimants, they were unable to solve. The two facts alledged are inconsistent, one of them must be untrue; and as the quantity of water on board, upon the seventeenth of *May*, which was only the day before the capture, is fully proved, the other part of the statement must be false, and the general credibility of the party is much weakened.

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Let us however take the case upon the party's own statement, which must be allowed to be administering to him an ample measure of justice. Upon the examination of the quantity of water, with all the other circumstances relating to it, the commissioners appointed to inspect, are of opinion that they "could not at last have performed the voyage without considerably reducing the allowance of water." The converse of this proposition therefore must be admitted, that by a considerable reduction of the allowance of water, they might have performed their voyage. Since then, they did not enter upon an allowance till after seventeen days, though they knew of the deficiency from the first, it should seem that if they had gone immediately upon a moderate allowance, they might have completed the voyage without any very great deduction from the usual supply of water, and of course without any great inconvenience to the crew. It appears then that if they had taken this precaution, which prudence suggested, of going upon an allowance, when they first were aware of the deficiency, that they might have completed the voyage according to the licence. Without however coming absolutely to that conclusion, which may depend in some degree upon other suppositions, thus much at least may be inferred, that the master, by neglecting this precaution, did not do all which was in his power to endeavour to complete his voyage.

They were acquainted with the deficiency of their water, and the inutility of that which they had taken in, at the very first. In the beginning of *May*, for four days, they were off the island of *Cuba*, and the port of the *Havannah*, and at that time the want of water engaged their particular attention; for they examined into the state of it, and

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went on an allowance upon the 2d of *May*. By the log, on the 1st of *May*, they "saw land, to the west of the *Havannah*, tacked ship in shore, and at eight saw the fort at port *Cabanes*, or *Mariel*." On the 2d. they "saw the *Moro* castle, bearing east by south, distant eight leagues." On the 4th they "saw the island of *Cuba*, bearing from south-east to south-west, distance off shore three or four leagues. At five they saw the double headed shot keys, from whence the master took his departure." During the whole time they were off this island, the wind was favorable, "moderate breezes, moderate, pleasant weather," sometimes "fresher," and sometimes "inclining to a calm." The island and its ports were to the southward, and the wind blew from northerly points. It has not been stated, even in argument, that there would have been any difficulty in procuring water at the *Havannah;* and it is thus proved by their own log, that they might have gone thither with the greatest facility, and thus have been enabled to pursue their original destination. Their going therefore to a port, in the *United States*, was not an act of necessity, but was their own voluntary, unconstrained, measure.

I condemn this vessel and cargo.

The Schooner BELLE, *Steinhauer*.

July 23, 1813.

The excuse for a deviation from a licence insufficient, Blockade of the *Delaware*.

A Licence case. This vessel sailed from *Philadelphia* for *Cadiz*, arrived at *Madeira*, discharged the cargo there, and was taken upon her return. The reasons alledged for going to *Madeira*, and discharging the cargo, were a leak and want of water, and that the government there refused a

The Schooner BELLE. — July 25, 1815.

clearance, and compelled the master to unload and sell his flour, the place being in want of that article.

The court was of opinion that the excuse was neither proved nor sufficient. That no accident had happened but the loss of two casks of water, which were said to have been spoiled by the sea water, that vessels ought to be better supplied than to be distressed by such small accidents, and that if they had had a sufficient quantity at first it could not have been so reduced. As to the leak, though the claim alledged that considerable repairs had been done at *Madeira* on that account, yet nothing of the kind appeared in the log, which was very well kept, and particular, giving an account of the work each day, and which was only stated to be "repairing the sails, scraping and painting the vessel, and such trifling works." Nor were there on board any bills of the charges said to have been incurred for these repairs, and which were to be paid by Messrs. *Gordon*, but must have been examined by the master, and some account of them brought with him for the satisfaction of his owners. And with respect to the detention, the log-book is at variance with the claim. The claim states that it was in consequence of the refusal of a clearance, and being obliged to land his cargo; but the log, after stating that, on the 13th of *April*, an *American* privateer had informed them that "he had had an engagement with an *Algerine*, and believed they were out in numbers," the master "judging the danger of proceeding to *Cadiz* too great, concluded to discharge at *Madeira*." Nothing here appeared of any refusal of a clearance or compulsion, though the log being written at the time was most likely to give the true reasons.

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I do not think it necessary to enter into the question of blockade, but I am inclined to think that there was no breach of blockade in this case. *Egg* harbour, to which this vessel was going, was not within the limits of the blockade of the *Delaware*, being 30 miles to the northward of cape *May*, the northern point of the mouth of that harbour; and considering that the vessel was in ballast, and other circumstances, the account given by the master, that he was only running along the coast to obtain a pilot, is deserving of some credit. The vessel was condemned.

In the evidence in this case it appeared that *Sidmouth's licences*, as they are technically called, sold for 1500 dollars, and *Forster's* licences sold for 200 dollars.

The CARLOTTA, *Carvalho*.

July 26, 1815.

JUDGMENT.—Dr. *Croke*.

Blockade of the *Delaware*, excuse insufficient.

THIS *Portuguese* vessel sailed from *Oporto* bound to *Philadelphia*; and there are two questions, the one of blockade, the other of contraband.

Meeting with bad weather she put into *Porto Rico*, where she sold her cargo, and took the present cargo on board, with which she was proceeding to *Philadelphia* when she was captured. No blockade of the *Delaware* existed when the vessel left *Oporto*, which was upon the 25th of *October*; but as the owners are answerable for the acts of the master, if it appears that he was acquainted with the blockade before he left *Porto Rico*, the consequence of it must fall upon this

The CARLOTTA.

July 26, 1813.

vessel and cargo. He sailed from thence upon the 19th of *May*. Public notification was made of the intention of his Majesty's government, that the blockade should take place upon the 6th of *February*. Sir *John Warren* issued a proclamation, that he had ordered the vessels under his command to blockade that port in execution of the order, and the actual blockade thus commenced.

These facts must have been known at *Porto Rico*, so near the scene of action. It has been argued, that great latitude was given to the *Americans*, with respect to blockades in *Europe*, on account of the distance; and undoubtedly the same favour would be shewn to the subjects of *European* neutral countries, and that this vessel therefore might have gone to the neighbourhood of the *Delaware* to enquire respecting the blockades in *America*. But this is not in reality a voyage from *Europe*, but from *Porto Rico*, where the cargo was taken in. Even admitting the liberty granted to the *Americans*, in its fullest extent, to apply to this case, and that the voyage was from *Europe*, they could not have sailed to the mouth of the blockaded port, to enquire of the vessels there stationed, and to have gone in, as the master swears was his intention, "only if permitted." As the vessel went to *Porto Rico*, which is within the reach of speedy intelligence from the port in question, *that* was the place to have made the necessary inquiries. Acquainted as the master must have been with the order, and the proclamation, even if any doubt remained whether a blockade was really carrying on, he ought to have stayed there till he could have received information as to that fact. Sailing in the face of those documents, and finding the *Delaware* blockaded, the master has been guilty of a breach

of that blockade, and was properly captured by the blockading squadron.

The question of contraband is now unnecessary. I condemn both ship and cargo.

The CARLOTTA. *July 26, 1813.*

The GUSTAVA, *Swenberg*. *July 26, 1813.*

JUDGMENT.—Dr. *Croke*.

Alledged purchase from the enemy fraudulent, Passports under the *Swedish* treaties.

THIS vessel and cargo, which consists of provisions, have been claimed, as *Swedish* property, for *Emanuel Ray*, of the island of Saint *Bartholomew*, by the supercargo, *Ebenezer Clap*, of *Boston*, together with his own adventure.

He states in his claim, that *Ray*, being at *New York*, gave him a power of attorney to purchase a brig, that in consequence he bought this vessel of *Silas Pennyman*, loaded her on *Ray's* account for the present voyage to *Madeira*, went in her as a supercargo, and from thence she was to go to St. *Bartholomew*.

It is a general rule that a neutral may purchase a vessel of the enemy during the time of war.* The order respecting *France* only has formed an exception to it, and that was merely a retaliatory measure, on the part of the *British* government, in consequence of a similar order by the *French* government. Such purchases may be perfectly fair, but experience has proved that they are frequently mere deceptions, for the purpose of carrying on the enemy's trade, under a neutral appearance. It is required therefore in all such alledged transfers, that the whole should be clearly and fully proved, and

* See order in council, 13th of *February*, 1813, in the Appendix, G.

The GUSTAVA. July 26, 1813.

that there should be no ground to believe, from the general tenor of the transaction, that it is otherwise than real and *bona fide*.

From the many cases which have been decided, the following rules may be deduced, to distinguish real from fraudulent cases. A mere bill of sale is not sufficient, for the whole transaction must be shewn, in all its parts. If the neutral was at the time in the enemy's country, it is considered as affording ground for particular suspicion. If the vessel has continued in the same trade, and under the management of the same persons, and if its home seems to be in the enemy's country, these circumstances are usually considered as conclusive, that the transfer is not real.* If we apply these *criteria* to the present case, it will be found to fail upon every point. In many cases, particularly where a business has been managed by an agent, it is found necessary, where the evidence is defective, to send abroad for further proof; but it happens that we have here all the evidence which can be had; for Mr. *Clap*, the supercargo and manager in the whole affair, came in the vessel, and has not only been examined, but has given in a claim, after advising with his proctor, and must therefore have been aware of what was necessary for him to prove, and must have had a sufficient knowledge to prove the whole of what the court could require. Now though there is a bill of sale from *Silas Pennyman*, to *Clap*, as agent for *Ray*, *Clap* is perfectly silent as to any farther particulars of the purchase, and refers, in answer to every interrogatory, to the bill of sale. He has not intimated from what funds of Mr.

* See the *Welvaart, Cornelis*, 1 *Rob.* 122. Two Brothers, 1 *Rob.* 131. *Jemmy Nosten*, 6, 431. *Fetsdam* and *Almendeligheder*. MSS. *Beurnen, Dunn, Rob.* 1, 181. *Argo, Smith*, 1, 159.

Ray he purchased this vessel and cargo, though a circumstance of all others the most important in proving a real purchase. It does not appear why Mr. *Ray* should have employed an agent at all to purchase a vessel, when he was himself in the *United States*. The letter of attorney itself is certainly very unusual in the powers given to the agent; it authorizes him to purchase a brig, to load her, to send her to *Madeira*, from thence to St. *Bartholomew's*, thence to the *United States*, or wherever he chooses, and likewise to sell her at his discretion. If property consists in the absolute right of disposing of any thing, this vessel, under the power of attorney, was as much the property of Mr. *Clap* as can well be conceived, though under the name of agent.

The alledged purchase having been made in *June*, *Clap*, who before had the management of the vessel, and had gone in her as supercargo upon former voyages, continued to act in the same capacity, and he appointed the present master immediately before she sailed, which was on the 17th of *June*. It does not appear when the cargo was shipped, and it is not improbable that it was on board when the alledged transfer took place, as *Clap* has not stated any more particulars relating to the purchase of the cargo than he has in regard to the ship; and the shortness of the time, between the alledged purchase of the vessel and that of sailing, would scarcely admit of the shipment of a cargo. Besides the power of attorney, there are instructions from *Ray* to *Clap*. He is there directed to carry his cargo to *Madeira*, from thence to the *United States*, or St. *Bartholomew's*, or *any other place*. So that he is authorized to carry on a trade, from and to the *United States*, or any other kind of traffic he chooses to engage in,

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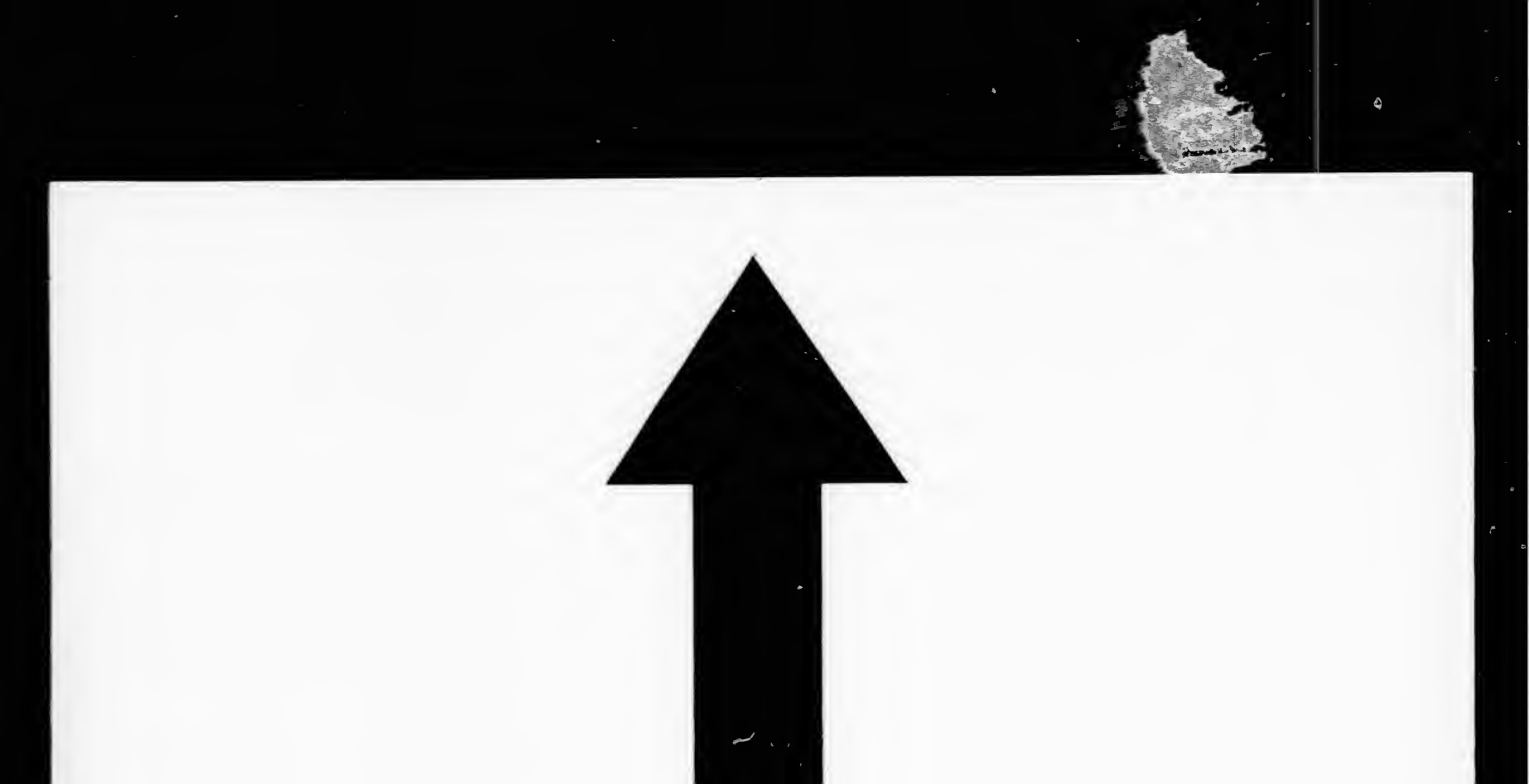
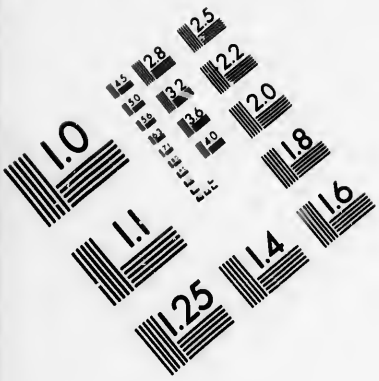
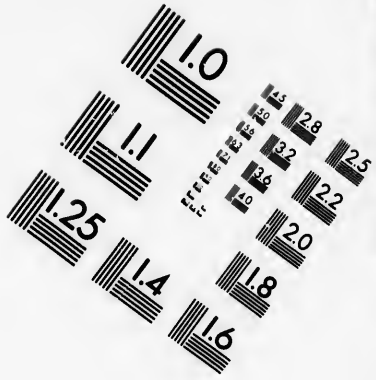
without any farther authority, and without any sort of direction, or obligation, that the vessel should ever visit the ports where the pretended owner resided, unless Mr. *Clap* should happen to be so disposed. There is one part of these instructions perfectly inconsistent with any ownership in *Ray*. After directing *Clap* to go to *Madeira*, or St. *Bartholomew's*, or any where else, he adds, that if Mr. *Clap*, under this wide authority, should take it into his head to "choose to go to St. *Bartholomew's*," he is advised to "consult our house," that is the house of *Ray*. How could it enter by any possibility into the mind of an owner, writing to his own agent, to give any instructions in case he came to the place of his own residence, that he should apply to himself? The claimant's counsel have endeavoured to obviate this objection by supposing that *Ray* would be still in the *United States*, and that this was therefore merely a direction to apply to his commercial house, in his absence. I think that this would scarcely account for the direction, if it were true; but it appears, in the same letter of instructions, that *Ray* was about to return home immediately; for he tells *Clap* not to write to him at *New York*, "as he should be returned before he received the letters;" and the supercargo states that "he was going to return when he last heard from him."

Even if it were possible to consider this as a *bona fide* sale, the vessel is not documented and navigated as a *Swedish* vessel. The treaty of 1661 is still in force, and has been recognized and confirmed, in all later treaties between the two countries. "Least enemies' property should be concealed under the disguise of friends," there are many very particular stipulations in that treaty, article the 12th, as to the safe conducts, passports,

and certificates, under which vessels and goods are to sail, which are to be signed by the magistrates or commissioners of the customs, and a form of certificate to be observed is introduced into the body of the treaty. And by a late treaty in 1801, article 7, "to obviate all the inconveniences of bad faith," it is established "as an inviolable rule" that any vessel "to be considered as the property of the country whose flag it carries, must have on board the papers and passports in due and perfect form, and that every vessel which shall not observe that rule shall lose all right to protection." Now this vessel had not any passport on board; *Clap* indeed has sworn that there was a regular passport at St. *Bartholomew's*. How he should have known it does not appear, but if it really existed, this vessel could derive no benefit from it, as it was not on board, which is not only required by the law of nations, but the former treaty expressly stipulates that vessels "shall be furnished *in their voyages* with them, and the latter treaty says, that "the vessel must have them on board." The certificates from the *Swedish* consul, and the commercial agent in the *United States*, cannot be considered as passports. I never understood that such persons had authority to issue those national documents, and indeed they are not so considered by the supercargo, as he refers for the real passport to that supposed to be at St. *Bartholomew's*. A vessel indeed, purchased in a foreign country, could not be furnished with the full and regular national documents, till they went to their new country, and till they could be procured, such consular certificates might serve as a protection. But a vessel, under such circumstances, would be bound to go home to the country whose character she had acquired, to procure them. In a direct voyage for







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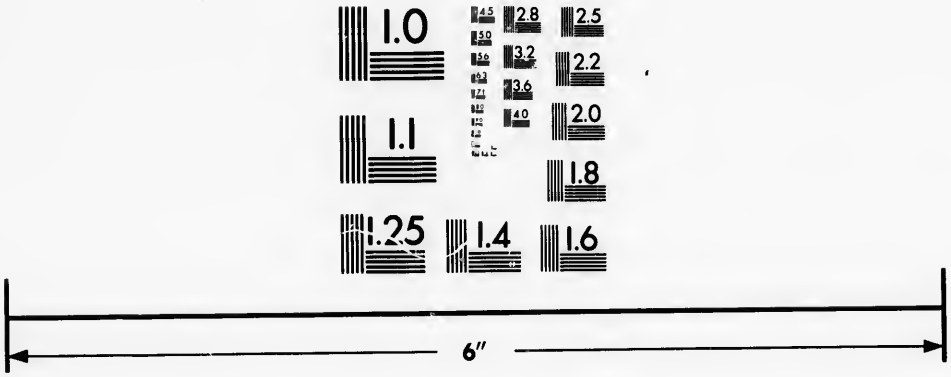

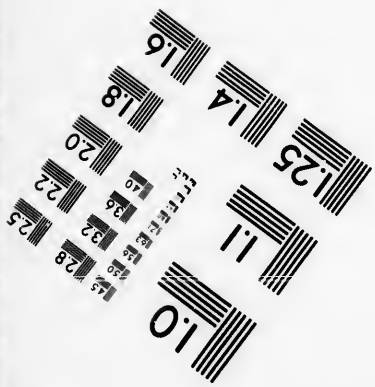

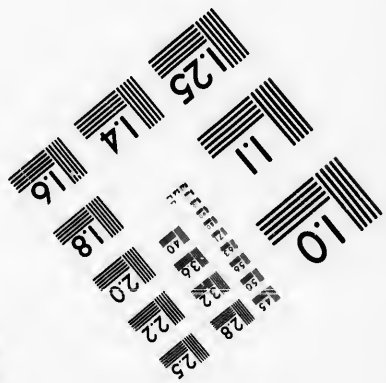

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The GUSTAVA.

July 26, 1813.

that purpose, such certificate might be sufficient. But in this case the vessel was not only not going directly to the island of her owners, and was making an intermediate voyage to *Madeira*, but there were no positive directions from the owner to go there at all, and it rested entirely upon the will and pleasure of Mr. *Clap* whether she should ever visit the territories of the sovereign of the alledged owner, and the benefit of whose flag she claimed.

Under every aspect this vessel and cargo are liable to confiscation.

September 6th, 1813.

The ARAB.

SENTENCE.—Dr. *Croke*.

A license cannot protect property when the importer is not comprehended under it.

UPON the former hearing of this case, when farther proof was ordered, I stated it to be entitled to every favourable consideration. The two vessels in which this flour had been taken, having been destroyed by the captors, together with nearly all the papers belonging to them, and this part of their cargoes transhipped into the *Arab*, under a defect of documents which was occasioned by the act of the captors, nothing more could be required of the claimants than the best evidence which the nature of the case will admit.

The licenses under which those two vessels had sailed having perished, certificates of their contents from the secretary of the province, through whose office they passed, have been received as admissible. So with respect to the proof of the identity of the flour, the affidavits produced, corresponding with the marks, though an inferior species of evidence, have been allowed to be sufficient.

It has been alledged that these vessels sailed just when the licenses were about to expire, one, nine days only, and the other, twenty days, before their expiration. Under the fair latitude which is allowed for the execution of these instruments, I cannot think that this alone can be considered as a fatal departure from the terms of them, especially if satisfactory reasons could be given for the delay.

But the allowance to be made in favour of the claimants extends no farther than to the proof of the facts. These being once ascertained, the same rules of law are applicable to them as to other cases. The substance of the licenses being proved, they are liable to the same construction as if the licenses had not been destroyed. The burning of the vessels might render the captors liable to damages, provided the seizure had been unlawful, but it cannot affect the legality of the seizure itself.

The Court has already decided in some late cases, that a license can only protect those who are designated in it. This property is claimed by *Woodward*, but the licenses were solely in the names of *Reynolds* and Co. and *Moody* and Co.; *Woodward* not being in partnership or connexion with either of those mercantile houses.

Neither *Reynolds* nor *Moody* were the importers of this flour, but *Woodward*. There was no bill of lading to them, the goods were consigned in the bills of lading to *Woodward*, who was himself on board. *Moody* in his affidavit has not stated that the flour was to be consigned to him, or that he had any sort of connexion with it. *Reynolds* has sworn that at the time he delivered the license to *Woodward* he told him that the vessel should be consigned to him, but from his mode of stating it, it is evident that this promise was not made till after the license was actually

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delivered, and therefore was no part of the conditions upon which the license was procured, and in fact no such consignment was made. All the letters prove that the only concern, which it was proposed that *Reynolds* should have in the business, was, that in case *Woodward* did not arrive himself with the cargo, *Reynolds* should act as his agent, under the controul too of Mr. *Dwalf*, who had a power of attorney to act for him. Neither *Reynolds* nor *Moody* therefore can be considered as the importers.

Woodward was the real importer, but he is not included in the license. It is however sworn both by *Reynolds* and *Moody* that they procured these licenses for *Woodward*, and therefore it has been argued that though not mentioned by name, he was virtually comprehended in it, and the case of the schooner *Nymph*, which was restored by this Court upon similar grounds, has been quoted as decisive. That was a case in which *Joseph Austin*, a *British* subject, claimed a vessel and cargo, and deposed that he procured a license from Sir *John Coape Sherbrooke;* that when he obtained it *he requested to have it made out in the name of William Stairs*, because he was desirous, for certain reasons which he stated, that his own name should not appear, and the license was never out of his possession.

That case differs most essentially from the present. Though the license was in *Stairs's* name, it was obtained by *Austin* himself in person from the secretary, who perfectly understood that the license was granted in reality to *Austin*. This brought it precisely within the reasons of the case of the *Christina Sophia*,* where the party swore that he intended to include the several claimants under a license for him-

* Quoted in Rob. 4. p. 264.

self and Co. and the Court "acceeded to the *favourable suggestion* that the *Irish* government *might be apprized* of this intention." In the *Nymphe*, the secretary was *actually apprized* of the intention of the applicant, and granted the license in the name of *Stairs*, professedly for the use and benefit of *Austin*. In this case it is not asserted that *Woodward* was intended to be comprehended under the designation of *Reynolds* or *Moody* and Co. or that the government was apprized of it. Nor would the facts bear out such an assertion. It is notorious that both *Reynolds* and *Moody* were engaged in license jobbing, that they procured them from government, and afterwards disposed of them as they could find purchasers, some in this country, and others were transmitted for sale to the *United States*. So little reason is there to believe that these very licenses were taken out specially for *Woodward*, that neither *Reynolds* nor *Moody* have ventured to swear positively that these were the very licenses which they delivered to *Woodward*; they can only state their belief that out of many licenses which they took out from time to time, and other circumstances, they believe these to have been the same licenses. Nor is there any suggestion that the governor or secretary was apprized that they were intended for the use and benefit of *Woodward*.

After the license had been obtained, there is something unaccounted for in the manner in which it was used. These vessels commenced lading, as is stated in the claim, in *October*, and he then procured licenses from Sir *John Borlase Warren*, and Sir *John Coape Sherbrooke*. These licenses, whether originally valid or not, must have expired in *January*, for none of them were granted for longer than three months. The present licenses were obtained in *January*, and,

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as is sworn by *Woodward, for these very cargoes.* Yet strange to say, on the 27th of *March*, when *Woodward* was in the *United States* with those latter licenses in his pocket, his two vessels sailed without them, with the two old expired licenses. When they had sailed out of *Baltimore*, they were ordered back by some of the squadron off that port. Finding that the old licenses were insufficient, which he must have known before, he then sent forward the two new licenses, with which the vessels again sailed upon the 4th of *April*. It is evident therefore that though he has sworn that these licenses were obtained solely for these two vessels, that he attempted to send them on their voyage without them. Why they were not put on board these vessels originally, and not till other means had been tried, and so late when they were near expiring, has not been explained. It is scarcely probable that *Woodward* should have kept them by him, and have ventured the loss of his cargoes, without any assignable motive. There is strong reason to believe that some improper use was made of them in the intermediate time, because otherwise *Woodward's* conduct is perfectly inexplicable.

I have stated these circumstances in answer to the suggestions of counsel, who have endeavoured to excite the compassion of the Court in favour of the claimant, by representing him as a young man who had been innocently led into difficulties through inexperience and inadvertence. On the contrary, it is clear that this license has not been used in a manner consistent with good faith, and that there is no small reason to believe that it has been applied to other purposes than what appear upon the face of the transaction. But be that as it may, these licenses can be no protection to the property claimed, and which I therefore condemn to the captor.

The Two Brothers.

September, 1813.

(*Mitchell's* Case.)

SENTENCE.—Dr. *Croke.*

THIS vessel, with a cargo of flour, is the property of an enemy. It is therefore liable to confiscation unless it is protected by the circumstances of the case.

Commanders may enter into contracts with subjects of the enemy for the supply of their forces, and grant passports to protect them in such transactions.

A protection is claimed for her, under a sort of passport from Sir *Thomas Hardy*, who commanded the blockading squadron in the *Chesapeake*, and the preceding transactions which lead to it.

It may be necessary to state from an accredited writer upon the law of nations, the foundation upon which protections of this nature depend.

*Vattel** says, in general, that the obligation of observing the faith of promises towards the enemy is more necessary than even in peace, and should be sacred between enemies, in the course of war. Of these conventions are truces, general or particular, and the latter may relate to hostile acts, or *to individual persons.*† To render an agreement of this kind valid, it must proceed from a competent authority; originally from the sovereign, but if there be no special order from him, every commander is presumed to be invested with all the powers necessary for the proper exercise of his functions, and with whatever is a natural consequence of his appointment. It is necessary that commanders should have the power of concluding particular truces, and it is

* *Liv.* III. c. 10. § 174. † *Liv.* III. c. xvi. § 235, &c.

The Two Brothers.

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therefore naturally presumed that a general or commander in chief is invested with this power. Such truces engage the faith of the nations. If individuals infringe a truce, the public faith is not violated, but the offenders should be compelled to make a complete reparation.

Another species of conventions in war, of much the same nature, are passports, which are a privilege given to certain persons to go and return in safety; or for certain *things* to be transported in safety. The prince may intrust to his officers the power of granting passports, either by an express authority, or in consequence of the nature of their functions.

These principles are applicable to the present case. The vessels which were carrying on the blockade of the *Chesapeake* were greatly in want of flour. An agreement was therefore made by Captain *Oliver* with the present claimant, an *American*, to bring two cargoes of flour from the *United States* for the use of the squadron. He accordingly procured them, but when he reached the *British* squadron, Captain *Oliver* was gone off the station, and the vessels then there stationed were not at that time in want of flour. Sir *Thomas Hardy*, who had the command of the squadron, therefore gave a passport to *Mitchell*, to proceed with his vessel to *Halifax*, in the course of which voyage he was captured.

The agreement with *Mitchell* was entered into by a competent power. Captain *Oliver* had either the command of the squadron, or must be presumed to have acted under the authority of the commander. If a power of making such agreements is vested in commanders in any case, it must surely belong to them for the purpose of procuring necessaries for the forces under their command. They have no autho-

rity to grant passports to license the trade of the enemy in general, or for any purpose not connected with their own service, but they must have the power of entering into contracts with the enemy, and granting passports to supply the wants of their vessels. The contract made by Captain *Oliver* with *Mitchell* is clearly proved. When he had performed his part of it by bringing the flour, the officer who had entered into the contract was gone, the flour was no longer wanted. What could be done by the commander upon the station? It was impossible for *Mitchell* to return with his cargo to the *States*. As it was brought under a contract made with competent authorities of the *British* nation, he was intitled to farther protection. Sir *Thomas Hardy* therefore gave him a passport to *Halifax*, where the cargo might still be purchased for the use of the *British* navy, or at least for the general benefit of that colony.

This cargo was therefore protected under the original contract, and since, under all the circumstances of the case, the subsequent passport was founded upon it, and the primary object having been defeated, was the best mode of proceeding which could be adopted. I am of opinion that the faith and honour of the *British* nation are pledged to the restitution of this vessel and cargo.

September 20th, 1813.

The Fanny and the Plough Boy.

Sentence—Dr. *Croke.*

Ransom when justifiable under the Prize Act.

THIS is a case respecting a sum of money which has been paid into this Court, by Captain *Stackpole*, of the *Statira*. He states in the affidavit, that whilst he was engaged in the blockade of the *Delaware*, he fell in with and seized a vessel called the *Fanny*, which had sailed out of one of the blockaded ports, but not being able to spare any of his sailors to man the prize, without weakening his crew so much as to injure the service of his vessel, and being therefore under the necessity of abandoning her, he agreed with the master to let her go upon the payment of a sum of money, which he accordingly received, and has now paid into Court.

This is a direct case of ransom which has been prohibited by the Prize Act under a heavy penalty. It is a practice which is beneficial to the enemy, injurious to this country, and tends in some measure to defeat the purposes of war. It is the object of all war to compel the enemy to enter into terms of reason and justice, amongst other means, by seizing his property and distressing his trade. But the effects of capture directed to this object are counteracted by admitting vessels and cargoes to be ransomed—no master will ransom his vessel and cargo unless he conceives it to be for his advantage, that is, that the property is worth more than the ransom, and the difference is so much gained to the enemy. It is an object of the war, likewise, to impede and destroy the enemy's commerce by depriving him of his vessels and the commodities which are the articles of traffic,

The Fanny and The Plough Boy.

September 20th, 1813.

but upon a ransom these are both again restored to him.

When a captor therefore is unable to secure a prize and send it into port, though the ransom may be more beneficial to himself, it is more consistent with the policy of war and the benefit of the country, to destroy it.

A power of ransoming is likewise subject to great abuses. Vessels may be seized contrary to law for the mere purpose of exacting a sum of money, which perhaps the master would rather pay than suffer delay and detention. Even when a seizure is justifiable, under colour of the ransom, secret compromises, collusions, and clandestine restitutions might be made of a fraudulent nature.

For these reasons ransoming has been considered as an improper practice; and it is enacted by the Prize Act, that if any commander shall ransom any ship or cargo, he shall forfeit and suffer such penalty or fine as the Court shall adjudge, not exceeding the sum of one hundred pounds; and the commander of a private ship shall likewise forfeit his letter of marque. And I apprehend that the money received for ransom must be condemned to His Majesty for such misconduct on the part of the captors. There is, however, an exception, in the case of extreme necessity, to be allowed by the Court of Admiralty; and it rests therefore with the Court to determine whether the circumstances compose such a case as to bring it within the exception.

Certainly, in this case, there is not the most distant suspicions of any thing like connivance, or impropriety in the conduct of the commander. It would have been highly unjustifiable to have weakened the crew of his vessel so as to render her less fit for performing the duties required of him in His

The FANNY and The PLOUGH BOY.

September 20th, 1813.

Majesty's service. This does in some measure compose a case of moral necessity, which I think might justify this proceeding, though perhaps not literally a case of extreme necessity. In giving this extension of the words of the act, the decisions which have been given by some other Courts of Vice-Admiralty in similar cases, which have occurred respecting other ships in the same squadron, and which were considered as the rule and guide for the rest of His Majesty's ships, and decided the conduct of Captain *Stackpole* upon this occasion, have had considerable weight.

I condemn this property as lawful prize to the *Statira*.

September 20th, 1813.

The ROSCIO, *J. Jose Carrac*, Master.

SENTENCE—Dr. *Croke*.

Claim for damages upon loss of vessel by shipwreck after capture, rejected, there being no misconduct on the part of the captors.

THIS vessel was taken close to the *Western Islands* on the 15th *June*, by the *Dover*, the *Melpomene* and the *Regulus* being in sight, and ordered for *Halifax*, under the care of a prize-master. Upon her voyage to this port, upon the 29th of *June*, she was cast away at one o'clock in the morning about fifteen leagues to the eastward of this port, near *Paper Head* harbour, and the materials of the wreck were sold by the prize-master for £20 to a man who lived near the spot, and as a consideration for bringing him and the crew to *Halifax*. If this vessel had been brought into port, the Court would

have to decide upon the condemnation or restitution of the property, but it is an unfortunate case in which the whole property has perished, except a small part of the wreck which was disposed of, under the necessity of the circumstances, for a small sum. The only question therefore which remains is, whether the captors are liable to make good the loss to the claimants. To determine this question it has not to decide whether the property would have been ultimately liable to restitution to the claimants, but merely whether there was a justifiable cause of seizure, and no fault in the captors afterwards.

Under the general rules of law, which are not peculiar to this country, but belong to most others, where the possession of property is founded in injustice, the possessor is even liable for unavoidable accidents: but, where there was a just cause of seizure, the captor is not answerable for mere casualties, but only for misconduct or voluntary neglect.

It might at once be pronounced to have been a justiable seizure in this case, if from the state of the papers found on board the ship it appears to have been a case for further proof. This vessel was purchased from the enemy since the commencement of the war, but there is no bill of sale, or any one document to prove the title. There are other deficiencies and reasonable grounds for suspicion of the reality of any transfer which have been pointed out by the counsel for the captors; with these defects in the documents of the vessel, it was the duty of His Majesty's cruizers to seize and bring this vessel for examination, and since their omission to put on board sufficient proof of their property was the fault of the owners themselves, no blame can be imputed to the captors.

But though the original cause of seizure was jus-

The Roscio.

September 20th, 1813.

tifiable, the captors would be answerable for losses which were occasioned by their wilful misconduct or gross neglect. A fair case is stated in the prize-master's affidavit, that on the 18th, they made land 130 miles to the east of *Halifax*; that they proceeded along the coast till the next day about twelve o'clock, when they fell in with the brig *Alexander*, just from *Halifax*. Being a stranger to the coast he went on board her for information, and was told by the master to steer west and by north, and that *Halifax* was ninety-five miles distant. Upon which he steered directly west, which was one point farther off the land, and kept that course till one o'clock, when they struck upon a reef; that an inhabitant, *Gasper Clauser*, furnished a vessel to transport himself and the crew to *Halifax* for twenty pounds, in lieu of which he left with him the wreck of the vessel which was going to pieces.

It appears therefore that the prize-master used every caution and prudence for the safety of the vessel which the case would admit of.

This is not contradicted on the part of the claimant, nor is any misconduct or negligence of the captors alledged on his behalf, though the master was on board the whole time, and he has stated other instances of misconduct respecting the plunder of the trunks, and an accusation of the captors having sold the materials of the wreck below their value.

I pronounce therefore against the claim for damages, and direct the proceeds of so much of the wreck as may have been saved after payment of *Clauser* for his services, to be applied to the payment of captors' expenses.—As to the rest of the expenses, as this is an unfortunate and losing case on all sides, each party must be contented to pay their own.

The FLIGHT, *Kelly*, Master.

October 16th, 1813.

Vessels associated for a blockade, intitled to share in captures of the enemy's property, though driven on shore and seized there.

THIS was a case of joint capture, upon petition on behalf of the *Statira* against the *Spartan*. It is stated that the *Statira*, under the command of *Hayard Stackpole*, Esq. made a part of the squadron under Sir *John Borlase Warren*, which was employed in carrying on the blockade of the *Chesapeake*, with the *Spartan* commanded by *Edward P. Brenton*, Esq. and was associated with the blockading squadron, co-operating in the various services; the *Statira* being employed in the upper part of the bay, and the *Spartan* at the entrance. That the boats of the *Victorious* chased on shore a schooner called the *Flight*, and after she had bilged on the shore, and was wrecked, the boats of the *Spartan* saved from the wreck divers goods, which had been condemned in this Court; and that the *Statira* was entitled to share by reason of having been associated in carrying on the blockade with the *Spartan*. An answer to this petition has been given on behalf of the *Spartan*, admitting the truth of the facts as there set forth. The *King's Advocate* argued in support of the Petition, and the *Solicitor General* for the *Spartan*.—

SENTENCE.—Dr. *Croke*.

The statement of facts in this case is admitted on both sides. The claim of the *Statira* to share in this capture is not founded upon any actual assistance rendered, or upon any constructive aid from a joint chasing, or even from being in sight, but upon the sole foundation of the two vessels having been at the time engaged in a conjunct service. The general rule, that vessels associated are all intitled to share in cap-

The Flight.

October 16th, 1813.

tures made by any of the squadron, which has been fully stated by His Majesty's Advocate, has been admitted by the Solicitor-general, but he alledges that in point of law they do not apply to this case, for two reasons—First, that this prize was a wreck on shore, not captured afloat, but on the territories of the enemy. Secondly, upon a late decision in the High Court of Appeals, the *Nordstern, Samsing*, that this vessel being an enemy's vessel, was not captured for a breach of the blockade; that the only object of the blockade of the *Chesapeake* was the capture of neutral vessels, and since that was the only purpose of the association, this capture was foreign to it, and none of the associated vessels were intitled to share.

The first of these objections is very slight. The transaction was commenced upon the sea, by the boats of the *Victorious*, which chased the vessel on shore. Being originally a marine pursuit it did not change its character by the mere circumstance that the actual seizure was made on shore. It was as much a naval prize as if the capture had been completed at sea. Generally speaking, it is not usually permitted to commanders of vessels, and privateers are expressly prohibited, to seize private property on shore: but it never could be contended that it would be unlawful to take possession of the property of an enemy which they had pursued at sea, merely because they had driven it to land. So the grant of the benefit of prize to the captors is limited to prizes taken at sea and to public property on land, yet it could not be pretended that this circumstance would oust them of their right, from its being private property on shore.

The second objection had rather more plausibility. It was laid down in the case of the *Nordstern*, that to

intitle vessels to share as joint captors upon the sole ground of the unity of an enterprize, "it is not sufficient a joint enterprize should exist at the time, except it expressly refer to the capture in question, or in other words, that the capture grow out of the purpose and object for which the parties have been united, and be the joint produce of an actual co-operation, and the object of union." It was therefore argued that the sole object of this blockade being the capture of neutral vessels, the capture of enemy's property was not within the object of the enterprize; and the counsel relied upon the general nature of blockades, and upon some observations which were made by this Court in the *Orion*.

The principle laid down in the *Nordstern* appears to me to be new; it seems very likely to lead to a great deal of litigation, since it may frequently be a nice point to ascertain, in particular cases, what is the object of an expedition, and how far any given capture may come within it. It would often be attended with considerable hardship. Suppose a squadron was dispatched upon any expedition in its object exclusively military, as to follow a *French* fleet across the *Atlantic*; if a rich merchant vessel were taken by one of the ships accidentally out of sight of the others, it would scarcely be equitable that they who were associated for every purpose of sharing in the hazard, the warlike exertion, and the real danger of the expedition, should be excluded from partaking in such benefits as fortune should throw in their way, without any hazard, exertion, or danger at all. To adhere to the principles laid down in that case, this Court is undoubtedly bound; but under the view which I am enabled to take of it, I should not be inclined to extend it beyond its fair limits. I observe

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that Sir *William Scott*, in the case of the *Forsigheid*,* considers that case as admitting that ships, captured for a breach of blockade, would be the joint prize to the whole fleet employed in that service. It is acknowledged that this was a general and strict blockade, as well commercial as military, and that these vessels were associated, and co-operating in carrying on the various services of the blockade, the *Statira* being employed in the upper part of the bay, and the *Spartan* stationed at the mouth; but it is argued that this vessel was not taken for a breach of the blockade, but as an enemy's vessel merely, which was therefore a capture unconnected with the blockade.

However ingeniously this point may have been argued, it is not tenable: though the seizure of neutral vessels is one effect of the blockade, it is not the only or even the principal object; it is the design of a blockade perfectly to stop up the port of an enemy, and to prevent all ingress or egress whatever, as much of the enemy's own vessels as those of neutrals. By a blockade the port is hermetically sealed, as it was strongly and metaphorically expressed by the learned Judge of the High Court of Admiralty, by a term in chemistry, when the mouth of a vessel is so perfectly stopped by welding the glass itself, that not even a particle of air can escape; so blockading ships are to prevent all vessels of every description from departing or going in. The observations in the opinion given by this Court in the *Orion*, do not apply to this case. It was the foundation of the *right of capture* which was there spoken of, not the *object* of a blockade; it was therefore observed that the right of capturing neutrals was founded merely upon the blockade itself,

* 1 *Edw.* 124.

whilst the right of taking the enemy's vessels depended upon the general state of war: but it was there stated, that even with respect to the enemy, a blockade is a disposal of naval forces to render the capture of his property more easy, and it was therefore in fact admitted that the capture of the enemy's vessels was an object of the blockade.

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I am of opinion that the capture of vessels belonging to the enemy was a part of the purpose for which these vessels were associated, and therefore I admit the allegation given on behalf of the *Statira*, and pronounce her to have been a joint captor of this cargo.

Euphemia, *J. M. de Marias*, Master. October 16th, 1813.

Sentence—Dr. *Croke*.

Unmanufactured copper going to a port of naval equipment, contraband. Ship restored with costs and expenses, as being a new question.

THE vessel and cargo are claimed by the master for *Matteo Lorenzo Murphy*, of *Vera Cruz*, admitted to be a *Spanish* subject. The cargo consists of 11,000 quintals of copper, and 96 quintals of *Campeachy* wood, besides the adventures of the master and the mate. They sailed on the 27th of *June* from *Campeachy* to *Jamaica*, but were to touch at the *Havannah* to receive further instructions from the owner's agents, and by whom they were directed to proceed to *Boston*, as he was informed that the copper could not be imported into *Jamaica*. On the 5th of *August* they sailed from the *Havannah* and were taken in their passage to *Boston*.

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The principal question in this case is, whether the copper is to be considered as contraband.

There are no treaties, that I am aware of, now existing between the *United Kingdom* and *Spain* to settle what shall be deemed contraband. By the declaration of war in 1803, all preceding treaties were annulled. By His Majesty's Order in Council of the 4th *July* 1808, it was ordered that all hostilities against *Spain* should cease. I am not informed that any subsequent treaties have been entered into which apply to this subject; none at all indeed appear, except mere conventions relating to the conjunct war. The relations of friendship between the two nations depend therefore upon this Order in Council. The 4th article declares "that all ships and vessels belonging to *Spain*, which shall be met at sea by His Majesty's ships and cruisers, shall be treated in the same manner as the ships of states in amity with His Majesty, and shall be suffered to carry on any trade now considered by His Majesty to be lawfully carried on by neutral ships." The determination of what is contraband is left to the general law of nations.

The relaxation of the general rule of contraband, that what is the native produce of the exporting counry is a rule of convention chiefly, it was expressly stated in the case of the *Stadt Embden**, on the authority of the *Med Goods Hielp*, not to be a general principle; and has chiefly been admitted by express treaty, and in favour of the northern states of *Europe*, most of whose native commodities are of a contraband nature.

The general principle upon which questions of contraband depend are clear, the only difficulty consists in the application to particular cases. To supply

* 1 *Rob.* 129.

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the enemy with implements of war is universally a departure from neutrality; what commodities shall be considered as coming within that description, has been much contested between nations at war, and those which have continued in peace. Arms and some other articles of direct use in warfare have been allowed to be contraband without dispute; it is another class of commodities, which have their use as much in the ordinary commerce of peace as in the affairs of war, which have been the subject of contention. Of this kind are all metals, including that which is now under the consideration of this Court. Respecting such articles, the rule laid down by *Grotius*, which is founded in justice and good sense, has been looked up to as the safe guide of decision, *destinguendus belli status*. The situation and means of the belligerent countries, and the course of any given war, and the objects of attack and defence, will clearly point out the hostile wants of each party, and the articles by which he may be assisted in opposing his enemy, or defending himself; the articles therefore which compose the list of contraband, must vary from time to time with the changes and revolutions of nations, in their territories, their manners and pursuits, and, above all, in the science of war. When from those charges, an article which before was innocent, becomes of great use in war, it immediately is clothed with the character of contraband. The principle continues immoveable, but the variation of circumstances may bring new articles within the range of its application. Whatever becomes of military use to an enemy, becomes immediately contraband. The invention of gunpowder added a vast accumulation to the catalogue. In more modern days, when wars have assumed a naval character, articles decidedly of use in military naval equipment, after some opposition from interested neu-

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trals, are universally admitted to be contraband. An improvement has been lately made in the mode of building ships by sheathing them with copper; it can scarcely therefore be disputed that copper, which is now a regular naval store in all public arsenals for building ships of war, is become of a contraband nature; indeed it appears to have been so even before it was applied to that use, and is enumerated amongst contraband articles in several treaties and public documents, such as in the treaty between *England* and *Holland* in 1625, the King's proclamation against *Spain* in 1625, and many others.

The contraband quality of this article cannot be doubted, though no decided case is found respecting it upon the general law of nations; that of the *Charlotte, Fochs,* arose upon the construction of the *Swedish* treaty: it came indeed before this Court in the case of the *Express, Haskett,* but was not fully considered, as there was ground to condemn the vessel for breach of blockade.

Copper in every state and in every form may be applied to innocent as well as to noxious purposes; even in plates and bolts for sheathing, it is as much applicable to merchant vessels as to those of war, and in its rudest state it is a material which may easily be converted to hostile purposes; it is *materia per se bello apta.* We must look farther therefore than to the mere state of the metal before it can be pronounced contraband or otherwise. In the case of the the *De Hoop, Witzes,* decided in the High Court of Admiralty 14th of *July,* 1801, but not reported in *Robinson's* and was produced under an affidavit in Court, under Reports; steel of which a sword had been made, the circumstances of the case was pronounced not to be contraband. Referring back therefore to the rule of *Grotius,* we may lay it down as a general principle,

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that whenever there is a moral certainty, or a strong legal presumption, that a cargo, or part of a cargo, of this article, is intended to be applied to naval military purposes, it is then contraband, and not otherwise.

Thus, if a cargo of copper in sheets and bolts was going to a port where ships of war were built and refitted, this presumption would be sufficient to condemn it. In the present state of *America*, which claims to be a naval power with whom all mercantile navigation is now prohibited, when all vessels which are capable are converted into privateers and are fitting out, as well as public ships, along the whole extent of the coast, every port in the *United States* must be considered as a port of naval military equipment, and every article of ship building to be of a hostile character. Besides, at *Charlestown*, near *Boston*, the destination of this vessel, there is a regular public yard for building of ships of war.

The exemption of raw materials is rather an indulgence than of strict right; it is not universal. Hemp is a raw material in its lowest state, and must be made into cordage, ropes, and then cables, before it can be applied to rigging and other naval uses. Sulphur, nitre, pitch, and tar are raw materials. In some treaties, as in that between *Spain* and the *Emperor*, in 1725, all things useful in war, manufactured or unmanufactured, are declared to be contraband.

It is on account of there being a greater or equal probability of an innocent than of a noxious application, that raw materials have generally been exempted from the penalty of contraband. The more remote the state of the article from the form in which it could be applied to military purposes, the less was the presumption of an intention of such application; but I apprehend that this is principally a rule of evidence, not in

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all cases of positive and inevitable conclusion, and must give way, especially where there are no decisions to the contrary, to more direct proof. Suppose a cargo of iron in its rudest state was going direct to a cannon-foundery of the enemy, professedly to be cast into guns and cannon-balls; I apprehend that it would be liable to confiscation, unless the provision of a treaty intervene.

If then, from the facts which appear, there is any reason to believe that the unmanufactured article would be manufactured, and applied to hostile purposes, we should not hesitate in pronouncing it contraband. The most innocent commodities, even provisions, under these circumstances are contraband.

Though copper may be said to be of promiscuous use, it is not so much so as iron, in whose favour this rule has been principally introduced; for one article of common life which is made of copper, there are one hundred formed of iron; for one coppersmith, blacksmiths innumerable are to be found in every country. But for naval purposes a very large quantity of copper is used; there is therefore a greater general probability that copper will be employed for naval uses, than there is with respect to iron.

This probability is encreased when the state of the war renders it an article of great importance to the enemy in preparing his military operations, as in the case of the *United States*, which profess to be a maritime power, equally bent upon increasing their navy, and upon contesting the palm of glory with *Great Britain* upon her own element: to such a nation copper is an article of the first importance; the duration of their ships, the length of their expeditions, the swiftness of their vessels, their facility of attack, defence, and flight, depend upon a supply of it.

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It is notorious that there is a great want of this article in the *United States*. Whilst their own territories supply almost every other material for shipbuilding, copper cannot be procured there; they have no mines, or at least none are worked. It would be difficult if not impossible for them to procure it *manufactured for the immediate use of their navy*. *Sweden*, the country which deals most largely in it, is expressly prohibited by its treaty with *Great Britain*. No other nation can import it without danger of confiscation. They are reduced therefore to the necessity of importing the unmanufactured material; they have founderies where it can be manufactured for every use which they can require. If they had not the means of manufacturing it generally, for what object was it imported at all, since without further preparation it would be useless for any purpose? If they can manufacture it for one purpose, they can for another.

By the report of the gentlemen who have been appointed to examine this article, it appears to be copper in the first rude state in which it is first fused from the ore; that in its present state it is not malleable, but that it might be rendered perfectly malleable and fit for rolling into sheathing copper, or any other naval purpose, by the easy process of a double fusion; that the experiment has actually been tried, and it appeared that by once melting, bolts were made which were malleable in some degree, and that after a second melting, in a rude and unscientific manner, a bar was found which was perfectly malleable. It appears likewise that copper in the same state is received as a naval store in the King's naval yard at *Portsmouth*, where it is manufactured for all the purposes of naval equipment. The quantity too is large, it consists of 11,000 quintals, and the prime

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cost was 18,976 dollars. It has been stated to be sufficient for sheathing a first rate man of war, and that a vessel of the line is now actually building at *Charles Town* near *Boston*.

I am of opinion therefore that under all the circumstances of the present war with the *United States*, copper in its unmanufactured state must be considered as contraband, but as this is in some measure a new question, and the claimant may have been misled involuntarily, and without any intention of violating the law of nations, from a general understanding that raw materials are not comprehended in the class of contraband, I condemn the cargo, but direct the vessel to be restored to the owner, together with his costs and expences, as was done in the case of the *Jonge Margaretha*. *Rob.* 1. 196.

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The JERUSALEM, *Panageas Cacori*.

Copper contraband. Ship and cargo belonging to other persons restored. Freight and expences allowed to the neutral master.

THIS was a *Greek* ship belonging to *Lazaro Nicholas Catarai* of *Idra*, in the *Morea*, and claimed by *Nicolas Cicliteras*, the supercargo. She was taken on a voage from the *Havanna* to *Boston*, with a cargo belonging to different persons on freight. A question arose with respect to some copper in bars, which was claimed for Mr. *Drake* of the *Havanna*.

SENTENCE.

It is admitted that the copper is of the same quality with that in the *Euphemia*. It is therefore liable to be condemned. It composes, however, but a small part of the cargo, and is under the same general favourable circumstances with the *Euphemia*.

In the *Neptune's Lamp*, in 3 Rob. 108, under similar circumstances, the High Court of Admiralty decreed the master his freight and expences, a precedent which I think it proper to follow upon the present occasion.

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The Republican, *Beaupin*. Nov. 5, 1813.

Sentence.---*Dr. Croke.*

THIS vessel and cargo sailed from *New York* upon the 9th of *July* last, and were captured upon the 11th. In this and several other cases, which depend upon the question of the blockade of that port, further proof was directed to be brought both by the captors and claimants upon that point, and which has now been produced.

The blockade of *New York* commenced on the 22d of *June* 1813. After a public notification, the actual investment constitutes a complete blockade without further notice.

This is a mere question of fact, whether the port of *New York* was actually blockaded, with a sufficient notification to the parties, to be charged with it, at the respective periods which can affect this vessel.

These are, the time of sailing, and the time of loading.

We have therefore to ascertain when the notification was given, and when the blockade *de facto* really commenced.

As to the *notification*, on the 20th of *March*, the Prince Regent published the Order in Council for the blockade of this port. In that order it was stated, that notice of the blockade had already been given to the ministers of neutral powers residing in *London;* but, independent of those specific communications, the order itself, published in the official Gazette of the *British* government, was in itself a general notification. It was the duty of the governments of the respective neutral countries, and their

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ministers, to make it known to their own subjects. After a reasonable time for that purpose, the *Belligerent* power has a right to charge them with that knowledge. If no such communication had been actually made, it is the fault of their own governments, which alone are answerable for the consequences of their own neglect; if the want of this communication from their own governments, or of any more specific notification than the order in the gazette, could exempt neutral subjects from being affected by a blockade, every blockade might be defeated. A period of four months had elapsed from the public notification to the sailing of this vessel, which was abundantly sufficient for the arrival of the Order in *America*, and for notice to have been given by neutral governments to their subjects there resident. But there is a special proof in this case, that the order was generally known in the *United States*; for it appears that it was published at full length in newspapers printed at *New York* on the 6th of *May*. The certificates which have been produced from the *Swedish*, the *Russian*, the *Spanish*, and the *Portuguese* consuls, bearing date about the 20th of *June*, that "they had received no notification of the blockade," may be laid out of the case. If they mean a specific communication to themselves from the *British* government, it was not required by the law of nations; the public notification was sufficient, and if no information had been given them by their own governments, the subjects of those respective countries can receive no protection from the omission of a more official communication, which after the public notification of the *British* government, would have been scarcely necessary.

It has, however, been argued by the Solicitor-General, that since to constitute a blockade, there

must be an actual investment, that this notification was not enough; that as it was some time before the actual blockade could, and really did take place, a further notification should then have been given, that it had commenced *de facto;* for since neutral vessels, notwithstanding the notification, might enter the port without any breach of a blockade, till an actual investment took place, it was right that they should be informed precisely when that privilege ceased, and their vessels would be liable to capture.

If indeed the *British* government had given notice of a blockade intended to be instituted at an indefinite future period, and had suffered any considerable time to elapse without taking any measures to effect it, there might be some foundation for this argument. The uncertainty of the time when it was to commence, would operate as a trap upon neutrals, unless a more specific notice was afterwards given of the real investment: but such is not the present case. In the Order in Council, neutral nations are informed, that the blockade was to commence *immediately.* It states that orders *had* been given to the commanders to invest the ports with a competent force. These orders would reach the *British* commanders as soon as the notification of them could arrive in *America.* It was known that this was not an empty menace, and that these were the means of executing it; there was a sufficient force in those seas, there was even a squadron already stationed off *New York* when the order was issued, and long before it was received. After notice that such order had been given, and a reasonable time allowed for the communication to be made to the commanders, neutrals were bound to presume that the blockade would immediately commence; they were

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to act as if it existed. If they ventured after this to enter into, or to go out of the port in question, it was at their own peril; it was a matter of hazard. If their vessels happened to arrive or to depart *before* the actual investment took place, they were safe, *if afterwards* they would be liable to seizure and confiscation; the mere fact, after the notification, drew the line of demarkation between a blockade and no blockade.

As to the evidence of the real investment, it is proved that *Sir John Borlase Warren*, the commander in chief on the *American* station, on the 22d of *May*, received an order from the Lords of the Admiralty, to institute a strict and rigorous blockade of *New York*, *Charleston*, *Port Royal*, *Savannah*, and the river *Mississippi*, and that, in consequence, upon the 26th of *May*, he issued his proclamations addressed to all officers and commanders on that station, by every means in their power, to enforce the blockade accordingly. This proclamation and order from the commander in chief were transmitted by *Sir John Beresford*, and received by the blockading squadron off *New York*, on the 22d of *June*, and an effectual blockade of the port was then commenced by a sufficient force off *Sandy Hook*, and the entrance into *Long Island Sound*. *Sir John P. Beresford* has deposed, that, besides his own ship, the *Poictiers*, he took with him the *Maidstone* and the *Nimrod*, to reinforce the blockading squadron, and that he continued off *New York* from the 22d of *June*, to the 16th of *July*, when he quitted that station. Mr. *Hulbert*, the Admiral's secretary, has deposed, that a blockading squadron has continued off *New York*, from the 22d of *June*, until the present time.

In opposition to this proof, evidence has been

brought by the claimant to prove that no blockade existed at the time when this vessel loaded and sailed. Much of this may at once be dismissed, as relating to a subsequent period; as, applicable to that time, there are two affidavits. The one is that of *Penrice*, who swears that he saw no cruizers off *New York* from the 9th to the 11th of *July*. It is not necessary that they should be in sight of the port; but if it is intended to be from thence inferred, that none were there stationed to carry on the blockade, besides the other evidence, it is directly contradicted by the witnesses in this very case; for *Smith*, who has been examined in preparatory, swears, that the *Republican* was chased by the *Nimrod* immediately upon her coming out of *New York*, upon the 9th of *July*, and till she was captured upon the 11th. The other is an affidavit made by two *Branch* pilots, who, from their situations and profession, may be supposed to be persons of credibility, and to have been competent to ascertain a circumstance of this nature. They have sworn positively, "that the whole of the *British* squadron left *New York* upon the 7th of *July*, and that no vessels were there stationed during the whole month of *July* following." When we compare this assertion with the direct evidence of *Sir John P. Beresford*, and what this very case affords, we may learn what credit is to be given to those affidavits. There is besides a certificate from the collector of the customs at *New York*, with a list of vessels which had entered and cleared out from that port, during the months of *June* and *July*. But this certificate was unnecessary, and proves nothing. It was well known and admitted, that many vessels had gone in and come out of *New York*, during the strictest time of the blockade. It is impossible completely to pre-

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vent it. In the night, in fogs, in storms, when the wind compels the blockaders to retire from the harbour itself, ships watching their opportunity may easily elude the blockading force. To render a blockade of so fluctuating a nature, is to amount to a legal relaxation, which would excuse vessels from violating it; the mere fact that some vessels had escaped is not sufficient; there must be a concurrence on the part of the blockading force---some act done by them, such as stopping and examining vessels, and letting them pass. Nothing of this is proved.

It is therefore clearly established in evidence, that a strict and rigorous blockade of the port of *New York*, by a competent force, did commence upon the 22d of *June*, and was in full execution on the 9th of *July* when this vessel sailed.

If any further notification were necessary than the order in council, which I cannot admit, it is proved, that even a particular communication of *Sir John Borlase Warren's* proclamation, and his order to the squadron of *New York*, to inforce a rigorous blockade, was given by *Sir John P. Beresford* upon the 22d of *June*, the very day of his arrival there, to the inhabitants of *New York*; for he states, that he then sent back a *Spanish* vessel which had just come out of *New York*, with an indorsement to that effect upon her log-book, a letter of notice to the *Spanish* consul, and likewise to Mr. *Barclay*, the *British* agent for prisoners. The neutral blockade *de facto*, was therefore known at *New York* immediately upon its commencement, and this important information must have circulated generally through the town long before the formal communication of it by Mr. *Barclay*, which he states in his affidavit not to have been till ten days afterwards, upon the 2d of *July*. We have arrived then at a period, when a complete

blockade most certainly existed, and it comprehends the time when this vessel sailed. But it is now necessary to enquire, whether it might not have actually commenced before. For it is alledged by the claimants, that the vessel commenced loading before that period, and therefore before the blockade commenced, and it is clear that a vessel may sail out of a blockaded port with a cargo taken in before the blockade began.

On the other hand it has been argued on behalf of the captors, that a blockade did actually exist before the 22d of *June*, and even from the month of *March*. It is certain that a neutral force had been continually stationed off the port of *New York* from some time in *March*, but it appears clearly to have been for mere military purposes, to watch the enemy's ships of war, and to capture their merchant vessels, but not to interfere with neutral commerce. No order to exclude neutrals was given by the commander in chief, till the proclamation of the 26th of *May*. A commodore who had the command of the squadron off *New York* might indeed have taken upon himself, without instructions from the commander in chief, to issue orders for blockading the port, but none such are proved. And as to the mere fact itself, Mr. *Hulbert* states that he believes that the squadron off *New York* had information of the Prince's order before it reached *Sir John B. Warren*, which is very probable, since it appeared in the *New York* paper on the 6th of *May*, and that *some* of the ships proceeded to execute it by capturing neutral vessels. It was not therefore generally carried into execution by all the squadron. Upon this point the evidence on the part of the claimant is more satisfactory and conclusive than what was before stated. There are affidavits from several masters of

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vessels, that they had been stopped by the *Ramilies*, and other ships of that squadron, and afterwards suffered to proceed upon voyages, both out from *New York*, and upon their return to that port at different periods, from *March* to the 6th of *June*. If, therefore, some of the captains upon that station took upon themselves to capture neutrals without orders from their commanding officers, and without the concurrence of the other vessels employed upon the same service, though upon the authority of the Prince's order, it could not constitute a blockade, but it must be classed amongst those irregular proceedings which cannot produce any legal effect.

We are brought therefore to another conclusion, that the blockade did not exist *prior to the period before assigned, namely the 22d of June*; and therefore, if the whole of the cargo had been taken in before that time, the claimants are entitled to restitution: there can have been no intermediate state between a blockade and no blockade.

The master has sworn in his affidavit upon further proof, for he says nothing upon that subject in his examination, that he commenced loading on the 5th of *June*, and ended on the 30th. It is therefore admitted, that a part of the lading was taken in after the blockade commenced. Of the time stated, a third part was subsequent to the blockade. If indeed nearly the whole of the lading had been taken on board before, and only a few articles, or a small part, after the blockade commenced, the court would not be disposed to enforce the general rule so rigidly as to inflict the penalty of confiscation. If that had been the case, the master would no doubt, have been very ready to state such exculpatory circumstances, but as he has not done so, and we are left entirely in the dark, as to the time

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when the principal part of the cargo was shipped; it is not unreasonable to suppose that a very considerable part at least, was put on board after the blockade commenced.

Since then this vessel took on board a part of her cargo, and sailed from the port of *New York*, during the blockade, and with sufficient notification, I am bound by every rule of law to pronounce for the condemnation of ship and cargo.

The ACTIVE, *Alberg*.

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SENTENCE.—Dr. *Croke*.

Iron under the *Swedish* treaty not contraband, though destined to a port of naval equipment. A cargo totally destitute of proof of property, and without any directions, not allowed to go to further proof.

THIS ship was captured upon a voyage from *Stockholm* to *Boston*, with a cargo consisting, besides some other articles, of 12,840 bars, and bundles of iron, of the weight of about 280 tons.

Consent has been given for the restitution of the vessel, and the cargo is proceeded against upon two grounds, that the iron, being destined to *Boston* a port of naval equipment, is contraband; and that the cargo is not owned by the neutral shippers, but by the consignees in the enemy's country.

To prove the iron to be contraband, the captor's counsel has relied upon the case of the *Ringonde, Jacob*,* from whence it has been inferred that even in *Swedish* vessels iron may be contraband, since in that case it was referred to the inspection of the officers of the King's yards to determine whether it was a naval store. There are some material distinctions between that case and the present. *There* though the vessel was under the *Swedish* flag, the

* 1 *Rob.* 89.

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iron was claimed for *Russian* merchants. *Here* both belong to *Swedish* subjects. That was a capture made in the year 1798, when the treaty of 1661 was the only subsisting treaty between the two countries, in which no mention is made of that article, but it is left to the general law of contraband. Since that period two treaties have been made, in which are articles relating to this subject; that of 1801, by which *Sweden* acceded to the *Russian* convention, and that of 1803. In the latter, manufactured articles immediately serving for the equipment of ships of war only are declared to be contraband; *iron* in bars, and steel, are excepted even from the right of bringing in for purchase, and it is agreed that they shall not be liable to confiscation, or pre-emption. There is no limitation made in this treaty that the iron should not be bound to a port of naval equipment, nor can this court introduce such an exception, where the words of the treaty are as general as possible; particularly since this treaty appears to have been entered into with the view of regulating all questions of contraband, with a country of which this commodity is the most valuable produce, to which therefore the contracting powers must have directed their peculiar attention, and all fair grounds of exception from the general rule must have been maturely considered.

It is required that a cargo consigned to the enemy's country should be fully documented; this case is remarkably deficient. By the bill of lading, the goods are shipped by *Erskine* and Co. and consigned to *Timothy Williams* at *Boston*, but no account and risk are stated. There is no invoice. In the charter party there is no intimation of her ownership. The letters are equally silent.

The only public document is a certificate from

the burgomasters of *Stockholm*, that *Erskine* and Company had personally appeared before them, in what form is not stated, and had sworn that they had caused this cargo to be shipped for *Swedish* account and risk, conformably to the bill of lading, which does not express any account and risk. It has been argued that this passport, though not precisely in the same words, is in substance the same risk the form prescribed in the *Swedish* treaty. But it differs very materially, in that the name of the owner is not specified. There is not a single paper, therefore, either private, or from the *Swedish* government, which states this cargo to be the property of the claimants, and consequently no oath of the party to his property. This alone would make it a case for further proof.

If we look at the evidence of the witnesses it amounts to little more. The master swears that he believes *Erskine* and Company are the owners of the cargo, because they hired the vessel, and put a cargo on board, and gave him a letter to a merchant at *Boston*, who was to receive the cargo and sell it for their benefit. The reasons which he assigns for his belief, except the last, of which he might not be fully informed, are not sufficient to support his conclusion. They are perfectly consistent with the ownership of any other person.

This case being thus utterly defective in proof to intitle the parties to the privilege of bringing further evidence, it must be consistent in other respects with probability, and bear the marks of fairness and truth.

Erskine, in his letter to *Williams*, says that they had not come to a decision respecting the return cargo which Captain *Alberg* was to bring back, and speaks of it as if he was under an engagement to

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bring back a cargo. Yet by the *Charter* party, the contract ended upon the delivery of the goods at *Boston*, and the instructions to the master from the ship owners are conformable to this agreement, for they direct him to look out for a freight back. In *Erskine's* letter of the 6th of May, he states that the cargo was to be sent by the *Betsy*, Captain *Alberg*, instead of the *Active*, though he appears as the Charterer of that vessel in *April*. These errors in the name of the vessel, and of the terms of the charter-party, are a little extraordinary, if *Erskine* and Company, were the real parties in this shipment, and had not merely lent their names to it.

But there is another part of this case more inconsistent with a real transaction. In the last letter from the shippers, they refer the consignee for further instructions respecting the return cargo to a letter which they were to write to the master at *Longhope*. No such letter was sent. The master deposes that the merchant in *Boston* was to have received the cargo and sold it, and to have shipped in return what he might judge proper *under the instructions from the shipper*. No such instructions were given, and there was no invoice to ascertain the original cost of the goods. So that the consignee had no directions whatever from the alledged owner of this cargo by any documents, or through the master, either as to the sale, on the price of the outward shipments, or as to the disposal of the proceeds, whether to be remitted, or to be invested in a return cargo, and in what articles.

This is not a mere omission of forms. The disposal of the cargo is the very essence of the transaction, as far as the owner is concerned. Where the most important part of the business is totally omitted, we must conclude that what appears upon

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the mere face of the case is not the real state of the facts. In a *bona fide* case those directions could not have been omitted.

Taking these circumstances therefore into consideration, which strongly point out this to be a fraudulent case; and reverting to the perfect nakedness of it as to any thing like proof of property, and that the alledged owners have not even gone so far as to declare, without an oath, that this property belongs to them, I am of opinion that the claimants are not intitled to farther proof, and I condemn this cargo.

The Schooner HIRAM, *Orme*, Master. Nov. 5, 1813.

THIS was a case of objections to the Registrar's and Marshal's charges upon the following petition of *John Dougan*, Esq.

Registrar entitled to 5 per cent. upon the gross amount of all money paid into the registry; marshal intitled to seven and sixpence a day for the custody of vessels.

In the case of the Schooner *Hiram*, *Orme*, Master.

Nova Scotia,
Court of Vice-Admiralty.

To the Honourable and Worshipful *Alexander Croke*, LL.D. Judge and Commissary of said court.

The petition of *John Dougan*, Esq. agent to the commissioners appointed for the care and management of *American* property condemned as droits of His Majesty.

Humbly sheweth,

That your petitioner has received from the registry of this worshipful court the accounts of all the costs, charges, and expences incurred in the

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case of the schooner *Hiram*, and cargo, which were condemned to his Majesty, and upon examining such accounts, your petitioner considers it his duty to bring to the consideration of the court, the following charges made against said property.

First. Your petitioner objects to the right of the registrars to charge a commission of five per cent. on the specie found on board of this vessel, and deposited by the registrar, pursuant to the order of court, in the hands of the commissary-general.

Second. Your petitioner objects to the right of the registrar to charge a commission of five per cent. on the proceeds of the cargo of said vessel, sold by order of the court, and paid over to your petitioner.

Third. That the specie paid to the commissary-general, as aforesaid, in this case, amounted to five thousand pounds, current money of the province of *Nova Scotia*, which, in consequence of the discount of eighteen per cent. on bills of exchange, produced bills of exchange to the amount of five thousand nine hundred pounds currency, on which sum the registrar has charged a commission, instead of charging it on the first sum, which was the amount of the specie actually paid in.

Fourth. That the registrar has charged a commission on one hundred and sixty-six pounds, fourteen shillings and sevenpence, currency, being the gross amount of the proceeds of the cargo of said vessel, instead of first deducting his own charges, and the costs and expences incurred thereon.

Your petitioner further begs leave to state to your worship, that the marshal, in this case, has charged for two hundred and eighty-eight days custody of the vessel, at the rate of seven shillings and six-

pence per day, making one hundred and eight pounds.

Your petitioner therefore humbly prays your worship to take the subject matter of this petition into your consideration, and to make such orders, touching the premises, as to your worship shall seem fit and proper.

And your petitioner will, as in duty bound, for ever pray.

Answers were given to the petition by the registrar and marshal, asserting that the charges in question were their usual and accustomed fees, and were reasonable.

The *King's advocate*, as counsel for the petitioner, observed that the main object of the petition was to obtain the opinion of the court upon the strict legality of the charges referred to, not from any imputation of misconduct on the part of the registrar or marshal in demanding the payment of those sums, but from the desire of Mr. *Dougan* to have the points of objection discussed by counsel, and established by the sentiment of the court. In doing this, it was not the wish of either the petitioner or himself to do more than their mere duty, as the gentlemen interested in the support of the charges objected to were persons of unimpeachable integrity, and, if they had no right in law to what they were claiming, have erred from a consciousness that they were entitled to those perquisites which the petitioner conceived it his duty to oppose. The King's advocate then proceeded to support the respective objections contained in the petition, which being fully stated and considered in the sentence, it would be unnecessary to make any further detail of them.

The *Solicitor-General*, for the registrar and marshal

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contended, that the charges in question were such as were fully warranted upon every ground of justice, practice, and precedent. That the conduct of the petitioners, in his mode of opposing them, had been candid and liberal, so that the questions for the consideration of the court must arise out of its antient practice in cases similar to the present, and not from any contention respecting the reasonableness or extravagance of the charges. The two gentlemen who are acting in their respective stations are men of the most unblemished conduct in public or private life, and would feel distressed at the most distant insinuation, that they were seeking perquisites of office upon illegal grounds or improper pretences. The antient fee table of this court, since the court's first existence, has been their scale of charge, and their commissions and fees have not only originated in that table, but have been confirmed by the decisions of this court, and the Decrees of the High Court of Appeals upon the very points of objection uow under discussion. The marshal's charge of custody, considering the worry and responsibility attached to this part of his office, should rather be increased, if justice were done him, than diminished, and the multifarious duties of the registrar would be pitifully rewarded if the commission now opposed were deducted from his profits, or decreased in its amount in any case whatever. That gentleman keeps up an expensive establishment of clerks, at a hazardous rate, arising from the uncertainty of business and the adventitious profit that attends it. The commissions in question are his chief and almost only perquisites; the rest of his fees are the slender reward of the labour of himself and his clerks at the registry and in courts. Under these circumstances, therefore,

if there were no precedent for the charge, and no practice to support it, the reason and justice of the thing itself would entitle the registrar to demand it and justify the court in confirming it. In the present case his right to it is as strong as in any other, upon the score of trouble and responsibility: nor can any distinction be shewn between the nature of the service rendered by him in the *Hiram*, and that which he has performed in any other case, entitling him to the commission in question. It is an office of the first importance and the highest responsibility, and has been filled for many years by the gentleman now performing the duties of it at *Halifax* with the strictest attention to its pecuniary concerns, and the most scrupulous integrity in every transaction that relates to the disposal of monies entrusted to his charge by the orders of the court, or under the directions of the Bye Act.

The *Solicitor-General* then replied *seriatim* to the objections taken on the part of the petitioners, but as his observations upon every point are so ably discussed in the judgment, the reader is referred to it.

SENTENCE.—Dr. *Croke*.

Though this is an application which concerns the droits of the court, no prerogative is claimed on that account, but the questions must be decided as in the usual cases of subjects. They have been brought forward and argued with great candour and liberality. No motives of any injury intended to the officers of the court, or of depriving them of their fair emoluments, can be attributed to the petitioner, or that he has been actuated by any other principles than that of doing his duty to his Majesty and those by whom he is employed.

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It is the business of this court to tax all bills that are presented to it, and which arise in the course of a prize cause. It is its duty, on the one hand, to take care that parties shall not be imposed upon by the exaction of unlawful and exorbitant charges; on the other hand, it is equally its duty to support and to protect its own officers, and other persons who may have been employed, in their just and reasonable demands. By the law of *Great Britain*, every person has a freehold in his office, and in the lawful fees and perquisites belonging to it, of which he can no more be lawfully deprived, than the possessors of freehold property of other descriptions can be divested of their land or of the profits of them.

The expences in Courts of Admiralty are a frequent subject of complaint by those who are not sufficiently acquainted with the proceedings there, and the manner in which they arise. The mere charges incurred by the fees of the courts themselves are but small, and those sums which seem most to startle by their large amount relate solely to the *custody* of the property, a duty which does not devolve upon any other species of courts of justice. From the care and anxiety of the courts, and of the *British* legislation, for the safety and preservation of prize property, different officers, each serving as a check over the others, are appointed to the care and management of it, by the constitution of the courts of Admiralty and the provisions of acts of Parliament. The property is of very great value. It is necessary that persons of sufficient skill and integrity should be appointed to those offices. Their profits are only occasional. During peace, and for long periods of war, the business, and consequently the emoluments, are fluctu-

ating, and occasionally very small, though many of their expences are perpetual. There is likewise a very heavy responsibility for property to an immense amount which attaches upon them. No persons who are fit for such offices can be expected to quit other profitable occupations, and to dedicate their time and labour to these, without a prospect of fair and even handsome emolument. I do not know that in any instance the fees are higher than what are usually and voluntarily paid and received by merchants for the performance of business, and for incurring a responsibility of a similar nature.

Besides, most of the heavy expences are incurred by the voluntary choice of parties themselves. By the law of the court every cause is to be heard and decided upon on the return of the monition, that is in twenty days from the vessel's being brought into port; all delay beyond that time is the fault of the suitors themselves, for each party has the power of compelling his adversary to proceed to trial under pain of making compensation for the delay. When heard and determined at the regular time, the expences are very trifling. In cases which require more delay, of further proof, and upon appeals, the parties are intitled to take the property upon bail. Sales, deposits in the registry, and every proceeding upon which a poundage is charged, may in every case be avoided, unless a party chooses so to proceed.

After these general observations, in answer to such popular clamours as are not unfrequently raised against Courts of Admiralty, and which have been alluded to upon the present occasion, I proceed to the petition itself.

As far as the registrar is concerned, it consists of four articles, two of them relate to the sums charged,

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the other two to the sums upon which the charge is to be made. The objection of the first kind is to a charge of 5 per cent. claimed by the registrar upon specie found on board the vessels, and deposited in the registry, and afterwards paid over pursuant to the order of the court into the hands of the Commissary-General; and the other to the same commission on the proceeds of the other parts of the cargo which were sold, by order of the court, by the marshal, under the usual commission, to return the proceeds into the registry, and which after they were so returned were paid over to the petitioner. As these two objections are of a similar nature, I shall consider them together, adverting afterwards to any difference which may appear between them.

In the year 1801, by the statute 41 *Geo.* III. chap. 96, a power was given to his Majesty to regulate the fees to be taken in the Court of Vice-Admiralty, and it was the intention of his Majesty's government that new fee-tables should be made. I was directed to transmit a statement of the fees which were taken in this court, which I accordingly did. Amongst these was the fee now disputed, of 5 per cent. claimed by the registrar. No objection was made to that charge, nor was any new table of fees established. It may therefore be considered as having had the tacit approbation of his Majesty.

In the year 1806, this commission was directly brought before the Lords of Appeal, in the case of the *Charlotte Greenfield*, upon a monition against the present registrar, Mr. *Morris*, to refund the sums which he had received under it in that case; after the Lords had heard the argument in the case, and the attestations, and exhibits on both sides, they dismissed Mr. *Morris* from the monition, and thereby pronounced for the lawfulness of the charge.

It has however been said that in that case the money upon which the commission had been charged had been remitted by the registrar to *England*, who had therefore been subject to a risk and expence on that account, which did not apply to cases like the present, where the money was paid here. But upon looking into the printed proceedings in that case, there does not seem to be any room for that distinction.

In the first place, the settlement itself, in which this charge of commission appeared, and which was the subject of complaint, was allowed by Mr. *Brenton*, the then judge of the court, whilst the money was still in the hands of the registrar, and before any order was given to transmit the money to *England*, and which therefore was merely contingent. For in his note, at the bottom of it, he states, that "the foregoing sum (namely the balance after all charges deducted) remains to be paid by the registrar, as the court *may see fit to direct* in the premises."

In the next place, though it does not appear that the Lords gave any reasons for their judgment, it must be presumed to have been formed upon the evidence produced before them. Now all the evidence in the case goes the full length of proving that this commission was the old and customary allowance, in all cases of money paid into the registry, *without any distinction as to its subsequent disposal.*

One of these evidences was a table of fees published by the Judge of the Admiralty, in 1771, and transmitted home to government, and which was founded upon a more ancient table, in which was this article: "for all money *paid into court*, for condemnation or otherwise, five per cent. to the registrar for *custody* of the money." It appears, therefore,

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that this poundage was allowed and attached upon the *payment of the money into the registry*, whatever was the ultimate disposal of it, and was in consideration of the custody, and other troubles which might be necessary in relation to it,

There is a certificate from myself, that I had inspected all the records of the court, from the first establishment thereof in 1749, and that it appeared that a poundage of five per cent. had been the fee allowed the registrar for all monies *paid into the registry, for receiving and paying money by order of court, making settlements, &c. &c.*

There are certificates to the same effect from Mr. *Blowns*, the present chief justice of *Nova Scotia*, as to the same allowances during the time he was Attorney General, " on monies paid into the registrar's hands;" others from the present Attorney and Solicitor General; from Mr. *Binney*, and various other persons conversant in this court. They all speak of the fee as due for money *paid into the registry*, without any allusion to the mode in which it was to be paid out again.

To this point then all the evidence produced was conclusive, and it must therefore be understood, that the decision of the Court of Appeals has fully established the right of this per centage upon all money paid into the registry, whether afterwards paid over immediately to the agents or other persons intitled to it, or remitted to *England;* or whether such money shall have been found on board a vessel, or shall be the proceeds of sales.

The other two objections are against the sums upon which the commission is charged, " that the specie paid to the Commissary General, amounted to five thousand pounds, which in consequence of the discount of eighteen per cent. on bills of ex-

change, produced bills of exchange to the amount of five thousand nine hundred pounds, on which sum the registrar has charged a commission, instead of charging it on the first sum which was the amount of the specie actually paid in."

This is evidently an improper mode of taking the poundage. If, as I have before stated, the fee accrues upon the payment of the money into the registry, it is at that time, and upon the sum actually paid in, that the poundages ought to be assessed; besides, the difference between the money itself and the bills of exchange, which were received by the registrar in lieu of it, and afterwards paid over to the agent, is merely nominal. Those bills were really worth no more than the specie which was paid for them, and if carried to market, would have produced no more. The difference therefore being only ideal, the registrar can have no claim to receive a real profit upon it.

The next article is, that the registrar has charged a commission on the gross amount of the proceeds, instead of first deducting his own charges, and the costs and expences incurred thereon.

The propriety of this mode of charging the commission must depend in a great measure upon the established usage. An examination of the bills of costs in the registry will shew that it has ever been the practice to charge the commission in this manner.

The principles already laid down will prove that it is not unfair or unreasonable. It has always been charged upon sums actually paid in, which in case of sales, are the gross proceeds, as they are received from the Marshal, who previously deducts his own commission, because the poundage attaches upon all the money. Upon being paid in, however, it may be

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disposed of afterwards. The registrar has the custody and the responsibility of the whole gross proceeds, which are the grounds of the allowance; his own commission and charges, and those of all other persons, except the marshal's poundage, are not paid and allowed till the conclusion of the cause and the final settlement, when the registrar pays over the whole money which has been deposited with him; till then he has merely the custody and responsibility for the whole.

The petition then objects to the charge made by the marshal for the custody of the *vessel*, at the rate of seven shillings and six-pence per day.

This claim rests upon nearly the same grounds with the registrar's poundage. Upon my arrival here I found it to have been the long established charge. In 1800, upon some disputes relating to fees, a reference had been made to His Majesty's council for this province. This allowance, with that of five shillings a day besides, to a person employed when it was necessary, was inserted in a fee table by them formed. Without entering into any question of how far this table is of legal authority, it may be considered as a proof, that this was considered as the established charge, and that it was reasonable in itself;—indeed, when the great trouble and attention which this part of the marshal's duty requires to be constantly employed, in the safe stationing of vessels; in guarding against accident and embezzlement, and his being answerable for all the losses which may be occasioned through the neglect or improper conduct of those whom he must necessarily employ; when all these circumstances are weighed, a daily pay for each vessel, equal only to that of a moderate artificer in this town, cannot surely be

demed an exorbitant demand. It was returned by me to government in the table transmitted, and was not objected to. About the same time with the case of the *Charlotte, Greenfield*, that of the *Lydia, Kerrison*, came before the Lords of Appeal, in which the charges of the marshal of this court were objected to, but were confirmed as those of the registrar were in the other. The poundage, in case of sale, indeed was the principal ground of objection, which is not complained of in the present case, but in the marshal's accounts in the *Lydia*, there was a charge for custody for 82 days, at seven shillings and six-pence a day, and for a person besides for attendance on board the said ship for the same time, at five shillings a day, which does not appear to have been objected to by the complainant, and was confirmed by the court. In the year 1808, this very charge amongst others, was resisted by an agent for the captors; it was brought before this court and fully argued. Upon the grounds before stated, it was again pronounced to be lawfully due.

Since then the registrar's right to a poundage of five per cent. upon all money paid into the registry, and the marshal's charge of seven shillings and six-pence a day for the custody of vessels and cargoes, have been fully established by the decisions of the courts of appeals, and, in the latter case, of this court likewise. I cannot but hold them to be just and lawful fees, which it is no longer competent to this court to alter; and since it appears to have been the customary and reasonable practice of the court to allow the registrar's poundage upon the gross sum paid into the registry, I pronounce for the third article of the said petition, and against the first, second, fourth, and last articles; and I therefore

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allow the accounts of the registrar and marshal in this case, after deducting from the registrar's poundage so much as appears to be overcharged, by assessing it upon the bills of exchange, instead of the money actually paid into the registry;---each party to pay their own costs.

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APPENDIX.

A.

ORDER, 21st APRIL, 1812.

WHEREAS the Government of *France* has, by an official Report, communicated by its Minister for Foreign Affairs to the Conservative Senate, on the 10th *March* last, removed all doubts as to the perseverance of that Government in the assertion of principles, and in the maintenance of a system, not more hostile to the maritime rights and commercial interests of the *British* Empire, than inconsistent with the rights and independence of neutral nations, and has thereby plainly developed the inordinate pretensions which that system, as promulgated in the Decrees of *Berlin* and *Milan*, was from the first designed to enforce: And whereas His Majesty has invariably professed his readiness to revoke the Orders in Council adopted thereupon, as soon as the said Decrees of the enemy should be formally and unconditionally repealed, and the commerce of neutral nations restored to its accustomed course:

His Royal Highness the Prince Regent (anxious to give the most decisive proof of His Royal Highness's disposition to perform the engagement of His Majesty's Government) is pleased, in the name and on the behalf of His Majesty, and by and with the advice of His Majesty's Privy Council, to order and declare, and it is hereby ordered and declared—That if, at any time hereafter, the *Berlin* and *Milan* Decrees shall, by some authentic act of the *French* Government publicly promulgated, be absolutely and unconditionally repealed, then and from thenceforth the Order in Council of the seventh day of *January* one thousand eight hundred and seven, and the Order in Council of the twenty-sixth day of *April* one thousand eight hundred and nine, shall, without any further order,

be, and the same are hereby declared from thenceforth to be wholly and absolutely revoked: And further, that the full benefit of this order shall be extended to any ship or cargo captured subsequent to such authentic act of repeal of the *French* Decrees, although antecedent to such repeal such ship or vessel shall have commenced and shall be in the prosecution of a voyage which, under the said Orders in Council, or one of them, would have subjected her to capture and condemnation; and the claimant of any ship or cargo which shall be captured or brought to adjudication on account of any alleged breach of either of the said Orders in Council, at any time subsequent to such authentic act of repeal by the *French* Government, shall, without any further order or declaration on the part of His Majesty's Government on this subject, be at liberty to give in evidence in the High Court of Admiralty, or any Court of Vice-Admiralty, before which such ship or cargo shall be brought for adjudication, that such repeal by the *French* Government had been, by such authentic act, promulgated prior to such capture; and upon proof thereof, the voyage shall be deemed and taken to have been as lawful as if the said Orders in Council had never been made; saving nevertheless to the captors such protection and indemnity as they may be equitably entitled to in the judgment of said Court, by reason of their ignorance or uncertainty as to the repeal of the *French* Decrees, or of the recognition of such repeal by His Majesty's Government at the time of such capture.

His Royal Highness, however, deems it proper to declare, that should the repeal of the *French* Decrees, thus anticipated and provided for, prove afterwards to have been illusory on the part of the enemy; and should the restrictions thereof be still practically enforced, or revived by the enemy; *Great Britain* will be compelled, however reluctantly, after reasonable notice, to have recourse to such measures of retaliation as may then appear to be just and necessary.

And the Right Honorable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, and the Judges of the Courts of Vice-Admiralty, are to take the necessary measures therein, as to them shall respectively appertain.

CHETWYND.

Translated from the *French.*

"*Palace of St. Cloud, 28th April,* 1811.

"NAPOLEON, Emperor of the French, King of Italy, Protector of the Confederation of the Rhine, Mediator of the Swiss Confederation.

"On the report of our Minister for Foreign Relations:

"Seeing the law of the 2d *March,* 1811, by which the Congress of the *United States* ordered the exemption of the provisions of the Non-intercourse Act, prohibiting the introduction into *American* ports of ships and merchandize of *Great Britain,* her colonies and dependencies:

"Considering that the said law is a measure in opposition to the arbitrary pretensions, ordained by the decrees of the *British* Council, and a formal refusal to adhere to a system illegal to the dependence of neutral powers and their flag:

"We have decreed and do decree as follows:

"The *Berlin* and *Milan* Decrees, from the 1st *November* last, are positively considered as not having existed with respect to *American* vessels.

(Signed) "NAPOLEON."

At the Court at Carlton House the 23d *June,* 1812.

PRESENT

His Royal Highness the PRINCE REGENT in Council.

WHEREAS His Royal Highness the Prince Regent was pleased to declare, in the name and on the behalf of His Majesty, on the 21st day of *April,* 1812, that if, at any time hereafter, the *Berlin* and *Milan* Decrees shall, by some authentic act of the *French* Government publicly promulgated, be absolutely and unconditionally repealed, then and from thenceforth the Order in Council of the 7th *January,* 1807, and the Order in Council of the 26th *April,* 1809, shall, without any further order, be, and the same are hereby declared from thenceforth to be, wholly and absolutely revoked:

And whereas the Charge des Affaires of the *United States of America,* resident at this Court, did, on the 20th day of *May* last, transmit to *Lord Viscount Castlereagh,* one of His Majesty's Principal Secretaries of State, a copy of a certain instrument, then for the first time communicated to this Court, purporting to be a Decree passed by the Government of *France* on the 28th day of *April,* 1811,

by which the Decrees of *Berlin* and *Milan* are declared to be definitively no longer in force in regard to *American* vessels:

And whereas His Royal Highness the Prince Regent, although he cannot consider the tenor of the said instrument as satisfying the conditions set forth in the said order of the 21st *April* last, upon which the said orders were to cease and determine, is nevertheless disposed, on his part, to take such measures as may tend to re-establish the intercourse between neutral and belligerent nations upon its accustomed principles:

His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, is therefore pleased, by and with the advice of His Majesty's Privy Council, to order and declare, and it is hereby ordered and declared, That the Order in Council bearing date the 7th day of *January* 1807, and the Order in Council bearing date the 26th day of *April* 1809, be revoked, so far as may regard *American* vessels, and their cargoes being *American* property, from the 1st day of *August* next.

But whereas by certain acts of the Government of the *United States of America*, all *British* armed vessels are excluded from the harbours and the waters of the said *United States*, the armed vessels of *France* being permitted to enter therein; and the commercial intercourse between *Great Britain* and the *United States* is interdicted, the commercial intercourse between *France* and the said *United States* having been restored: His Royal Highness the Prince Regent is pleased hereby further to declare, in the name and on the behalf of His Majesty, that, if the Government of the said *United States* shall not, as soon as may be after this order shall have been duly notified by His Majesty's Minister in *America* to the said Government, revoke or cause to be revoked the said acts, this present order shall, in that case, after due notice signified by His Majesty's Minister in *America* to the said Government, be thenceforth null and of no effect.

It is further ordered and declared, that all *American* vessels and their cargoes, being *American* property, that shall have been captured subsequently to the 20th day of *May* last, for a breach of the aforesaid Orders in Council alone, and which shall not have been actually condemned before the date of this order, and that all ships and cargoes, as aforesaid, that shall henceforth be captured, under the said orders, prior to the 1st day of *August* next, shall not be proceeded against to condemnation till further orders; but shall, in the event of this order not becoming null and of no effect in the case aforesaid, be forthwith liberated and restored, subject to such

reasonable expences on the part of the captors as shall have been justly incurred.

Provided that nothing in this order contained, respecting the revocation of the orders herein mentioned, shall be taken to revive wholly or in part the Orders in Council of the 11th *November* 1807, or any other Order not herein mentioned, or to deprive parties of any legal remedy to which they may be entitled under the Order in Council of the 21st *April* 1812.

His Royal Highness the Prince Regent is hereby pleased further to declare, in the name and on the behalf of His Majesty, that nothing in this present Order contained shall be understood to preclude His Royal Highness the Prince Regent, if circumstances shall so require, from restoring, after reasonable notice, the Orders of the 7th *January* 1807, and 26th *April* 1809, or any part thereof, to their full effect; or from taking such other measures of retaliation against the enemy as may appear to His Royal Highness to be just and necessary.

And the Right Honorable the Lords Commissioners of His Majesty's Treasury, His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, and the Judges of the Courts of Vice-Admiralty, are to take the necessary measures herein, as to them may respectively appertain.

JAMES BULLER.

B.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

His Royal Highness the Prince Regent, having been pleased by his Order in Council, dated the 31st of last month, in the name and on the behalf of His Majesty, to direct that the Commanders of His Majesty's ships of war and privateers do detain and bring into port all ships and vessels belonging to the citizens of the *United States of America*, or bearing the flag of the said *United States*, except such as may be furnished with *British* licenses, which vessels are allowed to proceed according to the tenor of the said licenses; but that the utmost care be taken for the preservation of all and every part of the cargoes on-board any of the first-mentioned ships or vessels, so that no damage or embezzlement what-

ever be sustained; we signify the same for your information and guidance.

Given under our hands the 10th *August*, 1812.

To the Judge of the Vice-Admiralty Court at Halifax.

By Command of their Lordships,

J. W. CROKER.

Commission—Condemnation.

In the Name and on the Behalf of His Majesty.

GEORGE P. R.

(L. S.)

GEORGE THE THIRD, by the Grace of God of the United Kingdom of *Great Britain* and *Ireland*, King, Defender of the Faith,—To our right trusty and well-beloved Cousin and Counsellor *Robert Viscount Melville*, our trusty and well-beloved *William Domett*, Esquire, Vice-Admiral of the White Squadron of our Fleet, *Sir Joseph Sidney Yorke*, Knight, Rear Admiral of the White Squadron of our Fleet, our right trusty and well-beloved Counsellor *William Dundas*, our trusty and well-beloved *George Johnstone Hope*, Esquire, Rea Admiral of the White Squadron of our Fleet, our trusty and well-beloved *Sir George Warrender*, Baronet, and our trusty and well-beloved *John Osborn*, Esquire, our Commissioners for executing the Office of Lord High Admiral of our said United Kingdom of *Great Britain* and *Ireland*, and Dominions thereunto belonging, and to the Commissioners for executing that office for the time being, greeting: Whereas we, having taken into our consideration the injurious and hostile proceedings of the *United States of America*, as set forth in the Declaration of this date issued by our command; and we, therefore, having determined to take such measures as are necessary for vindicating the honor of our crown, and for procuring reparation and satisfaction, did, by and with the advice of our Privy Council, order that General Reprisals be granted against the ships, goods, and citizens of the *United States of America*, (save and except any ships to which our license has been granted, or which have been directed to be released from the embargo, and have not terminated the original voyage on which they were detained or released,) so that as well our fleets and ships, as also other ships and vessels that shall be commissioned by Letters of Marque or General Reprisals, or otherwise, by you our Commissioners for executing the office of Lord High Admiral of our said United Kingdom of *Great Britain* and *Ireland*, now and for the

time being, shall and may lawfully seize all ships, vessels, and goods belonging to the *United States of America*, or to any persons being citizens of or inhabiting within any of the territories of the *United States of America* (save as before excepted) and bring the same to judgment in any of the Courts of Admiralty within our dominions, which shall be duly commissioned. These are, therefore, to authorize, and we do hereby authorize and enjoin you our said Commissioners now and for the time being, or any three or more of you, to will and require our High Court of Admiralty of *England*, and the Lieutenant and Judge of the said Court, and his Surrogates, and also the several Courts of Admiralty within our Dominions which shall be duly commissioned; and they are hereby authorized and required to take cognizance of, and judicially to proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods already seized and taken, and which hereafter shall be seized and taken, and hear and determine the same, according to the Course of Admiralty, and Laws of Nations, and to adjudge and condemn all such ships, vessels, and goods as shall belong to the *United States of America*, or to any persons being citizens of or inhabiting within any of the territories of the *United States of America* (save as before excepted). In witness whereof, we have caused our Great Seal of our United Kingdom of *Great Britain* and *Ireland* to be put and affixed to these presents. Given at our Court at *Carlton House*, the Thirteenth day of *October*, in the Year of our Lord One Thousand Eight Hundred and Twelve, and in the Fifty-second Year of our Reign.

C.

13th October, 1812.

WHEREAS it is expedient that all vessels which have arrived or may arrive at the Ports of *Lisbon* or *Cadiz*, with cargoes of grain and flour from the *United States of America*, being furnished with His Majesty's license, or with licenses from *Augustus J. Foster*, Esq. His Britannic Majesty's late Minister at the *United States*, should be permitted to return with cargoes of lawful merchandize to the ports of the said States; and that such vessels, with their cargoes, to whomsoever the same may belong, should be protected on their return against capture by His Majesty's cruizers: His Royal Highness the Prince Regent, in the name and on behalf of His Majesty, is pleased, by and with the advice of His Majesty's Privy Council,

to order, and it is hereby ordered, That all vessels which have arrived or may arrive at the ports of *Lisbon* or *Cadiz*, with cargoes of grain or flour from the *United States of America*, under His Majesty's license, or under the faith of passports granted for the protection of such vessels by His Majesty's Minister in *America*, shall be permitted to take on-board at either of the ports aforesaid, being the port of destination of their outward cargoes, respectively, cargoes of lawful merchandize, and to return therewith to any port of the *United States of America*, without molestation on account of the present hostilities; and notwithstanding the said ships and cargoes may belong to citizens or inhabitants of the said *United States of America;* provided, nevertheless, that all vessels claiming the benefit of this order shall be provided with an order from His Majesty's Minister at *Lisbon* or *Cadiz*, (who are hereby authorized and empowered to grant the same,) permitting the shipment of such cargoes of lawful merchandize, to be therein described, authorizing the said ships and cargoes to return to any port of the *United States of America* without molestation, in pursuance of the provisions of this order. And the Right Honorable *Viscount Castlereagh*, one of His Majesty's Principal Secretaries of State, and the Judge of the High Court of Admiralty, and Judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as may respectively appertain.

JAMES BULLER.

D.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

His Royal Highness the Prince Regent having been pleased, by his Order in Council, dated the 26th *October*, 1812, in the name and on the behalf of His Majesty, to order, that all such *American* vessels and cargoes of grain and flour, proceeding from the ports of the *United States of America* to *Spain* or *Portugal*, as shall be furnished with passports or certificates of protection granted by *Vice-Admiral Sawyer*, commanding His Majesty's ships on the *Halifax* station, shall be allowed to proceed according to the tenor of the said passports or certificates, without molestation on account of the present hostilities; and further to order, that if any such ships and cargoes, so proceeding, shall have been [illegible]tained, or shall

be detained, and brought in for adjudication, they shall be forthwith liberated and released: We signify the same for your information and guidance, and do hereby require and direct you to pay the strictest regard and attention thereto.

Given under our hands the 31st day of *October*, 1812.

W. DOMETT.
J. YORKE.
J. OSBORNE.

To the Judge of the Vice-Admiralty Court at Halifax, Nova Scotia.

By command of their Lordships,
JOHN BURROW.

E.

(COPY.)

At the Court at Carlton House, the 8th April, 1812.

PRESENT

His Royal Highness the PRINCE REGENT in Council.

WHEREAS by an act passed in the 49th year of his present Majesty's reign, entitled, An Act to authorise His Majesty to permit, until the 25th day of *March*, One Thousand Eight Hundred and Twelve, any goods and commodities to be imported into, and exported from, *Nova Scotia* and *New Brunswick*, in any ship or vessel whatsoever;

It is enacted, that it shall be lawful in any ship or vessel, in any manner owned or navigated, to import and export from any port or ports within the province of *Nova Scotia* or *New Brunswick*, which shall be specially appointed for that purpose by His Majesty, by Order in Council, any goods or commodities which His Majesty, by Order in Council, shall specially authorize and allow to be so imported and exported respectively, any law to the contrary notwithstanding.

And whereas the said act has been continued by an act passed in the present session of parliament, cap. 20, until the 25th day of *March*, 1815: His Royal Highness the Prince Regent, by virtue of the powers vested in His Majesty by the above recited acts, is pleased, in the name and on the behalf of His Majesty, by and with the advice of His Majesty's Privy Council, to order, and it is hereby ordered, that during the continuance of the above recited acts, until further order made thereon, it shall be lawful in any ship or

vessel, except a vessel belonging to *France*, or subjects thereof, to export from the ports of *Halifax*, *Nova Scotia*, and the ports of *St. Andrew's* and *St. John's*, *New Brunswick*, to any port belonging to the *United States of America*, from which *British* vessels are or shall be excluded, any articles being the growth, produce, or manufacture of the United Kingdom of *Great Britain* or *Ireland*, or any of His Majesty's colonies, plantations, or settlements in the *West Indies*, provided such articles shall have been certified by the Collector and Comptroller of His Majesty's Customs, at any of the ports above-mentioned, from whence the same shall be shipped for any of the ports of the *United States* as aforesaid, to have been imported into one of the said provinces of *Nova Scotia* and *New Brunswick*, in a *British* ship or vessel, from a port of the United Kingdom of *Great Britain* and *Ireland*, or from a port of the said colonies, plantations, or settlements, and also to import into the port of *Halifax*, *Nova Scotia*, and the ports of *St. Andrew's* and *St. John's*, *New Brunswick*, from any of the said ports of the *United States*, wheat and grain of any kind, bread, biscuit, and flour, pitch, tar, and turpentine, such articles being of the growth, produce, and manufacture, of the said *United States*.

And the Right Honorable the Lords Commissioners of His Majesty's Treasury, and the Lords Commissioners of the Admiralty, are to give the necessary directions herein accordingly.

(Signed) CHETWYND.

(COPY.)

At the Court at Carlton House, the 13th day of October, 1812.

PRESENT

His Royal Highness the PRINCE REGENT in Council.

WHEREAS by virtue of the powers vested in His Majesty by an Act passed in the 49th year of His Majesty's reign, and continued by an Act passed in the last session of parliament, chap. 20, an Order in Council was issued on the 8th of *April*, 1812, declaring that it should be lawful to export and import, in any ship or vessel, excepting a ship or vessel belonging to *France*, or to the subjects thereof, from and into the ports of *Halifax*, in *Nova Scotia*, and the ports of *St. Andrew's* and *St. John's*, *New Brunswick*, to and from any port belonging to the *United States of America*, from which *British* vessels are or shall be excluded, certain articles therein mentioned and described: And whereas it is expedient that the

exportation and the importation of the articles so allowed to be exported and imported by the said Order of Council should, notwithstanding the present hostilities, continue to be permitted in the same manner and in vessels of the like description, provided such vessels shall have a licence from the Governor, Lieutenant-Governor, or other officers administering the government in the said provinces of *Nova Scotia* and *New Brunswick:* His Royal Highness the Prince Regent, in the name and on the behalf of His Majesty, is pleased, by and with the advice of His Majesty's Privy Council, to order, and it is hereby ordered, that the said Governor, Lieutenant-Governor, or officers administering the government of the said provinces of *Nova Scotia* and *New Brunswick* respectively, for the time being, shall be authorized and empowered, and they are hereby authorized and empowered to grant licences accordingly for the exportation and importation of the said articles as enumerated and allowed by the said Order in Council, notwithstanding the ships and cargoes shall belong to citizens and inhabitants of the *United States of America*, or be the property of *British* subjects trading therewith. And the Right Honorable the Lords Commissioners of His Majesty's Treasury, the Right Honorable *Earl Bathurst*, one of His Majesty's Principal Secretaries of State, the Lords Commissioners of the Admiralty, and the Judge of the High Court of Admiralty, and the Judges of the Courts of Vice-Admiralty, are to take the necessary measures herein as to them may respectively appertain.

(Signed) JA. BULLER.

(COPY.)

EXPORT.—I, the undersigned Lieutenant-Governor in and over the province of *Nova Scotia*, and the territories thereunto belonging in *America*, in pursuance of the authority given to me by Order of Council, bearing date the 13th day of *October*, 1812, do hereby grant this Licence, and do hereby authorize *A. B.* to export in any ship or vessel not belonging to *France*, or the subjects thereof, from the port of *Halifax* in *Nova Scotia*, to any port belonging to the *United States of America* from which *British* ships are excluded, any articles being the growth, produce, or manufacture of the United Kingdom of *Great Britain* and *Ireland*, or of any of His Majesty's colonies, planta-

tions, or settlements in the *West Indies*, without molestation on account of the present hostilities, and notwithstanding the said ship and cargo may belong to any subject or inhabitant of the *United States of America*, or may be the property of any *British* subject trading therewith, provided that such articles shall have been certified by the Collector and Comptroller of His Majesty's Customs at the port abovementioned, from whence the same shall be shipped for any of the ports of the *United States* as aforesaid, to have been imported into the provinces of *Nova Scotia* and *New Brunswick*, in a *British* ship or vessel from a port of the United Kingdom of *Great Britain* and *Ireland*, or from a port of the said colonies, plantations, or settlements.

This Licence to continue in force months.

(COPY.)

IMPORT.—I, the undersigned Lieutenant-Governor in or over the province of *Nova Scotia*, and the territories thereunto belonging in *America*, in pursuance of the authority given to me by an Order of Council, bearing date the 13th day of *October*, 1812, do hereby grant this Licence, and do hereby authorize and permit *A. B.* to import in any ship or vessel, excepting a ship or vessel belonging to *France*, or the subjects thereof, into the port of *Halifax*, in *Nova Scotia*, from any port in the *United States of America* from which *British* vessels are excluded, a cargo of wheat, grain, bread, biscuit, flour, pitch, tar, or turpentine, without molestation on account of the present hostilities, and notwithstanding the said ship or goods shall be the property of any subject or inhabitant of the *United States of America*, or of any *British* subjects trading therewith.

This Licence to continue in force months.

F.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

WHEREAS the King hath been pleased to order that general reprisals be granted against the ships, goods, and citizens of the

United States of America, so that, as well His Majesty's fleet and ships as also other ships and vessels that shall be commissioned by letters of marque, or general reprisals, or otherwise, by us, the Commissioners for executing the office of Lord High Admiral for the time being, or by any person or persons, by us or them empowered, shall and may lawfully seize all the ships, vessels, and goods belonging to the *United States of America*, or to any persons being citizens, or inhabiting within any of the territories of the *United States of America*, (save and except any ships to which His Majesty's licence has been granted, or which have been directed to be released from the embargo, and have not terminated the original voyage on which they were detained and released,) we do in pursuance of His Majesty's commission under the great seal of *Great Britain*, bearing date the 13th day of *October*, 1812, (a copy whereof is hereunto annexed,) hereby will and require His Majesty's Vice-Admiralty Court of *Halifax*, and the Vice-Admiral, or his Deputy, or the Judge of the said Court, or his Deputy, now or for the time being, to take cognizance of, and judicially to proceed upon all and all manner of captures, seizures, prizes and reprisals of all ships and goods that are or shall be taken within the limits of the said Vice-Admiralty Court of *Halifax*, and to hear and determine the same according to the course of admiralty and law of nations, to adjudge and condemn all such ships, vessels, and goods, as shall belong to the *United States of America*, or to any persons being citizens, or inhabiting within any of the territories of the *United States of America*, except as before excepted.

And whereas His Royal Highness the Prince Regent, acting in the name and on the behalf of His Majesty, hath been pleased to establish instructions under his signet and sign manual, bearing date the 14th day of the said month, for the guidance of the said Courts of Admiralty respecting the mode of proceeding on the beforementioned captures; and by his Order in Council of the 13th day of the said month, to approve of a set of standing interrogatories, prepared by His Majesty's Advocate General, and the Advocate of the Admiralty, to be administered to all commanders, masters, officers, mariners, and other persons found on-board any ship or vessel (which hath been or shall be seized or taken as prize by any of His Majesty's ships or vessels of war, or by any merchant ships or vessels which have, or shall have commissions or letters of marque or reprisals, concerning such captured ships, vessels, or any goods, wares, and merchandize on-board the same,) examined as witnesses in preparatory during the present hostilities; and to order

that the said interrogatories be transmitted to the several Courts of Admiralty in His Majesty's foreign governments and plantations, for their guidance.

We send herewith copies of the said instructions and interrogatories to the Vice-Admiralty Court of *Halifax*, and the Vice-Admiral or his Deputy, or the Judge of the said Court or his Deputy, now or for the time being, for their guidance accordingly; and do hereby will and require them to cause the same to be duly observed. For doing all which this shall be their sufficient warrant.

Given under our hands and seal of the Office of Admiralty, the 26th of *October*, 1812.

J. YORKE.
G. WARRENDER.
J. OSBORNE.

To the Vice-Admiralty Court of Halifax, and the Vice-Admiral or his Deputy, or the Judge of the said Court or his Deputy, now or for the time being.

By command of their Lordships.

G.

By the Commissioners for executing the Office of Lord High Admiral of the United Kingdom of Great Britain and Ireland, &c.

His Majesty having been pleased, by his Order in Council bearing date the 11th day of *November*, 1807, to direct, "that in "future the sale to a neutral of any vessel belonging to His Ma"jesty's enemies should not be deemed to be legal, nor in any "manner to transfer the property, nor to alter the character of "such vessels; and that all vessels then belonging, or which here"after should belong, to any enemy of His Majesty, notwithstand"ing any sale or pretended sale to a neutral, should be captured "and brought in, and should be adjudged as lawful prize to the "captors:" And whereas it is expedient to confine the operation of the said order to vessels belonging to *France*, or to the territories thereof, or to any of the countries or places annexed to, or incorporated with *France;* His Royal Highness the Prince Regent, acting in the name and on the behalf of His Majesty, is pleased, by his Order in Council dated the 1st instant, to direct that His Ma-

jesty's Order in Council abovementioned shall henceforth be confined to vessels belonging to *France*, or to the territories thereof, or to any of the countries or places annexed to or incorporated with *France*; and that all vessels belonging to any other power at war with His Majesty, which may have been purchased, or may be purchased, by the subjects of any power in amity with His Majesty, and which shall be captured after the date of the Prince Regent's said Order of the 1st instant, and shall thereon be brought to adjudication in any of His Majesty's Courts of Prize, shall be adjudged by the said Court in the same manner as if the aforesaid Order of the 11th *November* 1807 had not been issued. We signify the same for your information and guidance, and do hereby require and direct you to pay the strictest regard and attention thereto.

Given under our hands the 11th day of *February*, 1813.

J. YORKE.
G. WARRENDER.
J. OSBORNE.

By command of their Lordships.

The following letter having been generally attributed to *Dr. Croke*, it may, not improperly, be introduced here. It appeared in the *Halifax Weekly Chronicle* of *March* 22, 1806, and was in answer to several documents which had been published by the *American* Government.

THE general pretensions of the *Americans* to a right to engage in the Colonial trade of the enemies of *Great Britain*, particularly as they appear in the Remonstrance of their Minister to the *British* Government, have been so ably discussed, and so satisfactorily refuted, in a letter which was printed in your last paper, that it seems scarcely necessary to add any thing further upon that subject. There are, however, some collateral points and arguments, in other documents, proceeding from equal authority, which may seem to require a more specific answer. After a few preliminary remarks, therefore, rather by way of recapitulation of what I consider as already proved, than as new matter, I shall proceed to state some observations upon those points, to which the writer of that letter has either not adverted, or which he has but incidentally mentioned.

From the earliest times of systematic enquiries into the rules which were to serve as guides for the conduct of indepedent nation,

the adjustment of the respective claims of neutral and belligerent powers, has ever been considered as perplexing and difficult. The right of trading uncontrouled, with any consenting people, set up on one side, the right of restraining this traffic in certain cases, asserted on the other, have both been maintained with equal warmth and confidence, and supported with no small appearance of plausibility.

Whether there may be any competition of real rights in other cases, is not of the present consideration; but I think it has been fully established that if a principle be admitted, which I believe has never been denied, that a nation cannot aid and abet one of the powers at war against the other, without a breach of its neutrality; in the question of the colonial trade, no such conflict exists. It has been shewn that that branch of trade is an injury to *Great Britain* in its very nature, without a shadow of right to plead in its defence. It is, in its origin, its existence, its very essence, and its effects, an assistance given to one enemy at the expence of the other, in their respective relations *as belligerents*, and consequently *in their hostile operations*. If it had not been an important object to *Great Britain*, in the war, to intercept the colonial communications of *France*, and if her naval resources had not supplied the means of effecting it, no stagnation of the colonial trade would have taken place. If *France* had not, in consequence of the distress imposed, required relief against the maritime exertions of *Great Britain*, the monopoly would still have continued. The opening of the markets therefore was neither more or less, than an application to neutrals for aid against *Great Britain*. If neutrals by engaging in it could not have assisted *France*, they would not have obtained the privilege; and if it had not been an expedient of that country to counteract the operations of her enemy, *Great Britain* would never have objected to it. It bears no resemblance then to those usual and habitual branches of trade, which a neutral may justly be said to have a right to carry on as well during a state of war as of peace, because in peace it has no existence at all, and in war it exists only as an aid to one party, and an impediment to the other, in their respective systems of warfare.

But I mean now only to advert to the assertions contained in the Message of the President of the *United States*, to the Senate and House of Representatives, and in a Letter of Instructions written by the *American* Secretary of State, to *James Munroe*, esq. that the principles held by *Great Britain* are *new*, *unacknowledged by the usage of nations*, contrary to *the most approved authorities*, and that they have moreover been virtually *renounced* by *Great*

Britain, both through *Commissioners* appointed by treaty, and in His Majesty's *Instructions* explained in the *decisions of the maritime tribunals*.

There is an evident fallacy in the assertion that the principles maintained by *Great Britain*, are of "*modern date*," or "*novel doctrines*." The *principle* itself is confounded with the *application* of the principle. The principle itself is co-existent with the Law of Nations, or rather with the Law of Nature, which is only another word for common sense, justice, and reason, that he who assists one enemy, in the operations of war, at the expence of the other, is no longer a neutral, but a friend to one party, and an enemy to the other. In what the assistance may consist must depend upon circumstances. It is impossible to ascertain *à priori* every case which may arise. Those of contraband and blockade have been long settled, and universally admitted, because they must have early and frequently occurred. But assistance is not limited to those two cases only. Whenever other modes of aid are discovered, the belligerent has a right to resist them; not by any new principle, but by an application of the old principle to existing circumstances. New situations create new modes of warfare, new points of attack, and defence. New modes of assistance will consequently be resorted to, but not the less unneutral, and hostile because they may have been unforeseen, because they may not have been distinctly specified by jurists, or provided for in any treaties.

It happened so with respect to contraband. Changes in the practice and the objects of war render a great part of the old list of prohibited articles almost useless; others, not usually enumerated, become more serviceable, and even essential. Neutrals, instigated by their views of private emolument, for some time strenuously contended that none but the articles in the old catalogues could possibly be unlawful. The point was fairly discussed; such doctrines which make the Law of Nations a law of the letter, and not of the spirit, could not stand the test of reason, and they were obliged finally to abandon them.

Thus the application of this principle to the particular case of the colonial trade must, in one sense, necessarily be of modern date, because the subject matter is not of ancient times. It could not be applied to colonies, before colonies existed. Their establishment, peculiar laws, and situation, are within a few centuries; and it was long before their real benefit was fully understood and experienced. It was only since a few years that they became of consequence enough to form an object of attack on one side, and of protection on the other; and therefore it is but recently that a neutral, by trading with

the colonies, could materially assist an enemy. The very moment the *casus fœderis* arose, the old rule was considered as immediately attaching to it. The old plan of relaxing the colonial monopoly and admitting neutral merchants "*pour approvisioner et aider les Colonies,*" in time of war, as far as I am informed, was first adopted by *France*, about the year 1705, under *Mons. Pontchartrain*, then Minister of the Marine. "Upon its first introduction it was considered on all sides as an expedient of war, which neutral nations ought not to aid, and which this country was under no obligation from the law of nations to tolerate," and the very first neutral vessels employed in the service were made prize. In the year 1756, and 1779, and at other periods, the same practice was resorted to, and with the same consequences,* without even a remonstrance, as far as I have heard, either on the side of *France*, or of the neutral countries. The principles then now asserted by *Great Britain*, and said to be novel doctrines and mere innovations, are at least of a century standing, and certainly as old as the very first existence of the case to which they apply.

It is said too that "*this practice is unacknowledged by the usage of other nations.*" If this were the fact, to make it at all applicable to the question, it must be shown that they were in the same predicament with *Great Britain*. I am not aware that the same case, in its full extent, ever happened to any other nation. No other country engaged in war with an enemy possessing valuable colonies, has ever obtained such a decisive naval superiority as totally to annihilate their trade and connection, and to compel them to open the market to neutrals. But the same principle of preventing neutrals from engaging in the carrying trade of the enemy, has been extended by *France* under the old, as well as under the new governments to a much greater length than ever was contended for by this country. We are informed by the *Code des Prizes*, that as early as the year 1704, it was ordained, that "*La totalité de la cargaison sera bonne prize, si, chargée sur un navire neutre elle est du cru et fabrique de l'ennemi, et destinée pour un etat ennemi.* The whole of the cargo shall be good prize, if, laden on-board a neutral ship, it is of the growth and manufacture of the enemy, and destined for the enemy's country." This comprehends all exportations and importations between the mother country and the colony, whether direct or circuitous, and whoever may be the proprietors of the commodities. To the regulations and practice of

* Robinson's Reports, Vol. iv. App. p. 22.

that country in more recent times, I apprehend no neutral would wish me to have recourse for precedents.

This affords, amongst innumerable instances which are evident upon the mere inspection of their respective codes, that in the most palpable contradiction to the calumnies continually repeated, of the naval oppressions said to be inflicted upon neutral commerce by *Great Britain*, that country has always adopted a milder system of maritime laws than *France*.

It is another charge against these *British* principles, "that they "are contrary to the Law of Nations *as settled by the most ap-* "*proved authorities.*" As to the particular question of the colonial trade, no authorities are to be expected in those venerable writers whose impartiality, learning, sound sense, and experience, have justly rendered them the arbiters of nations, because the case did not arise in their day. But the principles which I have already laid down, by which that question must be decided, and upon which *Great Britain* has acted, are there to be found in all their luminous evidence, and irresistible force. As they advanced nearer to modern times, and new cases arose, their general principles became more specific and distinct. In stating the utmost extent of the rights of neutrals, *Bynkershoek* confines them within the very limits now contended for by *Great Britain*, "That it was lawful for them to do *whatever was permitted whilst peace subsisted between the powers at war.*" *Omnia quo potuerunt, cum pax esset inter eos, quos inter nunc bellum est.** So *Wolff*, stating the services which might be rendered to either of the belligerents, describes them to be those which were rendered *when the war did not subsist, or in time of peace. Quæ extra bellum, seu pacis tempore gentibus præstantur.*†

I have had the curiosity to look into some of those more modern writers upon the subject, who have appeared as the professed supporters of neutrality. Their manifest partiality, want of candour, inconsistencies, and reciprocal contradictions, can scarcely intitle them to much consideration in the light of authorities. They differ materially as to their doctrines, and agree only in an insidious animosity against *Great Britain*, and against each other. Each of them condemns, and not entirely without reason, the absurdities of his rival advocate; and each of them boasts, that he has discovered the grand desideratum which is to cure all difficulties relating to the

* Quæst. Jur. Pub. Lib. 1. c. 9. † Jus. Gent. C. 8. S. 683.

conflicting rights of belligerents and neutrals. Their nostrum is indeed effectual—absolutely the saw, and the tommahawke. Their profound philosophy has found out, that the rights of neutral commerce are paramount to every thing, the rights of belligerents, nothing; the lucre of gain an imprescriptible obligation, to which every thing is to give way, and all pretensions assumed in opposition to it, unfounded oppression, or the mere offspring of convention. Such writers cannot be accused of warping the truth in favour of belligerents; their admissions, therefore, on that side of the question, may fairly be valued as disinterested testimony. Now it is remarkable, that whilst they are contending for the most unrestrained liberty of trade, under the natural Law of Nations, even to the supplying of contraband, and relieving besieged places, there is not one of them who does not introduce the very qualification which is now said to be peculiar to *Great Britain*. *Galliani* says, "a neutral "people have a perfect right to *continue their trade* with two "nations who are their friends, neutrality being a *continuance in* "*their former state, not a new state of things.*"*

Lampredi, after establishing that the only law obligatory upon neutrals is that of a perfect impartiality, proceeds to state, that "they may carry on their commerce *in the same manner in which* "*they did in time of peace. Essi per conseguenza il faranno nel* "*modo istesso, in cui lo facevano, in tempo di pace.*"† Afterwards he calls it, "*il loro solito commercio*," their usual commerce.

Azuni defines perfect neutrality to be, when a power "continues "to conduct itself *as it did before the war. Quand une puissance* "*continue à se conduire, comme elle le faisoit avant la guerre*" Passive neutrality he makes to consist in this, *en continuant de souffir que toutes les nations belligerantes, ou quelques-unes d'elles continuent d'introduire et d'exporter les marchandises qu'on introduisoit dans son pays, ou qu'on en exportait avant la guerre.* Again in another place he calls it, *le droit qu'il avoit avant la guerre.* So, *qu'ils doivent continuer de faire leur commerce de la même maniere et avec la même liberté qu'en temps de paix. Le commerce etant permis en tems de paix aux sujets d'une puissance, il leur sera encore permis de la faire avec le même liberté pendant la guerre.* He lays it down as "an invariable theory, as founded upon the rules of natural justice "and the law of nations," *qu'il doit etre permis aux nations amies et neutre de poursuivre, dans tout son etendue, leur commerce de*

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* *Dei Doveri dei Principi Neutrali*, ch. 9. § 2.

† *Del Commercio dei Popoli Neutrali*, § 5, & p. 45.

la même maniere et avec la même liberté qu'ils la pratiquoient en tems de paix. Afterwards he calls it, the commerce of which they are *in possession.* To be impartial in commerce, he says, *is equivalent to doing what they did before the war.* "The mischief done "by belligerents to neutrals is by interrupting their commerce, *et* "*en ne les laissant pas dans l'etat où ils etoient avant la guerre.*" And, not to multiply quotations, he says finally, that it is sufficiently demonstrated to be an incontestible principle, *que les puissances neutres peuvent librement commercer avec chaque partie belligerante sur le même pied où etoit leur commerce en tems de paix,*— "Trade freely with each belligerent party, *upon the same footing upon which their commerce was in time of peace.*"*

It seems then, that the warmest enthusiasts for the rights of neutrals, claim for them only their usual and habitual modes of commerce. If this is the rule which is to determine the extent of their rights, by a parity of reasoning it must form the just restriction of them. So much for the assertion that the *British* principles are supported by no authority.

But these principles, whether founded or unfounded, *Great Britain* is said to have abandoned. In the Message from the President of the *United States,* is the following passage: "The right "of a neutral to carry on commercial intercourse with every part "of the dominions of a belligerent, permitted by the laws of the "country, (with the exception of blockaded ports, and contraband "of war,) *was believed to have been decided* between *Great Bri-* "*tain* and the *United States* by the sentence of their Commission- "ers, mutually *appointed to decide on that and other questions of* "*difference between the two nations;* and by the actual payment "of the damages awarded by them against *Great Britain,* for the "infraction of that right."

How any such points can be believed to have been decided by those Commissioners, is difficult to conceive. It is certain that they had no such authority from the Treaty, under which they were appointed. The article alluded to premises, that "Whereas, com- "plaints have been made, that divers merchants during the course of "the war have sustained losses and damages, by reason of irregular "or illegal captures, or condemnations, of their vessels, and other "property, under color of authority or commissions from His Ma- "jesty; and that, from various circumstances belonging to the said

* *Azuni, Systeme universel de Principes du Droit Maritime,* Vol. II. pages 21, 31, 43, 53, 83, 95, 196, and 211.

" cases, adequate compensation cannot now be actually obtained by " the ordinary course of judicial proceedings; it is agreed, that in " all such cases, where adequate compensation cannot, for whatever " reason, be now actually obtained, in the ordinary course of justice, " full and complete compensation will be made by the *British* Go- " vernment. For the purpose of ascertaining the amount of any " such losses, five commissioners were agreed to be appointed. They " were to receive evidence, to exercise their discretion, and to decide " *the claims in question* according to the merits of the several cases, " and to justice, equity, and the law of nations."

That these Commissioners had then a power to ascertain the compensations due to particular merchants who had made complaint is clear, and was admitted by the *British* Government by paying the sums awarded; but I am at a loss to find any thing in this treaty like a reference to them of any general questions upon the Law of Nations, either as to the colonial trade, the rights of neutral commerce, or any other differences, of such a nature, between the two nations. If no such express reference was made to them, neither could their decisions in those cases operate as precedents to be binding in future; for they could have that effect only from an authority to decide the general questions, or from an agreement that these sentences should regulate the future conduct of the parties.

Those points are of such very great national importance, and so materially affect *Great Britain*, as a power too often unfortunately in the situation of a belligerent, that whenever they have been brought upon the carpet, they have been considered as the subjects of the most cautious and deliberate negociations; nor has *Great Britain*, in any instance, ever been known to recede from them. It is not easy to be supposed that they should have been referred to a board of *Commissioners so constituted*. By the terms of the treaty, the fifth Commissioner was to be chosen by lot, out of two named respectively, one on each side, and all decisions were to be made by the majority of voices. It was an equal chance, therefore, whether the majority would not consist of the *American* Commissioners, and consequently the decision in every case rest solely with them, independent of the opinions of the English Commissioners, as proved actually to happen. It was most incredible that the English Government should have trusted to mere hazard whether they had not entirely submitted the decision upon all the principles they had ever maintained respecting neutral commerce, to the discretionary power of commissioners sent from a country which was known to be hostile to those principles, and whether they had not authorised them to renounce on the part of *Great Britain*

all those rights as a belligerent for which she had so often fought, and which had been so often declared to be absolutely necessary to her security. In short, it would have been to have risked some of her best and dearest interests upon the cast of a die. If, indeed, the ministry had actually referred those points to them, they would have been bound to submit to their decision; but these considerations shew that it was next to impossible that they should have made such a reference; and the treaty itself is a complete demonstration that no such reference was made.

The lot determined that a majority of the Commissioners should be *Americans*, and, in many cases, they decided in favour of their countrymen, contrary to the principles maintained by *Great Britain*. It is drily observed by the *American* Secretary of State, "that it does not appear whether the *British* Commissioners concurred in these awards." The fact was notorious, that they not only did *not concur*, but that they strongly *remonstrated* and *protested* against the proceedings of the *American* Commissioners, as contrary to the Law of Nations. The sentences, no doubt, in *those individual cases* were equally binding, because *Great Britain*, by the treaty, had agreed to abide by the act of the majority. It was binding as far as the authority went, but no farther; and the non-concurrence of the *British* Commissioners is an additional reason why those decisions should not be extended beyond the express power defined by the treaty. That no such renunciation had been made, either positively or virtually, was certainly understood by the *British* Government, because His Majesty's instructions, both in the last and the present wars, implied, that the old doctrine was still considered as in full effect.

It is asserted, that these principles have been renounced by *Great Britain* on another ground, that of His Majesty's Instructions, explained by the decisions of the Court of Admiralty.

It is alledged, "that the *British* regulations admit a direct trade "between a belligerent colony and a neutral country; that it has "never been pretended that a neutral nation has not a right to re-"export to any belligerent country whatever foreign productions "may have been duly incorporated and naturalized, as a part of the "commercial stock of the country so importing it; and finally, that "landing the cargoes, paying the duties, and thus qualifying them "for the legal consumption of the country, does incorporate and "naturalize them, so as to qualify them, equally with native pro-"ductions, for exportation to a foreign market."

By these regulations, *Great Britain*, it is true, relaxed from her undoubted right of seizing vessels employed in a direct trade be-

tween the colonies of the enemy, and neutral countries, but it turned out that the subjects of the principal nation in whose favour, and for whose particular benefit this relaxation was granted, abused the privilege, to violate, in reality, the more important rule, which had never been seceded from; that which prohibited the trade between the enemy colony and the enemy parent state. By importing first into their own country the produce of the enemy's colony, and afterwards shipping them on, they completely opened the trade between the colonies and the parent state. This circuitous mode was indeed attended with some delay and some additional expence, but in the end it effectually answered the purpose of the enemy, and restored all his colonial advantages.

Such an unfriendly misapplication of an intended favour, and such an indirect violation of the rights of *Great Britain*, could never be submitted to. Accordingly, the *British* Courts of Admiralty have condemned vessels and cargoes which were seized in this commerce between the parent state and the colonies, notwithstanding the precaution taken to make a regular progress through the neutral ports and custom houses. Where the original intention was proved to have been to carry the colonial produce to *France*, it was evident that the compliance with those forms was merely with the design of evasion, and of sheltering themselves under the instructions. It never could be contended that a privilege granted for the benefit of *America* should be converted into a service to *France*, that the indulgencies of *Great Britain* should be turned into arms against herself, or that the connection between the colonies and the neutral country should have been designated merely as one part of a line of communication between those colonies and their parent state.

It is said that these condemnations were in direct contravention of former decisions, that of the *Polly*, *Laskey*, in particular, which had received a confirmation in the letter from *Lord Hawkesbury* to the *American* ambassador.

It is a sufficient answer to that argument to observe, that His Majesty's Instructions in the late war, which were the subject of decision in the *Polly*, *Lakey*, were very different from those in the present war. Whatever might be the construction of *those* orders, under the words of the *present* instruction, which directs His Majesty's commanders not to seize any neutral vessel which shall be carrying on "trade directly between the colonies of the enemy and the neutral country to which the vessel belongs," by any mode of interpretation, what prohibition can be understood to be given to those commanders, "not to seize vessels which should be carrying on trade, directly or indirectly, between the colonies of the enemy

and the mother country of the enemy?" But if no such directions were given to our cruisers, no relaxation in that respect has been allowed by *Great Britain*, and their commerce still continues upon its natural footing; that is, as I have already proved, an unneutral commerce, in which *British* cruisers are still at liberty to make seizures, and Courts of Admiralty to proceed to condemnation.

But the present decisions are perfectly reconcileable to the principles laid down in the *Polly*, *Laskey*, or, to speak more accurately, they depend upon the very identical principles there clearly stated.

All that is admitted in that case is, that "an *American* has a right "to import the produce of the colonies *for his own use*, and after "it is imported *bona fide* into his own country, he would be at li- "berty to carry it on to the general commerce of *Europe*." The question then was reduced to this point, what was "*the test of a* "*bona fide importation?*" In that case, *Sir William Scott* said that he was "*strongly disposed to hold*, that landing a cargo and "paying duties would afford sufficient criteria." He adds, "if it "appears to have been landed, and were housed for a considerable "time, it does, I think, raise *a forcible presumption* on that side, "and *it throws on the other party to shew how this could be merely* "*insidious and colourable.*"

The utmost then asserted by that highly eminent and respectable judge, was merely that entering, landing a cargo, and paying duties, *afforded a presumption* of a *bona fide* importation. Even this admission is very much qualified by the introductory words that "he was *strongly disposed to hold*," which shew that it was far from being a point clearly decided in his mind: it implied that some doubts still remained. But it was never laid down to have been *conclusive proof*, *a presumption juris et de jure*, against which nothing could be averred. All presumptive evidence may be repelled by other evidence, and it was declared in that case, that the other party might shew to the contrary, even under the most favorable state of circumstances which raised the presumption, namely, that the transaction had taken place for a considerable time.

In that case, therefore, it was distinctly declared that *there might be an importation, accompanied with an entry and payment of duties, which was not bona fide, and which consequently would not qualify the goods to be carried on to the general commerce of Europe.*

In the present war it appeared that these circumstances did not afford the presumption of a *bona fide* importation which was supposed. The whole trade between *France* and her colonies found its way through neutral ports. It was evident that this was not the

usual trade of *America*, nor could it be considered in any degree as an importation for the use of the *United States*. It was in reality the interdicted trade between the colonies and the parent state, revived and carried on under the supposed security of formalities, which, in the case of such a trade, could be considered as only false and colourable.

And, indeed, how could paying duties as on goods meant for home consumption be held to be a proof that they were intended for home consumption, when it was clear that they were designed originally to be sent to *France*? How, under such circumstances, could it be said that they "were duly incorporated and naturalized, "and made a part of the commercial stock of the country?" How can a mere compliance with the legal requisites of qualification for domestic use, prove, against plain facts, that they were designed for that object; or if they were not intended for home consumption, how can they claim the privilege of naturalization? If they are only on their passage, they still continue strangers, and aliens. Besides, what privilege in reason can be derived from the payment of duties, after they are drawn back upon re-exportation? If the payment of duties upon importation incorporated and naturalized the goods, on a supposition of home consumption, the drawing back those duties, and their exportation, must have dissolved the incorporation, and unnaturalized the naturalization. When imported into *France*, are they there considered as "part of the commercial stock of the re-exporting country?" Certainly not; *they are admitted upon reduced duties*, a privilege to which no part of that commercial stock is entitled. They are there admitted, not as *American* stock, but as the stock of the *French* Empire; not upon the footing of native productions of the *United States*, but upon the footing of native productions of the *French West India* islands.

It is argued, that "there is an impossibility of substituting any "other admissible criterion of a *bona fide* importation, than that of "landing the articles, and otherwise qualifying them for the use of "the country."

To substitute any one technical criterion which shall, in all cases, amount to positive proof, is indeed truly impossible. The criterion now insisted upon has proved very insufficient for that purpose. Daily experience shews, that whenever a particular rule or a positive criterion is attempted to be established, an undue use is immediately made of it; by complying with the mere form, while the substance is evaded, by setting up the empty literal shadow of the criterion in opposition to the very facts which it was designed to prove. When the formalities now contended for were to be considered as supplying

a test, every atom of commodities designed for the *French* markets went through the regular routine of home consumption. It is justly observed in one of the memorials presented upon this subject to the *American* Government, "that if a *bona fide* sale and delivery by an "importer, for a valuable consideration, will be conclusive evidence, "*the rule when once understood will become nugatory, and cease* "*to produce any commercial or political effects.*" The circumstances of the case, taken in combination, can alone furnish that proof which a belligerent has a right to expect; a proof which must be sufficient to produce a conviction in a reasonable mind, that a given cargo is not the produce of the enemy's colony, travelling in its passage mediately or immediately to the parent country.

The law of nations is the law of sense and reason, not a mere code of artificial rules. Where a neutral country has been guilty of a breach of one of its most important duties, in reality and in substance, it will never regard under what outward formalities the transaction may have been disguised. The colourable appearances of a fair commerce may be easily superinduced, but the injury to *Great Britain*, by the restoration of the colonial trade of *France*, is not the less real, or effectual, whether the communication is direct or circuitous, whether the whole has been managed by a single person in the same vessel, or through all the metamorphoses of importations, sales, trans-shipments, warehouses, entries, duties, and re-exportations, through the hands of an hundred different merchants: under every mask, and through every evasion, it is the conduct not of a neutral but of an enemy, and this country would be wanting in the duty and justice it owes to itself, if it did not seize and confiscate all property so employed.

Is this then an "oppression of neutral commerce and navigation; "are these circumstances of iniquity and violence, enormities, scenes "of violence and depredation, and the ravages of freebooters?" Is it a new or indefensible principle in the law of nations, that a great and respectable country, engaged in a contest for its very existence against one of the most powerful empires in the world, shall not stand idly looking on, and infatuated, when it sees its inveterate enemy protected under the shield of a pretended neutrality? When armaments which exhaust its treasury are rendered useless, its victories unavailing, and the blood of its brave defenders an ineffectual sacrifice, its efforts paralized, its enemy rescued from its grasp, and enabled to pursue a contest of which the event may be fatal to itself—can a nation be under any obligation to suffer all this with impunity? The insatiable ravenousness of mercantile avarice may unite with our enemies in calumnious declamation, but the right

claimed by *Great Britain* is not the less solid and indisputable. It is a necessary consequence or corollary of the rights of war. It is a part of the primitive and most sacred right of mankind, that of SELF DEFENCE. It is the mere exercise of a natural right; not an act of superiority, or of jurisdiction. It depends upon no convention; it requires no consent or requiescence on the part of other nations. It is not founded upon the opinions of jurists, upon written authorities, or the decision of tribunals. It is no variable rule, prescribed by an arbitrary will, and enforced by an arbitrary power. It arises from no partial views of policy or self interest in any particular state. It is not of to-day or yesterday, but it is one of the eternal and immutable dictates of the law of nature and nations; of that law which derives its origin and sanction from the Great Creator, from that Being who has given his creatures the power and the means of protecting themselves and their just rights against all assailants, under whatever names distinguished or disgnised. They are rights which a country may relax or surrender, but of which it cannot be deprived without a violation of every principle which is held sacred in the intercourse of nations.

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FINIS.

W. Heseltine, Printer, Chequer Yard, Dowgate Hill, London.

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ADDENDA

TO THE

REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

Vice-Admiralty Court,

AT

HALIFAX, IN NOVA-SCOTIA,

In the time of Alexander Croke, LL. D. Judge of that Court.

By JAMES STEWART, Esq.
SOLICITOR-GENERAL OF NOVA-SCOTIA.

SWEDISH MEMORIAL AND ANSWER.

HAVING been favoured with the following note of Baron de Rehausen, the Swedish minister, with Dr. Croke's spirited, but temperate answer, we have here inserted it, as it shews the vague accusations which are still brought against the conduct of Great Britain towards neutrals, and the little foundation there is for them. Perhaps the best refutation of the reflections against the Courts of Vice-Admiralty, is to be found in the present Reports.

THE UNDERSIGNED, His Swedish Majesty's Envoy Extraordinary, and Minister Plenipotentiary, by his Majesty's commands has the honour of addressing himself to His Excellency Lord Castlereagh, for the purpose of laying before the British Government what follows:

It is with deep regret the undersigned has to state, that several Swedish ships and cargoes, on their voyages to or from the United

J. and T. Clarke, Printers, 38, St. John's Square, London.

States of America, have been detained by the ships of war of His Britannic Majesty, and sent into Halifax for adjudication, although laden with innocent articles, perfectly conformable to the Treaty of Commerce and Navigation with Great Britain; and that even a ship, belonging to the port of Stockholm, has been condemned on the pretence of her papers being false. The shipping constitutes the greatest branch of the industry of Sweden. The trade to America is in its favour; for the articles principally sent are iron, steel, alum, &c. and the commodities taken in return are necessaries, of which Sweden is in real want. If, therefore, the practice of capturing Swedish vessels laden with bonâ fide Swedish property, is not put a stop to; if its commerce is thus laid open to the mercy of the lowest commander in the British navy, and liable to the often partial sentence of a Colonial Court of Vice-Admiralty, such proceedings must soon prove ruinous to the vital interests and prosperity of the country. It is true, if unjustly condemned, the property is restored in the High Courts of Great Britain, where justice and equity are universally experienced; but still, from the detention of the ships, the maintenance of the crews, and the enormous expences attending the prosecution, the whole is swallowed up, and the owner would almost as soon hear of the total loss of a ship, as of her detention by a British cruizer; for, if lost, they have a sure resource upon the underwriters; but, if detained, they not only run the risk of losing the capital, but also the premium of insurance, which is now no less than from 20 to 25 per cent. on vessels employed in this trade.

Under all these circumstances, and in consequence of the good harmony and close alliance so happily existing between the two countries, the undersigned entreats and most particularly urges, that his Britannic Majesty's Government will issue orders, which in future will protect Swedish ships laden with bonâ fide Swedish property, from such ruinous captures; and, as soon as possible, restore those already captured, with full indemnification for all their losses and expence.

The undersigned, in subjoining to this note a list of such captured ships as have been reported to him, with observations and certificates, has the honour, &c. &c. &c.

(Signed) G. D. REHAUSEN.

London, 15*th Jan.* 1814.

As the whole of the list of vessels and cargoes, and the complaints, are embodied into the answer, it is unnecessary to introduce them here. They concluded with a request, that the British Government would give orders that in future Swedish vessels may not be molested.

To His Excellency Sir John Coape Sherbrooke, K. B. and K. C. Lieutenant Governor of Nova Scotia, &c. &c. &c.

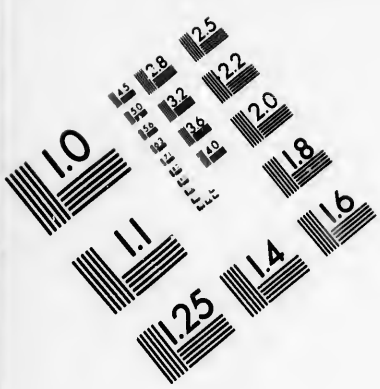
Halifax, Nova Scotia,
28th March, 1814.

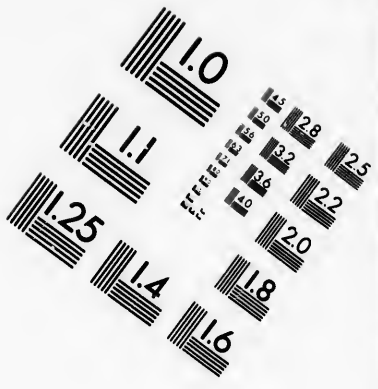
Sir,

I had the honour of your Excellency's letter of the 21st March, transmitting to me the copy of a letter addressed by Mr. Hamilton to Mr. Goulburn, inclosing the copy of a note from Mr. De Rehausen, with its enclosures, complaining of the capture and detention of several Swedish vessels, by British cruizers; and also the copy of a letter from Earl Bathurst, conveying His Royal Highness the Prince Regent's commands, that you should take the necessary measures for furnishing his lordship with the information required; and you therein request that I would give you such information upon the subject as may be necessary to explain the whole of the circumstances of the cases referred to, in order to be transmitted to Earl Bathurst.

I have attentively considered the note which has been delivered by Mr. De Rehausen to the British Government, with the papers annexed, and the complaints therein contained, and I have now the honour to transmit to your Excellency, in obedience to His Royal Highness's commands, a statement of the facts relating to the cases there referred to.

I must previously observe, that the proceeding of the claimants in these complaints has not been in conformity to the established practice between nations, and to the subsisting treaties between Great Britain and Sweden. By the law of nations, as received in every country in Europe, Courts of Admiralty, with their Courts of Appeal, are established as the common tribunals, to decide upon all captures made at sea. "By the law of nations," as justly stated in the celebrated answer of the British Government, to the





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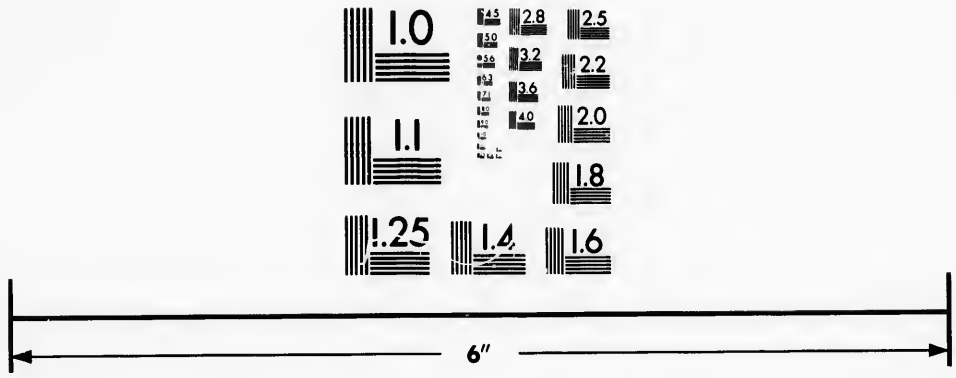

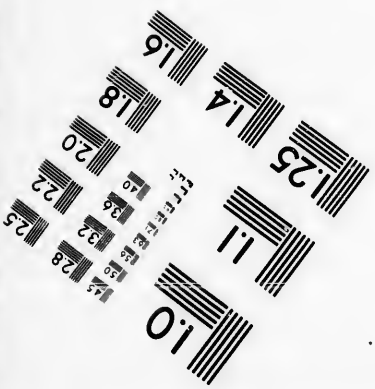

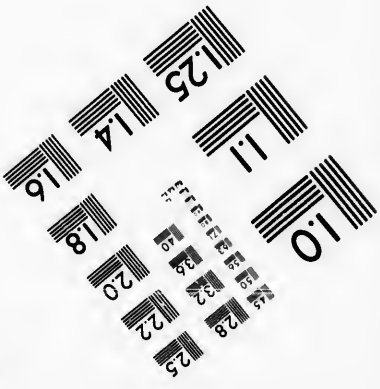

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Prussian Memorial, in 1752, "claimants ought not to complain to "their own sovereign till injustice in *re minimè dubiâ* was *finally* "done them, *past redress*." By the second of the additional articles to the Convention, between His Majesty and the Emperor of Russia, in 1801, to which Sweden acceded, it is agreed that "if "the ministers of one of the High Contracting Powers should re- "monstrate against the sentence which shall have been passed by "the respective Courts of Admiralty—*appeal shall be made to His Majesty's Privy Council.*" In deviation from this established rule, the claimants have not only complained to their Government in cases in which, although sentence had passed in the Court of Vice-Admiralty, the Court of Appeals, being His Majesty's Privy Council, is still open to them, when those sentences are liable to revision, and if erroneous, to be reversed; but they have complained of seizures which had not even been adjudicated upon in the first instance, and therefore no ground for any complaint of injustice could have existed; unless it is meant to deny to His Majesty's cruisers all right of search and detention whatever. I leave it to those whom it more particularly concerns, to decide whether this mode of making every capture, before it has undergone the investigation of a Court of Admiralty, an immediate question between Governments, is better calculated to promote harmony between nations, than the established methods of judicial enquiry; by which too, every case, in the last resort, is regularly examined and decided upon by His Majesty's Privy Council, and his highest Ministers of State.

I cannot observe without the deepest affliction, the severe and, I trust, unmerited reflections, which this high and eminent person has been induced, probably through the misrepresentations of interested merchants, to make of His Majesty's Courts of Vice-Admiralty; in asserting that "their sentences are often partial." By the law of nations, according to that urbanity which is practised by all civilized countries towards each other, respect is due to the tribunals of another nation, until they shall have been clearly convicted of a voluntary departure from their duty; an imputation which has never yet been proved of any of His Majesty's Courts of Prize. Till then, such charges are an injurious reflection, not only upon the persons who preside in those Courts, but upon the justice of the British nation itself, and a covert insinuation that

the Convention of 1801 has not been faithfully observed by His Britannic Majesty, which requires that "the judgments upon prizes "made at sea shall be conformable with the rules of the most exact "justice and equity, and that they should be given by judges above "suspicion." That illustrious person must certainly have been uninformed of His Majesty's anxious care for the due administration of justice to all nations, by placing the Courts of Vice-Admiralty, a few years since, upon the most respectable footing, by appointing Judges with large salaries, by enlarging their jurisdiction, and by selecting persons from England, who, by their practice as advocates in the Courts of Prize, were acquainted with the law of nations, as there understood; persons, who, though inferior in rank and talents to some of the eminent characters who preside in the tribunals in England, I will venture to say, as far as I have any knowledge of them, will not yield to them in the purity of their motives and the impartiality of their decisions. Their judgments may be occasionally erroneous, but they are not corrupt. The Judges have no concern whatever in prizes, and no personal interest in their decisions, whether for or against the claimants; and they are too proud of the honour of their country to compromise it for any sinister views. If he had enquired into the fact, he would have found that the decisions in those Courts are guided by the same rules and principles which direct the superior Courts; that an equal measure of justice is dealt out to all parties, and he might have been informed, even of some recent decisions in that very Court against which his censures are more immediately pointed, of large damages awarded against captors, in favour of neutrals, and even of the enemy, and that if no Swedish cases have occurred of that nature, it is because His Majesty's cruizers have respected the Swedish flag, and have been cautious of detaining vessels, unless the grounds of detention were clear and indisputable.

The general complaint against His Majesty's cruisers "of de-"taining Swedish ships and cargoes, although laden with innocent "articles, perfectly conformable to the Treaty of Commerce and "Navigation with Great Britain, and bonâ fide Swedish property," as far as they have come within my knowledge, is totally unfounded, and both His Majesty's cruizers and this Court of Vice-Admiralty have acted scrupulously, according to the established law of nations.

The Swedish vessels and cargoes which have been brought in here, will be found to come under the following descriptions.

Immediately upon the declaration of war by the United States, against Great Britain, the merchants of that country used every fraudulent practice to cover their property by pretended transfers to neutrals, and principally, for obvious reasons, to Swedish subjects. Many vessels and cargoes, under the Swedish flag, and furnished with *authentic* Swedish papers, have been fully proved to have been American property, and as such, condemned, and the parties have not ventured either to appeal or to complain. In others, the most apparently regular Swedish documents, have been detected to have been complete *forgeries*. After the discovery of such frauds, it became the duty of His Majesty's cruizers and of his Courts, to require the fullest proof of property in all cases; particularly where there had been a transfer from Americans. In many of these cases, where a transfer had been made from the enemy, the owners had neglected to furnish the vessels and cargoes with the usual documents required by the law of nations, and the particular treaties between the two countries. In these cases they were permitted to bring farther proof of their property, according to the established practice of the British Courts of Prize. If any of these cases were really bonâ fide cases, the detention and the consequent expenses, were occasioned by the neglect of the parties themselves, and cannot reasonably be imputed to the cruizers, or to the Court. Some Swedish vessels have been seized for having goods on board belonging to the enemy, and others for a breach of a blockade. In all these cases, unless it is intended to deny the right of visiting merchant vessels, and of bringing them in for farther examination, where the proofs on board are not satisfactory, the cruizers have only done their duty to their country.

I proceed now to consider the particular cases of capture which are complained of.

1st Complaint.—" Maria, G. Warman, Master, belonging to " Messrs. Tottie and Arfwedem, of Stockholm, and loaded there " with a cargo of iron and steel, on Owner's account, bound to " Boston, was captured in June last, near St. John's, New " Brunswick, into which port she was carried; the papers were " taken to Halifax, where proceedings were commenced against

" the ship and cargo, and at about the 20th August the cause " came on for hearing, when the Judge ordered the claimants to " produce farther proof from whence it could alone come, namely, " Sweden: the Judge, on the 20th September, condemned the ves- " sel and cargo as lawful prize to His Majesty's ship Bold. The " claimants, on behalf of the original owners, have re-purchased the " ship and cargo at the appraised value of £6255. 19*s.* 6*d.* ster- " ling, which has been drawn for upon the agents in London at the " enormous amount of 20 per cent. making the sums to be paid for " the same in London £7820. besides very heavy law expences."

Answer.—This was originally an American vessel called the Mary, and was said to have been purchased by the claimants at Stockholm, in March 1813. The authority from the American owners at Boston, to sell the vessel, was not on board, nor any proof of payment. She was consigned to Boston to Parsons and Co. the former owners, and was placed entirely under their management, and the master and mate both swore that the voyage was to terminate at Boston. The cause came on for hearing upon the 23d August, when, although by the decision of the High Court of Admiralty in the Jemmy, Noston, (Rob. vol. 4. 31.) it was held that " when a ship has been left in the trade and under " the management of the former owner, that fact is conclusive, " that it is merely a covered and pretended transfer, and affords " so strong a presumption that scarcely any proof can avail against " it." Yet the Court was so lenient as to permit the parties to bring farther proof. Upon the farther proof, on the 20th of September, no evidence having been produced of any authority given to the master to sell the vessel, or any correspondence between him and his former owners, Parsons and Co., both ship and cargo were condemned. On the 21st of September an appeal was entered, and on the 23d of November the vessel and cargo were delivered, upon bail to answer the final adjudication, to Gustaff Wierman, the master and claimant, when she pursued her original voyage, and arrived at Boston. The latter part of the complaint, therefore, is perfectly untrue, as the vessel and cargo were not sold or re-purchased, and the value for which bail was given could not be demanded till a final condemnation in the Court of Appeals.

As this case has been appealed, and the evidence of course transmitted, it is unnecessary to enter farther into the merits of it.

2d COMPLAINT.—"Active, Alberg, Master, belonging to "P. Brandstrom and Co. of Gelfe, cargo laden at Stockholm. The "cargo of this ship has been condemned at Halifax, subject to "pay a freight to the claimants, which freight, together with the "ship, are restored."

ANSWER.—This vessel was not proceeded against, but was immediately restored by consent, with freight. Part of the cargo, valued at £500., being admitted by the claimants to be enemy's property, by agreement, the value of it was delivered to the captors, the remainder to the claimants, upon paying costs.

3d COMPLAINT.—"Gamla, Lödiso Bug, Master, ship and "cargo belonging to V. Urk of Gottenburg, at which port she "was laden, and bound to Newport, in Rhode Island, captured "19th September, near Newport, by His Britannic Majesty's ship "Highflyer, and carried to Halifax, where proceedings have been "commenced. The cause came on for hearing, when the Judge "ordered further proof."

ANSWER.—The ship was immediately restored with freight; part of the cargo was acknowledged by the claimants to be enemy's property; the value of it was paid to the captors, and that of the rest of the cargo to the claimants.

4th COMPLAINT.—"Gladgen, Lundgren, Master, ship belonging "to P. Winnehelm and R. Dixon, of Gottenburg, cargo to "R. Dixon, and laden at Gottenburg, captured in the Bay of "Boston by His Britannic Majesty's ship Majestic, and sent to "Halifax."

ANSWER.—This vessel was not brought into this port. I am informed that she was rescued by the crew, and carried into the United States; but the Majestic not being now in port, I have no certain information. But as the fact that a Swedish vessel with a valuable cargo had been rescued is certain, the only doubt is as to the name of it.

5th COMPLAINT.—" Hoppet, Landstrom, Master, ship belong-
" ing to R. Dixon and Carl Brit, Br. cargo laden at Gottenburg,
" and belonging to R. Dixon and J. Hall of Gottenburg, cap-
" tured in October by His Britannic Majesty's ship Romulus and
" sent to Halifax."

ANSWER.—This ship was not proceeded against, but was restored with freight. The evidence respecting the cargo was defective. The certificates of property were not according to the form prescribed by the Swedish treaties, and did not directly assert it to be in the claimants. The master swore that he did not know who owned the cargo; and there were inconsistencies and contradictions between the depositions of the master and the supercargo. Upon the hearing on the 28th of December, farther proof was ordered. The cause came on upon the farther proof upon the 12th of January 1814, when it proved to be deficient, and the parties were permitted to bring still farther proof. Upon which order the case now stands. Upon the 24th of February 1814, the cargo was delivered to the claimants upon bail. As this cargo has not been decided upon in this court, I imagine that it cannot afford grounds for a complaint.

6th COMPLAINT.—" Resolution, Ollrom, Master, ship belong-
" ing to B. Weenbrug, and J. H. Von Aken, of Gottenburg,
" cargo, laden and belonging to Low and Smith, of Gotten-
" burg, captured going into Boston by His Britannic Majesty's
" ship Majestic, and carried into Halifax."

ANSWER.—The ship was not proceeded against, but restored with freight. The evidence relating to the cargo was defective. The certificates did not appear to be upon oath; the parties did not assert it to be their property directly, and the master could not testify to it. There were likewise circumstances which afforded good reason for suspicion of its being American property. Further proof was decreed, upon which the cause now rests. It has been delivered to the claimants upon bail.

7th COMPLAINT.—" Charlotta, Ellstrom, Master.

" (Copy.)

" London, January 18, 1814.

SIR,

" I am directed by Messrs. Kautzon and Biel, of Stockholm, " to lay before you the accompanying documental proof, as the " only channel through whom the hope for redress of the griev- " ances they, with other Swedish subjects, have to complain of " on account of depredations committed on their ships by British " cruizers; and to inform you that Captain B. Ellstrom, of their " ship *Charlotta*, loaded for their account at Lanscrona, and " bound for New Port, Rhode Island, writes them from Halifax, " that proceeding for his destination, he was captured by the " British frigate Hyperion, Captain Cumby, and taken into St. " John's, Newfoundland, the beginning of October; when, after " undergoing every examination, he was permitted to proceed " with Cumb's certificate of her neutrality, which, however, did " not protect him: for on departing for St. John's he was the same " day captured by the British man of war Comet, who sent him to " Halifax, where he arrived about the 20th of October, when his " ship was immediately stripped of her rigging, the crew turned " on shore, and treated in every respect as an enemy's vessel; the " cabin taken possession of by the prize master, and turned into " a common brothel, upon which Captain Ellstrom complained to " the captain of the British man of war Comet, who only laughed " at him, and told him he deserved no better treatment.

" The vessel, during her detention, was driven on shore at " Halifax in the severe storm which occurred there on the 13th of " November, by which she was dismasted, lost both her cables " and anchors, and was made a complete wreck, in which state " she still remained on the 5th of December, without any steps " being taken by the Admiralty Court for her liberation, and the " result of this vexatious detention will be the total ruin of the " voyage upon which she was sent by her owners with a cargo of " great value.

" I have, &c.

" (Signed) SAM. THOMPSON."

" To M. De Rehausen."

ANSWER.—This case has not been finally decided upon in this court. Farther proof has been ordered, which has not yet been brought in. It is not, therefore, a subject for complaint, but it may be proper to state the particulars.

The Complaints may be referred to three heads.

1. That the seizure was a depredation upon Swedish commerce.

2. That there was great delay in bringing her to trial.

3. That there was misconduct in the captors after she was brought into port.

First. It is evident that there were sufficient reasons for bringing this vessel in. She was seized and proceeded against upon two grounds:

1st. That she had broken the blockade of Copenhagen.

2d. That the property was not proved.

1st. The first ground of prosecution was an alleged breach of the blockade of Copenhagen. This port was declared to be in a state of rigorous blockade by the British Government on the 4th of May 1808, which order had not been publicly revoked, and there was a presumption, therefore, that it was still in force, and which threw upon the claimant the *onus probandi* that the blockade was not in existence when the vessel sailed.

As to the fact of breaking the blockade, there was sufficient ground to believe that the present cargo was taken in at Copenhagen, was merely landed at Lanscrona, and put on board again. Philips, the ship's steward, who helped to load the vessel at Copenhagen, swore to this fact; and another seaman deposed to the same thing, and that he derived his information from the the people at the quay of Lanscrona who had assisted in unloading and loading again. It appears besides that Law afterwards brought 1000 Demi Johns in a boat from Copenhagen. If the evidence of these persons was to be believed, the master was guilty of prevarication. Although he took possession of the vessel immediately upon the purchase, and was with her the whole time, yet he swears that he does not know the nature and quality of the goods she brought from Copenhagen and landed at Lanscrona, and that the former cargo was discharged at Lanscrona, and the present taken on board, implying that they were different cargoes.

2d. This vessel was alleged to have been purchased of the Americans, owners at Copenhagen, in March 1813, her former name being the Portia. A purchase of a vessel from an enemy, in an enemy's port, requires the fullest proof of a transfer. The vessel was stated to have been purchased by G. Ryan, as the agent of Kantzon and Biel, yet no authority or letter of agency was produced in confirmation of that statement, nor was there any evidence of the payment. The deposition of the master was contradictory to this statement in the papers, since he swore that possession was given to him, not by Ryan, but by George Law, whom he states to have been the correspondent of his owners, and who was an American and an American agent.

There was likewise a charter party, by which Kantzon and Biel charter the vessel to Ellstrom, their own alleged master. The notary, by whom this instrument was authenticated, certifies that Ellstrom the master, a party thereto, appeared before him at Stockholm on the 15th of July, and signed his name with his own hand, although there was a letter on board written by Ellstrom on that day from Lanscrona to his owners at Stockholm; and although in another subsequent letter the master acknowledged the receipt of the charter party, with the other papers from Stockholm. By the same charter party the freighters engage to load a cargo on board the ship, although the cargo at that time was completely laden. The said charter party was therefore a false paper, and together with a prevarication of the master, threw a suspicion of fraud upon the other documents, and the whole case.

Brit, one of the witnesses, swore that Law seemed to have a good deal to do about the ship and cargo, that he was an American who came out as supercargo, and was concerned with a number of American vessels; that it looked to him, and he could not help thinking the cargo to be American property. In confirmation of his suspicion, there was some reason to believe that this cargo had been shipped by the former American owners; before the purchase, she was destined to the United States, and put under the direction of Americans. And the property of the cargo was not proved by the oath of the alleged owner.

Under these circumstances, the claimants were directed to

bring proof that the port of Copenhagen was not then blockaded, that the cargo had not been brought from thence, and of the reality of the transfer of the vessel, and ownership of the cargo. This farther proof has not yet been brought in, and the case is therefore undecided.

Secondly. With respect to the other complaint of delay, the vessel was brought in on the 20th of October. The monition was served upon the 22d of October. The 20 days expired on the 11th of November, and the vessel was brought to trial on the 13th of December. This delay of a month was occasioned by the difficulty of finding an interpreter to translate the Swedish papers, which were very numerous, and were solicited as much by the agents for the claimants as those of the captors, as being absolutely necessary. Upon the order for farther proof, the claimants were at liberty to have taken the ship and cargo upon bail, which they did not choose to do.

Thirdly. As to the complaint of misconduct in the captors after the vessel was brought into port.—In the first place, no protest was made by the master of it, nor was any complaint made to the Court of Vice-Admiralty which would have redressed such grievances; but, in the second place, it is perfectly disproved by the affidavits hereunto annexed. By which it appears that the vessel was not unrigged, but that the sails and running rigging were unreeved as usual, and put away for safety with the greatest care. That the master was left in possession of his cabin, and the crew continued on board the vessel in perfect liberty, being maintained by the master from the ship's stores, and treated in every respect as neutrals, not as enemies.

It is a conclusive proof of the consciousness of the badness of the claimant's case, that an offer was made to compromise with the captors for the sum of £3000. as appears by the affidavit of Mr. Grassie hereunto annexed. This offer could not have been made to prevent the loss arising from the detention of the vessel, because the claimant was entitled to receive it upon bail, pending the litigation.

8. The last case mentioned is that of the Denewitze, which having been carried into Leith in Scotland, of course was not proceeded against in this court.

It appears, therefore, that of the eight cases of ships and cargoes captured which have been complained of,

Two were not brought into this court.

Two had enemy's property on board by the admission of the claimants themselves.

Two of the vessels were immediately restored with freight; and the cargoes being still upon farther proof, and not having been condemned, they are not a subject for complaint.

One is upon farther proof, both as to ship and cargo, and is not therefore a subject for complaint; and

One vessel and cargo only have been condemned, and which are now in a regular course of appeal before his Majesty's Privy Council, the proper tribunal to decide upon the merits of the case.

ALEX. CROKE,
Judge of the Court of Vice-Admiralty, at Halifax, Nova Scotia.

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ERRATA.

In the Preface.

Page.	Line.				
x	8	for,	*prescribed*	*read,*	presided
	17	—	*Lancaster*	—	York
	23	—	*Postliminum*	—	Postliminium

Table.

	—	*Jerusalem Cacori*	—	Cocori
	—	*Providence p.* 180.	—	p. 186.

2	12	—	*Neutral*	—	Natural
9	8	—	*Agnes*	—	Anges
	18	—	*nor*	—	or
10	2	—	*trial*	—	trust
	19	—	*impartially*	—	impartiality
	28	—	*Commissary's*	—	Commissaries
11	last but 10	—	*Jura*	—	Jure
		—	*Majesty's*	—	Majesty
12	17	—	*nor*	—	or
14	last but 2	—	*nor*	—	or, and in most places,
17	19	—	*Crofton and*	—	and Crofton Uniacke
23	last	—	*Conferent*	—	Conferente
25	24	—	*It is*	—	If it is
26	14	—	*pledging*	—	professing
28	5	—	*Inkel*	—	Juliel, and in all
	13	—	*Clause*	—	Cause
30	22	—	*Juffran*	—	Juffrau
42	23	—	*transferrible*	—	transferable
47	last but 8	—	*Darcul*	—	Durand
48	14	—	*Beauvegen*	—	Beauregard
	18	—	*Contrabands*	—	Contraband
	23	—	*Stores, the*	—	Stores. The
78	9	—	*new*	—	mere
96	2	—	*agreed*	—	argued
	last but 6	—	*title*	—	tittle

ERRATA.

Page.	Line.		
117	5	for, *then*	*read*, there
last but	4	after *trade*	dele the comma
122	10	for, *removed*	*read*, renewed
128	26	— *prelivery*	— unlivery
170	16	after *It is*	*insert*, unnecessary
176	2	for, *then*	*read*, there
	18	— *and issued orders*	— and which issued
last but	4	after *cargo*	put a full stop
		for, *even*	*read*, Even
		after *order*	dele the full stop
179	24	after *of*	dele Vice
190	11		dele 6
223	18	after *it is*	*add*, to be
227 last but	8	for, *have*	*read*, has
230 last but	5	— *seasonableness*	— reasonableness
260 last but	3	— *their*	— these
266	3	— *give*	— gave
	15	— *inspected*	— restricted
278	12	— *Pesari*	— Pesaro
279	1	after *master*	put a full stop
		for, *after*	*read*, After
	4	— *exhibiti*	— exhibits
	11	after *as well as*	dele, is
283	13	after *board*	dele, for
285	17	for *more*	*read*, most
286	8	after *with*	— all
288	24	after *general*	dele, If
290	4	for *That*	*read*, The
	11	— *or*	— as
297 last but	7	— *Information*	— Deposition
308	19	after *retain* a fresh section begins at,	It is
311	25	after *embargo at*	*read*, to
314	23	for *ever*	— even
321	19	— *stands*	— stand
328	10	— *then*	— there
332	last	— *William Douglas*	— Snouk Dougan
352	6	— *paid*	— fixed
362	17	after *cargo*	dele, though
363	20	after *that*	dele, the full stop
		for *Where*	*read*, where
366 last but	3	— *objections*	— objection
372 last but	4	— *Streng*	— Streng
373	11	— *properly*	— probably
374 last but	1	before *It is*	*insert*, If
376 last but	11	for, *ministers*	*read*, minister
377 last but	3	— *them*	— these
379	10	— *Governors*	— Governor
	11	after *being*	*insert*, in
380	7	for, *comprehends*	*read*, comprehend
381	12	— *ceteris*	— *verbis*
382	1	after *themselves*	*insert*, to
388	5	for *proclamation*	*read*, proclamations
396 last but	1	after *and*	*insert*, that
405	5	for *their*	*read*, his
407	2 & 3	after *upon*	dele, the
		for *Governor*	*read*, Governors
414	14	after *order for*	dele, the
415	16	for *have*	*read*, has
416	8	after, *being*	dele, in
417 last but	5	for, *their*	*read*, his
418 last but	13	— *them*	— him
438 last but	9	— *seem*	— seems
445	10	— *entered on*	— entered by
450	17	— *their*	— its
451 last but	10	— *claims*	— claim
521 last but	1	— *indefeasible*	— indefensable
528 last but	11	— *has*	— have
529 last but	3	— *nor*	— or

ERRATA.

Page.	Line.			
531	last but 8	after *especially*	*insert,*	as
34*b*	last but 5	for, *they*	*read,*	it
	—	— *their*	—	its
547	last but 10	— *nor*	—	or
559	4	— *Hayard*	—	Hazard
564	last but 9	— *Counry*	—	Country
565	10	— *have*	—	has
566	the two lines near the bottom beginning,			
			" *and was,* &c.	
			" *Reports,* &c.	
				to be transposed
567	19	after *building*	dele,	of
570		for *Cacori*	*read,*	Cocori
		Catarai	—	Catara
576	4	after *nature*	dele,	the comma
		for, *is*	*read,*	as
	7	after *it,* for ; — ,		
581	9	for, *risk*	—	with
585	22	— *sentiment*	—	sentence
586	4	— *petitioners*	—	petitioner
587	20	— *petitioners*	—	petitioner
592	14	— *Blowns*	—	Blower
593	last	after *money*	dele,	the full stop
		for, *Upon*	*read,*	upon.