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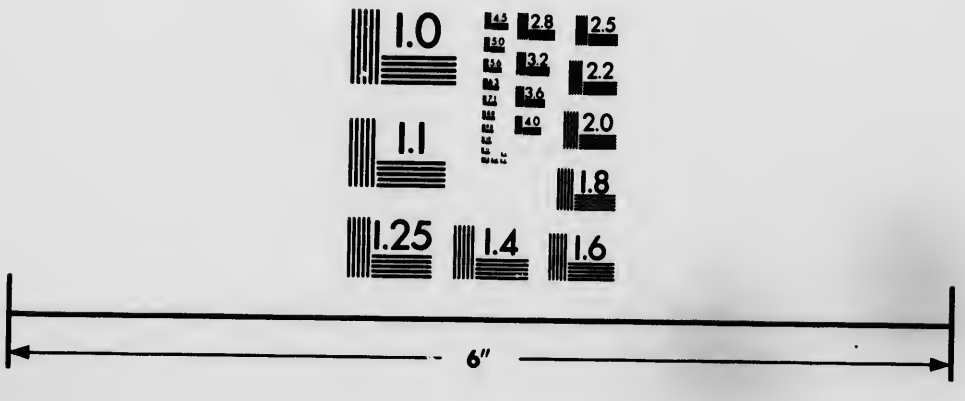

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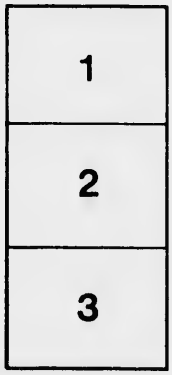

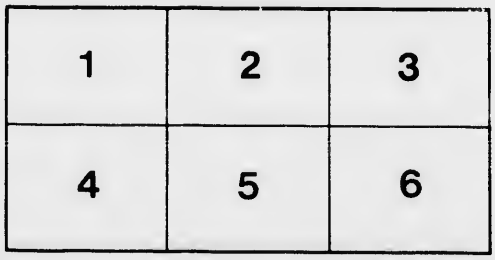

THE

SUBSTANCE OF A

JUDGMENT,

DELIVERED IN THE

COURT OF VICE-ADMIRALTY,

AT

HALIFAX, *(in Nova-Scotia)*,

On the 5th February, 1813;

IN THE CASE OF THE

LITTLE-JOE, FAIRWEATHER, MASTER;

UPON SOME QUESTIONS RELATING TO

DROITS OF ADMIRALTY.

The Independence of Judges is essential to the Impartial Administration of Justice; is one of the best securities of the Rights and Liberties of the Subject, and most conducive to the Honour of the Crown.

The KING'S Speech, 1761.

HALIFAX:
ANTHONY H. HOLLAND, *PRINTER.*
1813.

THE SUBSTANCE OF A JUDGMENT.

THE case of the schr. Little Joe, Fairweather, master, taken by the Liverpool Packet, Freeman, a private ship of war, belonging to Liverpool Nova-Scotia.

Sentence,——5th February, 1813.

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 intitled 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 intitled to receive and to have the custody of it, on behalf of his Majesty.

In both cases the property would ultimate center in the King, but it is important to determine *in which 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 of 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 accidently

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 that they shall be seized by a vessel not commissionated. If these three facts are 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. It was taken not in port but upon the high seas. Under whatever title therefore this seizure was made, the ship and cargo were at the time of seizure enemies property.

The two first requisites are therefore clearly proved, and the only question which can be raised as 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.

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.*

2d Whether she was commissioned by the *instrument* granted, upon the supposition that it *was authorized by the order in council.*

3d Whether *by that instrument itself*, independent of the order in council, as a mere embargo authority.

4th *As a letter of marque and reprizals.*

1 In the first point of view. What is a commissioned ship? It is a vessel authorized 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 reprizal. 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 commission 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 authority 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 reprizals.

4 This instrument in its form is a letter of marque and reprizal. The operative part of it is couched in the same words. "I

"do hereby authorize 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 U. 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 authority to commit reprizals, although the ultimate disposition of the property may depend upon future contingencies.

The question then became 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 reprizals 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 adherence 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 expence, and are reimbursed by a share, or the whole of their plunder, as may be conceded to them by his Majesty, from whose free grant alone they can be intitled 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 reprizals, 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 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 become therefore 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 adopted 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, became then 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* reprizals 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 letters of marque, or otherwise, by his Majesty's Commissioners for executing the office of Lord High Admiral. No other vessels, however commissioned, are authorized 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 suppo-

fed 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 authorized.

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. [*See appendix* A.]

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 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 comprized *civil* rather than *military* duties, and that the peculiar object of it was not ſo much the command over the fleet, *quā hoſtibus per mare reſiſtetur*, 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 ſtile was that of *cuſtodes maris*, and they were ſaid in the old language of parliament to be appointed "for the keeping and ſure de-" ſending of the ſeas againſt all perſons, for the Entercourſe of mer-" chandize ſafely to come and paſs out of the ſame." They were intruſted with *la gard de la pees de la meer, or la ſaufgard de la mere.* For this purpoſe they had a general juriſdiction in all affairs, civil and criminal, upon the ſeas, as incident to juriſdiction, they were intitled to various droits, rights and perquiſites. This was the or-

*Selden, *Mare Clauſum*, &c.

dinary 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 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 accessearty 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 authorized 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 ministerial 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 a 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 Cologn in the reign of Charles the 2d, 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 the vessel to be sold for the payment of it--the opinion of Sir Lionel was taken, and he determined that the contract of sale was absolutely void, on account of the unreasonablenessandextortion. Heexpresses 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 objection, 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 kings 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 lords commissioners to grant a commission of Vice admiral to them. The office thus conferred upon the Governors 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 admirals 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 superceded 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 adopted 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 authorized 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 authorized 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

* *Jenkins Vol. II. p. 718.* † *Vol. II. p. 765.*

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.

That no such standing power exists 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 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 remain-

ing 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 reprizals. 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 reprizal 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 *inlarge*, 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 vessels for the defence of the province, as authorized by the commission; or to issue letters of marque, when so authorized 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 reprizal*, 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 reprizal.

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 reprizals 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 formerly 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 2d. 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 accompained 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 60 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 commission under the Great Seal issued to the Lords of the Admiralty to impower them to grant wararnts 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 50 *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 hav-"ing arrived to the Governor to grant letters of marque, in the "mean time he assured the master, conformable to his Majesty's plea-"sure signified to him by the Right Honourabe 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 he may make prizes of, being first con-"demned as lawful prize to his Majesty, and that the Governor had "received his Majesty's commands to encourage all his Majesty's sub-"jects 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 the promise of 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 which 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 Governors commissions, or standing instructions but under a special authority given by his Majesty. They furnish therefore no precedent whatever that the Governor had 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 those 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 effecting its validity: it was issued on the 20th August, before the order for reprizals on the 13th Oct. Whatever may be the power vested in the Governor as to granting letters of marque, and reprizal, 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 reprizals and the issuing of letters of marque has 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 reprizals upon the 13th 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 declared, that though the United States had declared war, and had issued letters of marque, he had forebom previously to the 13th of October, to direct letters of marque and reprizal to be issued against them. So that this, com-

**Hargrave's law tracts p. 245. Pleas of the Crown. &c.*

mission 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 the hostile measures, had thought proper that no letters of marque and reprizal should be issued against them.

Nor is any authority given by these commissions which intrenches upon the doctrine of the common law, for their 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 posibility of mistake. In the instructions, there is the strongest injunction, "not to grant commissions of marque or reprizals 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 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 reprizals 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 reprizals, is not so far authorized by any commissions, or instructions, directed by his Majesty to the Lieutenant Governor of this Province, which have been produced in evidence, as would constitue the Liverpool Packet, such a commissioned vessel, as to deprive the Lord High Admiral of his Droits. And I therefore condemn 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 arrises 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 authorized 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 intirely upon 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, 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 of 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

*See appendix B.

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 Admirals 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 authorized 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 practice 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 their 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 these hostile, and unreconcileable applications ?

I shall first proceed upon the supposition that both parties are invested with the full powers, the one 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?

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 superceded 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 Receiver's 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 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 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. Cœteris 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, though one officer only, and subject only to a single renumeration.

If both applicants were fully authorized, 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 ap-

perently equal, and conflicting rights. But although, 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 Governer and Commander in Chief only, with power of deputing and surrogating deputies, but without mentioning the Lieutenant Governor. The commission to Sir John Coape Sherbrooke appoints him only Lieutenant Governor of the Province of Nova-Scotia, and authorizes 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.

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APPENDIX [A.]

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 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 Commanders, 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 Grand-father, 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."

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 reprizal 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, 1730, in relation to Colours to be worn by all ships of War."

B.

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 Pro-

vince of P— 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 adjuged or howsoever by reason of the premises, due or to be due in that behalf to us, or to our heirs, and successors."

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 priviledges 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 est*, upon such accounts, for all duties, Droits, and profits whatsoever received, or to be received, by the aforesaid Vice Admirals or other collectors, receivers or any Commissioners authorized 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 Majesty's Commission to us, appointed to be taken, collected and received, in all places where they shall happen, in such sort 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 Ma-

jesty's only use and behalf; and we having 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 of Droits.

1st. Directs him 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 embezling, 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.