REPORTS

OF

PRIZE CASES

DETERMINED IN THE

HIGH COURT OF ADMIRALTY,

BEFORE THE

LORDS COMMISSIONERS OF APPEALS IN PRIZE CAUSES,

AND BEFORE THE

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

FROM

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By the law of every maritime Court of Europe, spoliation of papers not only excludes further proof, but does *per se* infer condemnation; English law has, however, modified the rule to this extent, that if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by the commission of this injurious act.

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An enemy must show by affidavit the grounds of his claim.

A vessel belonging to Bjorneborg, in Finland, sailed from Hartlepool to Copenhagen with a cargo of coals, which she there discharged, for the use of the British fleet, prior to the declaration of war, which took place on the 29th March. She was unable to sail to Bjorneborg immediately after her cargo was discharged by reason of the ice; but on the 10th of April she left Copenhagen, bound for that port, in ballast, and was captured on the 12th. Held, she was not protected by the Orders in Council, which referred solely to ports within her Majesty's dominions. An Order in Council relaxing the belligerent's rights should be construed in favour of the party whom it is intended to benefit.

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National Character—Neutral Resident in Enemy's Country—Enemy Vessel—Mortgage—Invalidity—Condemnation.

A neutral, resident as merchant and consul in the enemy's country, loses his neutral character during such residence.

A claim for one-third of the proceeds of the ship founded on a mortgage deed, on behalf of a citizen of Lubeck resident at Helsingfors, in Finland, as consul of the King of the Netherlands, disallowed.

Foreigners cannot set up a mortgage deed on the ship against captors, though under certain circumstances the lien of British merchants may be allowed.

AINA (No. 2) [Spinks, 12] 251

Enemy Master—Restoration of Property.

The Court cannot restore property to an enemy master without the consent of the captors.

JOHANNA EMILIE, otherwise EMILIA [Spinks, 12]..... 252

Ship—Transfer by Belligerent Owner to Neutral before Declaration of War—Proofs of bonâ fide *Transfer—Spoliation of Papers—Further Proofs.*

A vessel built in Hanover in 1853 sailed in ballast to Riga, with a crew of Hanoverians. She then sailed, under Russian colours, to Havre, thence to Newcastle, and on the 23rd of January was transferred by her Russian owner to a Hanoverian; thence she sailed to Lisbon. There she took in a cargo, and sailed for London on the 4th of April under Hanoverian colours. Shortly after her arrival in the London Docks she was seized by a Custom House officer. She was claimed on the ground that, while lying at Newcastle, she had been, under a power of attorney given by the owner to the master, sold and transferred to a Hanoverian. Further proofs of *bona fides* of transfer required.

The legal consequences of destruction or spoliation of papers depend for the most part upon the circumstances of each case; but unless the case is one of grave suspicion, further proof will be allowed.

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IDA [Spinks, 26] 268

Lien—Restitution—Simulated Papers—Further Proof.

A lien, however honest, of a third party on captured property is no ground for its restitution.

The claim of a neutral merchant for 2,650 bags of coffee consigned to him on the credit of advances made by him, disallowed. Further proof cannot be allowed when there has been an attempt to deceive the Court by simulated papers.

FIDENTIA (No. 1) [Spinks, 39] 281

Practice—Further Proof—Evidence of Master Insufficient—Standing Interrogatories—Further Time—Affidavit.

When the evidence of the master as to the ownership of the property claimed is deficient, it cannot be restored without further proof. Evidence by standing interrogatories should be taken in full, and one interrogatory should not be answered by reference to the answer to another.

ABO [Spinks, 42] 285

Practice—Further Proof—Bill of Lading—Property in Cargo.

A bill of lading did not state on whose account the property therein named was shipped. At the time when such shipment was made war was not imminent. Held, that there must be an order for further proof.

PRIMUS [Spinks, 48] 290

Neutral's Shares in Enemy Ship—Condemnation—Neutral Cargo—Expenses of Capture.

A neutral having shares in an enemy ship is bound by the character of such ship, and his shares are therefore liable to condemnation. Motion for the expenses arising from the capture of a neutral cargo laden on an enemy ship, which was condemned and sold, to be paid from the proceeds, refused.

ARGO [Spinks, 52] 294

Capture—Exemption—Order in Council, March 29th, 1854—Continuous Voyage.

The Order in Council of 29th March, 1854, exempted from capture Russian vessels which, prior to the 29th of March, should have sailed from any foreign port bound for any port in her Majesty's dominions. A vessel under a charter-party for a voyage from Havannah or Matanzas to Cork sailed from Havannah in ballast prior to such date, took in her cargo at Matanzas, and sailed thence subsequently thereto. Held, that it was a continuous voyage; that it commenced at Havannah, where the charter-party was entered into; and that the ship must be restored under the Order in Council.

INDUSTRIE [Spinks, 54] 297

Neutral's Shares in Enemy Ship—Condemnation.

A vessel under Russian colours, with a Russian pass, and whose papers disclosed only Russian owners, being captured, a claim was made by the master as being a neutral, and the lawful owner of one-fourth part thereof. Held, that the claim could not be sustained, as the enemy's flag and pass imprinted a hostile character on the whole ship.

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POLKA [Spinks, 57] 301

Prize in Neutral Port—Condemnation—Special Circumstances.

The general rule of law is that a prize shall be brought into a port belonging to the captor's country, but under special circumstances the Court will condemn a prize which has been taken into and lies in a neutral port and allow it to be sold there.

JOHANN CHRISTOPH [Spinks, 60] 302

Ship—Fictitious Transfer—National Character of Alleged Purchaser—Proof of Purchase—Order in Council, April 15th, 1854—Condemnation.

A ship sailing under neutral colours and with neutral papers from a Russian to a British port with a cargo, within the time granted to Russian vessels by the Order in Council, was seized by the Custom House officers, and claimed by the master as the *bonâ fide* purchaser and a neutral. Held, on further proof, that, 1st, the neutral character was not established; 2nd, the transfer to the master was merely colourable; 3rd, the Court could not restore the ship as Russian, but protected by the Order in Council, when it had been claimed as neutral.

OCEAN BRIDE [Spinks, 66] 309

Recapture—Restitution—Municipal Law—Jurisdiction of Prize Court to recognise British Rules as to Registration.

The Prize Court, if a British owner is entitled to restoration of his ship, will not inquire into questions of municipal law—such as the registration of ownership—unless it is shown without doubt that the owner is not entitled to restoration through a clear breach of municipal law. A British ship fictitiously transferred to Russian merchants to prevent her seizure by the Russian authorities, while lying ice-bound in a Russian port at the outbreak of the war, but seized as Russian property by the officers of the Customs on her arrival at Leith, restored to the British owners on payment of the seizor's expenses.

RAPID [Spinks, 80] 317

Purchase immediately antecedent to War—Invalidity.

A purchase purporting to be made just antecedent to a war cannot be upheld unless it is proved that the transfer was *bonâ fide*, the money was paid, and that the transferee was a neutral subject.

CHRISTINE [Spinks, 82] 320

Seizure—Agreement for Sale—Non-payment of Purchase-money—Further Proof refused.

A vessel, under Lubeck colours, was seized by Custom House officers. Her master claimed her on the ground that he was a neutral, and had purchased her of her Russian owners. He admitted that he had paid no part of the purchase-money, and no bill of sale was on board at the time of seizure. Further proof was refused, and the vessel was condemned.

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FIDENTIA (No. 2) [Spinks, 85] 323

Practice—Further Proof—Cargo Owner—Condemnation.

Further time to bring in proof of the ownership of the cargo, when the asserted owner has made no affidavit and produced no correspondence, refused, and the cargo condemned.

ELIZE, otherwise ELISE WILHELMINE [Spinks, 88] 327

Unjustifiable Seizure by Custom House Officer—Damages and Costs.

A Customs officer having seized a neutral vessel on her arrival at Leith, on the ground of an alleged breach of the blockade of Archangel:—Held, that as on the facts the seizure was not justifiable, he must be condemned in damages and costs.

A bare offer of restitution should be accepted, reserving the question of costs and damages.

ERNST MERCK [Spinks, 98] 338

Ship—Sale immediately before outbreak of War—National Character—Onus of Proof—Legal Title of Claimant.

Where an enemy ship is alleged to have been sold to a neutral immediately before the outbreak of war, the burden is on the neutral claimant, who must show a good legal title in order to obtain restitution of the vessel.

ATLANTIQUE [Spinks, 104] 345

Damages and Costs—Fraudulent Claimant.

Parties knowingly making a fraudulent claim condemned in the costs of the proceedings.

FRANCISKA [Spinks, 287; 10 Moore, P. C. 37] 347

Blockade—Relaxation of Blockade in favour of Belligerent—Liability of Neutral—Notice—Restitution without Costs and Damages—Further Proof.

Where doubts exist with respect to matter which does not appear upon evidence furnished by the ship itself (namely, the papers on board, or the examination of the master and crew), such as the existence or non-existence, the sufficiency or insufficiency, of a blockade, a Prize Court will allow further proof, and such further proof is not limited to the claimant, but may be granted to the captors also.

Whatever may be the demerits of a ship, she cannot be condemned for a breach of blockade unless at the time when she committed the alleged offence, the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner.

The admiral of the fleet must be presumed to have carried with him from England sufficient authority to blockade such of the enemy's ports as he might deem advisable.

Principles which regulate the right of a belligerent to exclude neutrals from a blockaded port explained.

Relaxation of blockade in favour of belligerents, to the exclusion of neutrals, is illegal.

Semble, the blockade will not be valid if the same indulgence was extended to neutrals.

Notice of a blockade must not be more extensive than the blockade itself.

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The existence and extent of a blockade may be so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and such knowledge may supply the place of a direct communication from a blockading squadron, yet the fact, with notice of which an individual is so to be fixed, must be one which admits of no reasonable doubt.

On the 15th April, 1854, the commander of the Baltic fleet blockaded, *de facto*, the coast of Courland, but his notice to the British Ministers, including the British Minister at Copenhagen, was of that character that the impression was that all the Russian ports in the Baltic were blockaded. The English Government also on that date issued an Order in Council giving permission, up to the 15th of May, for Russian vessels to discharge their cargoes from Russian ports in the Baltic and White Sea to their ports of destination, even though these ports were in a state of blockade. A similar permission was granted by the French Government. And the Russian Government by a ukaso allowed the same indulgence to English and French ships. On the 14th May, 1854, a neutral vessel, under Danish colours, sailed from Copenhagen to Riga, and was captured off Riga by an English ship of war on the 22nd of that month, for a breach of the blockade of that port.

Held :—First, that the vessel was improperly seized, as there was no legal blockade at the time of the seizure.

Second, that as the Order in Council must be taken to have extended to British and French ships, and as it relaxed the blockade in favour of the belligerents to the exclusion of neutrals, the blockade was illegal.

Third, that assuming the blockade to be legal, yet the master of the ship must be fixed with personal knowledge of all that was publicly known at Copenhagen on the 14th May, and that as the general notoriety, so far as it existed at that time and place, was that all the Russian ports in the Baltic were blockaded, which was not the fact, the notice, therefore, of the blockade being more extensive than the blockade itself, it was of no effect against a neutral.

In such circumstances the sentence of condemnation was reversed, and simple restitution decreed, but without costs.

FRANCISKA (No. 3)—UNION [10 Moore, P. C. 73]... 416

Restitution—Sale—Rights of Claimants—Gross Proceeds—Proper Deductions—Expenses of Sale—Of Custody of the Ship—Of Pilotage, &c.

A ship and cargo taken as prize having been condemned by the Admiralty Court, was sold under a decree of that Court, pursuant to the Prize Act, 17 & 18 Vict. c. 18, s. 26. The decree was reversed on appeal, and simple restitution decreed. Held, that as the captors were *bonâ fide* in possession during litigation, they were entitled to the rights, allowances and incidents attaching to such possession, and that the claimants were only, upon simple restitution, entitled to the net proceeds of the sale, after deducting from the gross proceeds the marshal's charges, consisting of (1) expenses of sale; (2) reasonable expenses for the care and custody of the property pending adjudication; and (3) for pilotage, lights, and other dues incurred in bringing the ship to England.

The practice in former wars in such cases considered.

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OSTSEE [9 Mooro, P. C. 150; Spinks, 174] 432

Capture—Wrongful Act—Honest Mistake of Captor—Restitution—Damages and Costs.

If captors improperly and without reasonable cause, but through an honest mistake, seize a vessel, such vessel not being, by any act of her own, voluntary or involuntary, open to any fair ground of suspicion, the captors are liable in damages and costs.

JEANNE MARIE [Spinks, 167] 457

Blockade—Neutral—Cargo Owner—Liability for Act of Agent—Egress.

The rules as to blockade may be relaxed in the case of a cargo owner, ignorant of a blockade, who has purchased cargo in a blockaded port before the declaration of war, which cargo is brought out of a blockaded port without knowledge on his part of the blockade.

ODESSA [Spinks, 208] 462

Seizure—Release—Second Seizure—Validity—Order in Council—Protection to Enemy Vessel—Reasonable Time.

A ship under neutral colours sailed from a foreign port bound with a cargo to Hull within the time granted to Russian vessels to sail, was seized on her arrival at Hull on suspicion of being Russian, was immediately released as protected by the Order in Council, remained at Hull six months after the discharge of her cargo, and was then again seized. Held, 1st, the first seizure, not having been judicially recorded, was no bar to the second; 2nd, an enemy entering a British port, and claiming the protection of the Order in Council, must enter under enemy, not neutral, colours; 3rd, the protection of the Order in Council does not extend to enemy vessel beyond a reasonable time for the discharge of their cargoes and for their departure.

LEUCADE [Spinks, 217] 473

Blockade — Seizure — Reasonable Cause — Restitution — Costs and Damages.

The status of the Ionian States relatively to Great Britain being of so doubtful a character, and depending upon the nice construction of public documents, a commissioned captor, seizing an Ionian vessel on the ground of illegal trade with Russia, though that trade was, in fact, legal, and that vessel was a neutral ship:—Held, not liable to condemnation in costs and damages, as having captured her without probable cause.

The *Ostsee* (*ante*, p. 432) considered.

CARL (No. 2) [Spinks, 238] 497

Capture—Right of Ship of War to Share in Capture made by Tender—Constant Employment as Tender—Compliance with Municipal Law by Captured Ship.

A ship of war is entitled to share in all captures made by a tender attached to her, however distant she may have been from the tender at the time of capture.

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CAROLINE [Spinks, 252] 501

Seizure—Probable Cause—Further Proof.

A Prussian vessel, during the war between Denmark and Prussia, was fictitiously sold to a Russian and assumed Russian colours, which she continued to carry until the war between Great Britain and Russia was imminent.

The vessel with her cargo was decreed to be restored, but held, that her seizure, on suspicion of her being Russian, was not without probable cause, and did not subject the seizor to costs and damages.

OTTO AND OLAF [Spinks, 257] 507

Blockade—Egress—Laden Vessel—Capture—Probable Cause—Restitution—Practice—Variance of Claim and Preparatory Evidence—Further Proof.

Every ship leaving a blockaded port with a cargo is liable to detention without subjecting the captor to payment of costs and damages.

Where the claim and preparatory evidence is at variance with the documentary, the Court is bound to require further proof.

The Court will not enter upon an inquiry whether a captured neutral vessel has complied with the requirements of the municipal law of her own country.

NINA [Spinks, 276; on appeal, Spinks, 347] 514

Capture—Ship—National Character of Merchant—Ownership—Further Proof—Suppression of Papers.

The Court cannot restore to a person who claims as sole owner when others appear to have an interest in the property; and it cannot allow further proof when it is satisfied that no trustworthy proof could alter the complexion of the case.

The suppression of papers and the prevarication of the master also afford grounds for refusing further proof.

NEPTUNE [Spinks, 281] 520

Capture—Consent by Captors to Restitution—Illegality of Trade—Costs.

A Russian ship coming into a British port under the protection of the Orders in Council, and discharging her cargo instead of departing forthwith, was sold to a British subject, and remained in a British port. She was seized, and proceedings taken against her: but before hearing, on the admission of claim, the Admiralty Proctor, by direction of the Lords of the Admiralty, declared "that he proceeded no further, but reserved the question of costs and damages." Held, 1st, the declaration does not necessarily entitle the claimant to costs, it being always in the power of the Crown to stay the proceedings for condemnation; 2nd, the purchase of the ship by a British subject was a trading with the enemy not specially permitted by the Orders in Council, and therefore illegal; 3rd, for these reasons, and also for illegal opposition to those who seized the ship under the authority of the Court, the claimant must be condemned in the costs.

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BENEDICT [Spinks, 314] ... 527

Voluntary and bonâ fide *Transfer—Validity—Domicile—Education—Residence.*

The voluntary transfer of a ship by a father, an enemy, to his son, a neutral, as an advance of a portion of his inheritance, is valid if made *bonâ fide*.

The fact that a man is educated in a foreign country, followed by a continued residence in that country, tends strongly to establish the foreign domicile.

Vessels decreed to be restored, but captors to recover their expenses.

MARIA [Spinks, 321] ... 536

Practice—Ship—Absence of Bill of Sale—Further Proof—Procedure by Plea and Proof.

The absence of the bill of sale of a ship, and the ignorance of the master as to the ownership, both necessitate further proof.

If the claimant elects to proceed by plea and proof, the case is open to further proof on the part of the captors.

ALINE AND FANNY [Spinks, 322; 10 Moore, P. C. 491] ... 537

Practice—Further Proof—Ship's Papers and Depositions—Blockade.

Rule as to the admission of further proof by the captors. By the Law of Prize, the evidence, whether to acquit or condemn the ship, must, in the first instance, come from the ship's papers and the primary depositions of the master and crew; and the captors are not, except under circumstances of suspicion arising from the primary evidence, entitled to adduce any intrinsic evidence in opposition.

In a case where no suspicion of an intention to break a blockade appeared from the ship's papers, or the primary depositions, the Judicial Committee (affirming the interlocutory decree of the Admiralty Court) refused the admission of further proof by the captors to contradict the depositions with respect to the place of capture.

The principle laid down in the *Ostsee* (*ante*, p. 432), that a claimant upon restitution of the ship is entitled to costs and damages from the captors only in circumstances where the ship was in no fault, and was not by any act of her own, voluntarily or involuntarily, open to any fair ground of suspicion, approved.

A neutral vessel was seized for breach of blockade. She was chartered for a voyage from Umea to the neutral port of Itaparanda in Sweden, at the head of the Gulf of Bothnia, and had come across the Gulf of Bothnia from the Swedish toward the Finland coast, but not in a straight course from the neutral port she started from to the neutral port she was bound to; and when descried and followed by her Majesty's ships did not slacken sail, but pursued her course till brought to by a shot from the captors. Held, to be such an appearance of an intention to commit a breach of the blockade as to warrant the suspicion of the captors, and to entitle the claimants upon restoration to a decree of simple restitution only, without costs and damages.

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PANAJA DRAPANIOTISA [Spinks, 337] 560

Practice—Affidavit of Claimant—Residence—No Enemy Interest—Exception—Order in Council—Licence—Further Proof.

The affidavit accompanying the claim must state the residence of the claimant, and must negative all enemy's interest except where an enemy claims under an Order in Council or a licence.

A prayer for further proof must be founded on a statement of what is intended to be proved.

The omission of such statement renders a claimant liable to costs.

CHRISSYS [Spinks, 343] 568

Capture—Vessel near Blockaded Port—Further Proof—Condemnation.

A vessel captured sixty or seventy miles out of its course, and in the neighbourhood of a blockaded port, cannot be restored without further proof of its destination.

If the claimant declines further proof, the Court is bound to condemn the property.

NINA [Spinks, 345] 570

Further Proof—Condemnation.

ASPASIA [11 Moore, P. C. 79] 572

Practice—Leave to Appeal—Ignorance of Decree of Prize Court—Limit of Time to Appeal—Prize Act.

By 17 & 18 Vict. c. 18, s. 37, the right of appeal from the High Court of Admiralty in England is limited to three months from the date of the sentence, liberty being reserved to the Judicial Committee to allow, upon sufficient cause being shown, the appeal to be prosecuted after the expiration of that period.

Motion by a claimant, the owner of the cargo, upon notice to the captors for leave to appeal from a sentence of the Admiralty Court in England, pronounced *in pœnam contumaciæ*, fifteen months after the capture. The proceedings in England were unknown to the owner of the cargo, and the sentence of condemnation not having been communicated by the captors to the owner, he had no knowledge thereof until long after the time for appealing had expired. On the motion coming on, it appeared that no petition for leave to appeal had been lodged or referred to the Judicial Committee. Their Lordships refused to entertain the motion, except upon an undertaking to lodge a petition of leave to appeal.

Appeal allowed, subject to the presentment of such petition of appeal, on payment of costs, upon terms of extracting the inhibition, and prosecuting the appeal within three months, bail being given for payment of the captors' costs.

Practice where an appeal is allowed after notice, and the respondent applies to rescind the leave given.

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GERASIMO [11 Moore, P. C. 88]... 577

National Character of Trader—Foreign Merchant in Belligerent Country—Moldavia and Wallachia—Conversion of Neutral Territory into Enemy's Country—Blockade—Capture—Duty of Captor.

The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the power under whose dominion he carries it on, and as an enemy of those with whom that power is at war.

Nature of the possession which the Russians held of the Principalities of Wallachia and Moldavia in the years 1853-4.

Inquiry into and illustration of the political position of those principalities.

Circumstances which convert a friendly or neutral territory into an enemy's country considered.

A temporary occupation of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

A ship under Wallachian colours, with a cargo of corn belonging to owners residing at Galatz in Moldavia, was seized for breach of the Black Sea blockade, when coming out of the Sulina mouth of the Danube, then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia and Wallachia, but such holding was with the expressed intention of not changing the national character, or incorporating that country with Russia. Upon appeal, held (reversing the sentence of the Admiralty Court of England), that the national character of the owner was not changed by the fact of the Russians so occupying the principalities, and restitution decreed, with costs and damages.

The purpose of the blockade was declared to be for preventing the import of provisions to the enemy in possession of a neutral's country. *Semble*, the fact of a neutral ship bringing out a cargo of corn is not a breach of such blockade.

It is the duty of the captor, as soon as possible, to send a prize to some convenient port in her Majesty's dominions for adjudication, and to procure the examination in preparatory of the principal officers of the captured vessel, and to deposit in the Admiralty Court all papers found on board the prize. Restitution of ship and cargo, with costs and damages.

ARIEL [11 Moore, P. C. 119] 600

Ship—Transfer to Neutral—War Imminent or in Existence—Part Payment of Purchase-money—Lien—Restitution.

The sale of a ship absolutely and *bonâ fide* by an enemy to a neutral, *imminente bello*, or even *flagrante bello*, is not illegal.

A Russian subject immediately before the war between Russia and England sold, absolutely and *bonâ fide*, a ship to a subject of a neutral State. Part only of the purchase-money was paid at the time of the

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purchase, the remainder being agreed to be paid out of the earnings of the ship. Before all the stipulated price was paid, the ship was seized in a British port as prize, and condemned by the High Court of Admiralty of England, on the ground that the enemy's interest in the ship was not divested, as the residue of the purchase-money was to be paid out of the earnings. Such condemnation reversed upon appeal, as the non-payment of part of the purchase-money did not create a lien on the freight and ship in favour of the seller, so as to render the ship in possession of a neutral owner liable to seizure by a belligerent.

Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize.

MARIA [11 Moore, P. C. 271] 616

Ship—National Character—Proof of Ownership.

If any doubt exists as to the character of a ship claimed to be the property of a neutral being still enemy's property, the rule of the Prize Court is, that the claimant shall be put to strict proof of ownership, and any circumstance of fraud or contrivance, or attempt at imposition on the Court, in making out his title, is fatal to the claimant. Condemnation of the ship as enemy's property necessarily follows.

A vessel (formerly Russian) was seized as prize, as being enemy's property, after she had become the property of neutrals. Restitution was claimed by the parties to whom the property in the ship had been formally transferred before the declaration of war. Held, that as the claimants were shown to be invested with the character of owners, and there being no other party who could set up a title against them, they were entitled to restitution, but under the circumstances, respecting the ownership, without costs and damages.

BALTICA [11 Moore, P. C. 141] 628

Neutral—Residence in Enemy Country—Ship—Sale to Neutral—Imminence of War—Validity.

A neutral residing in an enemy's country as consul of a neutral State, and who also traded there as a merchant, is to be regarded as an enemy.

A Russian vessel was sold, *bonâ fide* and absolutely, by an enemy to a neutral when the war between Russia and Great Britain was imminent.

The vessel was at the time of the sale in the prosecution of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser. Held (reversing the sentence of the Admiralty Court of England), that the sale though *in transitu* was valid, as the *transitus* had ceased when the vessel had come into possession of the purchaser, which took place before the seizure.

A neutral, while a war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid whether the subjects of it be lying in a neutral or an enemy's port.

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PANAGHIA RHOMBA [12 Moore, P. C. 168]..... 635

Blockade—Condemnation of Ship—Liability of Owner of Cargo—Master of Ship Agent for Cargo Owner.

The general, but not universal, rule is, that where a ship is condemned for breach of blockade, the cargo follows the same fate.

The presumption is against a vessel captured in entering a blockaded port, and an imperative and overwhelming necessity for so doing must be established by the owner to exempt from condemnation.

It is not competent to owners of a cargo on board a vessel condemned for breach of blockade to save the cargo from condemnation by showing their innocence in the transaction, as the owners of the cargo are concluded by the illegal act of the master, although (1) it was done without the privity of the owners of the cargo; and (2) even if it was done contrary to their wishes.

When a blockade is known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility, be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it is not competent to rebut it by evidence.

In cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master is to be treated as the agent for the cargo as well as for the ship.

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REPORTS

OF

PRIZE CASES.

THE GUILLIAUME TELL. [Edw. 6.]

Joint Capture—Blockading Fleet—Temporary Obstacle.

In order to enable certain ships of a blockading squadron to share in a prize captured by other ships the former need not have actually pursued the prize, it being sufficient that the whole squadron was acting on a preconcerted plan, and that the ships in question were not prevented from action by any permanent obstacle.

1808 *July* 13; affirmed *February* 1, 1810.

The present question arose on a claim of joint capture interposed on behalf of his Majesty's ships *Culloden* and *Northumberland*, on the ground of associated service for the purpose, among other objects, of effecting this capture. The prize was a French ship of war, which with another had been for some time blockaded in the harbour of La Valette, in the island of Malta, by a British squadron then under the orders of Sir Thomas Trowbridge, commander of his Majesty's ship *Culloden*, acting in the absence of Lord Nelson. In the night of the 29th of March, 1800, the *Guilliaume Tell* made an attempt to escape, but was pursued and taken by the *Foudroyant* and some other ships belonging to the blockading squadron, while the remainder kept their stations off the port, except the *Culloden* and *Northumberland*, which were at anchor at the time in the Marsa Sirocco bay, a few miles distant from La Valette.

Sir W. Scott.—The present question arises upon a claim which has been interposed on the part of his Majesty's ships *Culloden* and *Northumberland*, to share in this prize as joint captors. It appears that the harbour of La Valette, at Malta, from which this prize (an enemy's vessel of war) was attempting to make her escape, had been for some time blockaded by an English squadron, and

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that the whole of the island was in possession of the English and the inhabitants, except this port, which still continued in the hands of the French. The object of the blockade was to reduce the port, and, of course, to obtain possession of the ships within it. Much evidence, which it is not necessary for me to enter into, has been adduced relative to the history of the blockade, to show under whose direction it was instituted and by whom it was carried on. It is an admitted fact, that Sir Thomas Trowbridge had taken the command of the squadron during the absence of Lord Nelson, and that his attention had been particularly directed to the capture of this and another French ship, which were blocked up in this harbour. Whether he issued any particular orders respecting these ships has been a subject of controversy between the parties; but it is of little importance, because, in succeeding to the command, he necessarily succeeded to all the orders given by his predecessor, and consequently will be entitled under them. These two French men-of-war were known to be in the harbour, and the obtaining possession of them must therefore be presumed to be in the intention of every ship upon that service; for it is not to be lost sight of that they were associated in one common enterprise, of which the capture of these vessels formed no insignificant part. If this ship had been taken in the harbour of La Valette upon its final reduction, as the other vessel was, no doubt could have arisen upon the subject; but as the capture was made at a distance from the port, a question is started whether it is to be considered as a capture by the whole fleet or only by the individual ships by which she was pursued and taken. Now, it must have presented itself to the minds of all the naval officers employed upon that duty that these ships would, if possible, attempt an escape, and there is abundant evidence to show that every precaution was adopted to frustrate the attempt. Every necessary arrangement was made by Sir Thomas Trowbridge with the commanders of the different ships, in expectation of this probable event; they were ordered to be on the look-out, and the proper signals to be used in case the blockaded ships should attempt to escape were regularly communicated. It does not appear that any particular ships were assigned to proceed after them, and I think one may see a sufficient reason for that, because the time of the escape, the course they might adopt, and

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the state of the wind at the time when the escape was to be attempted, were all equally uncertain. In such a state of circumstances no other order could be given than the general order, that in whichever quarter the attempt might be made a sufficient number of the contiguous ships should pursue. There was a general communication to all the commanders that they were to act as emerging circumstances might require; but it never could have been intended that every ship of the squadron was to join in the pursuit when it would have had the effect of opening the harbour for all other blockaded vessels, of which some, in consequence of this total desertion of the blockade, must have effected their escape. The *animus persequendi* is sufficiently shown by the part which they took in the general plan of co-operation; they were all in readiness to act under the general order to pursue as occasion might require. It appears that they had information, not only of the intention to escape, but also, in a sort of general though uncertain way, of the time and manner of it. It was known that on the first dark night the enemy were to push out some merchant ships as a decoy, and that then the *Guilliaume Tell* was to follow. She was seen in a state of preparation, and was expected on this day to make the attempt the following night, so that Sir Thomas Trowbridge, and his ship the *Culloden* in particular, would be pretty much on the alert. It is proved that he ordered a lieutenant and three men to be sent alternately from the *Culloden* and *Northumberland* to a post on shore called the Belvidere, to give notice of the movements of the enemy, and that upon observing them under weigh a preconcerted signal was to be made from that post, by which it was to be understood that the French ships were in motion, and that every effort ought to be made to intercept them. The two ships setting up the present claim, the *Culloden* and *Northumberland*, were lying at anchor in the Marsa Sirocco Bay, near La Valette. The *Northumberland* had a number of her crew sick on shore at the time, but still she was not disabled by that deficiency of her crew, at least in the opinion of the commander, as she was actually ordered to sea the next morning in pursuit of the French ship, though that order was countermanded upon its being understood that the *Foudroyant* and *Lion* were up with the enemy. It has also been objected that the

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Culloden was not in a fit condition to put to sea, in consequence of an accident which she had met with on going into the bay; but it clearly appears that the damage had been repaired, and in proof of that there is the fact that she afterwards made the voyage from Malta to England without receiving any further repairs whatever. At such a moment of expectation and anxiety, it cannot be supposed that Sir Thomas Trowbridge put his own ship out of the course of co-operating and participating in whatever hazards or advantages might arise. It is proved that every evening men were sent from the *Culloden* and *Northumberland* to watch the movements of the enemy; that on the night of the pursuit the signal rockets and the flashes of the guns were seen from these two ships in the neighbouring bay, and that a seaman was dispatched from the signal station to inform them that the *Guilliaume Tell* was in motion. It cannot be denied, therefore, that they knew perfectly well what was going forward, and that they were co-operating in the measures established generally for preventing the escape. But it has been objected that they had not the physical means of pursuing, because the state of the wind was such that they could not quit the bay. Whether they would have pursued, if it had been physically possible, it is not necessary to inquire. In the case of chasing by a fleet, the *animus persequendi* in all is sufficiently sustained by the act of those particular ships which do pursue. It is, I think, highly probable that even if the wind had been fair, the *Culloden* and *Northumberland* would have remained, as some of the other ships off La Valette did, in a state of inactivity, reasonably judging from the precautions taken, and from the flashes of the guns, that a sufficient force had already gone upon the service. Therefore, unless it can be maintained, which it certainly cannot, that the whole of a squadron must in all cases pursue, and that the other ships which remained inactive off La Valette are not entitled to share, upon what principle are these two ships to be excluded? But it has been urged that, as the wind then was, ships of their burthen could not have cleared the shoals so as to get out; and it comes therefore to a question of law, whether such an intervention of physical impossibilities will exclude a ship forming part of a squadron associated for the express purpose of making the capture. There

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have been cases in which it has been determined that physical impossibilities of some permanence, and which could not be removed in time, would have such an effect, as, for instance, in the case of a ship lying in harbour totally unrigged, which has been held to be as much excluded as one totally unconscious of the transaction, because by no possibility could that ship be enabled to co-operate in time. But I take it that in no case the mere intervention of a circumstance so extremely local and transitory as the accidental state of the wind has been made a ground of exclusion. The interests of joint captors would be placed on a very precarious and uncertain footing indeed if a doctrine were to be admitted which referred them to the legal operation of a casualty so variable in itself, and so little capable of being accurately estimated. It being proved in this case that the whole fleet were acting with one common consent, upon a preconcerted plan for the capture of this prize, it was as much a chasing under orders from the officer in command as if it had actually taken place in the open sea. It is a chasing by signal and in sight of these two ships which, even if they had not been incapacitated by the state of the wind, in all probability would not have thought it necessary or proper to join the pursuit. The cases which have been cited were very different from this; the *Genereux* was captured upon the coast of Sicily, at the distance of twenty-two leagues from Malta, by a part of the squadron which were sent to look out for her, while the rest kept their station off La Valette; there was no fight, and the utmost they could bring the case up to was, that a firing of guns was heard by one of the stationed ships. In the case of the *Mars* there was neither fight nor association, and in the *Trautmansdorf* there was the same defect of a want of association. Now in this case there was not only an actual fight, not only a perfect connusance of what was going forward, but as complete and uniform and persevering an association in this particular object, as well as in the general objects of the blockade, as can be imagined. I am therefore of opinion that the *Culloden* and *Northumberland* are entitled to share, and that the same right will extend to the other ships which remained off La Valette, although they have not made themselves parties to this suit.

[Edw. 17.]

THE THOMYRIS.

Continuous Voyage—Sale of Goods on Ship—Transfer to another Ship.

The sale of goods at an intermediate port, and their transhipment to another vessel for conveyance to their destination, does not break the continuity of a voyage.

1808 *August* 9.

The question which arose in this case was respecting a quantity of barilla which had been brought to Lisbon in an American vessel from Alicant, in Spain, and was there put on board this ship for the purpose of being carried on to Cherbourg. It was contended on the part of the captors that this was a mere transhipment of the barilla from one vessel to another at an intermediate port, which under the authority of former decisions was not sufficient to break the continuity of the voyage—that it must be considered as one entire voyage from Cherbourg to Alicant, and consequently that the barilla was subject to condemnation under the Order in Council (*a*) prohibiting the trade from one enemy's port to another.

Sir W. Scott.—This was the case of an American vessel laden with a cargo of barilla and cotton, and captured on a voyage from Lisbon to Cherbourg. The ship has been restored, and the Court directed further proof to be made of the property of the cargo, and also as to the importation of the barilla into Portugal. The witnesses examined in preparatory state that it was brought on board in lighters from an American brig then at Lisbon; and the mate, who speaks with less reserve than the others, says that the brig was called the *Hannah*, and that he was informed by the crew with whom he was acquainted that she came from Alicant, in Spain. This is a material fact, and it is fully established by the proofs now brought in by the claimants. In the original papers there is nothing particularly pointing to the barilla so as to furnish any explanation of its former history: there is only a certificate of the

(*a*) Order in Council 7th January, 1807: "No vessel shall be permitted to trade from one port to another, both which ports shall belong to, or be in the possession of, France or her allies."

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Spanish Consul at Lisbon, describing generally the whole of the cargo as the produce of the Portuguese colonies. It is quite unnecessary for me to say that the Court can pay no attention to a document like this, which carries upon the face of it the condemnation of its own credit; and it is not much assisted by the kind of apology which has been suggested, that it must have been a mere involuntary mistake of the writer, and not intended to apply to the barilla, because it would be absurd to describe that as coming from places which it is notorious do not produce it. That is an excuse which cannot be admitted; it is the duty of every person who grants a certificate to know precisely what it is that he does certify, and to what extent, otherwise all faith in public instruments must be at an end. And when it is said that at any rate this certificate could deceive no one, as it is notorious that barilla is not the production of the Portuguese colonies, I am by no means certain that the fact is of such universal notoriety; it is, I think, extremely possible that it might be unknown to many of the commanders of his Majesty's cruisers, some of whom might have been deceived by such a misrepresentation.

In all cases of this description it is a clear and settled principle that the mere transhipment of a cargo at an intermediate port will not break the continuity of the voyage, which can only be effected by a previous actual importation into the common stock of the country where the transhipment takes place. It therefore became absolutely necessary that the Court should require further evidence upon the subject, because if there was nothing more than a transhipment of the cargo from one vessel to another, that will not alter the transaction in any respect, and it must still be considered as the same continuous voyage to the port where the cargo was ultimately to be delivered. It is, however, contended that there was not simply a transhipment of this cargo, but likewise an actual sale of it upon its arrival in the Tagus; and, therefore, that the question arises whether the additional fact of a sale being made of the cargo at the port of transhipment will, under all the circumstances attending such sale, give it the character of a new voyage, or whether the two parts are so linked together that it must still be considered as one entire voyage from Alicant to Cherbourg. The fact that the goods after their arrival in the

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Tagus were converted by sale has been much relied on as satisfactory evidence of an actual and *bonâ fide* importation into the country; and, generally speaking, it is so, because it is to be understood in most cases that goods are actually imported before they can be sold; but it has never been decided that where goods are brought to an intermediate port, not *animo importandi*, but sold whilst water-borne and then transhipped, such sale with transhipment makes a new exportation from the port in which it is transacted. In order to constitute an exportation there must have been a previous importation in the case of commodities not native; where a cargo is sold to be immediately transhipped and exported that can never be considered as any importation at all; it is all one act, of which the sale and transhipment are only stages, they lengthen the chain but do not alter its direction. Now in this case the evidence of importation (and indeed that of sale) is very imperfectly sustained; there is no clearance, no custom house certificate to show that the duties have been paid; the whole is made to rest on the affidavits of the three persons immediately interested in the transaction, the buyer, the seller, and the broker; and how does the case stand upon their own representation of it? I shall first consider the affidavit of the seller, the person who is pretended to have imported the goods, if there really was any importation. He says, "that he caused to be sold at public auction to Basto & Co., through the intervention of a public broker, 460 bales of barilla, which were imported by him from Alicant for his own sole account, risk, and benefit, in the American ship *Hannah;* that the said barilla was unladen at Lisbon, and weighed and paid the duties at the custom house, and was afterwards shipped on board the *Thomyris*." Mr. Basto, the purchaser, swears "that it was put on board the *Thomyris* after it had been put on shore and paid the duties at the custom house at Lisbon"; and the affidavit of the broker is to the same effect. I find difficulty in reconciling this representation of the matter with the account given in the examinations in preparatory, where it is said that the barilla was brought in lighters from on board an American vessel. Am I to suppose that the barilla was first landed, and then put on board the *Hannah* again for the purpose of being transhipped in lighters to the *Thomyris?* Such a circuitous mode

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of transacting business is not very intelligible; but taking the fact to be in some way or other as they have represented it, will such a sale as this of goods not imported and transferred before any thing that can be deemed an importation, for the avowed purpose of being immediately sent off, break the continuity of the voyage? It is clear from the broker's account contained in his certificate that it was perfectly disclosed to the seller or his agent that these goods, which at the time of this sale had never been imported, were to go immediately to Cherbourg. He therefore brings the goods from the enemy's country without any intention of importation on his part, and instantly transfers them for the known purpose of conveying them to another port of the enemy. The buyer purchases them yet unimported from the enemy's country, and sends them forward on his own account to a port of the enemy. How far in substance does this differ from a sale on the high seas where no custom house forms whatever would have been interposed? Here is a custom house form interposed, provided faith is given to this imperfect proof of it, amounting to this, that the seller shall after the sale pay the duty for the re-exportation. So that either the duty of importation has not been paid at all, or the same person who pays it, pays likewise the duty of the re-exportation, and so combines in himself the characters of importer and exporter. The goods are not delivered, and do not become the actual property of the purchaser till after the charges of exportation are satisfied by the seller, who thus constitutes himself the legal exporter. A certificate is exhibited by which some merchants at Lisbon attest, "that to any ship coming from foreign parts shelter of the cargo is allowed, and that under such shelter goods are sold for re-exportation." Goods then are sold for this purpose of being carried away not under importation but under shelter. There is, in fact, neither import nor export, but the State raises upon the commodity a transit duty without either the one or the other. This is no breach of the continuity of the voyage (*a*); if permitted, it is clear that there would be no means

(*a*) In the *Die Junger Charlotta*, December 7, 1809, a neutral ship was compelled by stress of weather to put into Oporto, where part of the cargo was sold to a Portuguese merchant, but was not landed, and was carried on to an enemy's port. By the Prize Court the ship was [1 Acton, 171.]

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of preventing an universal evasion of that order which prohibits the trade between the ports of the enemy. The produce of the North might be conveyed to the South, and *vice versâ* by the intervention of merchants stationed at Lisbon at the mere inconvenience of touching at the Tagus and paying a slight duty of transit. It has been said, and justly said, that it was not the intention of his Majesty's Government to break in upon the accustomed trade of neutrals. I am of opinion that this is not so to be considered, even on the supposition that the fact was correctly described on the very defective proof of it that has been exhibited. In what sense is it a trade of Portugal? Here is neither import nor export; here is nothing but the transit of foreign goods subjected to an operation of finance on the part of the State. How long such a practice has obtained is not shown; so long as it does not interfere with the rights of third parties, it is no subject of the observation of others. But if an occasion arises on which another State acquires and exercises a right of prohibiting the passage of goods from one enemy's port to another, it appears to fall directly under that description, and is not privileged to elude that right by the plea of being an accustomed trade of the country.

Barilla condemned.

[Edw. 32.]

THE COMET.

Blockade—Ingress—Neutral Vessel—In Ballast.

It is illegal for a neutral vessel to enter a blockaded port in ballast.

1808 *October* 25; affirmed *March* 3, 1810.

Sir W. Scott.—This is a proceeding against an American vessel which was captured on a voyage from New York to Nantes; there was no cargo on board, as the ship had sailed in ballast, for the purpose, as it is said, of bringing away French produce, which had become the property of merchants in America, prior to the date of the order restricting the trade with the enemy's ports. Under

ordered to be restored; but the decree was reversed by the Lords Commissioners of Appeal without stating any reasons for the judgment, but apparently, as the *Thomyris* was referred to in the argument, on the ground that the continuity of the voyage had not been broken at Oporto.

that Order in Council the port of Nantes, when this vessel sailed, was subject to a rigorous blockade, and it has not been contended generally that a ship can enter a blockaded port even in ballast; that is a point upon which this Court has already decided: if wrongly, the decision must be corrected elsewhere. The rule of blockade has, it is true, been so far relaxed as to permit an egress to ships innocently in the port before the restriction was imposed, and even with cargoes, if previously laden; but in the case of ingress there is not the same reason for indulgence, there can be no surprise upon the parties, and therefore nothing short of a physical necessity has been admitted as an adequate excuse for making the attempt of entry. Generally, where a neutral ship is proceeding to a blockaded port, it must be supposed that she is going there for the purposes of trade. If she goes in ballast, it cannot be with the intention of being laid up for an indefinite time in a foreign port until the blockade is raised. It is a presumption which this Court, acting on reasonable principles, is bound to entertain and apply, that she has no other errand there than to keep alive that commercial intercourse with the interdicted port which it is the object of the blockade to prevent. In some cases, no doubt, the rules of blockade are attended with considerable inconvenience to neutrals in abridging their trade, and it is always much to be lamented when they do; but they are inconveniences which arise necessarily out of a state of war, and what neutrals must submit to, looking as well to the rights of belligerents as to the interests which they themselves derive from their neutrality, and which furnish no small compensation. To say that this property was actually locked up by the blockade, and that there was no other mode of extricating it, is going further than is exactly true: many channels of communication are still open, as these States are at peace with each other. The property might have been sold for its full value, and the money remitted, for it is not to be asserted that at the time this capture took place there was no practicable mode of remittance between France and America. It is stated, I observe, "that the property in question consists chiefly of brandy, and other proceeds of American goods sent in before the restriction was imposed." And there is a bond, dated 9th June, 1808, which was found on

1808 *October* 25. THE COMET. Sir W. Scott.

board, reciting a permission from the President of the United States for this vessel to proceed in ballast to Nantes for the purpose of bringing home brandy and other articles the property of the claimant, on condition that she is not to import any other merchandise, under a penalty of 40,000 dollars. The words are "that she shall not during the voyage, either directly or indirectly, be engaged in any traffic, freighting, or other employment, and that no goods, wares, or merchandises shall be imported in such vessel other than the property for which such vessel has obtained such permission, or the proceeds of property shipped *bonâ fide* by a citizen of the United States prior to the 22nd day of December last." There is nothing in this recital that points to the time at which these return goods were purchased and became the property of the exporter. It is not required that they should have become so before the commencement of the blockade. All that is required is that they shall be the proceeds (whenever acquired) of goods shipped before such a time; and it would sufficiently answer that description if they were purchased the week or the day before the permission was obtained. The permission from the President of the United States can only have been intended to exempt this American vessel from the penalties attaching to the violation of their own embargo, for it cannot be supposed that the government of a neutral State would assume to itself the power of relaxing a blockade. That right rests in the belligerent alone, and meaning to express myself with all the reverence which is due to the governments of neutral nations, I must observe that it is not to be expected that the belligerent country should trust the preservation of its rights to the vigilance of others. The relaxation must be the act of the belligerent upon a representation made on the part of the neutral State, or under a compact between the two governments, where it has been found to press with undue severity on the commerce of the neutral State. The permission which appears to have been given by a former captor to this vessel to proceed on her voyage under an ignorance of the law can make no difference. Where there has been misinformation as to the fact it may have a different effect; but the neutral is bound to know the law, and cannot allege that he has been ill-instructed in that by a belligerent cruiser. If the cruiser had told the parties they might go

on whilst they were connusant of the fact of the blockade, such misinformation upon a point of law would not protect the ship. It does not much extenuate the misconduct of this vessel that she had passengers of a military description on board, though, perhaps, not in such numbers as to produce a condemnation. 1808 *October* 25. THE COMET. Sir W. Scott.

Ship condemned.

THE EXCHANGE. [Edw. 39.]

Capture—Cargo—Illegal Destination of Ship—General Liability of Cargo Owner.

When it is proved that a vessel is bound for an illegal destination, and is captured when proceeding thereto, the cargo is also *primâ facie* liable to condemnation. The exception to the rule considered.

THIS was an American vessel with sugars from Guadaloupe, bound ostensibly to London, but captured close to Cherbourg. The ship had been condemned on a former day, and the present question was whether any distinction could be made in favour of the cargo, which was claimed on behalf of the house of Simond & Co., of London. It was stated that at the time of the breaking out of hostilities considerable debts were due to the house of Simond & Co. from French subjects resident in the island of Guadaloupe, in consequence of which his Majesty's licence was obtained, permitting them, through their agents, to receive produce in payment of the debts, and that this cargo was a part of the produce so received, and was consigned to claimant's house in London by their agents, Ardene & Guery, of Guadaloupe. 1808 *December* 6.

[The Court dealt with the facts as to the destination of the ship.]

SIR W. SCOTT.—This being the case [that the vessel was bound for an illegal destination], I am only to consider whether there are any circumstances which can exempt the cargo from sharing the fate of the ship. It has been suggested that though the ship was going to a French port, it might not be for the purpose of delivering her cargo there; but there is no rule which has been

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more clearly established in principle, than that the port of destination, being an interdicted port, is the port of delivery of the cargo. It is impossible to relax that principle; if it were once admitted that a ship may enter an interdicted port to supply herself with water, or on any other pretence, a door would be open to all sorts of frauds without the possibility of preventing them. The Court applied the principle when it was first led to the consideration of cases of blockade, and there is none to which it has more inflexibly adhered. I am therefore to take the question with this condition, that the ship was going to a French port for the purpose of delivering her cargo; and I really know of no cases, except those which have been cited, where the owner of the cargo has been relieved from the penalty attaching to the ship. The cases cited, which are familiar to us all, were cases of a supervening illegality, where it was shown that the owner of the cargo stood clear of any possible intention of fraud, and that by proofs found on board at the time of capture, and not supplied afterwards. For instance, where orders had been given for goods prior to the existence of a blockade, and it appeared that there was not time for countermanding the shipment afterwards, the Court has held the owner of the cargo not responsible for the act of the enemy's shipper, who might have an interest in sending off the goods in direct opposition to the interest of his principal. And the same indulgence has been exercised where there was no knowledge of the blockade till after the ship had sailed, and the master, after receiving the information, obstinately persisted in going on to the port of his original destination. In both these cases the facts speak for themselves, there can be no imposition, the Court has only to look at the dates to satisfy itself of the purity of the owner of the cargo; but in this instance there must either be fraud in the French shipper at Guadaloupe, or the master has been guilty of an act of barratry. If the fraud is in the French shipper, it is not, perhaps, too hard a rule to hold the British merchant bound by his act, as he vouched for his integrity to the British Government; at the same time, if the transaction has been conducted in a manner so different from the orders which were given, and these goods were really sent in fraud, the agents who violated those orders will be answerable to their employers. But suppose it to

have been an act of barratry in the master, which I must confess I think quite incredible without the privity of the agent shippers, it is a misfortune for which a remedy must be pursued against him. Taking it, therefore, at all events to have been a fraud on the British merchants, I find an insuperable difficulty in giving any direct protection to their claim; if the cargo was going on a destination to a French port, in consequence of a breach of faith, either in the agents or the master, they are to indemnify themselves by recourse against the wrongdoer. I feel myself, therefore, under an obligation to follow up the judgment which has been given by the Trinity Masters upon that fact, and to apply it as well to the cargo as the ship.

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THE EXCHANGE.

Sir W. Scott.

THE MERCURIUS.

[Edw. 53.]

Licence to Trade—Touching for Licence—Continuous Voyage.

Where a vessel intending to call at a British port in order to enable her to obtain a licence to trade with a blockaded port was captured before reaching a British port:—*Held*, that the voyage to the blockaded port was not continuous, and that the vessel must be restored.

1808 *December* 16.

This was the case of a ship under Bremen colours which at the time of capture was proceeding with a cargo of brandies on a voyage from Bordeaux to Bremen, but with directions to put into a British port for the purpose of obtaining a licence from this Government; and the question was whether an actual destination to a port of this country according to those directions was sufficient to counteract the imputation of a fraudulent breach of the Order in Council, and the effect of a continuous intention.

Sir W. Scott.—I think I must take it as fully proved that the intention of the party was to come to this country to obtain a licence to proceed to Bremen with the cargo, which, as coming from Bordeaux, could not otherwise be carried on. This fact is disclosed in the papers, and is as strongly guaranteed as any fact can be; and to this I have to add, that the Court has every reason

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to presume that the application would have been made to government in a fair, open, and unreserved manner. The parties have acted throughout *aperto voto*, there is nothing to lead to a suspicion of disingenuous conduct. Then the question comes to this, whether such a voyage intended ultimately to Bremen, but first to this country for the purpose of obtaining a licence, without which it was to be relinquished, is a continuous voyage, and therefore illegal? I think clearly not: it is a contingent voyage depending upon the determination, not of the parties themselves, but of the British Government; if the ship went on at all, it was to be the act of the British Government. This is very different from the case of American ships touching at their own ports, to which it has been assimilated; here the voyage was to be continued only if legalized by the government which would have a right to complain of the illegality; no two cases can be more unlike. The parties seem to have acted on a persuasion, perhaps too confidently entertained, that such a licence would be granted, misled either by some speculative reasonings of their own, or by some indistinct experience of what had been done in other cases. They might think that the employment of British agency in the transaction, and other advantages resulting from it to this country, might not be out of the view of the policy of government. It has been objected to the cases of the licences which have been cited, that they were obtained under special circumstances, and that they do not support the inferences which the parties had drawn from them. But supposing their conclusions to be erroneous, yet if there was an honest intention on their part, it would be very hard to visit such a case with the penalties of a fraudulent transaction. Where everything was to be disclosed, and referred to the discretion of the English Government, the case cannot be put on a footing with a continuous voyage framed for the mere purpose of a literal evasion. Then it is said that no instructions were given to Mr. Heyman for the regulation of his proceedings here in case the licence should not be obtained; that might be an indiscreet omission, but it does not alter the case. He must then have written for instructions, or have done the best he could at his own discretion under the circumstances. Upon the whole, I see no reason to depart from the opinion which I expressed in the case of

the *Minna* (*a*); but that, it is said, was a case of circumstances, and so is every case of this sort a case of circumstances; and the party had a right to take his chance upon the circumstances of his own case, and to make his application to those who were to judge of the propriety of complying with it. As to any conditions that might have been imposed by the British Government, how does it appear that they would not have been acceded to by the claimant? If not, there would have been no violation of law; the matter would have ended here, and the voyage have been brought to its termination in a port of this country. I cannot, under any view of the case, bring myself to regard it as a fraudulent continuous voyage. There was no act either done or to be done to found the imputation of fraud. On the contrary, there is sufficient proof of an honest intention to come to this country to procure the licence, and to act conformably to it when granted; and I shall, therefore, restore on payment of captors' expenses.

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December 16.

THE MERCURIUS.

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THE FORTUNA.

[Edw. 56.]

Capture—Freight.

Freight is not due to a captor on goods not brought to the original port of destination, and this principle applies though they are afterwards sold in this country.

1809
January 27.

THE question in this case was whether freight was due to the Crown on certain Portuguese goods on board this and other Danish ships which had been detained under the Danish embargo (*b*) and afterwards condemned to the Crown.

On behalf of the Crown it was contended that these cases were strictly within the principle of a virtual election, as the cargoes had actually been sold in this country; and although at the time of capture they might have gone on to Portugal, the claimants must have brought them back again, as they would have arrived

(*a*) This was a case very similar to the present. The ship was captured on a voyage from Bordeaux destined ultimately to Bremen, but with orders to touch at a British port, from whence she was to resume her voyage, if permitted.

(*b*) 2 Sept. 1807.

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THE FORTUNA.

there on the eve of the irruption of the French into that country, and consequently that it would not have been an effectual arrival for the purposes of sale.

On the other side it was urged that the contract of affreightment was not fulfilled, inasmuch as these cargoes were not carried to their port of destination, and that the grounds suggested were insufficient to show a virtual election of the ports of this country.

SIR W. SCOTT.—I have no doubt whatever upon the rule to be applied to these cases, as it arises out of the general principle. It is a claim for freight on the part of the Crown upon a supposed right of the captor, to whom the Crown is substituted, and whose right is derived from the owner of the captured vessel. It is possible that, under certain circumstances, the Crown may not succeed to all the rights of the captor, and still more possible that the captor may not succeed to all the rights of the owner of the captured vessel; but the first enquiry is, whether the owner would have been entitled to freight. He could have no right but upon an entire execution of the contract, or such an execution as he could effect consistently with the incapacities under which the cargo might labour. Where such an incapacity on the part of the cargo occurs, he has done his utmost to carry the contract on to its consummation; it is a final execution as to the owner of the ship, inasmuch as it does not lie with him that the contract is not performed. On the other hand, where the vessel itself is incapacitated, no right accrues to her owner; he can have no right to demand that for which he stipulated only on the performance of his engagement. The general principle has been stated very correctly, that where a neutral vessel is brought in on account of the cargo, the ship is discharged with full freight, because no blame attaches to her; she is ready and able to proceed to the completion of the voyage, and is only stopped by the incapacity of the cargo. In all cases in which the captor has received freight the contract had been consummated and the goods brought to the original port of destination, and to this rule the Demerara cases furnished not an exception but only a fair application of the principle. In those cases the English owners made an affidavit in

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support of their claim, stating that they would have brought the cargoes direct to this country, but that they were obliged by the law of Holland to proceed first to a Dutch port, meaning afterwards to bring them on to England. It appeared, therefore, on the affidavits of the claimants themselves, that the ports of this country were those to which they would primarily and preferably have proceeded if they had been permitted; and, consequently, as the goods were in fact brought to their real though not their actual destination, the Court was of opinion that the captors were entitled to freight. But these are cases of Danish ships that were going to Portugal with Portuguese cargoes on board, and were stopped. Why? Not on account of the goods, which at that time were entitled to a free passage to Portugal, but on account of the ships which were detained under the embargo on the commencement of hostilities between this country and Denmark. The ship was the subject of detention, not the goods, which might have gone on; and therefore the owner of the vessel had no right to say that freight was due, still less has the captor or the Crown. Whether, as the cargoes were brought into the ports of this country, the parties may have thought proper to dispose of them here is a matter into which the Court will not enquire, because it lays aside all considerations of more or less advantage arising to the property from the change of destination; that is merely an accidental circumstance, which has no connection with the principle upon which freight is given. It may happen that cargoes are sometimes brought to a more beneficial market in consequence of capture, but the Court will not institute an enquiry into such a fact, laborious in its process and uncertain in its result, when the only question is whether the contract of affreightment has been fulfilled or not. But it is said that these ships were taken at a time when this country and Portugal were in a state of hostility, or, rather, of approaching hostility, and it certainly did happen afterwards that in consequence of the unfortunate predicament in which that country was placed the goods could not go on, but there was not an existing incapacity upon them at the time of capture; it was entirely owing to the ship that they were prevented from proceeding to the port of their destination. The Court sometimes looks to the circumstance of an approaching war, where the expectation of such

1809 *January* 27. THE FORTUNA. Sir W. Scott.

an event appears to have guided the conduct of the parties themselves when the contracts were entered into, and in such cases it feels itself justified in applying the principles that belong to a state of actual war. But nothing of that kind appears in the present case; there is no part of the transaction that points to such an expectation, and, therefore, the mere existence of a state of things verging to hostilities between the two countries is a circumstance which the Court cannot take into its consideration.

No freight due.

[Edw. 60.]

THE NEUSTRA SENORA DE LOS DOLORES.

Capture—Restitution—Outbreak of War—Peace—Damages and Costs.

A decree of restitution of a Spanish ship was made, with costs and damages. War broke out between Great Britain and Spain before the decree was perfected. No step was taken during the war to obtain the condemnation of the vessel. *Held*, that on peace being made the claimant was in the same position as before the war, and was entitled to damages and costs.

1809 *March* 18.

THIS was the case of a Spanish ship which had been captured before Spanish hostilities, and restored with costs and damages; but no further proceedings took place at the time in consequence of the breaking out of the war between the two countries. An application was now made to the Court for a reference to the registrar and merchants, on the ground that hostilities having ceased the Spanish claimant was entitled to the benefit of the former decree for costs and damages.

In support of the application, *Arnold* and *Swabey*.

Contra, *Adams*.

SIR W. SCOTT.—I am clearly of opinion that the objection is not sustainable. It is true that the intervention of hostilities puts the property of the enemy in such a situation that confiscation may ensue, but unless some step is taken for that purpose, unless there is some legal declaration of the forfeiture, the right of the

owner revives on the return of peace. This is an acknowledged principle in the Courts of common law, borrowed, in all probability, from the general law of nations, and I see no reason for any distinction here. We know that, in captures at sea, the general law is, that the bringing *infra præsidia*, and even a sentence of condemnation is necessary to convert the property; and although in some instances positive institutions have determined that a possession of a certain number of hours is sufficient, yet this proceeds upon the ground that a possession of so many hours is an evidence of firm possession. Here there was no bodily possession, nor indeed could there be; but still some judicial act might have been done declaratory of the forfeiture to the Crown of those rights which vested in the claimant under the decree for costs and damages. It appears, however, that no step was taken for this purpose on the part of the Crown, and I am, therefore, of opinion that the rights of the Spanish proprietor do revive, and I refer it to the Registrar and merchants to ascertain the amount of the compensation to which he is entitled under the decree.

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THE NEUSTRA SENORA DE LOS DOLORES.

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THE BELLONA.

[Edw. 63.]

Joint Capture—Revenue Cutter—Sight.

A revenue cutter is not entitled to share of a prize merely on the ground of being in sight at the time of capture.

1809 *March* 1.

IN this case a claim of joint capture was set up by a revenue cutter, on the ground of being in sight. There was no act of assistance, and therefore the only question was whether the revenue cutter, upon the mere fact of sight, must necessarily be presumed to have the *animus capiendi* so as to entitle her to share.

For the captor, the *King's Advocate* and *Swabey* contended that a revenue cutter was to be considered as a private ship of war, and that the fact of sight, without co-operation, would not entitle her to share with the actual captor, which was in this case a King's ship.

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On the other side, *Adams* and *Jenner*.—It is true that the mere fact of sight will not entitle a privateer to share with a King's ship, because a privateer may choose whether she will pursue or not, and consequently the *animus capiendi* is not necessarily to be presumed. But revenue cutters stand upon a different footing, and cannot be classed in all respects with private ships of war. In the case of the *Active* (*a*), which had been recaptured by an armed revenue cutter, a question arose whether the recapturing vessel was to take a salvage of one-sixth as a private ship of war, or whether she was to be considered as a King's ship. The Court in that case gave only a salvage of one-eighth, and therefore if vessels of this description are to be considered as King's ships where it operates to their disadvantage, they are clearly entitled to the same character where it may have a beneficial effect. These vessels are in the public service, they are a description of force relied on for the public security, and it cannot be said, because the protection of the revenue is superadded to their other duties, that the capture of the enemy is not their immediate duty.

The *King's Advocate*.—The case which has been cited has been long overruled in this Court, which gives one-sixth to revenue cutters, the same as to privateers in cases of salvage.

SIR W. SCOTT.—This is a question arising on the admission of an allegation stating an interest, as joint captor, on the part of the *Falcon* revenue cutter, armed with a commission of war. I observe that there is no averment of actual co-operation, or that there was any indication of a design to co-operate in the capture. All that the allegation pleads is the mere fact of sight, and therefore if this revenue cutter is entitled to share it must be upon the ground of constructive assistance. It is a known rule of law that the mere fact of being in sight would be sufficient to entitle a King's ship, because in ships fitted out by the State for the express purpose of cruising against the enemy, the *animus capiendi* is always presumed; but this presumption does not extend to privateers. In the one case the duty is obligatory; in the other, where private individuals

(*a*) Adm., May 10th, 1798.

make captures at their own expense, they are engaged in a mere commercial speculation, to be carried into effect by military means, but dependent upon their own will in the particular acts and exercises of their authority. Although they are authorized they are not commanded to capture; it is a matter in which they are left to their own discretion. But these vessels, employed in the service of the revenue, are a class of ships of an anomalous kind, partaking in some degree of both characters; they belong to the government and are maintained at the public expense, but it is not for the purpose of making captures from the enemy. On the other hand, they have commissions of war; but then these are private commissions, which impose no peculiar duties upon them. They are not bound to attack and pursue the enemy more than other private ships of war, and they are likewise unfavourably distinguished in this respect, that the advantages of capture are not held out to them, the interest of all captures made by them being reserved to the Crown. Primarily their duty is to protect the revenue, and the capture of the enemy's vessels is engrafted upon their original character. All they derive from these commissions is an authority to attack the enemy, in addition to other authorities that belong to their original and proper employment. On principle, therefore, they can only be considered as private ships of war. They are under no injunction to cruise against the enemy, and are employed generally for fiscal purposes. It is true that there is the addition of a military commission in time of war, but that does not designate them anew; it merely puts them on a footing with other private ships of war, and I shall, therefore, reject the allegation.

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THE PRINCIPE. [Edw. 70.]

Capture — Duty of Captors — Improper Port — Restitution — Disallowance of Expenses.

It is the duty of a captor to take a prize into a port suitable for her, and where expenses are incurred by captors who have had reasonable ground for seizure in consequence of taking a vessel into a port not fit for her, such expenses will be disallowed on restitution.

1809 *March* 22.

THE question in this case was, whether the captors were entitled to their expenses, which in the common course of these Portuguese

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THE PRINCIPE.

cases had usually been allowed. The ship and cargo had been pronounced to be Portuguese property, reserving the question of captors' expenses; and it was now objected that the captors were not entitled to that indulgence, as they had misconducted themselves by carrying the vessel to an improper port, in consequence of which she sustained damage, and it became necessary to unliver the cargo.

SIR W. SCOTT.—This is the case of a Portuguese ship of very large dimensions, which was proceeding at the time of capture with a cargo from one of the Portuguese settlements to Lisbon. The detention of the ship was at the time perfectly justifiable, as it was for the purpose of preventing her from falling into the hands of the French, who were then in possession of Lisbon. The Court has always held in these cases that the captors are entitled to full indemnification for any expenses which may have arisen; and it is with pain that it ever feels itself compelled to deviate from the rule. But it would be carrying this indulgence of the Court much too far to say that upon restitution of the property the Portuguese owners should be answerable for expenses wantonly incurred against all reason and judgment. It appears that the ship was first brought into the Channel under pretence of carrying her to a port in England, but that the prize master afterwards shaped his course for Guernsey, contrary to the representations of the master of the ship, who conceived that it was not a proper place for the reception of so large a vessel. It is no justification to say that this was the port to which the privateer belonged, and that therefore it was the proper port to carry her prize to. That is not necessarily so: the first point to be looked to is the security of the vessel seized, and everyone must see that the road of Guernsey was not a fit place for that purpose. The Portuguese master took the alarm, and called his crew together to protest, but still the captor persists in his intention of carrying this vessel into an open port in the winter season of the year. To say that every attention was paid to her security afterwards is not sufficient. If she was put into a state of insecurity that act cannot be purged away by any subsequent care during her continuance in so hazardous a situation. It was evident she could not remain there till the case was determined,

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and if any expense has arisen in consequence it must fall upon the captors. It has been said that they offered to convey her to a port in England afterwards, and that the offer was refused by the Portuguese master; but how was his consent in any degree necessary when they had the ship in their hands and under their control? As far as I can collect the fact it was thus: finding the ship was not in good condition, and that the capture was not likely to end in a condemnation, the captors were desirous of getting rid of the matter, and made an offer to the master to proceed to Portsmouth on his own responsibility. Now, if that was the proposal, if he was to take the risk upon himself, it was an offer which he was not only not bound to accept, but an offer which it was his duty to reject. I am, therefore, of opinion that the captors are not exonerated; and in granting them their expenses generally I shall disallow the expense of the unlivery of the cargo, which became necessary entirely from their own misconduct, in carrying this vessel to a place where she could hardly fail to receive some damage, and that, too, in opposition to the representations of the master (*a*).

THE PROSPER.—THE HOLSTEIN.

[Edw. 72.]

Freight—Restitution—Right of Crown.

The Crown is entitled to freight as succeeding to the rights of the enemy ship owners, though not decreed prior to the breaking out of hostilities.

1809
April 25.

THESE Danish ships had been captured on a voyage from Tonningen to Lisbon with cargoes documented as Portuguese property, and ultimately restored as such. The ships had been restored by consent in the first instance, reserving the adjudication of the cargoes and the question of freight and expenses: it was now submitted to the Court that in consequence of the subsequent intervention of Danish hostilities these freights should be condemned to the Crown.

SIR W. SCOTT.—In objection to this demand for freight on the part of the Crown, it is said that it will operate with a considerable

(*a*) See the *Washington*, Vol. I. p. 555.

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degree of hardship upon the owners of the cargoes in these cases if the demand is acceded to; on the other side it has been pressed, with equal earnestness, upon the consideration of the Court, that, unless the strict rule is applied, there will not be funds sufficient in the hands of the Crown to remunerate the captors. These are considerations to which I shall pay very little attention, as they can have no influence in the decision of the question. The Court must proceed upon general rules, and it will sometimes happen that general rules press hard in individual cases; on the other hand, I am not to look to a possible deficiency of the fund for answering other purposes. It is my business to apply the law to the case itself, and I have only to consider upon what principle of adjudication this question is to be determined. These Danish ships, which had not been brought in upon their own account, were restored by consent, reserving the question of freight and expenses; and the cargoes which stood over for adjudication have since been given up to the Portuguese claimants in consequence of the favourable change which has taken place in the situation of that country. It is clear that these cargoes were not originally destined to this country, and, by the general law merchant freight would not be due, because the contract of affreightment has not been completed. But in this Court it is held that where neutral and innocent masters of vessels are brought into the ports of this country on account of their cargoes, and obliged to unliver them, they shall have their freight upon the principle that the non-execution of the contract, arising from the incapacity of the cargo to proceed, ought not to operate to the disadvantage of the ship. This rule was introduced for the benefit of the ship owners, and to prevent the rights of war from pressing with too much severity upon neutral navigation. Now it happens that, in consequence of Danish hostilities, these freights have become enemy's property, and the question is whether the right passes over to the Crown. By the Order in Council which directs that freight due or payable to Danish subjects shall be paid to the Crown, it is decided that it does; but a distinction has been taken in this case on the ground that there having been no declaratory sentence, there is no vested interest. It is contended that the freight is a chose in action, and can only be recovered by a suit at law; and that here the Danish

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owner having become an enemy he cannot pray a sentence, and the right remains extrinsic. Now it is certainly true that the captor, which is the Crown in this case, does not acquire extrinsic right more than it would become subject to any extrinsic burthens which might attach to the ship; and, therefore, if this is an extrinsic right, it will dispose of the question. The first question then is whether it is to be so considered or not. Now, undoubtedly, when a ship is brought in, and arrives at what is legally considered as her port of delivery, the right to freight is not extrinsic. The master is not bound to establish his right by a proceeding at law; he has possession of the cargo, and has a right to retain that possession till his demand is satisfied; and this forms a material distinction from those other rights in which the intervention of a Court of justice is required. It is just the same with respect to the obligations of the vessel; if one of these ships had been in a private dock for the purpose of being repaired, the Crown could only have made the seizure subject to the detainer for repairs. But it is said that here there could be no corporal apprehension, because these cargoes had been separated from the ships; but in what manner had they been separated? Why, by substituting bail for the bodily possession of the cargo. This is done merely for the convenience of the parties, and is by no means intended to place the owner of the ship, who has a lien upon the cargo, in a worse situation; the Court merely substitutes one security for another, it changes the nature of his security, but does not lessen it. Suppose the Crown had seized the ship with the cargo on board, there can be no doubt that it would have been entitled to the freight, for the Danish master was entitled, and might have retained the cargo till he was paid; and unless it can be said that this practice of taking bail alters the nature of his right so as to deprive him of his legal remedy, he must be considered, in point of law, though not in point of fact, as still in possession of the cargo. Taking it, therefore, that the Danish master, when here, was entitled to the freight, the Crown, which is substituted for him (*a*), has the same right, and I do not see that

(*a*) In the *Constantia Harlessen* (April 4, 1810), money had been advanced during the voyage by the cargo owner to the master to prevent borrowing on a bottomry bond; such money was at the end of the voyage to be applied [Edw. 232.]

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the mere absence of a declaratory sentence imposes any additional hardship upon the owner of the cargo. It has been said that he might have shown cause against the Danish master; so he may now, and with more advantage against the Crown than against the Danish master, who was in possession of more facts to meet any objections which might have been made to the payment of the freight. And although I wish to press with as light a hand as possible on the owners of these Portuguese cargoes, yet, considering that there was no necessity for a declaratory sentence, and that this was a vested interest of which the Danish master was in possession, and of which he was not deprived by the mere substitution of the bail, I am of opinion that the Crown is entitled to the freight.

to average, or regarded as a payment in respect of freight. Sir W. Scott said:—"The ship was seized and condemned to the Crown, which then succeeded to all the rights of the Danish master against the cargo, and to all the obligations to which he had subjected himself, so far as they arise out of that identical transaction upon which his claim against the cargo is founded. There may be other rights and obligations arising out of foreign and remote transactions with which the Crown is not affected; and upon this principle bottomry bonds have been disallowed, either because they do not arise out of the individual transaction, or, if they do, because the obligation is contracted with third persons, and not between the owners of the ship and cargo. But the Crown is bound to take *cum onere*, though not *cum onere universali*; and as the owners of the ship and cargo were entitled to set off against each other all deductions arising out of this immediate transaction, the Crown, which succeeds to the rights of the neutral master exactly in that proportion in which he would have possessed them, in accepting those rights is bound to make such deductions as the Danish master would have allowed if he had continued neutral. Then, what was the condition of the neutral master, in common justice and by the law merchant, as it has been certified to the Court? The merchant, who had advanced this money under an uncertainty whether it was ultimately to be considered as average or freight, had a right to consider it as an advance of freight as soon as it became certain by the event that no average was due. The right of making the deduction could never have been made a question between the master and the owner of the cargo; and the voyage being now terminated, by capture, as entirely as if the ship had arrived at Varel, the Crown can claim no exemption from observing the same conduct. Where the Crown takes to itself the rights of one of the parties against the other, so far as they arise out of the individual transaction, I am of opinion that it is to the same extent bound by the obligations of that party towards the other, and therefore, without breaking in upon the principle that the Crown is not to regard latent remote claims of third parties arising on foreign transactions, I shall allow the money which had been advanced to be deducted from the freight."

THE PENSAMENTO FELIZ. [Edw. 115.]

Salvage—Rescue of Ship and Cargo—Hostile Port.

A ship and her cargo were in a Spanish port, and were brought out by the boats of an English ship of war. The port at such time was within the influence of the French, though not occupied by them. *Held*, that this was a military salvage. *Held* also, that if this were not military salvage, it was a case of salvage over which the Instance Court would have jurisdiction.

1809 *July* 11.

This was a Portuguese ship, with a cargo belonging to British and Portuguese merchants, which had put into the port of Muros, in Spain, in consequence of having sustained damage on her voyage from Pernambuco to Liverpool. The vessel was brought out by the boats of the *Endymion* frigate, at which time there were only four persons on board. The ship and cargo were restored; but it appearing that a considerable benefit had been rendered to the parties interested in the property by this interference of the captors, a question arose as to the nature of the salvage to which they were entitled.

Sir W. Scott.—The question principally agitated here has been, whether the rescuing of this ship and cargo is a service of that description which will entitle the party to salvage under the Act of Parliament. No one can deny that the property has been rescued from considerable peril by Captain Capel, and that he is entitled to a remuneration of some kind or other; but it is contended that the service rendered was not of a military kind, and that therefore it is a matter not cognizable in the Prize Court. Now, supposing it were clear that there really was no salvage as of war, the effect of this objection would only be that I should put the parties to the expense of a new proceeding in the Instance Court by transferring this case from one jurisdiction to the other. There is no doubt that the Court of Admiralty has a general jurisdiction to reward services of this nature, and that the party would recover by action in the Instance Court; but then the proceeding there would be attended with fresh expenses. As the question, therefore, has arisen incidentally here, the Court would be disposed to lay hold of

1809 *July* 11.

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any circumstances that might give this service the character of a war salvage, and to press them with more effect than it might otherwise do, for the purpose of bringing the case within the jurisdiction which has been already exercised upon it; and taking all the circumstances together, I think there is enough to justify the Court in so doing. This ship was in the port of Muros when the French took possession of the place; it is true they had retired to proceed on another expedition, but they were not driven away, their hand was still in effect upon the town, and they had it in their power to return whenever they thought proper. The principal persons of the place were in the French interest, and entirely disposed to second any attack upon British or Portuguese property, and it is highly improbable that they would willingly have suffered this ship and cargo, which they knew to be destined for England, to come away without molestation. The French, too, were near at hand, and not unlikely to return; and under such circumstances, and to protect the parties from further expense, I think I am not guilty of any violent straining of the principle in pronouncing this a military service, and consequently that the parties under the Act are entitled to a salvage of one-eighth.

[Edw. 185.]

THE L'ACTIF.

Capture—Vessel of War—Prize Act (*a*).

When a British ship captured by the enemy has been converted into a vessel of war, the title of the British owner ceases entirely from that moment.

1810 *January* 3.

THIS was a British prize vessel, which had been recaptured from the French, and the question was, whether the former British owners were entitled to restitution on salvage under the circumstances of the case. It appeared that at the time when the recapture took place the ship was sailing, under French colours, as a merchant vessel, on a voyage from L'Orient to Nantes, with a cargo of sugar, cotton, and other goods. She had no commission of war nor any arms except a few muskets for self-defence; but

(*a*) See now Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 4.

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an affidavit was made by the mate, who deposed that she had cruised as a French privateer for two months against the commerce of this country; and there was also a register of this ship as a French merchant vessel on board, in which it was recited that she had formerly been fitted out as a privateer at Rochelle. On these grounds it was submitted that the British claimants were barred from restitution under the exceptive clause of the Prize Act.

SIR W. SCOTT.—The question in this case turns upon the interpretation of a clause in the Prize Act, the words of which are undoubtedly very large, for it provides that "if such ship or vessel so taken shall appear to have been, after the taking by his Majesty's enemies, by them set forth as a ship or vessel of war, the said ship or vessel shall not be restored to the former owners or proprietors, but shall in all cases, whether retaken by any of his Majesty's ships or by any privateer, be adjudged lawful prize for the benefit of the captors." Here, then, is a rule as broad and universal as can well be laid down, and the terms in which it is expressed are such that, if this Court were disposed to escape from its conditions, it would find it very difficult to furnish any sufficient apology for so doing. In the Act itself no policy is pointed out for the foundation of the rule, but it is laid down in general terms and in the past tense. It is, however, agreed on all hands that this particular clause was intended by the legislature as a stimulus to exertion proportioned to the danger of the undertaking, and therefore it has been argued that it is confined to vessels which are actually under commission when retaken. Now it is not without its use, in the interpretation of this statute, to consider what was the original state of the existing law upon this subject. The rule of that law was, that where a ship was taken and carried *infra præsidia*, and especially after a sentence of condemnation, the ship became the property of the captor, and, if retaken, the former owner had no *jus postliminii*; and this continued to be the general law of Europe down to a very late period. This country, as a commercial country, has departed from it, and has made a new and peculiar law for itself in favour of merchant property recaptured, introducing a policy not then adopted by other countries, and differing from its own more ancient practice. A rule of policy

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so introduced must still be considered as an exception from the general law, and is to be interpreted, where any doubt arises, with a leaning to that general law which is no further to be departed from than is expressed. By the terms of this clause vessels are excepted which "shall appear to have been set forth for war." The policy of this exception is not expressed, but it amounts, I think, to a declaration that the more lenient rule adopted by this country does not apply to a case attended with the present circumstances; and unless it can be proved that, in enacting this clause, the legislature had nothing else in view but to encourage the attack of armed vessels, it cannot be allowable for this Court to assume that such was the sole policy of the Act, to the effect of confining its operation to that single case. I think it more probable that where the former character of a vessel had been once obliterated by her conversion into a ship of war the legislature meant to look no further. From that moment the title of the former owner and his claim to restitution were entirely extinguished, and could not be revived again by any subsequent variation of the character of the vessel. His title being once gone is gone for ever. The words of the Act of Parliament are broad and general and in a retrospective form, and I feel it difficult to retreat from the obligations they impose upon me. At the same time, as this is a new case, I shall allow the claimants their expenses.

[Edw. 192.]

THE HENRY.

Salvage—Sale by Enemy Captor—Right to Reward.

Personal risk is not a necessary element of the salvage of a vessel captured by a belligerent. *Held*, therefore, that where a neutral ostensibly purchased a captured ship from a belligerent cruiser with the object of restoring her to her British owner, he was entitled to salvage.

1810 *February* 17.

THIS was the case of a British vessel which had been captured, and was afterwards sold by the commander of the French privateer to the master of an American vessel which he had taken on the preceding day. After the purchase was effected all the Americans, except two, were removed into the *Henry*, together with her own

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master and crew, and the American master then took the command upon himself, with the intention of carrying the ship into Milford Haven; but the weather proving unfavourable, she was driven into the port of Crookhaven in Ireland, and was there seized as prize by Lieutenant Keenan, the commander of his Majesty's schooner *Cecilia*.

An action was entered in a cause of salvage on behalf of the American master, who stated in an affidavit, "that the captain of the French privateer having informed him that he intended to burn the *Henry*, as she was in ballast, and it would not be worth his while to carry her to a French port, made an offer to sell the ship to him for 900*l.*; and being anxious to save the property for the owners, and to prevent the crews of both vessels from being carried to France, and being also strongly urged to accede to the proposal by the supercargo of the *Henry*, who offered at the same time to secure to him the repayment of 200*l.*, being his proportion of the purchase-money (as part owner), he was induced to draw a bill for the sum of 900*l.* upon his agents in London in favour of the owners of the privateer, in consequence of which he was put into possession of the vessel, and shaped his course for England."

SIR W. SCOTT.—The evidence upon which these claims of salvage are founded consists of a number of affidavits, and the depositions of three witnesses, who are examined, and who, I think, do not give any very different representation of the facts of the case. The master's account is, that "the ship was taken by the *Decide*, French privateer, on the 28th October last; that at the time his vessel was taken the privateer had an American vessel in her possession, called the *John and Edward*, of New York; and that some hours after the deponent and the supercargo, who had been carried on board the privateer, were sent back to the *Henry*, together with the master of the American ship, his crew and passengers. That the American master brought with him the papers belonging to the deponent's vessel, and told him that he had purchased the *Henry* from the captain of the French privateer for 900*l.* That it was intended the vessel should proceed for Milford Haven, but having met with contrary winds, she was forced into Crookhaven, in Ireland, where, after having been six days, she was seized by

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Lieutenant Keenan, commander of the *Cecilia* tender." So that here is nothing upon the face of the depositions to support the suggestion that the American master, after he had purchased the vessel, did not intend to carry her to a British port. He then proceeds to state that "Lieutenant Keenan came on board, and made inquiry for the master of the vessel, when the deponent related to him all the circumstances which had attended the vessel, and informed him that he had been the master, but he did not then know what he was." Now, although this person was at a loss how to describe himself, after the purchase of the vessel by the American master, the legal relation will be the same. He says further, "that the American master, happening to return on board soon after, Lieutenant Keenan demanded from him the ship's papers, which he accordingly delivered up; and on the following day Lieutenant Keenan took out the American crew and possessed himself of the vessel." The same account is given by the other witnesses, and I think it results from this evidence that there was nothing that was otherwise than meritorious in Lieutenant Keenan's taking the control of the vessel under the peculiar circumstances of the case. That merit, however, will not make him a re-captor; the ship is clearly not taken out of the hands of the enemy, though the measure he adopted might in some degree contribute to the security of the vessel. The account of the manner in which the *Henry* was purchased by the American master is contained more particularly in the affidavits of three gentlemen who were passengers in the *John and Edward*. They state that "in the month of October last they agreed with John Byers Burger, the master of the ship *John and Edward*, for their passage from London to New York, and having embarked with several other passengers, all British subjects, they continued to prosecute their voyage until the twenty-sixth day of the same month, when they were captured by the French privateer *La Decide;* that they were taken on board the privateer and remained there about forty hours, when the privateer fell in with and captured the brig *Henry;* that shortly after the brig was taken the captain of the privateer offered to sell her to Burger for eleven thousand dollars, which he refused to give, upon which the captain of the privateer said he would burn the brig;

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and after a treaty, which was carried on for some time between Burger and the captain of the privateer and Mr. Kerr, the supercargo of the *Henry*, Burger, with the approbation of Kerr, agreed to give nine hundred pounds for the brig, and to secure the same by his bills on London, of which sum Kerr then agreed to secure two hundred pounds to Burger on his arrival in London. That on the bills for that sum being so given, the captain of the privateer put Burger into possession of the *Henry* and her papers, and immediately sent Burger, together with the appearers and Hannay and Kerr, on board the brig, with permission to Burger to proceed in her to such port as he should think proper." Now this has been represented as if it were an illegal transaction, and certainly, if the American master had purchased the vessel upon his own account, it would be so, as he could derive no title from the captors without a previous sentence of condemnation. But if it was merely a transaction by which under the form and colour of a sale he was to recover the property for the owners, he has rendered them a very meritorious service, and is justly entitled to a salvage. It is not necessary that the recovery of the property should be attended with personal risk to the salvor; in cases where the enemy makes a present of a captured vessel to a stranger, who has encountered no hazard, who has not endangered a hair of his head, or laid out a sixpence of his money, the Court has always held the party entitled to a salvage if he has been the instrument of bringing the vessel back to the possession of its owner. Now if by this pretended sale the ship, which was otherwise consigned to destruction, has been recovered, it is surely not for the owner to quarrel with the transaction and at the same time to take the benefit of it. Risk is not necessary to found a claim of salvage; if it were so, it cannot be denied that the vessel has been brought in safety to an English port and restored to the hands of its owners at the risk of this person's purse, and perhaps at the risk of his personal liberty, because, for anything that I know to the contrary, these bills might be put in suit against him on his return to America, and he might finally become answerable for them. Well, but it is said, here was no intention to give the vessel up to her owners or to bring her into a British port. Now every particle of the evidence, which I shall presently notice, except the affidavits of Tooke, a

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passenger, and of two seamen of the *Henry*, points to an intention on the part of the American master of coming to this country. The original purpose of the American master was to run the ship into Milford Haven, which is certainly a very proper port, and from whence he could with great facility have had communication with her owners; but it happened that the weather proving unfavourable the ship was driven into Crookhaven, and on the sixth day after her arrival there she was seized by Lieutenant Keenan. Here, then, is the overt act which is sufficient evidence of the intention of the American master to bring her to a British port; and it affords no presumption against the fairness of his intentions that he did not throw up the ship, which was his only security, immediately on his arrival at Crookhaven. In the short interval that elapsed between his arrival there and the seizure of the vessel, he might have had no sufficient opportunity of opening a communication with her owners, or of obtaining proper advice with respect to the mode in which he was to proceed, for he had clearly a right to make his own indemnification a matter of negotiation. The averment which is contained in the affidavits of Tooke and of the two seamen, "that Burger threatened to carry them into a French port unless they would consent to give him two hundred pounds," I take it to be perfectly fabulous; it is so repugnant to all rational belief that I think the sooner that affidavit retires from observation the better; if such had been the fact, it would certainly have come out in the depositions and the affidavits of the three other passengers, who, however, appear to know nothing of it. Then what is there to diminish the merit of this salvage which has been effected under the colour of a sale, though no real sale took place. The property has been rescued from destruction, and brought to a British port, which certainly would not have been done if this American master had intended to run away with the ship. It is a clear case of salvage, and the American master must be protected against the bills drawn by him for the payment of the French captor. I shall therefore give him three hundred pounds over and above the amount of these bills, which, reckoning the property at three thousand pounds, will be one-seventh of the remainder. To the King's ship I shall allow thirty pounds, with the expenses, as it must be admitted

that the vessel came into the port in Ireland under very anomalous and suspicious circumstances.

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THE ARTHUR.

[Edw. 202.]

Blockade—Capture—Ship in Improper Place—Inquiry for Pilot—Condemnation.

A vessel is not justified in approaching close to a blockaded port to obtain a pilot for a non-blockaded port or channel, and is liable in consequence to condemnation.

1810
February 23;
affirmed
January 26,
1811.

THIS was the case of an American ship bound from Providence, ostensibly to Heppens, and captured near the King's buoy in the Ems, which river the master stated himself to have entered for the purpose of procuring a pilot for the Yadhe.

SIR W. SCOTT.—This American ship, with a valuable cargo on board, was seized on the ground of a breach of the blockade of the Ems. I need not say that it is at all times an unpleasant part of the duty of this Court to enforce the rules of blockade, which, though founded in strict justice, are necessarily harsh in their operation. At the same time the Court feels it to be a part of its duty, which it must conscientiously and strictly discharge, without departing from those rules which have been already laid down as necessary for the support of this belligerent right. In this case the fact is not denied that the ship was taken in a port which is blockaded, and therefore the whole burthen of exonerating himself from the penal consequences lies upon the party. He must show that he was led there by some accident which he could not control, or by some want of information which he could not obtain. In doing this he must prove his whole case, and, however innocent his intentions may have been, he must explain his conduct in a way consistent not only with the innocence of himself and of his owner, but he must bring it within those principles which the Court has found it necessary to lay down for the protection of this belligerent right of this country, and without which no blockade can ever be maintained. The facts in this case are contained in the evidence in preparatory, and in the letters found on board. By the letters

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it appears that there was a very strong inclination on the part of the owners that the cargo should be delivered at Emden, if it should turn out to be an open and permitted port; and the same inclination is very strongly expressed in the instructions which are given to the master, as the laws of his conduct. The instructions are in these words: "Should you hear on your passage that the British orders are rescinded, and the ports of Holland open to our trade, you may go to the Texel; otherwise, instead of going to the port of clearance, you are to proceed to the Ems; a passage into which river, to the eastward of the island of Juist, is left open by the British Order in Council of 17th May. Should the whole of the Ems be blockaded specially, you are to proceed to the Yadhe, which river will undoubtedly be left free. Whether you arrive in the river Yadhe, or at either of the other places, we request you to make immediate inquiry for Mr. Samuel Greene, who went in our ship *Robert Hale*, and was to remain in Europe to transact the business of one or two vessels for our account. By our last accounts he was at Rusterziel, on the Yadhe, but on your arrival we think he may be at Emden or Amsterdam." This being the case, it should by all means have been expressed in the open papers that the intention was that the ship should proceed to the Texel or to the Ems, if permitted to do so. These were primarily her ports of destination and ought not to be dissembled, otherwise the belligerent may be deceived and his rights eluded. I must observe also that a preference so distinctly expressed is not very consistent with the account given by the master, that his destination was to the Yadhe. On this, however, I shall not lay much stress, because it is open to the answer which has been suggested by counsel, that upon receiving information of the blockade of the Ems, that which was before only a contingent destination became definitive. However, in point of fact, he is found in an interdicted place, and he must account for his being in such a situation most satisfactorily. In answer to the third interrogatory, the master admits that he met his Majesty's ship *Desiree* off the Texel, and was then informed that the Ems was blockaded, except one passage, through which it was physically impossible for him to pass, so that if he was in any doubt of the fact before, that doubt was entirely removed. How he got so near to the Texel does not clearly

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appear, but, however, "there," he says, "he was informed by the commander of the *Desiree*, that if he would go to the island of Borkum, he would be sure to get a pilot for the Yadhe." He says, "that he lay at anchor off Borkum during the night where he did not succeed in getting a pilot, but was informed by a boat (of what description is not stated) that if he went up the Ems he would there get a pilot for the Yadhe, and that he accordingly weighed anchor and proceeded up the Ems." On this I must observe, that the small craft of the enemy was the very worst source to which he could refer himself for information; any intelligence received from such a quarter on such a subject is liable to great suspicion, and could afford no ground of justification. In his answer to the twenty-ninth interrogatory, he speaks in pretty much the same language; he says, "that failing in his endeavours to procure a pilot at Borkum, he went up the eastern Ems for that purpose." Now, in the first place, the fact that such was his real errand to the Ems is justly liable to great doubt, because it is surely not in the usual course of things that a pilot of one river should station himself in the navigation of another. Still less is it to be expected that a pilot, whose bread depends upon employment, should be found plying in an interdicted river where little or no trade was carrying on, and especially when it is to be expected that there would be a constant concourse of vessels elsewhere. If, however, this American master had received such information from the Dutch boat, it is strange he should not perceive the probable fallacy of it; but supposing this information to have been not improbable, was he at liberty to act upon it in the manner which he did? I am of opinion he was not; if he had any such expectation, it was not his business to run his ship so many leagues up the river, he might have sent his boat to the man-of-war to inquire whether a pilot for the Yadhe could be obtained there, and if the fact turned out to be so, there certainly could be no necessity for the ship to go up for the pilot, who might without difficulty have been brought down in the boat. He was not at liberty for any such purpose to place his ship on a forbidden spot, whither he had been told he was not to go; and therefore I think he did not proceed to act upon the information given by the Dutch boat in a lawful manner, if any such was given. I do not see how it can be more permissible to go up to a

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blockading squadron to inquire for a pilot than to procure information relative to the blockade itself. Of the two, it seems less venial, because in that case the fact of an actual knowledge of the blockade is admitted; in the latter there is at least the possibility of ignorance. I am clearly of opinion that upon the principles already laid down by this Court (*a*), and from which, however harshly they may operate in individual cases, it cannot recede without a total abandonment of belligerent rights respecting blockade, this ship and cargo must be condemned.

[Edw. 210.]

THE PROGRESS.

Recapture—Salvage—Place of Valuation—Freight.

Where vessels which had been chartered from the United Kingdom to O. and back were recaptured at O.:—*Held*, that salvage was due on the entire freight.

The value of recaptured property is to be taken at the place of restitution.

1810 *March* 6; affirmed *January* 26, 1811.

THIS case arose out of the recapture of certain Portuguese and British ships in the harbour of Oporto. Salvage was held to be due on the British ships only.

JUDGMENT. . . . The second question which I have to determine is, whether the valuation of the property recovered is to be taken here or at Oporto. And I confess that, on the first view of the subject, I was disposed to hold that the valuation ought to be made upon an estimate of the actual value of the property at the time when it was rescued from the hands of the enemy; but upon further consideration of the words of the Act of Parliament, and the practice of this Court, I am of opinion that it is at the place of restitution that the value is to be fixed. If the captors permitted the masters of these vessels to take possession at Oporto, it was merely a private arrangement for the accommodation of the claimants; but the actual and legal restitution is that which the Court makes when it pronounces in favour of claim, after the property has been brought in for adjudication. When that is done, according to the phraseology of all the Acts of Parliament the captor is to receive one-eighth part of the true value of the goods so to be restored, and I think I should depart from the principle which the clause of the Act has in view if I were to admit the

(*a*) See the *Neutralitet*, Vol. I. p. 521.

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application of a different rule in this case merely because the captors had, for mutual convenience, given up the possession of the vessels at Oporto, and had suffered them to be navigated home under the care of their crews. It must be supposed that in suffering them to go away the captors made only a provisional restitution, subject to all rights, and upon an understanding that the valuation should be afterwards determined. The introduction of a different rule would be attended with this inconvenience, that the captors would be induced to bring the vessels themselves to the port of restitution, and to retain possession of them, subject to all the rights which captors have upon them, and with the probability of great inconvenience to the owners and their cargoes. At the same time, when I say that the true rule is to take the valuation at the place of restitution, it must be understood that the value is to be considered with reference to the moment of arrival in port; for, most undoubtedly, the captors can have no right to a salvage on any additional value which the cargo may acquire by the payment of duties and other incidental expenses incurred afterwards. These are adventitious augmentations of the value, which must be deducted from the proportion which the captor is to receive, and the registrar and merchants will attend to the distinction. The last question which I have to determine is, whether any and what salvage is due upon the freights of those vessels which had been chartered in this country under an agreement to proceed to Oporto in ballast, for the purpose of bringing home these cargoes of wine, and in consequence of the recapture have been enabled to carry that purpose into effect. Now, it is clear that a service has been rendered to the vessels so circumstanced, and it is a service which goes the length of putting them in a condition to recover their whole freights, which depended entirely upon their final arrival here. As to the freights of the vessels that were taken up at Oporto, no salvage is asked upon them, and certainly it could not have been contended that any would be due, as the voyage had not commenced. But these vessels, which had gone to Oporto from this country under a charter-party for one entire voyage out and home and had already performed the outward voyage, were in the course of earning their freights at the time of capture; they had actually broke ground, as the phrase is, and had entered upon

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that adventure out of which their profits were to arise. While lying in the harbour of Oporto they were in the course of earning their freights; they were *in itinere*, and the salvage is as clearly due as if they had been captured at sea. If there had been two distinct voyages, as is sometimes the case in charter-parties, distinguishing the outward from the homeward voyage, the case would have assumed a different aspect; but where a ship goes out under a charter-party to proceed to her port of destination in ballast, and to receive her freight only upon her return, the Court is not in the habit of dividing the salvage. These, therefore, are the determinations I have come to: first, that no salvage is due on the Portuguese property; secondly, that the valuation is to be taken at the port of restitution *deductis deducendis;* and thirdly, that where a ship goes out under a charter-party for the voyage out and home, salvage is due upon the whole freight.

[Edw. 224.]

THE MADISON.

Neutral Ship—Despatches—Letters from Enemy's Government to Enemy's Consul in Neutral Country.

A neutral ship carrying despatches from an enemy's government to its consul in a neutral country was in the circumstances restored subject to payment of captors' expenses.

1810 *March* 13.

This American ship had been captured on her former voyage by a French privateer and carried into Dieppe, from whence after obtaining her liberation she was proceeding in ballast to Baltimore. The compulsion under which the vessel went into the blockaded port being sufficient to exempt her from the penalties of a breach of the blockade, the counsel for the captors now pressed for condemnation, on the ground that among the papers on board were some despatches from the enemy's government which the master had not delivered up. It was also objected, that there were eight passengers and a small quantity of antimony on board, and consequently that the vessel must be considered as coming out with a cargo.

Sir W. Scott.—Proceedings have been instituted against this ship on various grounds, and, among others, on the ground that

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she had sailed from a blockaded port with a cargo and a number of passengers on board; but it appears that the few articles which she carried do not deserve the name of a cargo, and the passengers are not of a description to affix any hostile character to the vessel conveying them. The only remaining objection to restitution is that the ship was carrying despatches from the government of the enemy to America; and the question is, in what manner this will operate upon the vessel. The Court in several instances has had occasion to consider the effect of carrying papers of a public nature, and according to the different circumstances of the cases themselves its decisions have been governed. In some it has held that the conveyance of despatches for the enemy did affix an hostile character to the ship; in others, attended with circumstances of a different description, it has been held that the conveyance of them was not of a criminal nature, and that though the vessel was justly subject to the inconvenience of seizure and detention, it was not liable to confiscation. I have now to consider to which of these two classes the present case is to be assigned. The papers themselves had been transmitted to his Majesty's Government, and an application has been made to the Secretary of State for information respecting their real character. The manner in which they came on board is stated by the master, who says, in an affidavit, "that he received them from a person who is employed under Mr. Armstrong, the American ambassador at Paris, and that he understood they came from him." Certainly, if these papers are really of a hostile and illegal nature, it is not in the power of the American ambassador to sanction them, or to protect the conveyance of them. This Court has held, in cases of convoy, that even the interposition of the sovereign of a neutral country will not take off the criminality of an illegal act; still less can an ambassador, acting only under a delegated authority from his sovereign, be permitted to assume a privilege so injurious to a belligerent whose rights it is his duty to respect. But the matter turns in this case upon the character of the papers, as far as government has thought it proper to characterise them. The answer from the Secretary of State's office is, that No. 3 contains a despatch from the Danish Government to the Danish Consul-General at Philadelphia; and I think I am to infer from this account, negatively, that all the other

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papers are of an innocent nature. Now I am of opinion that a communication from the Danish Government to its own consul in America does not necessarily imply anything that is of a nature hostile or injurious to the interests of this country. It is not to be so presumed; such communications must be supposed to have reference to the business of the Consul-General's office, which is to maintain the commercial relations of Denmark with America. If such communications were interdicted the functions of the official persons would cease altogether. It has been said that this communication of the Danish Government with one of its delegates in another country, through the medium of the American minister at Paris, is a matter in which the neutral government is not at liberty to interpose and carry on, and that the neutral government is not to concert measures with the enemy for the purpose of assisting in communications relating solely to his own commerce. But I take this to be a correspondence in which the American Government is itself interested. A Danish consul-general in America is not stationed there merely for the purpose of Danish trade, but of Danish American trade; his functions relate to the joint commerce in which the two countries are engaged, and the case, therefore, falls within the principle which has been laid down in the case of the *Caroline* (*a*) in regard to despatches from the enemy to his ambassador resident in a neutral country. In the transmission of these papers America may have a concern and an interest also, and therefore the case is not analogous to those in which neutral vessels have lent their services to convey despatches between an enemy's colony and the mother country. Here there is no such departure from neutrality as to subject the vessel to confiscation; yet, I cannot help observing, that the conveyance of papers of this description for the enemy, by American vessels, is a practice of which they would do well, for various reasons affecting their own safety and convenience, to be more abstemious in the indulgence than the observation of this Court enables it to say they are. In this case the favourable presumption arising from the papers is strengthened by the character of the person from whom they were received; for it is a presumption, which I am bound to maintain, that as the neutral

(*a*) Vol. I. p. 607.

master received these despatches from the hands of the American minister, there is in that circumstance a guarantee of the innocence of his conduct. This case is clearly not of a nature to call for serious judicial animadversion, and I shall therefore restore the ship, giving the captors their expenses.

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THE MADISON.

Sir W. Scott.

THE RAPID (No. 1).

[Edw. 228.]

Neutral Ship—Despatches of Belligerent—Ignorance of Master—Non-official Character of Sender of Despatches.

Where despatches from a belligerent subject were put on board a neutral ship in a neutral port, in an envelope addressed to a private individual, and among a number of private letters:—*Held* to be an exception to the general rule by which a neutral master carrying despatches from a belligerent cannot set up the plea of ignorance of such despatches in order to avoid liability for their carriage.

1810 *March* 21; affirmed *March* 9, 1811.

THIS was the case of an American ship which was captured on her voyage from New York to Tonningen, on suspicion of an intention to push into the Texel. But the question of destination being abandoned by the captors, they now contended that the case came within the principle laid down by the Court in the case of the *Atalanta*, as it had been discovered, that among the papers given up by the master at the time of capture, there was a despatch addressed to the Dutch colonial minister at the Hague, under cover to a commercial house at Tonningen.

SIR W. SCOTT.—The question of destination being disposed of, I have now only to consider what will be the legal effect of carrying these despatches; and as it appears that the practice of conveying papers of this description for the enemy prevails to a considerable extent, I must take occasion to remind the proprietors of neutral vessels that wherever it is indulged without sufficient caution, they will inevitably subject themselves to very grievous inconveniences. I should certainly be extremely unwilling to incur the imputation of imposing any restrictions upon the correspondence which neutral nations are entitled to maintain with the enemy, or, as it was suggested in argument, to lay down a rule which would in effect deter masters of vessels from receiving on board any private letters, as they cannot know what they may

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contain. But it must be understood that where a party, from want of proper caution, suffers despatches to be conveyed on board his vessel, the plea of ignorance will not avail him. His caution must be proportioned to the circumstances under which such papers are received. If he is taking his departure from a hostile port in a hostile country, and still more, if the letters which are brought to him are addressed to persons resident in a hostile country, he is called upon to exercise the utmost jealousy with regard to what papers he takes on board. On the other hand, it is to be observed that where the commencement of the voyage is in a neutral country, and it is to terminate at a neutral port, or, as in this instance, at a port to which, though not neutral, an open trade is allowed, in such a case there is less to excite his vigilance, and, therefore, it may be proper to make some allowance for any imposition which may be practised upon him. But when a neutral master receives papers on board in a hostile port, he receives them at his own hazard, and cannot be heard to aver his ignorance of a fact which, by due inquiry, he might have made himself acquainted with. The party in the present case has the benefit of the favourable distinction: these papers, with some others, were put on board in an envelope, addressed to a person at Tonningen, who was instructed to forward them to Holland; but of this the master swears he knew nothing. They turn out to be of a public nature, conveying intelligence of importance to the government of the enemy at the Hague; and they begin, I observe, with an assertion which I hope is not true. The writer says, "the letter and accompanying inclosures which I this day despatch to his Excellency the Minister of the Colonies, *viâ* Tonningen, will, I expect, be communicated to you. I trust my conduct will be approved of by his Excellency, and that he will please explain himself, both with regard thereto as also respecting the contents of my letter to the Marshal Daandels. The surest mode of correspondence is by way of England or Paris, through the channel of the Dutch Minister, as the American Minister will not refuse to inclose for him a letter to me in his despatches." This, I hope, is rashly and injuriously said: the Court cannot bring itself to believe that the accredited minister of a country in amity with this would so far lend himself to the purposes of the enemy as to be the private instrument of

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conveying the despatches of the enemy's government to their agent. The papers in question come from a person who seems to be invested with something of a public character, though of a peculiar kind, and they are upon public business, but I do not know whether they come strictly within the definition of despatches. The writer of them had been sent to America from Batavia by the governor, to beat up for volunteers among the American merchants, in the hope of inducing them to embark themselves in the trade of that settlement. How far he had been acknowledged by the American Government does not appear. From the contents of the papers themselves he seems to have been stationed in America, not by the Government of Holland, but by the Dutch governor of Batavia, rather as a commercial agent to drive a bargain with individuals, and to induce them to join in these speculations for the relief of the Batavian trade, than for any purposes of a more diplomatic nature. His commission was such that it might exist without his being acknowledged as a public accredited minister by the American Government; and therefore the claimant is, perhaps, entitled to the benefit of the distinction which has been taken, that these papers, though mischievous in their own nature, proceed from a person who is not clothed with any public official character. They came to the hands of this American master among a variety of other letters from private persons: they were concealed in an envelope, addressed to a private person, and were taken on board in a neutral country. These are circumstances which would rather induce the Court to consider this case as excepted from the general rule, which does not permit a neutral master, carrying despatches for the enemy, to shelter himself under the plea of ignorance. In the present instance the American master denies all knowledge of the contents of these papers, and the benefit of that denial will extend to the cargo. It is not, therefore, a case in which the property is to be confiscated, although in this, as in every other instance in which the enemy's despatches are found on board a vessel, he has justly subjected himself to all the inconveniences of seizure and detention, and to all the expenses of those judicial inquiries which they have occasioned.

[Edw. 246.]

THE FRIENDS.

Freight—Capture—Recapture.

A British vessel chartered to proceed to Lisbon arrived at the mouth of the Tagus, and was there warned off by a blockading squadron. She was subsequently captured by a Spanish ship, and then was recaptured by a British cruiser and taken to Madeira, where the ship and cargo were sold. *Held*, that as the loss of freight had been caused by a calamity common to ship and cargo, the loss must be divided, and a moiety of the freight must be paid by the cargo owners.

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Sir W. Scott.—This was the case of a British vessel which had been chartered at Campeachy for the purpose of delivering a cargo at Lisbon. The ship had successfully prosecuted her voyage to the very entrance of the Tagus when she was warned off by the blockading squadron. Upon receiving this intimation she continued for some days with the fleet, but a gale of wind coming on, which blew her out to sea, she was picked up by a Spanish privateer, and was soon afterwards retaken by a British cruiser and carried to Madeira, where the ship and cargo were sold by the recaptors to pay the salvage. A claim has since been given for the ship and cargo, which was decreed to be restored, and the Court has now to consider what freight is due under the circumstances of the case. On the part of the owner of the ship, it is contended that the whole of the freight is due, as the ship had actually gone up to the mouth of the port to which she was destined. On the part of the owner of the cargo, it is contended that no freight is due, as the cargo was not delivered according to the terms of the charter-party. Several cases from the Courts of common law have been cited, but I confess it does not appear to me that any principle is to be extracted from them that is applicable to the present question, although I should have thought that some cases of British ships which had come up to the very port of their destination, and were prevented from discharging their cargoes there by the act of the sovereign authority of their own country, must have occurred in those Courts among the multiplicity of cases which the present extended system of blockade has given rise to. In the case of the American ships bound to France or Holland, which were brought

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into the ports of this country under the prohibitory law, the full freight was pronounced to be due where the owners of the cargoes elected to sell here. Where they did not elect to sell here the Court left it to them to settle the freight with the owners of the ships. The Court considered a voyage from America to this country very nearly the same in effect as a voyage to those contiguous countries to which those vessels were originally destined. In all probability the markets of this country were not less favourable than in the blockaded ports, and no doubt the sale was effected with every attention to the interests of the owners of the cargo. In those cases the Court gave the master the full benefit of the freight, not by virtue of his contract, because, looking at the charter-party in the same point of view as the Courts of common law, it could not say that the delivery at a port in England was a specific performance of its terms. But there being no contract which applied to the existing state of facts, the Court found itself under an obligation to discover what was the relative equity between the parties. This Court sits no more than the Courts of common law do to make contracts between parties, but as a Court exercising an equitable jurisdiction. It considers itself bound to provide as well as it can for that relation of interests which has unexpectedly taken place under a state of facts out of the contemplation of the contracting parties in the course of the transaction. The present case is marked with peculiar misfortune, because here, after the ship had been stopped by the blockading force, she was blown out to sea, and being subsequently taken out of the hands of the master, she was carried by the receptors to a distant port and there sold, together with her cargo, at a great loss. In this case, therefore, loss is unavoidable, and the only question is upon whom the weight of it shall fall. Now if the incapacity of completing the voyage could be exclusively attributed to one of the parties, it would be proper that the loss should fall there; but the fact is that the calamity is common to both, for both ship and cargo were equally affected by the blockade. The ship could not have entered the interdicted port in ballast, any more than the cargo could have entered it in any other vehicle. The loss arises from the common incapacity of the one and of the other. I think,

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therefore, that what equity would suggest is, that the loss should be divided; and under these circumstances I shall direct a moiety of the freight to be paid.

[Edw. 249.]

THE COURIER.

Licence—Breach—Authority of Naval Officer to vary Licence.

An officer of a cruiser has no power to give permission to a vessel trading with a belligerent under a licence to go to an interdicted port, except in case of a nautical necessity.

1810 *June* 19.

THIS ship had sailed on a destination from Pillau to Colberg, but the master in the course of the voyage entertaining doubts as to its legality, applied to the commander of a British cruiser, who gave him permission to proceed. It was contended on behalf of the claimants that although this was a prohibited voyage under the Order of 7th January, 1807, the permission given by a British officer was sufficient to entitle the case to a favourable distinction.

SIR W. SCOTT.—The Order in Council prohibits neutral vessels to trade between ports from which the British flag is excluded, and under that authority this Court held that the trade between one Prussian port and another was illegal. The other conclusion at which the Court arrived was, that vessels are not to call for orders at an interdicted port (*a*), and although that rule may press hard in particular cases, and perhaps in this, yet if vessels were suffered to touch at ports where they are not at liberty to trade, it would enervate the whole effect of the prohibition, because it would be impossible to devise any means by which they could be prevented from delivering their cargoes there. In this case there certainly do appear to be some circumstances which indicate an intention on the part of the master of coming on to this country after touching at Colberg, but the fact is that at the time of capture the ship was actually going to a Prussian port. Then what is there to take the case out of this peril? Nothing. It is clear that in the original

(*a*) See the *Frau Magdalena*, *post*.

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intention of the owners this cargo was to be sent on a prohibited voyage; the master after he had got to sea became doubtful as to the propriety of proceeding, and made inquiry of a British cruiser, whose commander very improperly gave him permission to go on. But it is not the mistaken exposition of this British officer that will alter the law of the case; the Court has allowed misinformation upon a point of fact to be a fair ground of indulgence, but upon a question of law the neutral is to look to other sources for instruction. In this case, indeed, the officer does not assume the right of interpreting the law, but he assumes a right which he is as little possessed of: that of superseding the Order in Council by giving this vessel permission to go to the interdicted port. I do not say a case might not occur in which the Court would be disposed to hold an officer in his Majesty's service authorized to assume such a power, but it must be a case of necessity, as, for instance, where a ship is in absolute want of provisions or is otherwise incapable of proceeding to an open port, and where the necessity alone without such permission given would be a sufficient justification. Now it is not pretended that this is such a case; all that the certificate of the British officer says is, "I have permitted this vessel to proceed from Pillau with her cargo to Colberg." Did he possess any authority to grant such permission, in the very face of an Order in Council? It cannot be. I am very sorry that this conduct in the British officer has had the effect of misleading the master of the vessel; but at all events, his owners have not been deceived; theirs was the original purpose of sending the vessel to an interdicted port, and from which purpose they had never departed. At the same time, it is not without some degree of pain that I condemn this ship and cargo as proceeding to an interdicted port under an insufficient authority.

[Edw. 252.]

THE CHARLOTTA.

Blockade—Breach—Necessity for Repair—Justification.

A vessel went into a blockaded port under necessity for repairs, and came out without discharging her cargo. *Held*, that the entry into the blockaded port was justifiable.

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June 26.

Sir W. Scott.—This case has already been before the Court once or twice, and I have now come to a determination to permit the attendance of Trinity Masters. It is the case of an American ship which was proceeding on a voyage from Boston to Petersburg, and put into the Texel in distress. At the former hearing I was much inclined to hold that, although a vessel going into a blockaded port would be subject to condemnation, the legal presumption that she is going in there for the purposes of trade was ousted by the fact of her being taken coming out without having delivered her cargo. But I think that the case, in the first instance, is fit for further inquiry, because if it shall turn out that the ship went in for the purpose only of getting repaired, and that the port of the Texel was a fair port to make, with reference to the alleged distress, the case will be entitled to be favourably considered. If, on the other hand, it should appear that there was no such necessity, the legal presumption will be that she actually went in there for the fraudulent purpose of delivering her cargo, and it is not her having come out again without executing that purpose owing to some unexpected change of circumstances that will entirely remove the illegality. At present the Court has no absolute constat that the vessel came out with the original cargo, as it has not been inspected; but supposing the fact to be that the cargo remains the same, but that she went in meaning to dispose of it, and there found the rigour of the French decrees, or the disadvantages of the market to be such as to frustrate the intention: in that case the delinquency of a fraudulent intention has actually been consummated, and the vessel would be subject to confiscation. I am therefore desirous to look a little further into the case, in order to know whether her going into the Texel, after passing by all the intermediate ports between the island of Sylt and that place, was a step which, under the circumstances alleged,

ought naturally to have been taken. The master states in his deposition, "that having passed the Texel and made the island of Sylt, he was driven back by stress of weather and compelled to put into port." I think, therefore, that I see enough in the case to make it not improper to require the attendance of Trinity Masters, in order to ascertain how far the Texel was fairly a preferable port under all the circumstances of the case. Certainly it is a port which ought not to have been resorted to unless under the clearest necessity.

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On a subsequent day the Trinity Masters gave it as their opinion that the deviation was necessary, and that the Texel was fairly a preferable port, as the state of the wind made it impossible for the ship to proceed to Gottenburgh, and there were circumstances which made the ports in the neighbourhood of Sylt objectionable. This being a sufficient justification, the ship and cargo were ultimately restored.

THE JAMES COOK.

[Edw. 261.]

Blockade—Breach—Change of Intention.

The intention to enter a blockaded port may be abandoned; but if a vessel is captured in a place conclusive against the presumption of such abandonment, she will be condemned.

1810 *July* 31.

Sir W. Scott.—This American ship, though navigating with a professed destination to Tonningen, was captured at the entrance of the Texel, three or four miles west of Kickdown. The situation of the vessel will justify the legal conclusion that the master intended going into that port for the purpose of disposing of his cargo, and throws the onus upon him of exonerating himself by just and satisfactory explanations. What, then, is the account given by the master in this case? He says nothing of the situation of the vessel at the time of capture, and this is the more alarming, because he is principally concerned in the navigation of her. Now, in any case of this nature, supposing it to be fraudulent, it is obvious that the master must be the principal agent, and

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it is highly probable that the mate also is a party to the fraud, because such a plan is not easily carried on without the assistance of him as an accomplice. On questions, therefore, arising upon the destination of the vessel, although in other cases the Court is disposed to give great attention to the evidence of the master and the mate, I do not think they are entitled to any advantageous preference. Where they speak to the situation of the vessel, their testimony must be outweighed by that of the common mariners, unless there is reason to suggest that the mariners had been debauched by the captors. The mate says that the course of the vessel was at all times directed to Tonningen, and so says the master; but he suppresses a very important fact which is admitted by the mate and the other witnesses, that he sent a letter on shore by a Dutch fishing vessel a few hours before the capture; he denies also that he had a signal flying for a pilot (although the fact appears upon the log), and seems to expect that the Court will receive his explanation as satisfactory, when he says that he made the signal for the purpose of speaking a vessel, which he took to be an English frigate. Here, then, is clearly that sort of conduct in the master which renders his evidence highly suspicious. The log speaks a language extremely indicative of an intention to enter a Dutch port: it appears that they approached the coast of Holland the day before, and from that time kept as close in to land as possible. I must observe that if it were necessary that a ship going to the northward should make the Dutch land so far to the southward of the Texel, she could not be permitted to sail close along the shore, as there can be no doubt that advantage would be taken of the facilities which such an opportunity would afford. The fact is, she continues (as the phrase is) to hug the coast, she lies-to in the night, and as the two mariners say they heard the master declare, "in order that they might not overshoot the Texel." The accuracy of the log has been attempted to be impeached in the argument, but I can never take any suggestion of that sort against a document of this authentic nature unless it is supported by affidavit; it cannot be impeached with effect upon the mere pretence of interlineation, or a difference in the colour of the ink, or any slight objection of that kind. The log says that the ship lay-to off the Texel, and

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spoke a fishing boat; at eight a pilot came alongside, and it appears that the ship had not moved away from the entrance of the Texel when she was seized. Upon all this evidence, I think it is not an arguable proposition that there was not an intention of going into that port. With respect to the cargo, I do not see how it is to be exempted from the fate of the ship; the master, who is also the owner of the ship, can hardly be supposed to have risked his vessel without the privity of the owner of the cargo and in its service; but the fact is not very material, as the owners of cargoes must at all events answer to the country imposing the blockade for the acts of the persons employed by them, where, as in this case, the blockade is known at the port of shipment; otherwise, by sacrificing the ship, there would be a ready escape for the cargo for the benefit of which the fraud was intended. It remains, therefore, only to be considered whether there was in reality any subsequent change of intention on the part of the master, and whether that change of intention was so acted upon by him as to deliver the ship and cargo from the penalty of confiscation. To say that there is no case in which the master of a neutral ship, losing sight of a malignant purpose originally entertained and taking another course more consistent with his duty to other countries, might not be exonerated is a proposition which I am not inclined to maintain. It is proper that there should be a *locus penitentiæ*, and if the case had been brought up to this, that the intention of going to a Dutch port was actually abandoned and that the ship was captured while proceeding to some open port, the claimants would have had the benefit of that fact. But what is the case here? The ship is captured in a place where the fact is conclusive against her, for it has been determined over and over again that a ship is not at liberty to go up to the mouth of a blockaded port even to make inquiry. That in itself is a consummation of the offence, and amounts to an actual breach of the blockade. The master does not inform us what was the purport of his communication with the shore through the medium of the Dutch fishing vessel, as he suppresses the fact entirely; it appears, however, from the evidence of the two mariners, that he afterwards made some little appearance of steering for Tonningen. But what would be the legal effect of that, supposing the fact to be more clearly made out than it is in

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this case; he had already broken the blockade, he had come up to ground which it was improper for him to tread, and finding the impossibility of going in he turned away. Is that a *locus penitentiæ?* The matter was closed upon him; he had committed the offence as much as in him lay; and having been defeated in his purpose by a mere impossibility of effecting it, he cannot be heard to aver an innocence of intention. It is, moreover, extremely probable that the frigate was in sight before this pretended change of intention was thought of, for it appears that the communication with the pilot boat took place at eight and the ship was captured at ten, previous to which time, by the evidence of the mate, it appears that she had been becalmed at least an hour, and therefore the capturing vessel could not have come up very rapidly.

Ship and cargo condemned.

The Court afterwards, on being requested to restore the master's private adventure, said: Wherever it appears that the master is the principal agent in a fraud, I shall not give him his private adventure, but shall leave him to the mercy of the captors.

[Edw. 265.]

THE ROBERT HALE.

Salvage—Recapture of Ship released on Bail.

Salvage is not due for the alleged recapture of a vessel released by a belligerent Prize Court on bail, since no effective service has been done to the owners of such ship.

1810 *August* 2.

THIS American ship had sailed from Providence, Rhode Island, with a miscellaneous cargo, and was seized in the river Yadhe by the French douaniers, by reason, as stated by the master, of her not being furnished with a certificate of property, and the Yadhe being interdicted by the French. Her cargo was landed, and the ship released on bail being given to answer the adjudication in the French Prize Court; but before she left the river, the vessel was brought out by the boats of his Majesty's gun brigs, *Thresher* and *Broedageren*, and a claim of salvage was now set up on their behalf for this service.

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Sir W. Scott.—I think this question has properly been brought before the Court, but I do not think it a case in which a claim of salvage can be sustained. The ship had been seized in the Yadhe by the French douaniers, who, I presume, are acting there for the rights and interests of the Government of France, and must be considered as captors for the authority under which they act. The case was submitted to the Prize Court at Paris for adjudication, and in the meantime the ship was liberated on bail; and this not only on security, but by an actual deposit of money. I must therefore take it that this ship, having been so liberated, was free to depart, as far as the rights of the French Government, and the persons employed by that government, were concerned. Her stay was voluntary, she had dropped down the river towards the neighbourhood of the British gun brigs, and was there waiting the arrival of the office copies of her papers from Paris, as the papers themselves were necessary for the decision of the original cause. Whether from her proximity to the French armed boats the service of bringing her out was attended with any personal danger to the officers and men who were employed in it, does not appear: but supposing it to be so, that would not be a ground of salvage, unless the vessel was in French possession. That, however, was not the case, she was no longer detained, she had left a representative, on which the sentence of the French Prize Court was to operate, in the deposit of 24,000 francs. If the Court condemned, the effect of the sentence would be to confiscate not the ship, but that sum of money which had been accepted as a substitute; if, on the other hand, the Court restored, neither the ship nor the substitute can be said to have been in peril. And therefore in no case does it appear that any service has been performed, because the bringing out of the ship, which was at liberty, was not a rescue of the 24,000 francs, upon which the sentence of the Court was to operate; it was no effective service to the owners to bring away the ship, which was in no danger, whilst it left the representative exposed to the same hazard as before. Then it has been said that the ship might have been seized again, and certainly she might; but that is not enough: the Court will not grant salvage on prospective and ideal danger, it must be proximate and certain. What is there to raise this phantom? Why, that the French

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douaniers had no authority to release the ship on bail. But why is the Court to suppose that? They are something more than simple captors, they are public agents; and the fair presumption is, that they knew that what they were doing was not contrary to the regulations of their own government. The re-seizure of a ship after the value had been deposited in a Court of Prize was never yet heard of; from the moment the bail is accepted, the ship is sacred to the government by which she has been liberated, for it would be monstrous injustice to say that the thing itself, and that which has been accepted in lieu of it, shall be condemned for the same act. Allowing for all the violence and irregularity which mark the proceedings of the French Government, the improbability is so striking that I cannot entertain the notion that this ship was in any danger of being made prize of a second time by the enemy. And therefore, whatever dangers may have been encountered in bringing out the vessel, the parties must seek their reward in the consciousness of having done their duty as brave men, and in the approbation of the country; but as no service has been rendered, there is no ground for salvage against the owners.

[Edw. 280.]

THE LA GLOIRE AND OTHERS.

Head-money—Actual Captors—Time for Claim.

Head-money is only distributable to the actual captors of a vessel, and not to those who are merely in sight or in chase. Claims for head-money should be promptly instituted.

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SIR W. SCOTT.—The present question arises on the admissibility of this allegation, which is offered to the Court on behalf of several ships composing a part of the squadron by which these French frigates were captured, and claiming upon the principle of associated service to share in the head-money. I shall not repeat the complaint which I have already had occasion to make, that this suit has been long depending, although it is of a nature which, in a peculiar degree, requires to be brought to its termination with the greatest expedition. Head-money, according to the principle which is recognized in this and the superior Court, is the peculiar

and appropriate reward of immediate personal exertion, and, consequently, wherever any claim to participate in a bounty so appropriated has been advanced, it has always been considered in a more rigid manner by the Courts than those which arise out of the general interests of prize. There are some very ancient cases in which the question has been decided (*a*): in the case of the *Superbe*, in the case of the *Duchess Anne*, and also in the case of the *Toulouse*, in which it appears by a note of that judgment, communicated to me by a very eminent person of great experience and of the longest practice in these Courts, that the prize was condemned to one man-of-war as actual captor, and to two others as assisting at the capture; but the bounty-money was ordered to be paid only to the actual captor, the others not being actually engaged with the prize. This is the invariable rule which for more than a century has been applied to cases of this description, and therefore the circumstances must be of a very peculiar nature to induce the Court to recede from a practice so long and so universally established.

[The Court then dealt with the facts alleged as to the claim of three of the fleet.]

Now it is clear that all these circumstances, taken separately or collectively, are not such as will bring these ships within the established principle; they were not engaged in fight, they were not actual captors, they were merely in sight and in chase, and their claim is quite unsustainable on any principle that has been sanctioned by this or the superior Court. What the reason is that has prevented the discussion of the claims of these three ships before, I do not know; four years have elapsed since the capture of the prizes, and the delay which has taken place has, I suppose, prevented the distribution of the head-money. Matters of this kind cannot, consistently with the honour of the Court, be permitted to be hung up for so many years together. The Court must prescribe a limitation of time for such claims. If head-money is to be considered as the reward of personal exertion all questions

(*a*) *Superbe*, 26th June, 1710; *Duchess Anne*, 6th July, 1710; *Toulouse*, 13th June, 1715.

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arising out of it ought to be brought to an early determination, and not be kept fluctuating in a state of uncertainty until many of the persons interested are consigned to their graves. It has been suggested that this case stood over because the parties were in hopes of settling the matter by arbitration. But they must finally have come to this Court for a decree, otherwise the head-money would not have been paid; and I wish it to be clearly understood that if parties propose to go to an arbitration in a matter of this kind it must be speedily resorted to, otherwise I shall find a necessity for proceeding to adjudication upon the point, in order to secure to the persons interested the speedy possession of that bounty which it was intended they should receive. What may be the proper limit of time within which the arbitration is to take place I shall consider, but certainly it shall not be one which will countenance an unnecessary delay. Every part of this allegation which relates to these three ships must be expunged, the Court having decided against their interest. Their case rests upon a very different footing from that to which it has been assimilated, of ships claiming to share in bounty money arising out of a general engagement, in which case there can be no selection of combatants. It is a service in which all equally participate, the whole fleet is supposed to be engaged with the whole of the opposing force, it is often so in the reality of the fact and always so in the supposition of law, and therefore all are equally admitted to partake in the benefit of prize and head-money. But in the case of a general and remote chase like this, where the parties are dispersed to a great distance from each other, there may be a combination of exertion and yet a separation in contest. In such a case there is no danger of that confusion and uncertainty as to the actual services of each individual ship which was suggested in argument, because from the difference of locality the facts must be capable of being sufficiently substantiated by evidence taken *recenti facto*. But the mere endeavour to come up and close with the enemy either before or during the battle will not sustain a claim to participate in the head-money; unless the effort is successful the endeavour to do the act does not constitute the act itself, so far as the claim of head-money is concerned. Some ships may also use laudable endeavours to render assistance after the battle, by

helping to remove the prisoners and doing other acts of a useful nature, but that is not joining in the battle, and will not bring them within the principle which I have cited. I come now to consider what is the case of the *Revenge*.

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[The Court then dealt with the facts in regard to this vessel.]

THE FOX AND OTHERS.

[Edw. 311.]

Licence—Blockade—Orders in Council—Presumption of Legality—Revocation of Decree of Foreign Government—Evidence.

The Prize Court will presume that Orders of the Sovereign in Council are in accord with the law of nations.

The revocation of a decree of a foreign government can only be proved by the declaration of such government itself, and cannot generally be presumed.

1811 *May* 30.

Sir W. Scott.—This was the case of an American vessel which was taken on the 15th November, 1810, on a voyage from Boston to Cherbourg. It is contended, on the part of the captors, that under the Order in Council of 26th April, 1809, this ship and cargo, being destined to a port of France, are liable to confiscation. On the part of the claimants it has been replied, that the ship and cargo are not confiscable under the Orders in Council; first, because these Orders have in fact become extinct, being professedly founded upon measures which the enemy had retracted; and secondly, that if the Orders in Council are to be considered as existing, there are circumstances of equity in the present case, and in the others that follow, which ought to induce the Court to hold them exonerated from the penal effect of these Orders.

In the course of the discussion a question has been started: What would be the duty of the Court under Orders in Council that were repugnant to the law of nations? It has been contended on one side, that the Court would at all events be bound to enforce the Orders in Council; on the other, that the Court would be bound to apply the rule of the law of nations adapted to the particular case, in disregard of the Orders in Council. I have not observed, however, that these Orders in Council, in their retaliatory character, have been described in the argument as at

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all repugnant to the law of nations, however liable to be so described if merely original and abstract. And therefore it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes upon me, that I observe that this Court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilized States. At the same time it is strictly true, that by the constitution of this country, the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this Court. These two propositions, that the Court is bound to administer the law of nations, and that it is bound to enforce the King's Orders in Council, are not at all inconsistent with each other; because these Orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them—cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself; or they are positive regulations, consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

The constitution of this Court, relatively to the legislative power of the King in Council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. Those Courts have their unwritten law, the approved principles of natural reason and justice; they have likewise the written or statute law in Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the Courts could extract from mere general

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speculations. What would be the duty of the individuals who preside in those Courts if required to enforce an Act of Parliament which contradicted those principles, is a question which I presume they would not entertain *à priori*, because they will not entertain *à priori* the supposition that any such will arise. In like manner this Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot, without extreme indecency, presume that any such emergency will happen; and it is the less disposed to entertain them, because its own observation and experience attest the general conformity of such orders and instructions to its principles of unwritten law. In the particular case of the orders and instructions which give rise to the present question, the Court has not heard it at all maintained in argument, that as retaliatory orders they are not conformable to such principles, for retaliatory orders they are. They are so declared in their own language, and in the uniform language of the government which has established them. I have no hesitation in saying that they would cease to be just if they ceased to be retaliatory; and they would cease to be retaliatory from the moment the enemy retracts in a sincere manner those measures of his which they were intended to retaliate.

The first question is, What is the proper evidence for this Court to receive, under all the circumstances that belong to the case, in proof of the fact that he has made a *bonâ fide* retractation of those measures? Upon that point it appears to me that the proper evidence for the Court to receive is the declaration of the State itself, which issued these retaliatory orders, that it revokes them in consequence of such a change having taken place in the conduct of the enemy. When the State, in consequence of gross outrages upon the law of nations committed by its adversary, was compelled, by a necessity which it laments, to resort to measures which it otherwise condemns, it pledged itself to the revocation of those measures as soon as the necessity ceases; and till the State revokes them this Court is bound to presume that the necessity continues to exist. It cannot, without extreme indecency, suppose that they would continue a moment longer than the necessity which produced them, or that the notification that such measures were revoked would be less public and

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formal than their first establishment. Their establishment was doubtless a great and signal departure from the ordinary administration of justice in the ordinary state of the exercise of public hostility, but was justified by that extraordinary deviation from the common exercise of hostility in the conduct of the enemy. It would not have been within the competency of the Court itself to have applied originally such rules, because it was hardly possible for this Court to possess that distinct and certain information of the facts to which alone such extraordinary rules were justly applicable. It waited, therefore, for the communication of the facts; it waited likewise for the promulgation of the rules that were to be practically applied; for the State might not have thought fit to act up to the extremity of its rights on this extraordinary occasion. It might from motives of forbearance, or even of policy unmixed with any injustice to other States, have adopted a more indulgent rule than the law of nations would authorize, though it is not at liberty ever to apply a harsher rule than that law warrants. In the case of the Swedish convoy which has been alluded to, no order or instruction whatever was issued, and the Court therefore was left to find its way to that legal conclusion which its judgment of the principles of the law led it to adopt; but certainly, if the State had issued an order that a rule of less severity should be applied, this Court would not have considered it as any departure from its duty to act upon the milder rule which the prudence of the State was content to substitute in support of its own rights. In the present case it waited for the communication of the fact and the promulgation of the rule. It is its duty in like manner to wait for the notification of the fact that these orders are revoked in consequence of a change in the conduct of the enemy.

The edicts of the enemy themselves, obscure and ambiguous in their usual language, and most notoriously and frequently contradicted by his practice, would hardly afford it a satisfactory evidence of any such change having actually and sincerely taken place. The State has pledged itself to make such a notification when the fact happens; it is pledged so to do by its public declarations, by its acknowledged interpretations of the law of nations, by every act which can excite an universal expectation and demand, that it shall redeem such a pledge. Is such an expectation peculiar

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to this Court? Most unquestionably not. It is universally felt and universally expressed. What are the expectations signified by the American Government in the public correspondence referred to? Not that these orders would become silently extinct under the interpretations of this Court, but that the State would rescind and revoke them. What is the expectation expressed in the numerous private letters exhibited to the Court amongst the papers found on board this class of vessels? Not that the British Orders had expired of themselves, but that they would be removed and repealed by public authority. If I took upon myself to annihilate them by interpretation I should act in opposition to the apprehension and judgment of all parties concerned—of the individuals whose property is in question, and of the American Government itself, which is bound to protect them.

Allusion has been made to two or three cases, in which this Court is said to have exercised a power of qualifying and moderating the general terms of an Order in Council, as in the case of the *Lucy*, in which the general terms of the order subjected to confiscation all ships transferred by the enemy to neutrals during the war, and yet this Court held that these general terms did not extend to prize ships so transferred by the enemy. But what was the ground of that interpretation? It was this—the rule itself was adopted from the rule of the enemy, and upon a principle of exact retaliation; for it was declared in the express terms of the preamble of the Order that it was just to apply the same rule to the enemy which he was in the habit of applying to this country. And when the Court found upon satisfactory evidence that the enemy did not apply any such rule to prize ships, but specially exempted them, it would have pronounced in direct contradiction to the avowed principle of the Order itself, if it had not followed the enemy in this acknowledged distinction. It has likewise been urged that cases may be found in which the Court has presumed a revocation, though no such revocation has been promulged. And it is certainly true that where an essential change in the circumstances that occasioned the Order has, in effect, extinguished its subject-matter, and that change of circumstances has been publicly declared by the State, the Court has not thought it necessary to wait for a formal revocation itself. In the

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case of the Baltic Order, by which, in compliance with the wishes of its allies in the war, the government of this country granted an immunity from the molestation of capture in that sea: the Court held that Order to be revoked when the State had declared that most of those States to whose applications, as allies, that indulgence had been granted had changed the character of allies for that of enemies. It was quite unnecessary to wait for such special revocation when by the general declaration of war all hostilities had been authorized against them.

Admitting, however, that there may be cases of presumed revocation, does it follow that this is, with any propriety, to be considered as one of those cases? The novelty of these Orders in Council—the magnitude—the complexity—the extraordinary nature of the facts to which they owe their origin—the attention which they called for and excited both at home and abroad—the pledges given by this State and accepted by other States, all disqualify this Court from taking upon itself to apply a presumed revocation in any such case.

Supposing, however, that the Court felt itself at liberty to accept as satisfactory other evidence of a sincere retractation of the French decrees, what is the amount of the evidence offered? No edict—no public declaration of repeal—no reference to cases in which the Courts of that country have acted upon any such revocation. The only case mentioned was that of the *New Orleans Packet*, and 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—whether at all applicable to the present question, whether a mere irregularity, or what was its real character, the Court could not learn. This, however, is matter of notoriety, that these decrees are pronounced fundamental laws of the French Empire—that they were declared so in their original formation—and that they have been since so declared repeatedly and recently—long since the date of the present transactions. The declaration of the person styling himself Duke de Cadore imports no revocation, for that declaration imports only a

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conditional retractation, and this upon conditions known to be impossible to be complied with. It has been urged that the American Government has considered it otherwise, and has so declared it for the regulation of the conduct of the people of that country. If such is the fact, it is not for me to lose sight of that respect which is due to the acts of a foreign government so far as to question the propriety of any interpretation which they may have given to such an instrument; but when the effect of such an instrument is pressed upon me for the purpose of calling for my decision, I must be allowed to interpret it for myself, and to act upon that interpretation. And to me it appears that the declaration, clogged as it is with stipulations known to be beyond the reach of all rational hope of any possible compliance, is in effect a renunciation of any serious purpose of repealing those decrees. I think I might invoke the authority of the government of the United States for denying to this French declaration the effect of an absolute repeal, when I observe that the period which they have allowed to the British Government for revoking our Orders in Council extends to the 2nd of February, an allowance which could hardly have been made if the revocation on the part of France had really taken place at the time to which that declaration purports to refer.

In the absence of any declaration of the British Government to such an effect, there is a total failure of all other evidence (if the Court were at liberty to accept other evidence as satisfactory) that the French decrees had been revoked. If I were driven to decide upon that evidence, independent of all evidence to be regularly furnished by the government under whose authority I sit, I think I am bound to pronounce that no such revocation has taken place, and therefore that the Orders in Council subsist in perfect justice as well as in complete authority.

It is incumbent upon me, I think, to take notice of an objection of Dr. Herbert's to the existence of the Orders in Council, namely, that British subjects are, notwithstanding, permitted to trade with France, and that a blockade which excludes the subjects of all other countries from trading with ports of the enemy, and at the same time permits any access to those ports to the subjects of the State which imposes it, is irregular, illegal, and null; and I agree to the

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position that a blockade, imposed for the purpose of obtaining a commercial monopoly for the private advantage of the State which lays on such blockade, is illegal and void on the very principle upon which it is founded. But in the first place (though that is matter of inferior consideration) I am not aware that any such trade between the subjects of this country and France is generally permitted. Licences have been granted certainly in no inconsiderable numbers, but it never has been argued that particular licences would vitiate a blockade. If it were material in the present case, it might be observed that many more of these licences had been granted to foreign ships than to British ships to go from this country to France and to return here from thence with cargoes. But, secondly, what still more clearly and generally takes this matter out of the reach of the objection is the particular nature and character of this blockade of France, if it is so to be characterized. It is not an original, independent act of blockade, to be governed by the common rules that belong simply to that operation of war. It is in this instance a counteracting reflex measure, compelled by the act of the enemy, and as such subject to other considerations arising out of its peculiarly distinctive character. France declared that the subjects of other States should have no access to England; England, on that account, declared that the subjects of other States should have no access to France. So far this retaliatory blockade (if blockade it is to be called) is coextensive with the principle: neutrals are prohibited to trade with France because they are prohibited by France from trading with England. England acquires the right, which it would not otherwise possess, to prohibit that intercourse by virtue of the act of France. Having so acquired it, it exercises it to its full extent with entire competence of legal authority; and having so done, it is not for other countries to inquire how far this country may be able to relieve itself further from the aggressions of that enemy. The case is settled between them and itself by the principle on which the intercourse is prohibited. If the convenience of this country before this prohibition required some occasional intercourse with the enemy, no justice that is due to other countries requires that such an intercourse should be suspended on account of any prohibition imposed upon them on a ground so totally unconnected

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with the ordinary principles of a common measure of blockade, from which it is thus distinguished by its retaliatory character.

The last question is, are there any circumstances addressed to equitable consideration that can relieve the claimants from the penal effects of these Orders? Certainly, if any could be urged that arose from the conduct of the British Government itself, they might be urged with a powerful and even irresistible effect; but if they found themselves in the fraud of the enemy, or in the misapprehensions of the American Government induced by the fraud of the enemy, they found no claim on the British Government or on British tribunals. In the one case they must resort for redress to a quarter where, I fear, it is not to be found, to the government of the enemy; in the other, where I presume it is to be found, to the government of their own country.

Upon the declaration of the American Government I have already said as much as consists with the respect which I am bound to pay to the declaration of a foreign government professedly neutral. The custom-houses of that country, say the claimants, cleared us out for France publicly and without reserve. They did so; but they left the claimants to pursue all requisite measures for their own security, in expectation, I presume, that they would inform themselves by legal inquiry whether the blockade continued to exist, if its continuance was uncertain. That it was perfectly uncertain in their own apprehensions is clear from the tenor of these letters of instructions to the different masters of these vessels. In these letters, which are numerous, all is problematical between hope and fear—a contest between the desire of getting first to a tempting market on the one side, and the possible hazard of British capture on the other; and it is to be regretted that the eagerness of mercantile speculation has prevailed over the sense of danger. In such a state of mind, acting upon circumstances, the party must understand that he takes the chance of events—of advantage if the event which he hopes for has taken place, and of loss if it has not. It is his own adventure, and he must take profit or loss as the event may throw it upon him. He cannot take the advantage without the hazard of loss, unless by resorting to British ports in the Channel, where certain information may be obtained, on the truth of which all prospects of loss or

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profit may safely be suspended. On the British Government no responsibility can be charged; they were bound to revoke as soon as they were satisfied of the sincere revocation of the French decrees. Such satisfaction they have not signified, and I am bound to presume that no such satisfaction is felt. With respect to the demand of warning, the Orders themselves are full warning; they are the most formal admonitions that could be given, and being given and unrevoked they require no subsidiary notice.

On the grounds of the present evidence I therefore see no reason to hold the claimants discharged; but I do not proceed to an ultimate decision upon their interests till I see the effect of that additional evidence which is promised to be produced upon the fact of the French retractation of their decrees, said to have been very recently received from Paris by the American *chargé d'affaires* in this country. Having no official means of communication with foreign Ministers, I shall hope to receive the information in a regular manner, through the transmission of the British offices of State.

Judgment resumed.

SIR W. SCOTT.—As the claimants have failed to produce any evidence of the revocation of the French decrees, and have nothing to offer as the foundation of a demand for further time, I must conform to what I declared on a former day, and proceed to make the decree effectual. I should certainly have been extremely glad to receive any authentic information tending to show that the decrees of France, to which these Orders in Council are retaliatory, had been revoked; and it was upon a suggestion offered on the part of the claimants that dispatches had been very recently received from Paris by the American Minister in this country, by which the fact might be ascertained, that the Court on the former day deferred its final judgment. It would have been unwilling to proceed to the condemnation of these vessels without giving the proprietors the opportunity of showing that the French decrees, on which our Orders in Council are founded, had been revoked; but they admit that they have no such evidence to produce. The property of the ships and cargoes is daily deteriorating, and it is my

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duty to delay no longer the judgment which is called for on the part of the captors.

From everything that must have preceded, and from everything that must have followed the revocation of the French decrees, if such revocation had taken place, I think I am justified in pronouncing that no such event has ever occurred. The only document referred to on behalf of the claimants is the letter of the person styling himself Duc de Cadore. That letter is nothing more than a conditional revocation. It contains an alternative proposed: either that Great Britain shall not only revoke her Orders in Council, but likewise renounce her principles of blockade —principles founded upon the ancient and established law of nations—or that America shall cause her neutral rights to be respected; in other words, that she shall join France in a compulsive confederation against this country. It is quite impossible that England should renounce her principles of blockade to adopt the new-fangled principles of the French Government, which are absolute novelties in the law of nations; and I hope it is equally impossible that America should lend herself to a hostile attempt to compel this country to renounce those principles on which it has acted, in perfect conformity to ancient practice and the known law of nations, upon the mere demand of the person holding the government of France. The *casus fœderis*, therefore, if it may be so called, does not exist; the conditions on which alone France holds out a prospect of retracting the decrees neither are nor can be fulfilled. Looking at the question therefore *à priori*, it cannot be presumed that the revocation has passed. On the other hand, what must have followed if such had been the fact? Why, that the American Minister in this country must have been in possession of most decisive evidence upon the subject, for I cannot but suppose that the first step of the American Minister at Paris would have been to apprise the American Minister at this Court of so momentous a circumstance, with a view to protect the American ships and cargoes which had been brought in under the British Orders in Council. If no such information has been received by him, there never was a case in which the rule "*De non apparentibus et non existentibus eadem est ratio*" can more satisfactorily apply. For it is quite impossible that such a revocation can have taken

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place without being attended with a clear demonstration of evidence that such was the fact.

I am, therefore, upon every view of the case, of opinion that the French decrees are at this moment unrevoked. But if by any possibility it can have happened that an actual revocation has taken place against the manifest import of the only public French declaration referred to, and without having been yet communicated to the American Minister in this country, who was so much concerned to know it, for the benefit of the persons for whose protection it must have been principally meant, the parties will have the advantage of the fact, if they can show upon an appeal that those decrees have been revoked at a time and in a manner that could justly be applied to the determination of these causes; revoked at a period which would reach the dates of this capture, and in a manner unincumbered with stipulations which it was well known this country could never accept, and to which there was every reason to presume that the justice of America could never permit her to accede, upon the refusal of Great Britain. On such a state of evidence the claimants will carry up with them to the superior Court the principle that might entitle them to protection according to the view which this Court has taken of the subject. But things standing as they do before me—all the parties having acted in a manner that leads necessarily to the conclusion that no *bonâ fide* revocation of the Berlin and Milan decrees has taken place—I must consider these cases as falling within the range of the British Orders in Council, and as such they are liable to condemnation.

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Licence—Time—Non-completion of Voyage—Due Diligence.

Where a holder of a licence has acted *bonâ fide*, the Court will construe such licence liberally, and where a voyage has not been completed within the time specified in a licence, the Court will not condemn the vessel if the non-completion has been caused by circumstances over which the master has had no control.

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This was a leading case, and became of importance, as it furnished the Court with an opportunity of stating generally the principles by which its decisions would be governed in questions arising on the capture of vessels sailing under British licences. The ship was chartered at Marennes, to proceed in ballast to Rochelle, and there to take on board her present cargo; she arrived at Rochelle on the 1st of April, 1809, and completed her lading on the 13th May, but did not sail until the 29th June, on which day she was captured, as the licence had expired. The excuse set up was, that the ship was detained after her cargo was on board by an embargo which had been imposed by the French Government; and that for some days after it was taken off she was prevented from sailing by contrary winds.

Sir W. Scott.—This was the case of a vessel under Oldenburgh colours, which was captured in the prosecution of a voyage from Rochelle to Hull, and brought to Plymouth. There was a licence on board granted to Henry Nodin, on behalf of himself and other British merchants, for four vessels under particular colours which are enumerated, to proceed with cargoes of brandies from Charente, Bordeaux, or any port of France not blockaded, to any port of Great Britain, and permitting the masters to receive their freights, and depart with their vessels and crews. The licence is dated 15th November, 1808, and is to remain in force six months from that period. Now, the ship was taken the 29th of June last, and therefore, according to the literal construction of the licence, after the time had expired during which it was to continue in operation.

This question has led to some discussion on the rules of interpretation to be applied to licences generally, and as those rules will of

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necessity embrace a great variety of cases, it is extremely desirable that they should be settled now, as far as this can be done by the authority of this Court. These licences owe their origin to the general prohibition, which declares it to be unlawful for the subjects of this country to trade with the enemies of the King without his permission, for a state of war is a state of interdiction of communication: that is a law which is not peculiar to this country, but one which obtains very generally among the States of Europe. In former wars this prohibition was attended with very little inconvenience, as the greater part of the countries in the neighbourhood remained neutral, and presented to the belligerents various channels of communication, through which they obtained from each other such commodities as they stood in need of. While the world, therefore, continued in that state, of course licences would be granted only in very special cases, where it appeared that there was a necessity to have a direct communication with the enemy; and being matter of special indulgence, the application of them was *strictissimi juris*. At the same time, when I so describe them, I do not mean to say that there ever was a period in which a rational exposition, allowing a fair and liberal construction of the intention of the grantor, would not have been received. There never was a period, for instance, in which it could have been contended that the words "six months" were subject to such a strict and literal interpretation that a failure, arising from circumstances which the party could not control, would have the effect of vitiating the licence, where he could show that he had used all due diligence, and was prevented from completing the voyage within the time by embargoes in foreign ports, or by the fury of the elements. These are accidents which prejudice no person, and therefore I presume the time never existed when the party would not have been at liberty in this Court to allege such facts, and when he would not have been entitled to a virtual protection from its decisions, although the terms of the licence were not literally complied with. While he was baffled by these obstructions, the intervening time was, as it were, annihilated, and he was to be put again in possession of the time so lost. That interval, in which he was not at liberty to act, was, in fair construction, no time as to the operation of the licence.

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It was a construction founded on the intention of the grantor, that where a party had acted with good faith, and had complied with the terms prescribed, as nearly as controlling circumstances would permit, he should have a fair indulgence respecting those points in which he had been prevented from a literal performance, by obstructions which he could neither foresee nor obviate. This was the rule of interpretation when licences were even matters of special indulgence.

But it has happened that in consequence of the extraordinary and unprecedented course of public events, these licences have, in a certain degree, changed their character, and are no longer to be considered exactly in the same light. It is notorious that the enemy has in this war directed his attacks more immediately against the commerce of this country than in former wars; and a circumstance of still greater weight is, that he has possessed himself of all those places that in former wars remained in a state of neutrality. To what part of the Continent can we now look for a country which is not either under the actual dominion of France, or in that state of subjection to it which operates with all the effect of dominion? It is a state of things in which it has become impossible for England to carry on its foreign commerce without placing it on a very different footing from what its convenience required in former wars. To say that you shall have no trade with the enemy would be in effect to say that you shall not trade at all, because that commerce which is essential to the prosperity of the country cannot be carried on in those small and obscure nooks and corners of Europe, if any such can be found, which are still independent. The question then comes to this, How is the foreign commerce of the country to be maintained? It must be either by relaxing the ancient principle entirely, and permitting an unlimited intercourse with the ports of the enemy, and where the ports of other nations are put under blockade (as they are by the Orders in Council) for other reasons than those of a direct hostile character, they become liable to be considered and treated in like manner, so far as the purposes of blockade require; or it must be by giving a greater extension to the grant of licences. As to the relaxation of the general principle, by which an open and general intercourse with the enemy would be allowed, the

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consent of both parties is requisite to make that effectual, and even if the enemy permitted it, the legislature would probably not think proper to proceed to that length, and for reasons, I presume, connected with the public safety. It has therefore tolerated a resort to the other mode of permitting a trade by licences, which, though they are so denominated, are likewise in effect expedients adopted by this country to support its trade, in defiance of all those obstacles which are interposed by the enemy. They are not mere matters of special and rare indulgence, but are granted with great liberality to all merchants of good character, and are expressed in very general terms, requiring, therefore, an enlarged and liberal interpretation. At the same time they are not free from control; restrictions dictated by prudent caution are annexed, and where they are so annexed, those restrictions must be supposed to have an operative meaning. It is not, therefore, in the power of this Court to apply such an interpretation to a licence as would be in direct contradiction to its express terms or to say that effect should be given to one part and not to another. If the permission is for a ship to go in ballast, it would be impossible for the Court to say that it shall go with a cargo; for that would be, not an interpretation, but a contravention of the licence. But where it is evident that the parties have acted with perfect good faith, and with an anxious wish to conform to the terms of the licence, I presume that I am only carrying into effect the intention of the grantor when I have recourse to the utmost liberality of construction which it is in the power of this Court to apply. As a general rule, therefore, it is to be understood that where no fraud has been committed, where no fraud has been meditated, as far as appears, and where the parties have been prevented from carrying the licence into literal execution by a power which they could not control, they shall be entitled to the benefit of its protection, although the terms may not have been literally and strictly fulfilled. If I assume too much in laying down this rule, it must be rectified in the superior Court; but, looking to the intentions of the government, not only to what they are, but to what I am led to suppose they must be; looking to the extreme difficulty of carrying on the commerce of the country in the struggle which it has to maintain, not only against

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the power but against the craft of the enemy; looking to the frequency and the suddenness with which he lays on or takes off his embargoes according to the exigency of the moment; looking to the various obstructions that present themselves in obtaining vessels, in consequence of the small remainder that there is of neutral navigation in Europe; looking also to this circumstance, that all this intercourse must be carried on by the subjects of the enemy, that it must be a confidential transaction to be conducted by an enemy shipper at great risk and hazard to himself; looking to the total change which has taken place in the nature and character of these licences, if that denomination is to be considered: I say, looking to all these considerations, where there is clearly an absence of all fraud, and of all discoverable inducements to fraud, I must go to the utmost length of protection that fair judicial discretion will warrant, though there may under such circumstances have been a considerable failure in the literal execution of the terms of the licence. There may be great inconvenience in the whole system of licences, as, indeed, it is scarce possible in the present state of the world that there should not be great practical inconvenience in any mode of conducting its commerce. That is a question of policy with which this Court has nothing to do. It has only to enforce the just execution of legitimate orders issued by legitimate authority.

Having laid it down, therefore, as a general principle, that where there is clear *bona fides* in the holder, this Court, though it certainly will not contravene the terms of a licence, will give it the most liberal construction, I come now to apply that rule to the case before me. The principal ground of objection is the delay which took place in the sailing of the vessel; but I must observe that, having called on the counsel for the captors to point out what particular fraud could have been intended by this procrastination, I have only been answered by a sort of general suggestion that such an extension of the period allowed might afford an opportunity of bringing the licence into use a second time; but that any such use was made, or intended to be made, of the licence in the present instance has not been suggested, and therefore it is to be taken as a case clear of that act or intention of fraud. It is objected to the master that he did not produce his licence to the

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captors, and that on his arrival at Plymouth he delivered certain papers and documents to his agents there. But it is impossible not to take into consideration the difficulties under which such persons labour; they are persons exposed to great harassments both on the one side and on the other. They know that they are embarked in transactions of great confidence and mystery requiring the utmost care and circumspection, and they are to pick their way in fear and silence, walking, as it were, at every step over burning ploughshares; that under such circumstances there should have been something of reserve in the conduct of this neutral master is not very much matter of surprise or of serious judicial animadversion. As far as can be collected from the contents of the papers no fraud seems to have been meditated in keeping them back, and I dwell the less upon this objection because it is one which the captors have no right to take in this case, as it appears that they have not done their duty in bringing in the papers in a regular manner. It is the known duty of the prize-master to take possession of the ship's papers, and upon his arrival to make an affidavit and bring them in, but here they were left in the custody of the master of the ship. When the ship comes into port does the prize-master demand them? No, that was not done; they are brought in some days afterwards by a person of the name of Smith, who describes himself as the agent of the agents of the captors. If, therefore, any papers were kept back, it is a fault of which the captors have no right to complain; there is an end of any objection that can proceed from that quarter as to an unfairness in the production of the papers. But these papers are such as the master could not have any interest in withdrawing, and therefore there is not much in the substance of the objection. The account given by the master is, "that the vessel sailed from Marennes, in France, in the month of March last, where she was chartered to proceed in ballast to Rochelle, there to take on board her present cargo; that the said ship sailed from Marennes aforesaid on the 28th of March last, and arrived at Rochelle on the 1st of April following, and in the same month began to take on board her present lading, and completed the same on the 13th of May following; that the said ship sailed from Rochelle aforesaid, being her last clearing port previous to the capture on the 29th of June last, having been

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detained from sailing after her cargo was on board by means of an embargo by the French Government, and for some days by contrary winds." It is said that this was a very long time, and so it is; and it is a long time which the Court is under the necessity of allowing on account of the immense difficulties which are to be overcome. You cannot generally send ships from England, and they must therefore be procured as they may in ports of the enemy. This ship was chartered in an enemy's port, and as there must have been a good deal of previous correspondence, it is not surprising that a considerable time elapsed before the business was concluded. The ship sailed from Rochelle on the 21st of June, and was taken on the same day. Now the whole labour of the argument has been employed to show that some fraud or other must be presumed, from the length of time which elapsed after the expiration of the licence. But what is the natural presumption in this case? Why, that the party would not countenance an unnecessary delay, which must be contrary to his own direct interest. This furnishes a very strong ground to suppose that it was by accident that the ship was prevented from completing her voyage within the time expressed in the licence. If it could be shown that the licence had been used before, and that the delay in the present instance arose from its previous use, or that there was any other fraudulent purpose to be answered, most certainly I should then call for more particular explanations; but as no fraudulent motive has been pointed out, I must suppose that the party was not dilatory in furthering the completion of his own mercantile adventure. The only thing suggested is the fact that the time limited by the licence had expired. That has been accounted for by the intervention of an alleged embargo. Shall I, under these circumstances, order the fact of the embargo to be established by further proof, when it is so probable in itself, and load this table with French decrees and ordinances which would, after long delay, in all probability lead to the same conclusion at last? Looking to the local circumstances of the country in which the transaction originated, and to the conduct of the French Government at that particular period, I think it my duty to stand upon the presumption that the embargo did exist, and to hold the parties entitled to restitution, paying the captors their expenses, which I cannot

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refuse where the parties are acting in apparent contravention of the literal terms of their licence. In such cases his Majesty's officers have a right to be satisfied, and they are entitled in justice to be protected in their expenses. It is an inconvenience not arising from capture, but from the present state of affairs, and from which the Court cannot relieve the claimants, however it may regret that they should be subjected to it. The licence, I observe, is only to bring a cargo of brandy, and as there are other goods on board, those goods must be condemned, as the permission is limited to the brandy (*a*).

[Edw. 339.]

THE CARL.

Licence—Time Expired—New Licence obtained, but not on Board.

Where a vessel was captured the licence of which had expired, but her owners had obtained another licence not on board:—*Held*, that the ship should not be condemned.

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THIS was the case of a vessel in ballast which was captured on a voyage from Louisa to Cronstadt. A claim was given by a British house of trade, setting forth that in the month of August, 1808, and also in the months of February and May, 1809, they had procured licences to protect various ships engaged in importing cargoes from Russia to this country; that the licences were forwarded, soon after they were procured, to their agent at St. Petersburg; but that, owing to the difficulty of procuring vessels in the Russian ports, some of the licences obtained in August, 1808, remained at the end of the season in the hands of their agent, and among others the licence on board this vessel; that in May or June, 1809, they were informed by their agent that he had engaged the ship *Carl*, then in the port of Louisa, to proceed from thence in ballast to Cronstadt to take on board a cargo which

[Edw. 355.]

(*a*) In the *Johan Pieter* (March 30, 1810), a licence was dated April 27, 1808, to allow a ship to bring a cargo from Charente to the United Kingdom. She was sent out in April, arrived at Charente in June, and was detained by an embargo till February, 1810, and was captured in that month. She was held to be protected, for the reasons as given in this judgment.

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he had purchased for their house, for the purpose of proceeding with it to a British port; that they were subsequently informed by their agent that, not having then received any of the licences procured by them in February and May, 1809, he had, in order to save the season, sent to Louisa one of the licences procured in August, 1808, with a view to protect the ship from capture on her way from Louisa to Cronstadt. The claim further set forth that it was the fixed intention of the British merchants, and also of their agent, that one of the licences, procured in February and May, 1809 (copies of which were annexed to the claim), and which had actually been forwarded previous to the capture, should be used to protect the ship *Carl* on her voyage from Cronstadt to England; but which of the licences would have been so appropriated they could not set forth, as it must have depended on the time of their coming to hand.

SIR W. SCOTT.—In any view of the case there can be no doubt that the captors were fully justified in detaining this vessel, as the licence found on board had expired several months before this transaction took place. The licence permits a vessel under any flag, except the French, to bring a cargo to this country from any port in the Baltic, and there is an indorsement on the back of it in these words: "The annexed licence came to the hands of the undersigned, a British subject, now in this country upon commercial business, too late in the season to make the intended use of it; but having bought the Louisa-built ship *Carl*, which I have ordered here to take in a cargo of Russian produce for England, I have provided her with the documents for a free passage in ballast from Louisa to Cronstadt, not doubting to provide her with a new licence for England, having advice of such documents taken out and obtained by my friends. I trust, therefore, under these circumstances, a free passage and even protection will be given by all British or allied cruisers to the said ship." Dated St. Petersburg, 10th (22nd) May, 1809. Such a statement the captors were justified in disregarding, for certainly this Court, in considering the application and use of these licences, has never laid it down that time is an ingredient of no consequence.

And here I cannot help expressing my surprise that the licences

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taken out for this particular trade are limited to the period of six months, as well on account of the length of the voyage, as the known fact that the ports of Russia are very ill supplied with shipping, a difficulty which is frequently to be removed by obtaining vessels from other ports in the Baltic. These considerations do, in my apprehension, form a ground for this Court to exercise an equitable discretion in distinguishing this class of cases from some others which have been alluded to in the argument. For this Court will consider it a part of its duty to attend to the local circumstances and situations of the different countries in which these licences are to be carried into effect. Where there is evidently no fraud in the transaction the Court will, in considering this class of cases, hold the rule less strictly than it would do relatively to transactions taking place in countries where the opportunities of carrying adventures into effect are more obvious. Now, in the present case, I ask whether there is anything like an indication of a fraudulent intention; it is surely one symptom of fairness that the agent shipper puts on board this acknowledgment of the infirmity of the licence, and refers to one subsequently to be obtained in England for protection. I certainly see something of negligence in the house here in not making immediate application at the Council office for a licence expressly for this particular ship the moment it was known to them that she was to be sent to Cronstadt with this expired licence on board.

But looking to the importance of this commerce, and the difficulty of maintaining it under the deficient supply of navigation in the ports of Russia, if I were to fasten down upon the parties penal consequences for every trifling irregularity, it would be to put this important branch of the commerce of the country into a state of thraldom that must amount to an utter extinction of it. Under these considerations I think I am not stepping beyond the equitable discretion which this Court is bound to exercise, in saying that these licences convey a virtual protection to this vessel, and I shall therefore restore, on payment of the captor's expenses.

THE SPECULATION. [Edw. 344.]

Licence—No evidence of applicability to captured Vessel—Intention of Licence.

A vessel was captured with a licence which did not appear to refer to her. *Held*, that she must be condemned.

The object of licences considered.

1810
February 16.

Sir W. Scott.—This ship, under Lubeck colours, was captured on a voyage from Copenhagen to Riga, in ballast, with a licence on board which does not appear to refer in any manner to this vessel, as it is not indorsed, and the name of the ship is not to be found in the body of the licence. The Court is extremely unwilling to be rigorous in respect to the application of licences to the vessels which they are intended to protect. But they must in some specific manner be so applied, and I cannot take the mere averment of the fact by the British claimant to be sufficient. In this case a licence was found on board at the time of capture, and *primâ facie* it might be taken as intended to be applied to this vessel; but the fact may be otherwise. For instance, the licence may be going for the protection of some other vessel to which it is to be applied, and it would be impossible to say that the mere circumstance of its being on board the vessel that conveys it shall be sufficient for her protection also.

There is nothing in the present case to show that this licence was intended by any of the parties to be applied to this vessel. All that appears is that the owner of the ship at Hamburg is sending this licence to his correspondent at Riga, telling him that he would send instructions for its application, and directing him to let this ship on freight, or, in failure of that, to put her up to sale. His words are these: "I hereby take the liberty of enclosing you a licence at your disposal, having to-day an opportunity for sending you the present. I hope it will soon reach you, and I will write further to you on this subject by post." And in another letter on board, addressed to the same person, he says: "The bearer hereof is Captain Eberhard, commanding the ship *Speculation*; have the goodness to procure him as good a freight as possible, in order that this undertaking may render me a good profit. If I could get 9,500 or 10,000 R. D. Hamburg banco nett

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for the ship, I should be inclined to sell her again, for which purpose I hereby empower you to do so." Here, then, are very slender grounds whereon to infer that this licence would have been applied to this vessel by the correspondent of the owner at Riga. But if we had got that length would that be sufficient? I am of opinion that it would not. Licences are granted by the government of this country on a prospect of reciprocal advantage to the government which grants it and the foreigner who receives it. The permission of going from one port of the enemy to another requires that the vessel shall be going thither for the purposes of British trade. Now it cannot be argued that such was the intention of the parties in the present case, because no such voyage was in contemplation, for, on failure of obtaining a freight, there was the alternative purpose of selling the ship at Riga. There must, in all these cases, be an intention conformable to the objects for which the licence has been granted. Parties are not to take advantage of the permission to proceed to the port of the enemy without an engagement that the vessel is proceeding thither for the purposes of a trade immediately connected with this country, for surely licences cannot be presumed to be granted for the purpose of carrying on the enemy's trade without any ulterior view to British use and advantage. Here, therefore, is a total failure not only in the application of the licence to this particular vessel, but also in its effect, supposing it had been so applied to a vessel proceeding to the port of the enemy for sale. Then comes the question whether, throwing the licence out of the case, this vessel would be subject to condemnation; and it is argued, that being a prize vessel, purchased by a neutral of the enemy, she is entitled to all the privileges of a neutral vessel, and at liberty to proceed in ballast from one enemy's port to another. If that were the only circumstance in the case, it might be so; but it is to be remembered that this vessel was purchased by the neutral in a blockaded port where a traffic cannot be allowed in ships more than in goods, and consequently the transfer is illegal. In the next place, if this vessel was proceeding to Riga to be sold, I am of opinion that this would be in itself a trading in contravention of the Order, 7th January, and therefore the ship would be liable to confiscation.

THE COUSINE MARIANNE. [Edw. 346.]

Licence—British Merchant—Goods of Belligerent.

A licence to British merchants to import a cargo from a belligerent port will not protect the property of a belligerent unless the licence contains the words, in reference to the goods, "to whomsoever the property may appear to belong."

1810 *March* 13.

This was the case of a vessel under Prussian colours which was captured on a voyage from Bordeaux to London, and claimed as protected, under a licence permitting Messrs. Wombwell and Company, and other British merchants, to import a cargo of enumerated goods into Plymouth for payment of the duties, and then to proceed on to a port in the Baltic. The words "to whomsoever the property may appear to belong" not being inserted in this licence, the question was whether certain parts of the cargo, which belonged to French merchants, were protected under it.

Sir W. Scott.—The question in this case is, whether the property of these goods vested in the British consignee at the time of capture, for 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 inquiry into the proprietary interest; but they are not to be found in the licence on board this vessel, and the Court, therefore, is not at liberty to depart from the general rule.

It is a settled principle in this Court that in order to constitute an effectual transfer of the property there must be either an order for the goods, or an acceptance of them by the consignee, prior to the capture. If the capture takes place where no order has been given and before the goods have been accepted, they must be considered as the property of the persons who have so consigned them. In this case, therefore, the Court has called for evidence to show whether any order had been given by the British merchants, or any act done by them in the nature of an acceptance before the capture. It is not pretended by the claimants that any specific order was given for these goods, but an affidavit is now

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introduced, purporting that the manufacturers at Valenciennes knew the quality of the goods wanted by the house here, and that it was understood they were to make their shipments without waiting for orders. I certainly cannot conceive that any such understanding could impose upon the parties here an obligation to accept goods to any quantity as well as of the specific quality; but what makes this account the more unsatisfactory is, that the shipment is not made by the manufacturers at Valenciennes, but by a house at Paris; and how are the parties here to be bound by their act? The course of trade referred to in this affidavit does not apply to the house at Paris, but to the manufacturers at Valenciennes. If, however, the shipment had been made by the manufacturers themselves, the question would still remain for the consideration of the Court, whether a general order to ship goods of a certain quality would impose upon the parties a legal obligation to accept goods of that description to any quantity. In order to show that the parties here have a vested interest in the property, it must be shown that they were under a legal obligation to accept these goods on their arrival. Now I have no idea that these shippers, putting their characters as alien enemies out of the question, could have compelled the British merchants to a specific payment for these goods. There might exist an expectation on their part that they would be accepted and paid for; but there was no legal obligation on the British merchants, and therefore, unless it had been shown that there was some act done by them in the nature of an acceptance of the goods prior to the capture, I cannot but be of opinion that the legal property still remains in the enemy, and, consequently, that this portion of the cargo must be condemned, as not being protected under the words of this licence.

THE VROW CORNELIA. [Edw. 349.]

Licence—Cargo—Shipment in Two Vessels.

A licence to bring a cargo in one vessel is sufficient to protect the same cargo shipped on board two vessels, one of them having only an attested copy on board, and having taken in her portion of the cargo in another port.

1810 *March* 14; affirmed *June* 13, 1811.

This was a question on the effect of an attested copy of the original licence under which the brandies on board this vessel were to have been imported into Hull from Charente, the vessel having sailed from Bordeaux. There was a further question whether, the licence being for a cargo of brandy, and the original having been used for 289 puncheons, which were shortly after forwarded from Charente to Hull in the *Johannes Von Letten*, this copy of the licence could enure to the protection of the goods on board this ship, being the other part of the original cargo intended to have been brought in one vessel from Charente when the licence was obtained. The claimants showed that the cargo was purchased on their account and ready to be shipped when the licence was applied for, but that they were unable to make the shipment at Charente, as the foreign vessels in that port were under sequestration, and the *Goede Verwagting*, which was chartered for the purpose, had been prevented by the French decrees from going thither; that under these circumstances they sent on this portion of the cargo overland to Bordeaux, where it was shipped in the *Vrow Cornelia*, and the sequestration being in a few days after taken off from the *Johannes Von Letten*, then at Charente, they availed themselves of the opportunity to ship the remainder direct from that port.

Sir W. Scott.—In the use and application of licences the Court will not limit the parties to a literal construction; it is sufficient that they show under the difficulties of commerce that they come as near as they can to the terms of the licence; and where that is done the Court will not prevent them from having the entire benefit intended by his Majesty's Government. If I did not adopt this rule I should inflict a severe wound upon British commerce, than which nothing can be further from my inclination; and if the cruisers expect a more rigid construction of licences

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from me they will find themselves disappointed. Wherever I am satisfied that there is no bad faith in the parties, and no undue extension of the terms of a licence beyond the meaning of the Council Board, any little informalities or any trifling deviations shall not injure them.

It appears that in the present instance the licence was granted to import these brandies into this country from Charente; but, for the reasons stated in the affidavits, it is shown that there was an impossibility of bringing out the cargo from that port, and consequently this portion of it was very warrantably forwarded to Bordeaux, to be exported from thence, for it is known that in the present state of France a merchant is often unable to tell from what port he can ship his cargo.

It was put upon the parties to prove that the goods ordered from Charente are the same goods that were put on board this vessel at Bordeaux; and it is said that there is reason to suspect that this is not the case, as the charge of warehouse rent is not in the invoices. I should have been startled if it had. It is not usual to introduce such a charge there, and I do not see what motive there could be to attempt an imposition on the Court in this part of the case. The only question, therefore, to which it is necessary for me to direct my attention is whether there has been any fraud upon the government in the application of the licence or in the use of it.

Mr. Corlass and his partner in Yorkshire are great dealers, and there are other dealers concerned in this transaction, but not to the same extent. These, through Corlass, order a particular quantity of brandy, and he says he has usually half the quantity in the ship, and this assertion I have no reason to question; they make application for a licence for this conjoined cargo, of which Corlass has the superintendence, he having what is equal to all the rest, and the formal business is done through Hodgson, whom I suppose to be a broker. Application is thus made to the Council Board, and they obtained a licence for the cargo to be imported into this country in the *Goede Verwagting*, or any neutral vessel. What is the fair construction of this licence? Certainly that they might import a cargo sufficient in bulk to stow the *Goede Verwagting* full, or any other neutral merchant ship. If they, under cover of this

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licence, had imported in two vessels what no one mercantile vessel in the port of Charente could hold, it might be considered as a fraud; but the whole quantity, it has been shown, is not beyond the capacity of vessels frequently sailing from that port. Upon the faith of this licence thus obtained, orders were given by Corlass to his agents in France for a particular quantity of brandies for others and for himself, sufficient to fill up the measure of the vessel, and under such a licence he had a right to have what would fill up any such a vessel as the *Goede Verwagting*.

It appears that the *Goede Verwagting*, under the present difficulties of commerce, could not get admission at Charente, in consequence of which delay the licence expired. In this distress the parties apply for a new licence to import the brandies in another ship; not for a ship of any particular dimensions, for they must be content with what they could get, and they send a ship which, having only a copy of the licence, could not proceed to the place of destination. It then became necessary to adopt other means; and what do they do? They take the *Johannes Von Letten*, and in that they put a cargo consisting of a portion of these goods, under the protection of the licence itself, and they provide a certificate that the *Vrow Cornelia* put to sea from Bordeaux, having on board a copy of this licence, with 300 puncheons, another portion of the intended cargo, and so forth. Thus documented these vessels openly avow that two are to be sent, and thus the parties establish their good faith and integrity by the most ingenuous disclosure of the whole transaction.

The application to the Council Board was for permission to bring a cargo, and if a proper ship could not be got, which is a matter likely to occur under the present difficulties of commerce, it is fit that they should be at liberty to put that cargo on board two ships; to say that this is a fraudulent use of a licence is not correct. The quantity the government looked to—that is the matter to be considered; and if the quantity in two ships be only equal to what might have come and was intended to have come in one, where is the fraud? If you do not prove that the quantity has exceeded the intention of the grantor, you prove nothing. Under these circumstances I think the parties are perfectly entitled to the restitution of the property, as I do not see any objection to the propriety of their conduct.

[Edw. 357.]

THE JONGE FREDERICK.

Licence—To proceed with a Cargo—Non-delivery—Return—Capture.

A licence to a ship to take a cargo from Great Britain to a foreign port protects her on her return voyage with the same cargo if unable to deliver such cargo at her port of destination.

1810 *May* 10.

This was the case of a vessel under Prussian colours, which had sailed from London for Ostend, under a licence to proceed with a cargo of British manufactured goods, &c. to any port between the island of Walcheren and Boulogne. On her way to Ostend the ship was driven by stress of weather into Nieuport, where her licence was destroyed to prevent seizure by the officers of the French Government, and application was made for permission to land and dispose of the cargo there, but it was refused. Under these circumstances, the agents of the British merchants received directions from England to send back the ship with her cargo to this country, and on her return she was captured and brought in for adjudication. In the claim it was stated that the British merchants, in order to avoid any inconvenience that might arise from the destruction of the licence at Nieuport, had applied for another licence, permitting the vessel to return with the cargo she had carried out; and this second licence was annexed to the claim.

Sir W. Scott.—I have no doubt that the licence to return is unnecessary in this case, the master having found it impossible to dispose of his cargo in the port of the enemy to which he was destined when the first licence was obtained; because the permission of his Majesty's Government having been granted to export this cargo, the original licence must be sufficient for the protection of the ship and cargo, not only *eundo*, but *redeundo*, where the original purpose has been defeated by the elements or the act of the enemy. At the same time, in order to entitle himself to this benefit, it is absolutely necessary that the claimant should show that these are the identical goods that were carried out, and that no others were taken on board in the enemy's port. But as there is no particular reason for any suspicion of fraud in this case, the Court will content itself with an affirmance on oath that no other goods were taken on board the vessel.

Restored.

THE WASSER HUNDT.

[1 Dods. 271, n.]

Blockade—Interdicted Trade—Capture—Violation of Order in Council to escape Seizure by Belligerent.

A neutral ship captured on her way from one enemy's port to another with a cargo which she had landed at one port, but had reshipped for the other under alleged apprehension of seizure by the enemy, was condemned under the Order in Council which prohibited neutral vessels from trading between ports of the enemy from which British vessels were excluded.

Semble, a neutral ship is liable to condemnation for breach of blockade, even if there is immediate and pressing danger of a capture by the enemy, in consequence of which she leaves the port (*a*).

1810 *October* 28.

THIS was the case of a Danish ship, with a cargo of colonial produce, captured on a voyage from Kiel to Wismar. The goods belonged to American citizens, and had been brought in the first instance from New York to Kiel, where they were re-shipped and forwarded on the present voyage to Wismar, on account of an alarm asserted to have prevailed at Kiel that the French were about to seize and confiscate all the colonial produce that might be found in that port.

JUDGMENT.—As these goods were going on a voyage from Kiel to Wismar, they must be supposed to be going for the general purposes of trade at the port to which they were destined, and, consequently, they fall within the operation of the order of the 7th of January, 1807. A party can never be permitted to aver that he is sending them thither with any other view than the disposal of them in the common course of mercantile transactions; but it has been urged that here are circumstances stated in the attestation of Mr. Smith which show that there was no final importation at Kiel, and that, under the peculiar circumstances of the case, these goods are to be considered as proceeding to Wismar on a continuous voyage from New York. Mr. Smith, in his affidavit, states that these goods were imported into Kiel in the month of June last, and that he caused them to be re-shipped and sent on to Wismar. Now this, I think, but ill supports the

(*a*) In the *Drie Vrienden*, June 2nd, 1813, the Court restored a ship on the ground, apparently, that the master was justified in leaving a blockaded port to escape confiscation; but the grounds of the judgment are not reported, nor are the facts of the case set out fully in the report. [1 Dods. 269.]

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assertion of a continuous voyage from New York to Wismar. The affidavit sets out with declaring that these goods were imported into Kiel, and therefore negatives the suggestion that there was originally an intention to send them forward. It has been argued that there is nothing to show that the duties were paid at Kiel, or that there was any intention of selling the goods at that place; but although it is not shown that the duties were paid, the fact of payment is not denied, and if the goods were landed, the unavoidable presumption is, that the duties were paid as in other cases of importation, and this presumption is the stronger, as there was at the time no intention of sending them on to Wismar. That the goods were afterwards exported does not make it less an importation. It is not to be supposed that all the goods landed at Kiel are in all cases consumed there. The question then comes to this: whether the goods can be protected on the voyage from Kiel to Wismar by the circumstances which the party has stated. Now, what are these circumstances? First, that "the goods are *bonâ fide* American property"; why, that can impart no protection to them, if they were captured on an illegal voyage: then, that they were removed from apprehension of French invasion. Mr. Smith says, "that the only reason of his moving the said goods from Kiel to Wismar aforesaid was the deponent's great apprehension, from the French assembling such a number of troops in this quarter, that it was their serious intention to enter Holstein and seize all American property and colonial produce, as they had done in Spain and Holland." Will political and remote speculations of this kind give the parties a right to violate the Orders in Council? If these apprehensions, so entertained and so extended to remote consequences, are to authorize the violation of a blockade, one does not see how any blockade is to be supported. There was no actual persecution in the case; but the party smells danger at a distance, and satisfies himself that the French army was assembled for no other purpose than to seize American property. But suppose his apprehensions were well founded, would that justify his violating the rights of another country? Certainly not. He is to rely on his neutrality, and to look to his own government for protection. That the French in this apprehended march, this creature of his own imagination, might have been

guilty of excesses, can give him no right to shove aside the British Order in Council. Then it has been said that he acted without orders from the American owners, and that they had no intention of invading the rights of this country. But the British orders are violated, and you cannot distinguish the intention from the fact. It is done by them if it is done by him, for nothing can be more certain than that the act of the agent is the act of the principal. It is a trading for which the British Orders in Council subject the property to confiscation, and as the excuses set up furnish no ground whatever for exemption, I must pronounce this ship and cargo subject to condemnation.

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THE WASSER HUNDT.

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THE FRAU MAGDALENA.

[Edw. 367.]

Licence — Touching for Orders — Interdicted and Intermediate Port — Condemnation.

A vessel is liable to condemnation for touching at an intermediate port when trading under a licence for a direct voyage, unless it is proved that such vessel has left such intermediate port with the identical cargo which she carried in.

1811 *October* 24.

Sir W. Scott.—This was the case of a Danish vessel captured on a voyage from St. Petersburg to London under a licence [to proceed direct from St. Petersburg to London], but with directions to touch at Neustadt for orders. A claim has been given for the ship as coming to London, and for part of the cargo only as consigned to a house of credit in this town. In support of this assertion a letter of advice is referred to, by which the British claimants say that they were empowered to dispose of this portion of the cargo, and that they believe the voyage was to end in a port of this country; but that is matter of belief only. In point of fact they know nothing of the transaction but from the letter on board, which is not sufficient, for it can be matter of no great difficulty for the foreign shippers to write a letter to that effect to their correspondents here, and to countermand it afterwards if they should be able to dispose of their cargo elsewhere. It is said that all the evidence in the case supports the averment of an actual destination to London. That is not so; the master was to call at Neustadt for orders, which might have been of a contrary tenor, directing him to deliver his cargo in that port.

1811 *October* 24.

THE FRAU MAGDALENA.

Sir W. Scott.

It has been repeatedly decided in cases of blockade, and this class of cases must be decided by analogy to the rules of blockade, that a vessel cannot be permitted to touch at an interdicted port for orders under a licence for a direct voyage to this country. This is a rule which the Court has felt it necessary rigidly to adhere to, except in those cases where the vessel had quitted the intermediate port with the identical cargo she had carried in, and was actually proceeding for England at the time of capture. In those cases the presumption that there was an intention of delivering at the intermediate port was repelled by the fact that the ship had come out again with the same cargo, and the Court therefore relaxed the rule. The rule is founded not only upon the presumption that at the intermediate port the vessel might receive another destination, but that she might actually deliver her cargo in that very port. The Court cannot inquire, nor has it the means of ascertaining, whether there was any *mala fides* in the contemplation of the parties; it can merely look to the fact whether the vessel was going to an interdicted port or not, and if so, the presumption of law must be that she was going thither for the purpose of violating the licence. The fact may in some cases be otherwise, and the rule may at times operate with severity upon innocent persons, but it is a sacrifice which must be made to the general security.

In the present instance the parties may, for anything that appears, have intended to act honestly, but they are doing that which in express terms the law of this country prohibits, and I must therefore hold this ship and cargo subject to condemnation.

[Edw. 370.]

THE BOURSE.

Licence—French Flag—Prussian Flag—French Ownership—Condemnation.

A licence was granted to sail under any flag except the French. *Held* to exclude a ship sailing under the Prussian flag, but owned by Frenchmen.

1811 (?)

SIR W. SCOTT.—This is the case of a vessel navigating under Prussian colours, but in reality belonging to French owners. The ship was captured on a voyage from Bordeaux to London under a licence permitting her to sail under any flag except the French;

and the question is whether the ship is entitled to protection. The cargo, which belongs to other parties and is not involved in the question, has been restored by consent. It has always appeared to me that the exception of the French flag only is not very clear and intelligible, but if I am called upon to construe it, I am inclined to hold that a vessel being French property was intended to be excluded from the benefit of the licence, although not accompanied with the formal characteristic of the French flag. Wherever, therefore, these words "bearing any flag except the French" have presented themselves to the notice of the Court, it has felt the necessity of giving them a more substantive meaning as excluding French interests, and has held, that where French interests clearly appear, the vessel cannot be protected by the mere absence of the French flag. If otherwise, the whole French navigation might be conducted with the utmost safety, nothing else being requisite but that a foreign flag should be substituted for the French. It does not appear to me that it could be the intention of the State to give that accommodation to the public enemy. If I am wrong in this supposition, the error must be corrected by superior authority. In the present case the vessel is navigating under the Prussian flag, but the property is proved to be French, and I shall therefore condemn the ship.

1811

THE BOURSE.

Sir W. Scott.

THE JONGE CLARA.

[Edw. 371.]

Licence—Exclusion of Person of particular Nationality—Subsequent Annexation of a Country.

Where a licence was granted to a particular vessel to sail under any flag except the French, and the owner of such vessel, subsequent to the grant of the licence, became a French subject by the annexation of his country:—*Held*, that the cargo was protected.

1811

August 7.

SIR W. SCOTT.—This is the case of a vessel taken on a voyage from Bordeaux to London, with a cargo of wine, seeds, cream of tartar, verdigris, capers, and other goods. A claim is given in for the ship and cargo, as protected under the licence on board permitting this vessel, under any flag except the French, to export from London and Poole, to any port in France between L'Orient and the river Garonne, any articles which by law might be exported, except cotton wool, and to import in return a cargo of

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grain, meal, flour, burr-stones, seeds, French cambrics, lawns, olive oil, and wine, upon condition that the vessel importing the wine should have exported to France under the same licence British or East India manufactured goods, sugar and coffee, and that the cargo so to be imported should consist of two-thirds in bulk of grain, meal, flour and seeds, and in no case of more than one-third in bulk of wine. The ship is the property of a person at Emden; and it is contended by the captors, that in consequence of the annexation of that place to France, this vessel is now liable to be considered as the property of a French subject. But I observe that the ship is described by name in the licence which was granted for its protection while engaged in British commerce, and it can hardly be contended that a sudden and unexpected change in the political relations of the country to which she belonged should deprive her of that protection if the parties have acted fairly under it. It is a known fact that many vessels belonging to countries annexed to France have obtained licences, and that no alteration was made in that respect until February of the present year.

But it has been further urged on the part of the captors that this licence has been violated in many respects, that the quality of the outward and return cargoes were not such as are permitted by the licence, and that it had expired before it was made use of. It is said that by this licence the parties were bound to carry out British or East India manufactured goods, sugar or coffee, to the amount at least of one-third of the tonnage, and that in point of fact the outward cargo consisted of salted codfish and herrings. In my apprehension these goods are sufficiently within the spirit and meaning of the licence; they are not in a state of nature; they were cured in this country; they are articles which have received the aid of British industry, and in which the commerce of the country is deeply interested. Indeed, if any doubt could arise upon the subject, the custom-house clearance, where the nature of the articles composing the outward cargo must have been fully understood, would put the question at rest.

Another objection started is that the vessel has some goods on board which are not permitted by the licence, which provides that the return cargo shall consist of grain, meal, flour and seeds, and

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in no case of more than one-third of wine; and it is thence contended that in conformity with the terms of the licence the cargo must necessarily consist of two-thirds of the first descriptions, and that this condition is a *sine quâ non*, and that where it is not complied with the licence is vitiated *in toto*. I cannot think so, as it appears to me that the restriction is thrown loose by the words "in no case" which immediately follow, because, supposing the parties were not to be permitted to substitute any other articles, those words, which qualify and mitigate the preceding imperative words, would be nugatory. I am therefore inclined to hold that the terms of the licence are sufficiently satisfied if the quantity of wine does not exceed one-third of the tonnage. There are other goods on board which are not within the enumeration of the licence, and they must of course be condemned, but the penal consequences will not go to affect the licence. It would fall extremely hard upon the commercial interests of the country if the innocent goods of one merchant should be confiscated on account of the misconduct of another. Such a position would carry the doctrine of infection beyond what is done even in cases of contraband where the penalty attaches only to the property belonging to the same owner.

I cannot admit that this licence has been vitiated on any such grounds as those which I have adverted to; but there is a further objection, which is, that this licence was granted on the 2nd October, 1810, for four months, and it appears that the ship was captured so late as the 4th July, 1811. This certainly is a circumstance which requires the fullest and most satisfactory explanation, for parties are bound to adhere to the terms of the licence under which they claim protection, unless they can show that they were prevented from so doing by some unavoidable impediment. Licences are granted upon the exigency of the moment, and it is obvious that strong reasons of policy may operate with his Majesty's Government to cause or to prevent the granting of them at different times, and it is the business of the government, and not of the private merchant, to say at what periods this permitted intercourse with the ports of the enemy shall take place.

Wherever the licence has been out of date, the Court has not shown a disposition to be pedantically narrow on this point, or to

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notice a trifling excess; but here I think it highly necessary to call upon the parties for some explanation of the delay. In former cases the Court has held the embargo of the enemy to be a sufficient excuse, thinking it hard, that through the act of the enemy the British merchant should lose the benefit intended him by his own government, which would be in effect to place him at the mercy of the enemy. But then the embargo must be satisfactorily proved. The Court cannot so construe a licence as to allow a ship to proceed to the enemy's port, and to remain there an unlimited time at the discretion of the parties. Now it is certainly unfavourable to this case that no charter-party is exhibited, binding the master to return, and I observe also, that the papers on board seem to represent the lading of the vessel as having taken place so late as May and June, a delay which must be fatal to the case unless it can be shown that there was an embargo. The master says that he was under an embargo from January to the middle of June, but this cannot be considered as a matter proved upon his mere averment. The utmost indulgence I can show the claimants is to allow them to establish that fact by other evidence, and such evidence they must possess, as I conceive it to be impossible that the merchants in this country should not have received some intimation of the cause of the detention of the vessel during so many months.

On a subsequent day the Court, upon the production of the further proof, restored the ship and the wine, but refused freight and expenses to the neutral master upon the non-enumerated goods condemned, as the vessel was not privileged to carry them.

[Edw. 375.]

THE MINERVA.

Licence—Condition to touch at a Port—Non-compliance—Condemnation.

Where a licence contained a stipulation that the vessel should touch at L.:—*Held*, that this was a fundamental condition the breach of which rendered the vessel liable to condemnation.

1811 *October* 29.

This was the case of a vessel under Danish colours, with a cargo of deals, lathwood, staves, &c. captured on a voyage from

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October 29.

THE MINERVA.

Christiansand to Jersey. A licence was obtained for this vessel by name, by which it was provided that she should go to Leith, there to take convoy to the Downs or Portsmouth, and from thence to take convoy for Jersey. The vessel had not gone to Leith, but was steering to Yarmouth to take convoy there; and the question, therefore, was whether the Court, under such circumstances, could say that the licence had been sufficiently complied with.

SIR W. SCOTT.—This is the case of a vessel which is claimed as protected under a licence; the cargo is asserted to belong to British merchants, but I do not observe that it is so set forth in the claim. It is a licence which is granted for this particular ship to carry a cargo from Christiansand to Jersey, on the condition that she shall touch at Leith for convoy. The licence is granted to these British merchants on a condition for which they are responsible: they stipulate with government for a due observance of the terms of the licence, and if the terms are departed from in any essential point, the Court cannot protect the parties from the inevitable consequences. The question then is, has this licence been virtually and substantially carried into execution? Certainly not. Here is not a mere departure from a subordinate regulation, it is a fundamental condition of the licence, without which it would not have been granted. The Court is not called upon to inquire into the reasons of this regulation, but it is highly probable that his Majesty's Government may think it proper that vessels with cargoes of this description on board should take convoy at Leith, that they may be subject to British inspection in that part of their navigation which brings them into the neighbourhood of the ports of the enemy. It is evidently introduced for that purpose, and, being so, can never be considered as a condition to be waived at the option of the party who has accepted it. The condition is fundamental, and the breach of it must be fatal. It is not for me to relax those terms on which the public wisdom has deemed the conveyance of such articles to be consistent with the public safety.

[Edw. 376.]

THE ST. IVAN.

Licence—Issue subsequent to Capture.

A licence obtained subsequently to the date of a capture is no protection.

1811
November 12.

This was the case of a Russian vessel with a cargo of pitch and tar, which had sailed from Uleaborg in Finland, on the 16th of July, 1811, for London, and was captured on the following day. A claim was given by the consignees in this country for the cargo as Swedish property, stating that they had received a letter from the owners, dated 11th July, 1811, directing them to apply to his Majesty's Government for a licence permitting the ship *St. Ivan* to proceed from a port in Sweden to the port of London with a cargo of pitch and tar. Application was accordingly made by them at the Council Office, and a licence was granted, dated 30th July, 1811, which was annexed to the claim, together with a letter addressed to the consignees by the owners, dated 11th July, 1811, stating that they had ordered the master to sail without waiting for the licence, in order to avoid delay.

Sir W. Scott.—This ship, which is clearly Russian property, was captured on the 17th of July, 1811, on a voyage from Uleaborg to London with a cargo of pitch and tar. The ship is claimed as protected under a licence, dated 30th July, 1811, which is many days after the capture; the question, therefore, is whether the licence, which is annexed to the claim, can by any means have a retroactive effect so as to protect this ship and cargo, and I am clearly of opinion that it cannot.

The statute which authorizes the Council to grant such licences as his Majesty was in the habit of granting can be carried no further than the term licence, which is an instrument in its very nature prospective, pointing to something that has not yet been done, and cannot be done at all without such permission. Where the act has been already done, and requires to be upheld, it must be by an express confirmation of the act itself, or by an indemnity granted to the party; but a licence necessarily looks to that which yet remains to be done, and can extend its influence only to future

operations. It is true that it has been held in this Court, as well as in the Courts of Common Law (for there have been decisions expressly upon this point), that the King may, for reasons of State, release a prize as against the interest of the captors. The captors bring in their prizes subject to such interposition on the part of the Crown, but it is of very rare occurrence, and speaking with all due reverence ought to be of rare occurrence, and only under very special circumstances; as, for instance, where the detention of the vessel may be detrimental to the general interests of the country. In such cases there can be no serious doubt of the authority or of the intentions of the Crown. The order for release recites the capture and detention, and proves the knowledge and intention of the Crown acting upon those facts. But the Council has no such power, and could have no intention to go beyond the powers conveyed to it by the Act of Parliament, which extends only to the granting of licences.

In the present instance, when the licence was applied for, it was totally withdrawn from the knowledge of the Council that the ship had sailed, still less that she had been taken; for the licence is granted "upon condition that the vessel shall clear out from the port of Oregrund on or about the first day of September, 1811." The licence, therefore, is clearly out of the question, although the parties seem with great sincerity to have relied on it for protection, as I observe the master, in his instructions, is told to proceed to Hano to join convoy, and that there he will receive the licence expected from England. But whatever may have been their expectations or intentions, it cannot avail them, and it only remains for me to consider whether the cargo can be protected on any other ground. As to the ship, there can be no doubt what must be its fate, as Russia is at war with this country. The cargo, which is documented as Russian property, the master says was to be delivered in London on account of the owner of the vessel, as he believes, upon the information he derived from the owner in Finland, and in this he is confirmed by all the ship's papers. It is true a claim has been given on behalf of the house of Falcke & Co., of Stockholm, in opposition to the ship's papers and the depositions; such claims, in opposition to the original evidence, have been in some few instances and under very strong circumstances

1811 *November* 12.

THE ST. IVAN.

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admitted, but with the utmost jealousy and caution, and never without an explanation in the claim. Here, on the contrary, no explanation, no evidence is offered in support of this Swedish claim; it rests upon the mere broad assertion of Swedish property. Under such circumstances I am bound to say the claim cannot be admitted; and the cargo, therefore, as Russian property, must follow the fate of the ship.

[Edw. 379.]

THE HECTOR.

Licence—"This Kingdom."

The words "port of this kingdom" include a port in Ireland.

1811 *November* 28.

THIS was the case of a vessel under American colours, captured on the coast of Norfolk, on a voyage from Archangel to Dublin with a cargo of hemp, flax, tar, &c. The licence was for a vessel, under any flag except the French, to proceed to a port of the United Kingdom, and stipulating that if the vessel should be destined to any port of this kingdom south of Hull with naval stores she should stop at Dundee or Leith for convoy, which in this instance had not been complied with, and on that ground the captors pressed for condemnation.

SIR W. SCOTT.—It has been held that the words "this kingdom," since the Union, must generally be considered to mean this United Kingdom, for the kingdom of England as a separate kingdom has ceased to exist. If, therefore, this licence was to be construed on a strict technical sense of the words, Ireland would certainly be included. But as this Court has been accustomed to construe licences with reference to the probable intention of his Majesty's Government in granting them, and considering that this is a mode of expression not likely to be employed if the ports of Ireland were intended to be included, I think I must understand the condition as applying only to vessels destined to ports of England south of Hull. It would be an awkward and indirect mode of prescribing the conduct of vessels bound to Ireland to distinguish ports of that island as south of Hull, and I am confirmed in this view of the subject by the circumstance that late

licences which have been granted for the ports of Ireland, in which another mode is adopted for securing the delivery of the cargo at the asserted port of destination, namely, by a clause which makes it imperative on the parties to go north about (*a*). It is likewise to be observed that in this licence the words "this kingdom" appear to be placed in some degree of opposition or exception to the words "United Kingdom," which has been used in the antecedent part of the sentence.

1811 *November* 28. THE HECTOR. Sir W. Scott.

THE PENSYLVANIA.

[1 Acton, 33 (*b*).]

Prize—Insufficient Prize Crew—Right of Master to continue his Voyage—Non-resistance to Search.

If an insufficient prize crew is placed on board a prize, her master is entitled to navigate her to such port as he pleases in the interest of her owners, and the prize is not liable to be condemned if she is a neutral ship and is subsequently captured, if there was no resistance to the search and capture and no armed rescue.

1809 *June* 28.

THIS vessel on a voyage from Trieste, in the Adriatic, to Canton, in China, was captured by two British cruisers in the Mediterranean, and possession taken by sending three persons on board her, who being unable to navigate the vessel, the neutral captain continued to direct her course according to the instructions of his owners, refusing to carry the vessel into Malta for adjudication, as required by the prize-master. Immediately after passing Malta she was boarded by a third privateer, and carried into Malta, where the claim of Messrs. Wilcox & Co., of Philadelphia, as neutral and sole owners, was rejected, and the ship condemned as having been rescued from the original captors.

Stoddart and *Harrison*, for the captors.—This vessel has been condemned in the Court below on account of the resistance she

(*a*) In the case of the *Success*, December, 1811, the licence contained the following clause: "If to Ireland, the vessel shall go north about; if to any port of this kingdom, south of Hull, then to stop at Dundee or Leith for convoy."

(*b*) Though the republication of the Prize Cases in chronological order has been followed, it has been necessary to interfere with it slightly, in the case of Acton's Reports, so as to keep the cases grouped under the titles of the original reports.

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THE PENSYLVANIA.

appears to have made to the exercise of the acknowledged belligerent right of search, a right which, if once permitted to be violated by neutrals with impunity, must involve all maritime nations in a series of calamities, cruelty and bloodshed. That indulgence and lenity now shown to vessels boarded on suspicion would no longer be politic or justifiable, and the interest of the captors would point out the necessity of rigour and severity in compelling vessels, under circumstances of suspicion, to enter those ports best calculated for legally investigating the claims of the respective parties. The evidence of the prize-master who was left on board, corroborated by his own men, and one of the ship's crew, proves, that at the time of his taking possession, he would have obtained more men in consequence of the captain's suggesting that his men would not work the vessel into Malta if he had not been assured by him, almost immediately afterwards, that the men had consented, at his request, to navigate the vessel into that port. As soon as the vessel was supposed to be out of the reach of danger from the privateers which made the capture, the captain threw off the mask, and assured the prize-master he would never again carry a ship under his command into port for adjudication, as he had before suffered severely for so doing. He then called his men together, assured them he would not permit the vessel to be carried in, and after demanding the ship's papers which had been left in charge with the prize-master, and which he surrendered through apprehension and intimidation, the vessel proceeded, by his direction, on her course towards the Straits of Gibraltar. The captain assured him of his safety, and promised to send him on board a Danish vessel then in sight. In this state of things she was again boarded by a British cruiser and carried into Malta. There is no attempt made to impeach the proof of property, but the sole circumstance of the rescue attempted must appear sufficient to affect the ship and cargo. (The private adventure of the master having been restored by consent.) Hence, it is submitted, the sentence of condemnation should be affirmed upon the principle which regulated the decision of this Court in the case of the *Washington*, where no actual force had been employed, but the existence of a conspiracy to retake the vessel had been considered fatal to the interest of the owners.

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June 28.

THE PENSYLVANIA.

Arnold and *Stephen*, for the appellants and owners.—In this case there arises a difficulty from the nature of the testimony of two interested parties, who appear to have different motives for giving these inconsistent and contradictory statements. The master, mate and seamen, with a solitary exception, agree in stating the anxiety of the master to have a perfect capture made of the vessel, probably that he might not be responsible hereafter to his owners for a neglect of their interest, or to the captors should any attempt be made to rescue the vessel by his crew. The only witness of the ship's crew who supports the statement of the prize-master is a person deserving little credit, from the resentment which appears to have actuated him on account of his being punished for disorderly conduct and inebriety. The remaining part of the crew confirm the statement of the captain, that he openly avowed the crew would not work the vessel into port, and that the prize-master in consequence hailed the privateers, demanding more men to navigate the ship. This request was not complied with, solely because there appeared several other vessels in sight, which the privateers were anxious to capture. Independent, however, of the contradictory part of the evidence adduced, there is one point in which all are agreed, that no force was employed, and this alone must obviate the inference attempted to be drawn, that the principle upon which the *Washington* (*a*) was condemned is applicable to this vessel, and will operate on your lordships to pronounce against the appeal. In that case a dangerous conspiracy was proved to exist, and the crew had been previously armed to carry the proposed rescue into effect. Taking, therefore, that part of the evidence in which all are agreed that no resistance was made to the prize-master, but that solely in consequence of the inability of the captors to work the ship the vessel continued to hold on her original course, it remains for your lordships to decide on a very circumscribed, though very material, point of law, whether in all cases of capture the master and crew are bound, at the peril of the confiscation of the vessel or her cargo, to navigate her to such port as the prize-masters, or those in custody of the vessel for the captors, shall please to direct.

(*a*) This case is not reported.

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THE PENSYLVANIA.

Sir W. Grant.

SIR W. GRANT.—We cannot see that any such duty is imposed on the master and his crew. They owe no service to the captors, and are still to be considered answerable to the owners for their conduct. It is the duty as well as the interest of the captors to make the capture sure; if they neglect it from any anxiety to make other captures, or thinking the force already furnished sufficient, it is exclusively at their own peril. In this case the captain performs a duty he conceives he owes to the owners; he will not act against their interest, nor will he attempt to prosecute their interest by any violence on his part or that of his crew. Neither he nor they are found to make resistance. The captors, therefore, are left to pursue their separate interests; they are unable to navigate the vessel, and the captain resumes his command. What effect a compromise or agreement to navigate the vessel into a particular port, made by the master and his crew to the captain of the privateer on his capture (without experiencing any undue influence either arising from apprehension or compulsion), might have on the master or crew, and whether they might not therefore be comprised within a new obligation, is not now our duty to determine. It might probably raise a very different question had any such agreement been here proved. As, therefore, there appears no actual grounds for the detention and subsequent sentence, we reverse the decree and order the vessel to be restored, each party paying their respective costs.

[1 Acton, 57.]

THE NANCY (No. 1).

Blockade—Effectiveness—Duty of Blockading Squadron.

When a port is notified as blockaded, such a force should be employed as will prevent vessels from entering or leaving a port.

A neutral vessel left a port which was insufficiently blockaded, and was subsequently captured. *Held*, reversing the decision of a Vice-Admiralty Court, that she must be restored.

1809 *July* 6.

THIS was a leading case of several appeals from Vice-Admiralty Courts in America and the West Indies, condemning the ships and cargoes for a breach of the blockade of the island of Martinique in the year 1804.

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THE NANCY.

The attestation of the master, who was the claimant of the vessel for himself and other American citizens, and of the cargo, as the property of John Jubel, also of New York, in America, proved that he had, under charter-party, agreed to sail with a cargo from New York to the port of St. Pierre in Martinique, unless the same should be blockaded, and to bring from thence a return cargo of the produce of the island, for the sole account and risk of Jubel and other American citizens. That in case the island should be blockaded, he had agreed to proceed to St. Thomas, from whence he had orders to procure a return cargo from the proceeds of the outward. In pursuance of this agreement, he arrived off Martinique on the 29th of March, and finding no ships of war there, and not being given to understand that there existed any blockade at that time, he, in consequence of the vessel's having sprung a leak, repaired to the port of Trinity in that island to refit, from whence he set sail, and arrived at that of St. Pierre on the 3rd of April. That while in the island he was informed the blockade had been removed, and the squadron had gone on an expedition to Trinidad. No vessel of war whatever had appeared off the island during his stay; nor was there any notice given of a blockade then existing. Having completed his cargo on the 15th, he sailed for New York, in which voyage he was captured and carried into Halifax in Nova Scotia, when the vessel and cargo were condemned as prize. This statement was supported by the evidence of a passenger on board the vessel, by some of the crew, and by the tenor of a correspondence between persons in France, New York, and Martinique, which proved that the blockade was at that time removed, or at least so far relaxed that no armed vessels had been seen off these ports during the period the vessel remained in the island.

For the captors, it was contended that although the blockading fleet had been dispatched to Surinam, a force had been left off the island to continue the blockade and apprize vessels of its existence. This appeared even by the correspondence exhibited by the claimants; one of the letters admitting that a British fifty-gun ship continued off the island, and was now and then seen by the inhabitants.

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JUDGMENT.—The Court held, that to constitute a blockade the intention to shut up the port should not only be generally made known to vessels navigating the seas in the vicinity, but that it was the duty of the blockaders to maintain such a force as would be of itself sufficient to enforce the blockade. This could only be effected by keeping a number of vessels on the different stations, so communicating with each other as to be able to intercept all vessels attempting to enter the ports of the island. In the present instance no such measures had been resorted to, and this neglect necessarily led neutral vessels to believe these ports might be entered without incurring any risk. The periodical appearance of a vessel of war in the offing could not be supposed a continuation of a blockade which the correspondence mentioned had described to have been previously maintained by a number of vessels, and with such unparalleled rigour, that no vessel whatever had been able to enter the island during its continuance. Their lordships were therefore pleased to order that the ship should be restored, the proof of property being sufficient, but directed further proof as to the cargo claimed for the American citizens mentioned.

[1 Acton, 63.]

THE NANCY (No. 2).

Blockade — Effective Character — Opinion of Commander of Station — Single Vessel.

Under particular circumstances a single vessel may be adequate to maintain the blockade of a port and co-operate with other vessels at the same time in the blockade of another neighbouring port.

1809 *July* 6.

THIS vessel had been restored in the Vice-Admiralty Court, in consequence of a deficiency of proof on the part of the captors, who were unable to obtain an affidavit of the blockade of the port of Trinity at the time of the capture.

Arnold and *Gostling*, for the owner.—This vessel sailed from Trinity on the 25th of May, about which period the correspondence of the governor of the island with the French Minister of Marine states that a frigate showed herself from time to time off the port of Trinity, with an intention to cut off supplies. The station of

this vessel was sometimes off Trinity, and at others off another port more than seven miles distant. Such an interruption of the trade of these ports could never be considered an actual blockade, and therefore the sentence of the Court below restoring the vessel was perfectly justifiable. 1809 *July* 6. THE NANCY.

Swabey and *Stephen*, for the captors.—The sentence of the Court below proceeded merely upon the ground of insufficient proof of the existence of the blockade. This is now altogether obviated; the invoked papers with the affidavit, formerly deficient, prove that it existed. The extensive range of the frigate mentioned was perfectly consistent with the objects she had in view, the blockade of Trinity and a co-operation with the vessels on the other station. From the activity of the cruisers off this port this vessel had twice been nearly cut out of the harbour, and her preservation was merely owing to a want of wind. From all these circumstances the Court will most probably be inclined to reverse the sentence of the Vice-Admiralty Court, and repair the injury the captors have sustained.

SIR W. GRANT.—As it appears the commander on that station considered the force employed completely adequate to the service required to be performed, we feel it necessary to rely on his judgment, and condemn the vessel as prize to the captors.

THE NORDSTERN.

[1 Acton, 128.]

Joint Capture—Associated Service.

In order to entitle a vessel other than the actual captor to share in the prize, it is not sufficient to prove that the captor and the claimant were associated in a joint enterprise, but it must also be proved that the capture was the joint produce of an actual co-operation.

A QUESTION arose as to the right to share in the cargo of the prize in question, on the part of several officers of a squadron of his Majesty's ships employed in the blockade of the port of Cadiz, asserted joint captors. The cargo of the vessel had been condemned in the Vice-Admiralty Court of Gibraltar as prize to the 1809 *July* 18.

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actual captors. This sentence had been confirmed on appeal by their lordships, so far as referred to the condemnation of the property as prize generally, reserving the question by whom taken. [After considerable argument the issue was confined to one point.] . . . .

SIR W. GRANT.—It seems to me unnecessary to insist further on the question of fact whether the fleet were in sight. This part of the case stands upon extremely deficient evidence, and is principally conjectural. The point to which the attention of the Court should principally, if not exclusively, be directed, is whether such a co-operation existed as to make the capture in question necessarily dependent and consequent thereon.

Stoddart and *Harrison*, for the actual captors.—To prove that such a co-operation did not exist at the time, very little will be necessary on our part. Upon the facts of the case already stated, as considered separately from the authorities cited, there seems to remain little doubt that the capture was made without any co-operation as to that precise object. The co-operation admitted is evidently for very different purposes. The principle upon which this claim must fall to the ground may be drawn from the decision of the judge of the High Court of Admiralty in the case of the *Vryheid* (*a*), taken in the engagement between Admirals Duncan and De Winter. The doctrine of constructive assistance was here very fairly tried, and as the claimant's ship, the *Vestal*, was admitted to have been sent to procure the assistance of Admiral Duncan, and the remainder of his squadron for the purpose of engaging the enemy, the claim, as far as it depended on joint enterprise, may be supposed equally admissible with the present; yet here the allegation was absolutely rejected, and the parties not permitted to go into the proof. In this decision particular reference also was made to the case of the *Mars* (*b*), where a still stronger claim on the principle of joint enterprise, as well as co-operation, was rejected. In direct violation, then, of the autho-

(*a*) Vol. I. p. 179. (*b*) Lords, 1760.

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rity of this judge, you are now called upon to extend the effect and meaning of constructive assistance, so as to include the present claimants. The capture, it is contended, was made in compliance with the order of Earl St. Vincent to continue the blockade, and be particularly attentive to intercept all enemy's vessels passing to or from the Spanish West Indies and Cadiz. This cannot be supposed to include the detention of a Danish vessel laden with property documented as neutral. Such was the prize. This order refers not to her. The order, or rather notice, by Sir John Orde never reached the captors: it therefore forms no part of the case. In the case of the *Generoux* (*a*), the claim of joint capture was supported on several distinct grounds—the intelligence given respecting the prize to the actual captors, conjoint enterprise, and actual co-operation. The fleet had been so disposed that the enemy with her convoy could not possibly get into Malta; and means were taken to drive these vessels into the hands of the actual captors. Thus these vessels appeared to be acting under the same commander, and co-operating for a specific purpose, of which the claimants were the absolute apprizers, yet your lordships, without hesitation, decided against the admissibility of the claim. In the case of the *Kinders Kinder* (*b*), although the *Defiance* was only five leagues from L'Aigle at the time of the capture, which was made without chase, and in a thick fog, the claim was also considered without sufficient foundation. In the *Vrow Constantia* (*c*), decided in February last, it was held that a claim to joint capture could not be supported, except the capture arose out of the express object for which the parties had been associated or united. As far, therefore, as authority can go, the claim of the present parties, admitting the analogy, is already decided against upon the clearest principle.

Swabey, in reply.—The cases alluded to were not analogous. In the *Vryheid* the claimants were employed on a detached service. In the *Generoux* an order had also been issued for a detached service, the body of the fleet continually changing day after day, so that no distinct claim could be fairly made out for any. In the *El Navarro* the claim to salvage was justly rejected, as not founded

(*a*) Lords. (*b*) Lords, 1807. (*c*) Lords.

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on the only proper and general ground of such application, *pro opere et labore*. No such averment could be there made with truth. The only remaining question before the Court, therefore, was whether this capture was a separate service, independent of the purpose of general association. The lateness of the introduction of the claim for the remainder of the fleet, he added, was merely owing to the inattention of the person entrusted with that charge.

SIR W. GRANT.—Upon the authority of the cases which have been cited, a principle appears to have been established perfectly just and consistent with the interests and welfare of the service. Where a capture is strictly made in association, the parties so associated shall be admitted to share. We are now called upon to extend this principle to a very considerable length indeed, and give an extremely vague, constructive meaning to the term "association." We cannot, however, go the length necessarily requisite to include the present claim. There certainly appears to have been a joint enterprise undertaken between the captors and the appellants, but this was expressly limited to a precise object, namely, a military blockade. The proceedings, therefore, in the Court below, turned not upon a breach of blockade but upon the question of property; a breach of blockade was not imputed to her, she was therefore restored as neutral property. The cargo alone was condemned, and this upon further proof as to property solely, which could not have been the case had the coming out of port been part of the crime imputed, for in fact this was admitted by the parties. The sole question upon which this case must be decided, and which has therefore in the course of the argument been principally attended to, is whether it is sufficient to establish a right to share on the part of asserted joint captors that the capture shall take place during the time of a joint enterprise. Upon this we are decidedly of opinion that it is not sufficient a joint enterprise shall 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. We therefore confirm the sentence appealed from, and reject the claim on the part of the remainder of the fleet.

THE MARGARET.

[1 Acton, 333.]

Capture—Contraband—Outward Voyage—Liability on Homeward Voyage.

If a vessel carries contraband on her outward voyage, she is liable to condemnation, together with the cargo, if captured on her homeward voyage, even if the homeward cargo has not been purchased with the proceeds of the outward cargo. Intermediate voyages between the outward and home voyages do not take away liability if the vessel is captured on the homeward voyage.

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THE captor having only a commission against Spain, this ship and cargo on a return voyage from Batavia to Baltimore had been condemned in the Vice-Admiralty Court of Barbados as prize to the Crown and a droit of Admiralty, having been employed on the outward voyage in conveying gunpowder and other contraband articles to the Isle of France, a colony of the enemy.

The *King's Advocate* for the respondent—that the part of the return cargo which was the subject of the present appeal, namely, a moiety of certain shipments of sugar, coffee, and pepper, claimed as the property of the owners of this vessel, Messrs. M'Faden & Schwartes, of Baltimore (the remaining moiety, together with the residue of the goods on board, appearing to be the property of a Dutch merchant), was justly liable to condemnation; first, because the outward cargo, consisting principally of tar and gunpowder, and such contraband articles, were by means of false documents and suppression carried to the Isle of France; and, secondly, because the homeward cargo was also falsely documented, and this moiety of the sugar, coffee, and pepper claimed was the produce arising from the proceeds of the said contraband.

Arnold and *Stephen*, for the claim, contended that this return cargo could not be considered to have any connection whatever with the objectionable outward cargo. The vessel had since her first leaving Baltimore entered into a completely distinct line of commerce, had performed a number of different voyages, in which she continued to be occupied from the year 1804 to 1807. In the outward voyage she touched at the Cape of Good Hope and disposed of part of her cargo for cash; proceeded thence to the Isle of France, where the remainder was disposed of; from thence to Batavia in

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ballast; again sailed with a cargo of arrack, &c., for Tranquebar; returned to Batavia with piece goods; and finally sailed with this cargo for Baltimore, after three years and four months occupied in these several voyages, four of which had intervened between that in which the objectionable cargo was carried out and the present. In these various fluctuations and changes of property it must be supposed that any possible connection of the present with the first cargo, comprising the contraband articles, must be completely lost. This could not be considered the return cargo to the first.

SIR J. NICHOL.—In all these successive voyages and exchanges of property, it is admitted by the master that after the first cargo, which was exclusively the property of the neutral claimants, a Dutch merchant had a joint concern of one-half in each subsequent cargo, and that in the present voyage the Dutch merchant owns the whole of the cargo except the moiety of these shipments of sugar, coffee, and pepper.

It certainly would be admitted this master had acted strangely throughout, and had been very liberal in admitting that which must be prejudicial to the interest of the claimants, who had lost upon the voyage the master in whom they reposed confidence; and this acquiescence in the views of the captors had been amply recompensed by their indulgence, as they had restored to him all the property he had an interest in on board, with other signal marks of favour. The property of the present cargo appearing completely destitute of any connection with the first, it would be a step beyond any the Court had taken on any former similar occasion, were this property considered liable to condemnation. Some boundary should be established, or else it would be impossible to ascertain when a vessel might be considered exempt from the consequences of an act of delinquency, however remote.

SIR W. GRANT.—The principle upon which this and other Prize Courts have generally proceeded to adjudication in cases of this nature appears simply to be this, that if a vessel carried contraband on the outward voyage she is liable to condemnation on the homeward voyage. It is by no means necessary that the cargo should have been purchased by the proceeds of this contra-

band. Hence we must pronounce against this appeal, the sentence of the Court below being perfectly valid and consistent with the acknowledged principles of general law.

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THE ELIZABETH.

[2 Acton, 57.]

Practice—Appeal—Rescission of Decree.

It is contrary to the practice of the Court of Appeal to rescind a decree of that Court on any ground.

THIS was an application to rescind a decree condemning part of a cargo. The ground of the application was that the decree had been acquiesced in, as alleged by the present applicants, owners of cargo, on the understanding that, if satisfactory proof of the national character of the applicants was brought before the Court, the decree should be rescinded. Counsel for the captors denied any such agreement. The application was refused (*a*).

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[2 Acton, 106.]

Capture—Rescue—Liability of Cargo Owner.

When the ship and cargo are owned by different persons, and after a capture the master attempts a rescue, the cargo is liable to condemnation.

AN appeal from a sentence of condemnation of ship and cargo, pronounced by the judge of the Vice-Admiralty Court of Gibraltar, as rescued from the prize master put on board whilst proceeding to a port for adjudication.

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(The ship and cargo were American, and the reasons for the appeal were that ship and goods were the property of American citizens, "and were engaged in lawful trade, and no misconduct

(*a*) In the *Geheimrath* (Lords, 1798), the Court refused a similar application, saying that "their decree being final, it would be contrary to their practice to rescind their decree, and even where it appeared a fraud had been practised they could not go out of the order of their practice."

In the *Harmony* (December 9, 1807), a decree was rescinded, but the grounds for such rescission were not stated in the record. (Notes to report of the *Elizabeth*.)

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has been proved to forfeit the owners' right to restitution." Prize Appeals Admiralty Registry, vol. xlvii. p. 63.)

The *King's Advocate*, for the captors, adverted to the circumstantial evidence exhibited in the case, proving the fact of the master and his crew having risen upon the prize master and his men, whom they had confined below, whilst the ship's course was altered for her own port of destination. In the prosecution of which intention this ship was again captured. He now prayed the sentence might be affirmed.

Dallas, for the claimants, submitted that in this case, notwithstanding the vessel's course had been changed by the interference of the master and crew, yet it would be difficult to make out a case of rescue from the evidence, as it appeared no actual force had been employed; but that from the improper conduct of the prize master, as it was stated in an affidavit made by one of the crew, the ship was considered to be in danger, and by the consent of the remaining parties it was resolved the vessel should be navigated by the master. The mere circumstance of the vessel's course having been shaped for a different port from that to which she had been bound by the direction of the captor would not, he contended, affect the interests of the claimants upon the principles laid down by the Court in the case of the *Pensylvania* (*a*), when the Court held that "there was no duty imposed upon the master or crew to navigate the vessel to a port for adjudication." To secure the capture was said to be a duty imposed on the captors at their own peril, in which having failed by providing only a complement of men inadequate to navigate the vessel, the master on resuming the command had sailed for his own port, and the Court decreed restitution. The property of the greater part of the cargo was not that of the owner of the ship, which raised a very material consideration, whether the fate of a vessel condemned for a rescue would involve the interests of other persons, who were the shippers of the cargo and totally unconnected with the owners of the ship. This was altogether a novel question, and one which, upon a

(*a*) *Ante*, p. 103.

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review of the cases, had not yet been decided. There was certainly a dictum recorded in the case of the *Catherina Elizabeth* (*a*), where the Court said the consequence of a rescue, "had it been by a neutral master (the master there being an enemy), would undoubtedly reach the property of his owner, and the judge thought it should extend also to the confiscation of the whole cargo entrusted to his care." It must be observed, however, this was merely a dictum, the case before the Court not at all comprising such a question. Upon the obvious principles of justice and equity, when there were separate owners of the cargo and ship, the conduct of the master ought not to bind the owner of the cargo, who could not be considered as having reposed any confidence, or capable of exercising any control over him. Upon this equitable principle the Court had uniformly regulated its decisions with respect to the other questions, where it had been argued the act of the master should affect the interests of other persons. In the cases of breach of blockade, of contraband, and of dispatches, in the *Mercurius* (*b*), when the master committed a breach of blockade, with notice, the owners of the cargo were admitted to further proof, it appearing that the master was not specially constituted their agent, nor were they then cognizant of the existing blockade. Other cases of a similar nature had since occurred which sanctioned the principle upon which the Court then proceeded. In the *Atalanta* (*c*), when dispatches had been carried to the enemy, both ship and cargo were condemned because the whole expedition had been entrusted to the supercargo, who was acquainted with the nature of the dispatches, and in whom the owners had reposed confidence. In the next case [*Constantia*] (*d*), the master was part owner of both ship and cargo, and constituted agent for the residue, and there also, upon the same grounds, the ship and cargo were condemned. In the next, the *Susan* (*e*), the ship was condemned, and the cargo restored, including even that part of it belonging to the owner of the ship, a distinction having been taken that the master did not appear to have been appointed agent of the cargo, and although his general agency for the ship would affect that part of the property, the residue of the same owner's property should not

(*a*) Vol. I. p. 458. (*b*) Vol. I. p. 54. (*c*) Vol. I. p. 607.
(*d*) Vol. I. p. 613, n. (*e*) Vol. I. p. 614.

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thereby be affected. This was carrying the principle to its utmost bounds.

Arnold, same side, argued, first, that the rescue was improbable, if not impossible, it appearing that the crew consisted only of four effective persons, a boy and an aged cook, whilst the prize master's force consisted of seven men, all effective; and secondly, that no rescue was proved to have been attempted, no force had been resorted to; and the only fact which could serve as a pretext for such an imputation was that of throwing overboard the arms which lay on the quarter deck in an open basket.

SIR W. GRANT.—It is, in our minds, from the evidence adduced, clearly a case of rescue.

In the few cases of rescue to be found reported, the present question had never yet arisen. In the *Dispatch* (*a*), the master and crew, with the supercargo, rose and rescued the vessel. Here all parties were bound by the act of their agent, and both ship and cargo were condemned. In the *Carmelite*, 15th December, 1802, ship and cargo belonged to one person. In the *Washington*, the ship and cargo were both the property of the same person, and both condemned, the cargo being the property of the ship's owners, the supercargo, and two others. In the *Mars* (*b*), the ship and cargo were both condemned, the cargo being the property of the owners, the supercargo, and two others. In none of these had, therefore, the question arisen. Having no direct authority, the question should be argued by analogy. In the *Alexander* (*c*), a case of breach of blockade, where the ship was condemned, and it was objected that the owners of the cargo were not bound by the act of the master, the judge admitted that, had the master deviated, under particular directions from the ship's owners, to land part of his cargo at the blockaded port, unknown to the rest of the shippers, such partial instruction might lead the Court to consider, with indulgence, that distinction in favour of those shippers who had meditated a legal voyage; but as the case stood, no such distinction could be raised from the facts proved. Upon these

(*a*) Vol. I. p. 305. (*b*) Lords, June, 1807. (*c*) Vol. I. p. 358.

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authorities, he contended the claimants were here entitled to an equal if not greater share of favourable consideration. In the *Adonis*, the claimant's case failed because the fact of purity of intention on the part of the owners of the cargo was not shown; it would have been otherwise if the fact had been established.

The *King's Advocate* in reply said, if the question were new it was the highest time it should be settled by a solemn decision. Although acts of a master did not in all cases bind, yet in most they did, and he apprehended particularly in those instances where the principle was found necessary for the protection of belligerent rights; if so, the present case would be included. Where no possibility of privity between the master and his employers or freighters existed, Courts had relaxed the rule respecting blockades, and granted greater indulgence to the parties; where the possibility existed they had acted directly the reverse. Infinite danger would attend the admission of shippers to distinguish their purpose from that of their master. The case of contraband and of dispatches did not support the principle contended for. The enforcement of the right of the captor to bring in for adjudication, upon which so much depended in the conduct of a war, was too important not to claim the particular attention of the Court. It was such a necessary right, and acquiescence on the part of the neutral was so imperatively enjoined, that any infraction of the implied compact would be attended with the most dangerous consequences, and should therefore be punished in the most exemplary manner by the confiscation of the whole property engaged. Counsel had urged that, where there was no case in which a diversity of interest had been brought before the Court for sentence, it might be true; but the case of the Swedish convoy, he thought, would be quite decisive in principle upon this case, when the Court condemned all the property withheld from search.

Dallas objected that in the Swedish convoy case the Court had decided on different grounds from those submitted here for condemnation, the owners or the cargoes having put them on board with knowledge of the intended convoy and its purport.

The Court took time to deliberate.

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The Court (*a*) pronounced against the appeal, and affirmed the sentence of the Court below condemning the ship and cargo.

THE VREEDE.

[1 Dods. 1.]

Practice—Bail—Enforcement of Bond—Lapse of Time.

A surety to a bail bond given to answer adjudication on the delivery to the claimant of cargo captured is not released by lapse of time from his liability on such bail bond.

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THIS vessel, laden with a cargo of rice, sugar, coffee, and other goods, was captured on the 2nd of May, 1799, by his Majesty's ship *Ranger*, Charles Campbell, Esq., commander, and carried into Yarmouth. The usual proceedings were instituted by the King's Proctor, and on the 15th of June a claim was given by Mr. Vink, one of the partners in the house of Van Dyck, Gevens & Co., of London, merchants, for forty-one cases of sugar and nine casks of coffee, and also for fifty casks of rice. On the 18th of October, 1800, bail was given to answer adjudication by Gideon de Bie and John Tullock, and the goods were in consequence delivered up to the claimant. On the 13th of May, 1801, the judge decreed the fifty casks of rice to be restored, and condemned the sugar and coffee, which amounted in value to the sum of £650 9*s.* 6*d.* This sum had never been paid or demanded till the 14th of April, 1810, when a monition was extracted against the parties to bring in the value of the goods condemned. An attachment was now prayed against them for not complying with the terms of the monition. The claimant himself and one of the sureties, Mr. Tullock, had become bankrupts since the bail was given.

SIR W. SCOTT.—This is a proceeding against the principal and sureties to enforce the payment of £650 9*s.* 6*d.*, the amount of goods delivered on bail to answer adjudication. The parties against whom these proceedings are instituted have, with the exception of Mr. de Bie, all become bankrupts. The property, it seems, was condemned in the year 1801, but the monition against

(*a*) Sir W. Grant, M. R., Sir W. Wynne, Sir W. Scott, Sir J. Nichol.

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the bail was not extracted till the month of April, 1810, nine years after they had entered into the recognizance. The monition was then served upon the parties, and they in return allege the delay and laches of the captor, asserting with great truth that if due diligence had been used in making the demand the money might have been recovered from Mr. de Vink himself, the claimant of the property, and insisting that the bond cannot now be legally enforced.

The question for the Court to determine is, whether from the length of time and circumstances of the case the bail can be held discharged from their responsibility. The captors must at all events be protected in their rights. The Court felt it its duty to inquire in what manner the delay had arisen, a delay which has occasioned a case of great hardship to Mr. de Bie, the only security who has not become a bankrupt. He has, undoubtedly, great reason to complain, and the misfortune under which he labours is attributable either to the misconduct of the captor or to that of his agent.

A letter has been exhibited on behalf of the agent purporting to explain his own conduct in the transaction. The letter, as far as it is material to the present business, is in these terms:—"Being very desirous, as the captor's agent, to give all the explanation in my power, I have to state that, by Messrs. Steward, of Yarmouth, the brokers who sold the vessel and cargo, their letter of the 11th January, 1802, in which they sent the account-sales, they said, this is the remaining part of the cargo, I was led to conclude this was all that was coming to the captors, consequently payment was made to them. I had no information from the late King's proctor." Now, I can by no means consider this explanation satisfactory, either in its form or its substance. It appears hardly possible that he could have been misled by the expressions in Messrs. Steward's communication respecting the account-sales, since he must have known that those particular goods were delivered out upon bail to answer adjudication, and therefore could not be the goods which composed the remainder of the cargo to which the letter of the 11th of January referred.

Further satisfaction was required by the Court, and an affidavit of Captain Campbell has been brought in, wherein he states, that

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"the agent had the entire and uncontrolled management of all the *Ranger's* prizes committed to his charge, and that he confided implicitly in him as agent, and, not suspecting that he was negligent in his duty, did not in any way interfere in regard to the said prize, the *Vreede*." He states likewise the manner in which, by the examination of his agent's accounts, he himself made the discovery respecting the money due upon this bond. I must say, that in my opinion Captain Campbell has most completely exculpated himself from all blame. He had placed his concerns in the hands of an agent, and expected that he would act with diligence and fidelity in the care of them. Has the agent answered the demand made upon him by the Court in a manner equally satisfactory? After stating that the ship was carried into Yarmouth, he says, in his affidavit, that "although he was agent for the captors, the superintendence of the ship and the goods on board her was necessarily removed from the appearer to Messrs. Steward & Co. of that place, merchants, as sole agents or brokers." Now, I can by no means admit that the duties of the agent ceased upon the employment of a broker, although not upon the spot, it was still his duty to act with care and sedulity. Is it not the business of an agent to know in all cases what becomes of the goods? Is he to make no inquiries as to their restitution or condemnation? It is his duty to be urgent "in season and out of season"; more especially is it expected of him to be careful in his attention to the law proceedings, to watch their course, and to inform himself accurately of their result. The agent goes on to say, that "no copy of the condemnation was ever sent to him by or from the late King's proctor, or information of such condemnation, to the best of his recollection and belief, as, if it had, that he should particularly have directed that proceedings were duly taken against the claimant and his bail to procure payment, and should have caused distribution thereof." Now this, it must be observed, is a charge brought against a deceased person, and that too upon a mere belief and vague recollection of a very remote transaction. Neither can I follow him to the conclusion, that if such communication had been made to him, he should have ordered the money to have been demanded, and distribution to have been made. But if the charge of negligence against the late King's proctor were true, is it not

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the duty of the agent also to exercise vigilance? If the King's proctor did not transmit the sentence, it was the agent's duty to require it, for a sentence there must have been, and he was bound to know what that sentence was. But he, it seems, remained in utter ignorance till the error was pointed out to him by Captain Campbell. I do not by any means intend to say that the agent has been actuated by any corrupt motives (for it is quite impossible to attribute to him any corrupt motive whatever, the money being entirely out of his possession, and remaining in the registry without any knowledge on his part that any such money existed); but it is at the same time equally impossible to acquit him of extreme inattention and negligence, and if the Court had the power of laying the burthen on the agent, it would in this case have done it without dissatisfaction. Under the present Prize Act, I think the Court would have the power to compel payment by the agent; but on reference to dates, I find this to be a transaction prior to that Act. The Court then, unfortunately, has not the power, and if the agent cannot be fixed, I fear the liability must rest on the bail. I have looked into the Chancery cases, and I find, as far as I can collect them, that a surety is not released from his engagement by mere lapse of time, unless where payment was to have been made within a limited period, and the time has been extended by the other parties without his consent or knowledge. In the case of *Nisbet and Smith* (*a*), ulterior time was given against the express directions of the surety, and Lord Thurlow, relying upon that ground, held him to be discharged. In the latter case of *Rees* v. *Berrington* (*b*), the obligee in a bond had, without any communication with the surety, taken notes from the principal, and given further time; the surety was there also held to be discharged upon the same ground. In the still later case of *Wright* v. *Simpson* (*c*), the Lord Chancellor intimated very strongly that mere forbearance in enforcing payment on a bond would be insufficient to release a surety from his engagement, and expressly said, that "as to the case of principal and surety, in general cases, he never understood that as between the obligee and the surety there was an obligation of active diligence against the principal; that

(*a*) 2 Bro. C. C. 579. (*b*) 2 Vesey, 540. (*c*) 6 Vesey, 734.

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the surety is a guarantee, and it is his business to see whether the principal pays, and not that of the creditor." Such is the result of all the cases which I have been able to find upon the subject, so far as I can understand them; and as I have no power of throwing the responsibility upon the agent, I am under the painful necessity of enforcing payment from the bail; but I shall order the attachment not to be issued for the space of one month.

[1 Dods. 25.]

THE POMONA.

Condemnation—Proceeds of Prize—Right to enforce Condemnation.

Proceeds of prize may be followed wherever they can be traced. Monition enforced against persons who were at the time or had been in possession of prize goods.

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SIR W. SCOTT.—This is an application to the Court to enforce a monition against certain persons who have had the proceeds of prize in their hands, knowing them to be such. It is a principle, recognized in these as well as the common law courts, that the proceeds of prize may be followed wherever they can be traced. The Act of Parliament does not introduce a new principle in its provision for this purpose, but merely gives to this Court a stronger arm in supporting the rights of captors; and it will not be the disposition of the Court to abridge its powers where they are necessary to protect those rights. The goods, out of which the proceeds now sought to be recovered arise, were put on board this ship at Port-au-Prince, in St. Domingo, and were captured and carried into the island of Jamaica. A claim was given for them by the master, as the property of Messrs. Geddes & Co., of London, merchants; and the goods were delivered up upon bail being given by Mr. Smith, of Kingston, in Jamaica, to answer adjudication. The goods were afterwards condemned as prize to the captors by the Vice-Admiralty Court in that island, from which sentence of condemnation an appeal was asserted; but not having been prosecuted within the time limited by law, it was pronounced to have been deserted by the Lords Commissioners of Appeal. I am, therefore, now to consider these goods as undoubted prize; deter-

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mined to be such by a competent tribunal. Whether Mr. Hunter or any one else had anything to do with these goods originally is quite out of the view of this Court; it can look no further back than to the period of their condemnation. It appears that the goods were condemned by the Vice-Admiralty Court at Jamaica, and delivered to Smith as agent of the claimants; they come into his hands as prize goods, and the clause of the Act of Parliament was meant to include every person receiving goods in that character. Where goods have been fairly purchased in market overt, under a total ignorance of their previous history, the captor might find some difficulty in enforcing a process against the purchaser; but here Mr. Smith was aware of the fact; he takes the goods with this responsibility, and he is, therefore, directly amenable to the Court. New bills of lading were made out at Jamaica to the order of Smith; he is clearly fixed with the possession of the proceeds, and he assigns them over by his agents to Hunter & Co. by the same title by which he had himself holden them. They have the bills of lading, and take possession of the property with a perfect knowledge of the history attending it. Every particle of the evidence in the cause tends to fix them with the knowledge of their being prize goods. They go further, and specially charge themselves with responsibility to the captors by giving a bond of indemnity to Smith. It was not, indeed, in their power to discharge Mr. Smith, but they could and did make themselves peculiarly answerable. A great deal has been said as to the want of equity in proceeding against these parties and not against Mr. Smith only. But when equity is spoken of, I would ask, by what kind of equity do these persons bind themselves down to responsibility and obtain possession of the goods, and when that possession has turned out not beneficial, then endeavour to throw the onus upon the other party? That they had the possession of these goods is perfectly clear; whether they transferred them again to suit any purposes of their own is perfectly immaterial. It will not avail them to say that they have not now possession of the proceeds; all the possession that has been had of the goods since, has sprung and arisen from their possession; the possession of other parties is their possession as derived from them. Whether the parties to whom they transferred the goods received them with a knowledge of the

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fact that they were prize proceeds, does not appear; if they received them without such knowledge, then, undoubtedly, the captors have done right in passing them by, and in proceeding as they have done against Messrs. Hunter & Co. The captors have made their election, and they had a perfect right so to do. Upon every principle, I think the parties who have been proceeded against are responsible for the amount of the proceeds; and I shall therefore decree the monition as prayed against Mr. Smith, and also against Messrs. Hunter, Raynie & Co.

[1 Dods. 28.]

THE BUENOS AYRES.

Joint Capture—Expedition—Antecedent and Subsequent Services.

Services of a vessel in connection with, but antecedent to, and subsequent to an expedition, will not give a prize interest to such vessel in captures by the expedition.

1811 *March* 30; affirmed *November* 18, 1812.

SIR W. SCOTT.—This is a proceeding originating in the capture of the Spanish settlement of Buenos Ayres. A claim is set up by Captain Honeyman, and the other officers and crew of his Majesty's ship, the *Leda*, to share as joint captors in the proceeds of the property captured at that settlement. The matter comes before this Court on reference from a Committee of his Majesty's Council, who, upon application being made to them by Captain Honeyman, signified their opinion that it was a question proper to be submitted to the Court of Admiralty; and, as his Majesty's proctor has consented to appear, I see no reason why I should decline to entertain the cause.

Putting aside these preliminary remarks, I now come to the substance of the case. Before the original expedition to the Cape of Good Hope sailed from the ports of this country, Sir Home Popham had received directions from the Admiralty to send a frigate to cruise on the eastern coast of South America, between Rio de Janeiro and Rio de la Plata, for the purpose of procuring intelligence of the enemy's motions. As soon as the object of the expedition was accomplished by the capture of that settlement, he, in pursuance of the orders thus previously communicated to him,

dispatched the *Leda*, under the command of Captain Honeyman. Connecting these circumstances together, it cannot be denied that Captain Honeyman was sent under orders originating with the Admiralty itself, and also that he was dispatched with a view to the expedition, though there was no fixed determination to make an attack upon this Spanish settlement.

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The question is, whether upon any general principle the services antecedently performed by the *Leda* are of a nature to give her an interest in the capture. I am of opinion that they are not; that the services previously performed by her, however meritorious they may have been, will not entitle her to share, since there was no preconcert and no specific knowledge of the expedition till after the capture was effected. Upon any general principle of joint-capture, or on the authority of decided cases, I am clearly of opinion that the claim of the *Leda* cannot be established, and it certainly is not the disposition of this Court or of the Lords Commissioners of Appeal to extend the interests of joint-capture beyond their present limits. So likewise with respect to services subsequently performed, they must be considered precisely in the same light; I think I may lay it down as a certain and fixed rule that no services antecedent or subsequent, unless the vessel is employed in the identical service of the expedition, will impart a prize-interest. If, therefore, I had to dispose of this case on principles of law, I should have no hesitation in pronouncing against the claim of the *Leda*.

THE EL RAYO.

[1 Dods. 42.]

Joint Capture—Head-money—Fleet—General Engagement—Subsequent separate Service.

In a general engagement the whole fleet is entitled to head-money, though the formal surrender be made to one ship only; but the surrender must be a continuation of the general engagement.

1811 *May* 14.

This was the case of a claim set up on the part of his Majesty's ship *Leviathan*, to share in the sum allotted for head-money upon the capture of this Spanish ship of war.

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SIR W. SCOTT.—A decree was originally made in this cause, entitling the fleet generally to share in the head-money due on account of this capture. At the time when this decree was made, no circumstances had transpired which gave reason to suppose that a peculiar claim would be set up for any individual ship. It is now, however, asserted on behalf of his Majesty's ship the *Donegal*, that she was the sole captor, and a claim has also been made on the part of the *Leviathan* to share as joint-captor with the *Donegal*, to the exclusion of the rest of the fleet.

The first point to be decided is, whether upon the statement of facts now before the Court the whole fleet is or is not entitled to share in the bounty of the Crown. I accede to the principle laid down by the King's Advocate, that if this capture could be considered as a continuation of the general action, then the whole fleet would be equally entitled to head-money, notwithstanding the formal surrender to one particular ship belonging to the fleet. If the prize now in question before the Court had not gone into port and come out again upon a new enterprise, the capture might, I think, very fairly have been considered as forming a continuation of the general engagement. But here are two circumstances which take it out of this principle; first, the ship to which the surrender was made had been detached on other service, and did not compose a constituent part of the original fleet by which this memorable engagement had been sustained; secondly, the captured vessel was not left after the action upon the field of battle, but had escaped from her victorious enemies and got into port, from whence she was again sent out for the special purpose of assisting other vessels in distress. Now these two circumstances do, I think, completely destroy all supposition as to the continuity of the engagement. Neither the capturing nor the captured vessel can be identified with the respective fleets between which the contest had taken place, and upon this broad and intelligible ground of distinction I shall pronounce against the claim of the fleet to share in the head-money.

The next question is with respect to the claim of the *Leviathan*, and that certainly approaches much nearer to the principle on which the Court is in the habit of acting, and rests upon much nicer distinctions of law. The *Donegal* had been dispatched from

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the British fleet for the purpose of securing prizes, and if it had appeared that her attention had been in any manner directed to the *El Rayo*, her claim would, I think, have been pretty nearly made out. There was no combat between the prize and the actual captor, and all that was done on the part of the *Donegal* was the mere form of taking possession. The *Leviathan* was in sight at the time of the surrender, but her whole and undivided attention was directed to one object, the assistance of the *Monarca*. The *Leviathan* did, indeed, fire a gun, but this was merely as an admonitory signal to the *Monarca*, without any intention of compelling the surrender of the *El Rayo*, or of producing any effect upon that ship by intimidation or otherwise. The *Leviathan* was certainly within reach, and might have given assistance if any had been required, but she neither afforded any actual contribution of endeavour, nor had she the most distant intention of so doing, being wholly employed on another and different service. With reference, then, to the rule applied to head-money, I think her interest is not established. It is a case very different from that put by Dr. Lushington of a pursuit by a frigate and a seventy-four gun ship, where a surrender was produced by the exertions of both vessels. In such a case both would, undoubtedly, be entitled to the head-money, although the actual surrender might be made to the frigate, and possession taken by her only. But in this case there was no pursuit, and nothing was done by the *Leviathan* to produce the event which has occurred. I shall therefore pronounce for the exclusive right of the *Donegal;* but, as this case has been very properly brought to the notice of the Court, and has been conducted with the utmost fairness and propriety, I shall decree the expenses on all sides to be paid out of the sum allotted for head-money.

[1 Dods. 50.]

THE NIED ELWIN.

Practice—Bail Bond—Liability of Sureties—Subsequent War.

As bail is only given as a security pending the decision of all questions before the Court at the time such bail is given :—*Held*, that sureties who gave bail for a neutral vessel are not liable in respect of such vessel if war breaks out, and she thereby becomes belligerent property, and liable to condemnation on this ground.

1811 *May* 23.

This vessel, sailing under Danish colours, and laden with a cargo of sugar, coffee, elephants' teeth, and other articles, was captured on the 16th September, 1806, by the private ship of war, *Happy Return*. On the 14th of October, in the same year, the ship was restored by consent, with freight and expenses. Claims were given for the cargo on behalf of Messrs. Ryberg & Co., of Copenhagen, and others, and on the 6th of May, 1807, the cause came on for hearing, when the judge restored four-sevenths of the general cargo, and ordered further proof of the remaining three-sevenths, and of the elephants' teeth. On the 13th of August, 1807, bail was given to the captor to answer adjudication in the sum of 20,057*l.* 9*s.* 4*d.*, being double the appraised value of the said three-sevenths of the general cargo and the elephants' teeth. On the 12th of February, 1808, the judge pronounced the further proofs to be sufficient, and the goods to be Danish property, and directed the captor's general expenses to be paid. The King's Advocate now moved for condemnation of the property to the Crown, in consequence of the hostilities which had since been declared between this country and Denmark ; and also for a monition against Smith and Wolf, the bail, to answer the adjudication.

On behalf of the Crown, the *King's Advocate* and *Jenner* argued that the bail bond must be considered in all respects as a substitute for the thing itself ; that it was not confined to the individual captor to whom it was given, but was to answer all questions relative to the property which might arise before the ultimate adjudication of the cause ; that bail bonds are never in possession of the captors, but of the Court, and therefore it would be too much to maintain that they can only be put in suit by the

persons to whom they are given by name; that the Crown must for such purposes be considered in all respects as identified with the captor; that all right of capture proceeded from the Crown, and that all right of prize vested originally in the Crown; that in a case of joint capture, it could never for a moment be contended that the bail would not be responsible to the joint captor, who had subsequently proved his interest, as well as to the actual captor, to whom alone the bond was given; that in the case of property condemned, under the provisions of the Prize Act, to the Crown, instead of the captor, by whom the proceedings were originally instituted, the responsibility of the bail was indisputable. It was further urged that it is the policy of this country to consider all property depending in judgment before the Court as liable to condemnation in case hostilities should supervene; and that it was just and reasonable that a bond taken for such property should be subject to the same considerations, and that the possession of it should be considered as equivalent to the possession of the property itself.

For the bail.—*Arnold* and *Adams* contended that bail bonds were granted for a limited purpose only; that they were given to the captor, and not to the King; that if the Court should decide otherwise, no bail would ever be given in future; that the present security was given merely to answer the point then before the Court for its decision, namely, whether this was or was not Danish property; that the parties were induced to give such bail by the established credit of Messrs. Ryberg & Co., on whose behalf the goods were claimed, by the firm expectation that those gentlemen would be able to establish their property in the goods, and also by the confidence they entertained that, in the event of condemnation, the owners would furnish them with the means of discharging the bond; that at the time when this security was given the parties had not the least expectation of a war between this country and Denmark; that if the bond were to be enforced against them, they alone would be the sufferers, having no means of calling upon the Danish merchants for payment in consequence of the war with Denmark.

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SIR W. SCOTT.—The question in this case is whether the parties who have given bail to answer adjudication are subject to this demand of the Crown to bring in the amount of the value of the goods for which they have become securities. At the time the property was delivered on bail, the question depending before the Court was whether that part of the cargo which was ordered for further proof was or was not Danish property; if it really belonged to subjects of Denmark, the party making the claim would at the time have been entitled to restitution, and upon due proof of the property being made, the bail would have been equally entitled to their dismissal. Now, I cannot entirely accede to the position which has been laid down on behalf of the claimant, that these bonds are mere personal securities given to the individual captors; because I think they are given to the Court as securities to abide the adjudication of all events at the time impending before it. This Court is not in the habit of considering the effect of bonds precisely in the same limited way as they are viewed by the Courts of common law. In those Courts they are very properly considered as mere personal securities for the benefit of those parties to whom they are given. In this place they are subject to more enlarged considerations: they are here regarded as pledges or substitutes for the thing itself, in all points fairly in adjudication before the Court. The cases put by the King's Advocate fully establish this point, and it would be easy to suggest others in support of the same doctrine. Suppose a bond given to the actual captor to answer the adjudication of property, which should, from the locality of the capture, be subsequently condemned to the King in his Office of Admiralty: I have no hesitation in saying that the bail would in such a case be answerable to the Admiralty.

But the question still recurs, Has the Crown a right to enforce payment from these parties in the event, which has since occurred, of Danish hostilities? I am of opinion that it has no such right; that is an event which, I am persuaded, was not in the contemplation of the parties at the time they entered into this security; it has no connection with the question which this bail was given to answer, namely, whether these goods were Danish property or not. The present is an adjudication upon an entirely new question, arising out of an entirely new state of things, and cannot be iden-

tified with the original proceedings in the cause. The Court does, indeed, upon the intervention of hostilities, accept the old proceedings, and upon them pronounce for the interest of the Crown; but it does so merely for the purpose of saving time and expense, and not with any view of fixing a responsibility on those who have given bail to answer a very different question. If the Court were to accede to the prayer of the Crown upon this occasion, the effect would be monstrous; it would extinguish altogether the practice of delivering property upon bail, a mode so much encouraged by the Court and by the legislature. No British merchant would become security for foreign claimants in any case if he should be considered responsible to the extent of such a possible contingence as that of a subsequent intervention of hostilities. How could this Court expect it? How could the neutral world expect it? I am clear that I have no authority to compel these merchants to bring in the amount of the property, and I pronounce for the dismissal of the bail.

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THE CEYLON.

[1 Dods. 105.]

Recapture—Prize—Enemy Ship—Prize Act—Setting forth for War—Informal Commission—Offensive Operations—Recapture by Navy and Army—Condemnation.

In order to constitute "a setting forth for war" within the Prize Act, 45 Geo. III. c. 72 (*a*), an informal commission coupled with the use of a ship in an offensive operation is sufficient (*b*), and such ship on recapture will be condemned to the captors.

Recapture may be effected by a combination of land and sea forces.

THIS was the case of an English East India ship which had been captured by some French frigates, and carried to the Isle of Johanna, where she was refitted and supplied with two additional carronades, and a French crew consisting of seventy men. From the Island of Johanna she was conveyed by the French captors to Port South-East, in the Isle of France; on her arrival off that place she was attacked by the British frigate the *Nereid*, and the

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(*a*) See now the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 40.

(*b*) See the *Georgiana*, *post*, p. 193.

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guns of the Isle du Passe, and having fired several shots in return at the frigate and fort, she passed on to her anchorage at Port South-East; whilst lying in that port she was again attacked by the British squadron employed in the blockade of the Isle of France, when, with the assistance of some other French ships, she succeeded in repelling the attack, and in taking and destroying the British squadron. She was afterwards carried round to Port Napoleon, where she was dismantled, and fitted out as a prison ship for the purpose of receiving English prisoners of war, in which state she was found at the time of the capture of the island. The question was, whether, under these circumstances, the ship was sufficiently set forth for war to come within the terms of the Prize Act which directs restitution, upon salvage, of British ships recaptured from the enemy, unless they shall have been "set forth as ships or vessels of war by the enemy."

On a former day the judge thinking the evidence adduced not sufficient to establish the facts of the case, directed the cause to stand over for the purpose of admitting further evidence, or of affording some explanation why the proper evidence had not been supplied.

Affidavits were now exhibited stating the circumstances attending the capture of this ship, her subsequent employment by the enemy, and the belief of the witnesses as to the state in which she was found at the time of recapture.

On behalf of the former British owners, the *Advocate of the Admiralty* and *Stoddart*.

For the captors, the *King's Advocate* and *Jenner*.

SIR W. SCOTT.—This ship is alleged to have been retaken by his Majesty's land and sea forces employed in the capture of the Isle of France. The circumstances attending the recapture are very imperfectly detailed in the evidence before the Court, no person who was present at the recapture being produced as a witness. It is certainly the first time in which a cause of this kind ever came on for hearing in such a form; however, this is a defect which cannot now be supplied, and I can only understand generally, that the ship was employed, in conjunction with other

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vessels, in defence of the Isle of France against the British assailants.

A claim has been given for this ship, so taken and so employed, on behalf of the former British proprietors. The former master states the circumstances under which the ship was taken by the enemy. He says, "that she was taken and seized on the 3rd July, 1810, within sight of the Isle of Johanna, in the Indian sea, by the *Bellone* and *Minerve*, French frigates of war, and the French corvette of war, *Victor*, after a very severe engagement of five hours and a half, during which many guns were fired on both sides. That the said ship was an English East India ship sailing under English colours; that the ship and goods were afterwards carried into the Island of Johanna, where she was refitted and had additional guns put on board by the French, by whom she was afterwards conveyed to the Isle of France; that on her arrival at Port South-East, on the 20th of August, 1810, she was attacked by the *Nereid*, British frigate, and the guns of the Isle du Passe, then in possession of the English; that she fired several shots at the frigate and fort, and then passed on to her anchorage at South-East Point; that the deponent was afterwards put on shore, but was present on the 24th and 25th days of the aforesaid month of August, when the said ship, being still at her anchorage in Port South-East, was engaged in action against the English blockading squadron, under the command of Captain Pym, of the *Sirius*, which, with the *Magicienne*, another English frigate, were both burnt, and the *Nereid*, English frigate, taken, and the *Iphigenie* surrendered; and which was effected by the exertions of the two French frigates and corvette by which the deponent was captured, assisted as aforesaid by the French crew, which had been put on board the deponent's ship; that the deponent was afterwards conveyed from Port South-East, where he left the *Ceylon*, on the 15th of September, in a cartel, in consequence of his having been exchanged; but the deponent has heard, and believes, that the *Ceylon* was afterwards carried round to Port Napoleon, where she was unladen, dismantled, and fitted out as a prison ship, for the purpose of receiving English prisoners of war, and in which state she was found at the time of the capture of the island." It appears that she was a very large ship, of the burthen

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of eight hundred tons; that she had on board twenty-six guns, and one hundred and ten men, with arms, and ammunition of every description, in sufficient quantities for offensive or defensive operations; it appears also that she was furnished with a British letter of marque, empowering her to make reprisals. Now, the question for the determination of the Court is whether, under the words of the Act of Parliament, she is sufficiently "set forth for war" by the enemy. I am of opinion that she is. "Setting forth" does not, I think, necessarily mean sending out of port. It is no necessary part of the interpretation that she should have been carried into port and sent out with a formal and regular commission; it is sufficient if she has been used in the operations of war, and constituted a part of the naval and military force of the enemy. *Non constat* that there was not a regular commission of war in the present case; that must remain matter of conjecture only, since all the ship's papers are lost. I hold it, however, to be unnecessary that she should have been regularly commissioned; it is enough that she was employed in the public military service of the enemy by those who had competent authority so to employ her. In the case of *Castor* (*a*), which ship was not carried into port, there was no regular commission, for it is not in the power of the admiral to grant a regular commission; he has only an inchoate authority for such a purpose, and his acts necessarily require confirmation: yet in that case, it was held that the ship, though commissioned by the admiral alone, was sufficiently clothed with the character of a vessel of war. A commission of war is conclusive of itself as to the character of a ship; but it by no means follows that a regular and formal commission is in all cases indispensable. The want of such an instrument is not fatal; it may be supplied in various ways by acts equivalent to a commission. What are the facts in the present case? There was, indeed, no great additional armament, for that was unnecessary, the ship having been already armed in the service of this country; but two guns, it appears, were added out of the stores of other vessels to those which were originally on board. She sailed with a *lieutenant de vaisseau*, a person having a military commission, and a complement of men capable of fighting

(*a*) Lords of Appeal, May, 1795.

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the ship; for it appears that she did fight the British frigate the *Nereide*, by which she was attacked. It is said these were mere defensive operations; but are not many of the operations of war defensive? If the *Nereide* had proved inferior in force, would not this ship, in conjunction with the others, have carried the matter further and attacked in her turn? Then, being arrived at the Isle of France, she again sustained an engagement with other British ships, and assisted in the destruction of the *Sirius* and the *Magicienne*, and in the capture of two other English frigates. Here, then, was an operation not merely defensive but an actual offensive attack, terminating in the destruction of the British blockading squadron. I cannot doubt, under the circumstances, that this ship was sufficiently "set forth for war" to satisfy the terms of the Act, or, as the marginal note of the Act expresses it, "used as a ship of war." As little doubt can I have that she was so used under competent authority. We know extremely well that in remote parts of the world, where the domestic authority cannot be immediately resorted to, the commanders are of necessity vested with larger powers than is usually entrusted to them when employed upon European stations. I think this vessel was sufficiently commissioned by the French commander on that station; this *lieutenant de vaisseau* and the seventy men were put on board by his order in the first instance, subject, undoubtedly, to the approbation of the French Minister of Marine; but can I doubt that this appointment would have been confirmed by the constituted authorities at home in the present situation of the French navy? What was her after-employment? Why, as a prison-ship, as other ships of war frequently are, and, lastly, in defence of the place. This conversion is in itself sufficient to show that a regular commission is not necessary. There cannot be stronger proof of an actual military character being impressed upon her, and I have no hesitation in saying that she was sufficiently "set forth for war." Then it is said there is no proof of the condemnation of this ship by a competent Court; but this Court is bound to presume that she was regularly condemned when she remained so long in the possession of the enemy.

Another question has been raised, whether this is a recapture under the Act of Parliament; and it is said not to be within the

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provisions of the Act, because that speaks of recaptures by boats and ships only, and this is a recapture effected by the conjunct operation of the army and navy. Now we know very well that the Act was drawn with the intention of expressing the sense and meaning of the law of nations as it at present exists; but it cannot be forgotten that by the ancient law of Europe the *perductio infra præsidia*, *infra locum tutum*, was a sufficient conversion of the property; that by a later law a possession of twenty-four hours was sufficient to divest the former owner. This is laid down in the 287th article of the Consolato del Mare, in terms, indeed, not very intelligible in themselves, but which are satisfactorily explained by Grotius, and by his commentator, Barbeyrac, in his notes upon that article. Bynkershoek lays it down to the same effect in these words: "Sane in libro, qui inscribitur Consulatus Maris, c. 287, ita, ut modo dicebam, res definita est: nam is, qui navem et onus ab hoste recuperavit, jubetur navem et onus restituere pristino domino, salvo tamen servaticio, idque servaticium ut justum sit, constituitur pro modo operæ et impensæ in recuperationem factæ, præteritâ omni distinctione, quamdiu navis onusque in potestate hostium fuerint. Recte autem ibi additur, eam restitutionem duntaxat obtinere, si navis nondum fuerit deducta in locum tutum, sed si in locum tutum, dominio sic plane et plene in hostem translato, navem mercesque deinde recuperatas, ex asse recuperatori cedere. Quæ apprime conveniunt cum his, quæ hoc capite disputavimus. Vellem omnia, quæ in illa farragine legum nauticarum reperiuntur, æque proba recta essent, sed non omnia ibi sunt tam bonæ frugis." Grotius expresses himself very much to the same effect, and Loccenius considers this rule as the general law of Europe. In Lord Stair's decisions also, the same rule is laid down as the rule of law in Scotland. According to Valin a similar practice prevailed in France, and Crompton, in his Treatise on Courts, states it as the ancient law of this country that a possession of twenty-four hours was a sufficient conversion of the property, and that the owner was divested of his property unless it was reclaimed *ante occasum solis*. So that, according to the ancient law of England, which was in unison with the ancient law of Europe, there was a total obliteration of the rights of former owners. It is true that this rule has since been receded from by

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this country when its commerce increased. During the time of the Usurpation, when England was becoming commercial, an alteration was effected by the Ordinance of 1649, which directed a restitution upon salvage to British subjects, and the same indulgent rule of law was continued afterwards, when this country became still more commercial; but the common law still prevailed, and controlled the provisions of the statute, where the enemy had fitted out the prize as a ship of war. In the most recent change of the law, it is determined that a vessel belonging to a British subject loses her character on capture by the enemy, and subsequent conversion into a ship of war. That being the case, what is there that stands in the way of the right of the recaptor? Why, it is said that the Act of Parliament only mentions recaptures by ships and boats, and not such as are effected by the assistance of land forces. The Act, though it only mentions the usual mode of recapture at sea, does not, and cannot, mean to exclude other modes of recapture. What is the peculiar merit of a recapture where boats have been employed? The essential facts must be the same, and no difference can exist but in such circumstances as are perfectly immaterial to the merits of the transaction; and in the present case it is highly probable that a maritime force was actually employed. The means of boats were, I must presume, resorted to for the purpose of taking possession. It is perfectly true that in some clauses of the Act distinctions are made as to conjoint operations, but for what purpose are these introduced? For the benefit of the joint captors, in order to settle their respective interests and not to change the nature of the capture in favour of the former proprietors. But even if the Court could be of opinion that this case did not fall within the Act of Parliament, it must still consider it to come under the old rule of the law of nations, by which the rights of the owner would be completely divested; though I hardly think it necessary to have resort to that original principle. I am clearly of opinion that this ship must, under the provisions of the Prize Act itself, be condemned to the recaptors.

[1 Dods. 131.]

THE SUCCESS.

Ship—Licence to Trade with Enemy Country—Part Owners British and Neutral.

When by Order in Council neutrals are allowed to trade with an enemy country, a ship so trading must be wholly the property of neutrals.

1812 *January* 28.

This was the case of a ship under the Swedish flag and pass, laden with a cargo of deals, tar, iron, and other articles, and captured whilst in the prosecution of a voyage from Gothenburg to Malmo. The cargo and a moiety of the ship appeared to be Swedish property, and the other moiety to belong to British subjects. Claims were given on behalf of the respective owners for the whole of the property as protected by his Majesty's instruction of the 20th of June, 1810.

Sir W. Scott.—This ship and cargo were taken on a voyage from Gothenburg to Malmo, and are proceeded against for a breach of the Order in Council of the 7th of January, 1807, by which the intercourse between all ports from which British ships are excluded is prohibited. On the part of the claimants, an exemption from the operation of this order has been set up under a later instruction of his Majesty relative to the coasting trade of Sweden.

When the cause came on for hearing on a former day, some doubts were entertained respecting the national character of the persons for whom this property is claimed, but an inquiry in the nature of further proof has been made, and it turns out that the cargo is entirely Swedish, and that the ship belongs in moieties to a Swede and two British subjects. The evidence to that effect appears to be full and satisfactory, and indeed it is agreed on all sides that the real character of the parties is to be taken on the proof now before the Court. It appears, likewise, that the vessel sailed under the Swedish flag and pass, and that the master is a British subject who has been admitted a burgher of Kong-Elf, in Sweden, at which place, however, he has never resided.

Such are the facts of the case, and the question is, how far this

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ship thus owned and navigated is to be considered within the order of the 20th of June, 1810, passed for the purpose of protecting Swedish vessels carrying on the coasting trade of Sweden. Now it is a known rule of law that when parties agree to take the flag and pass of another country, they are not permitted, in case any inconvenience should afterwards arise, to aver against the flag and pass to which they have attached themselves, and to claim the benefit of their real character. They are likewise subject to this further inconvenience, that their own real character may be pleaded against them by others. Such is the state of double disadvantage to which persons expose themselves by assuming the flag and pass of a foreign State.

The point on which the captors rely for condemnation in the present case is the legal incapacity of the claimants in their real character to carry on the trade in which they had engaged. What was the relative situation of British and Swedish subjects at the time when this capture took place? Sweden had issued a declaration of war against this country, but that had not been echoed by any counter declaration on the part of Great Britain; neither had the British Government caused any notification to be made to its own subjects respecting the fact of the Swedish proclamation. It might, perhaps, be a question of some nicety to determine how far this unilateral declaration, not acted upon or even notified to them by the government of their own country, would affect the right of British subjects to carry on their accustomed intercourse with the ports of Sweden. But it is not necessary for the Court, in order to decide upon the validity of the present claim, to say what would be the effect of this state of things; for the question, I think, may be considered as resting upon other grounds. The relative situation of British subjects to Sweden must depend upon the Order in Council, by which not only the countries with which we are actually at war, but those also from which the British flag is excluded, are placed in a state of blockade. The blockade which has thus been imposed is certainly of a new and extended kind; but has arisen necessarily out of the extraordinary decrees issued by the ruler of France against the commerce of this country, and subsists, therefore, in the apprehension of the Court at least, in perfect justice. What then is the situation in which British

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subjects are placed by these retaliatory measures which have been resorted to as a defence against the injustice and violence of the enemy? Is it competent to them to trade at the ports thus placed under blockade, provided they can by any means elude the vigilance of the government of that country in which the ports happen to be situated? I am of opinion that they cannot. The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded. It would be a shameful abuse of a belligerent right thus to convert the blockade into a mere instrument of commercial monopoly; and for this reason British subjects have not been permitted, except under special licence, to have access to those ports which lie under an interdiction as to general trade. Such licences have been occasionally issued in cases of regular and ordinary blockades, and may perhaps have been granted with greater liberality under that imposed by the Order in Council, which is of a peculiar character, and necessarily requires a greater degree of modification. But in no case has an intercourse with blockaded ports been allowed, except a licence has been first specially granted for that purpose. It has been described as a strange and absurd proceeding to deprive British subjects of the power to trade with these interdicted ports, when the very effect intended to be produced by the Order in Council was to compel the admission of British merchandise. The object of the government in imposing the blockade has been truly represented; but that object must be attained through the general privations occasioned to the enemy, not by the encouragement of the trade of your own subjects to the exclusion of neutral trade: a contrary mode of proceeding might perhaps be attended with advantage, but it would not be a legitimate advantage, since it is inconsistent with the rights of other countries. These considerations, it appears to me, dispose of the case as far as British interests are concerned.

The question then remains as to the other moiety of the ship which has been claimed for a Swedish subject, and which is now

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admitted, by the counsel for the captors, to belong as claimed. It has been contended that this part of the property is entitled to protection under his Majesty's instruction, permitting the coasting trade of Sweden to be carried on by Swedish ships. Many orders of a pacific tendency towards Sweden, particularly this of the 20th of June, 1810, have been issued with a view of taking off, in some degree, the weight which would otherwise press very heavily on the commerce of that kingdom. The same indulgence, however, has not been vouchsafed to the navigation of other countries, and this Court has no power of extending it beyond the terms of the order by which it is granted. Is this then to be considered, either legally or grammatically, as a Swedish ship? Grammatically it certainly is not; the Court has already pronounced it to be half British. Nor do I think that it is legally to be considered a Swedish ship, since the Swedish flag and pass under which it was sailing do not describe, but, on the contrary, disguise, its real character. A Swedish ship must be Swedish *in toto*, without any intermixture of other interests. In this case a fraction only of the ship is Swedish, and I do not know that a moiety has a peculiar privilege over any other fraction. Consider what would be the effect if a mere Swedish portion, however small, were sufficient for the purpose of protection from British capture; the navigation of the whole world would then be let in to the advantages of this trade, which it was the express intention of the Orders in Council to prohibit. It would only be necessary to get a Swede as part owner, and then an American, or any other neutral, would be at liberty to engage in this course of trade, and the blockade would be entirely at an end. I am of opinion that only such ships as are entirely Swedish are entitled to the favourable operation of the instruction issued in June, 1810, and I am therefore under the necessity of pronouncing the condemnation of the entire ship and cargo.

[1 Dods. 160.]

THE VROW DEBORAH.

Licence—Grant subsequent to Capture—Condemnation.

A licence not granted till after the capture of a ship, though bearing a previous date, can afford no protection to such ship.

1812 *May* 6; affirmed *February* 10, 1813.

This was the case of a ship under Prussian colours, which was captured on the 24th January, 1812, whilst in the prosecution of a voyage from Amsterdam to London with a cargo of cheese. There was an expired licence on board, permitting the vessel to come from Norden, and there were also several other documents representing the shipment to have been made in that port. A claim was given for the ship and cargo as protected by another licence, purporting to be dated on the 20th of January, 1812. On the part of the captors an affidavit was brought in, by permission of the Court, in which it was sworn that from inquiries made at the Council office from one of the principal clerks, it appeared that a petition had been presented on the 20th of January for a licence to import from Amsterdam on board the *Vrow Deborah* a cargo of butter, cheese, and grain, and that such petition had been refused on the same day and the refusal thereof entered in the registry book of the Council office; that no further application was made respecting the licence till the 30th of the same month, when the claimant again attended and added the following words to his petition, "The butter and cheese to be warehoused for exportation in British ships," whereupon a licence was directed to be granted. The claimant was ordered by the Court to produce and verify the directions and instructions under which he applied for the licence, and to explain the circumstances which attended the application for and the grant of the licence. The claimant in his attestation deposed, that in pursuance of directions received by his house of trade on the 18th of January in a letter from their correspondent at Amsterdam, he on the 20th of the same month applied to the Privy Council by petition for a licence to import butter, cheese, and grain from Amsterdam to London on board the *Vrow Deborah*; that on making application for the said licence a few days afterwards at the Council office, he was informed it was with-

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held on the ground that the petition did not contain the clause that the goods should be warehoused for exportation; that he had before obtained licences on presenting similar petitions, but it being suggested to him that as a matter of regularity it would be necessary to insert the said clause in the petition, it was accordingly done, and a licence was immediately ordered for the protection of the ship and cargo. Further explanation was demanded by the Court, and an affidavit was brought in by each party respecting some alterations which had been made in the registry book of the Privy Council. The question was, whether the licence would enure to the protection of this ship and cargo, which had been captured on the 24th of January.

SIR W. SCOTT.—This is the case of a ship and cargo which were taken on the 24th of January last, and which have been claimed as protected by a licence. There was a licence on board, which permitted the vessel to come from Norden with a cargo to whomsoever the property might appear to belong.

[The Court examined the evidence.]

The question comes to this: Is it shown that there was any licence in existence at the time when the capture was made? I think it is incumbent on the party making the claim to show that he was at the time furnished with a protection; and, when he has admitted that the date of the licence is incorrect, when he has admitted that he made his first application on the 20th, and that, upon calling some days afterwards, he found the licence had not been granted, can I support it upon a mere date which the party himself admits to be incorrect? Admitting that there is good faith in the transaction, and thinking that the consequence may bear hard upon an innocent party, what is the Court to do, or how is it to relieve him from his difficulty? The Court must necessarily be governed by the principle which it has laid down and acted upon in other cases, that a licence does not act retrospectively, and cannot take away an interest which is vested, in point of law, in the captors. The Court has laid down this principle, and it has not hitherto been impeached. In what light the matter may be viewed in the superior Court it is not for me to conjecture, but it

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stands as a decided rule in this Court, and must be adhered to till it shall be reversed by the decision of a higher tribunal. The case appears to be free from fraud, but that is a circumstance which cannot alter the judgment I find myself under the necessity of giving. A superior Court with more extended powers may, perhaps, be inclined to grant the party that relief which it is unfortunately out of my power to bestow.

To give protection, the existence of the licence at the time when the capture took place must be presumed; the party has not averred this to be the case, and the style in which he expresses himself in the affidavit implies so absolutely the contrary, that I must take the contrary to be the fact. I am bound to believe that the licence was not in existence: if so, how can I, consistently with those principles to which this Court has adhered, give to this case any protection which is to be derived from a licence subsequently granted? I am afraid, under all these circumstances, that nothing remains for the Court but to pronounce that neither this licence nor that which was on board at the time of capture is sufficient to protect the ship and cargo.

Ship and cargo condemned.

[1 Dods. 183.]

THE DANKBAARHEIT.

Blockade — Licence to Trade — Substitution of Enemy for Neutral Vessel — Condemnation.

A neutral holding a licence to trade with a blockaded port from the Government of Great Britain may substitute one neutral ship for another; but if he substitutes an enemy ship for a neutral ship, he is not protected by the licence, and such ship is liable to condemnation.

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November 6.

THIS was the case of a ship under Prussian colours, laden with a cargo of cheese, and captured on a voyage from Amsterdam with an asserted destination to the port of Leith. The ship and cargo were claimed as protected by a British licence on board which was granted for the Prussian vessel, the *Minerva*, Hayes, master; and the question was whether a licence so granted would enure to the protection of this Danish vessel, which had been substituted for the Prussian vessel named in the licence. There was also a further

question respecting the fate of the cargo in case the ship should be held liable to condemnation.

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Sir W. Scott.—This ship was taken on a voyage from the Texel to Leith, and was documented, at the time of capture, as the Prussian ship, the *Minerva*, commanded by a Prussian master. Upon inquiry it turns out that she has no pretensions to that appellation, but is Danish property, having every character of a Danish vessel, and that the master is, in fact, a Dane, assuming the name of the former Prussian master. A protection is set up for this ship and cargo, under a British licence permitting the importation of certain enumerated articles from Amsterdam to the port of Leith, on board the Prussian ship *Minerva*, Hayes, master.

The question is whether it is in the power of the Court to apply this licence, so granted, to the protection of this Danish ship with this Danish master on board. I need not repeat what I have so often stated, the anxious wish of this Court to relieve, as much as possible, the difficulties under which the commerce of the world now labours, and to apply the most favourable consideration to the construction of licence cases. At the same time it is necessary to be remembered that the Court possesses the mere power of interpretation, that it must confine itself to a reasonable explanation of the terms made use of, and cannot alter or dispense with conditions considered as essential by the government granting the licence. If the Court assumes the power of extension by favourable interpretation, it does so only where there is a total absence of *mala fides*, and where unavoidable obstacles have been thrown in the way of an exact compliance with the terms prescribed. Where there has been a want of good faith, or a departure from the terms beyond the necessity thus imposed, the Court has not felt itself called upon to mitigate the penalties incurred by such a deviation.

With respect to fundamental conditions, without meaning to lay down any very precise rule, I may venture to state that the Court is not in the habit of considering it a very essential deviation if the ships of other countries than those designated in the licence have been employed, provided the different countries had the same political bearing towards this kingdom. If Prussia and Denmark stood in the same relative situation with respect to Great Britain,

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licences would be granted to the vessels of either country with equal facility. But the Court has never gone the length of holding it to be a matter of indifference to substitute a ship belonging to a country at war for a neutral ship, at the will and pleasure of the holder of the licence. Many reasons may induce government to grant licences to neutral ships where it would not bestow the same indulgence upon ships belonging to the enemies of the country. I know that his Majesty's Government has sometimes granted licences for enemies' vessels; but because licences have been so granted at particular times, does it therefore follow that they would be granted at all times? I cannot take upon myself to say that the Crown would not in the present case have granted a licence for this very Danish ship; nor can I, upon the other hand, venture to say that it would have done so. There may be reasons inducing the government to grant licences to Danish ships at one time which do not exist at another. In the case which has been cited of the *Job* (*a*), the Court held that a licence granted for a Swedish vessel would enure to the protection of a Russian vessel, those countries approaching much nearer to the same relative state towards this country than Prussia and Denmark do at this time.

[The Court then examined the facts as to the granting of the licence, and concluded:]

I have no hesitation in pronouncing the liability of this ship to condemnation.

With respect to the other part of the question, in what manner the proprietors of the cargo shall be affected by the conclusion at which the Court has arrived, that must depend upon how far they are implicated in the fraud which has been practised.

[After an examination of the facts, the Court ordered the case on this point to stand over.]

(*a*) 1811.

THE CHARLOTTE CAROLINE. [1 Dods. 192.]

Recapture—Salvage—Subsequent Condemnation—Order of Release by Sovereign Power.

Salvage on recapture is not extinguished by subsequent capture and condemnation in an enemy's port, where the sentence condemning the property is overruled by an order of release from the sovereign power of the State.

1812 *December* 9.

This ship, under Swedish colours, laden with a cargo of iron and deals, on a voyage from Stockholm to Dublin, in the month of June, 1810, was boarded off Moen Island in the Baltic by a Danish rowboat, and afterwards by his Majesty's cutter *Cheerful*, Lieutenant George Wood commander, and placed under the protection of the convoy from Darshead to England, the master being put in possession of his ship on granting a certificate that she had been recaptured from the Danes by the *Cheerful*. The ship did not arrive at Dublin, the port of her destination, till the month of November, 1811, having in the meantime been captured a second time by the Danes and carried into Copenhagen, where the vessel and cargo had been condemned for sailing under British convoy, but were subsequently restored by an order from the King of Denmark.

Sir W. Scott.—This case arises upon the asserted capture and recapture of this Swedish ship and cargo, and the question to be decided, in the first place, is whether any right to salvage has been acquired; and secondly, whether, if acquired, it has not been discharged by circumstances which have since occurred.

[The Court first dealt with the facts which involved the right to salvage.]

The second question is whether anything has since occurred to deprive the recaptors of the right which, by their services, they had acquired. It has been contended very strongly that the subsequent act of capture and condemnation, by the Danes, worked a conversion of the property, and consequently a defeasance of the right of the salvors. Now it is certainly true that the right of the

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receptors to salvage is extinguished by a regular sentence of condemnation carried into execution, and divesting the owners of their property. But in the present case no such effect has been produced. You cannot here resort to the legal fiction of conversion, because the sentence of the Prize Courts was, in this case, overruled by an order of release from the sovereign power of the State. The ship, it appears, was proceeded against, and condemned for having sailed under British convoy; and there being a Danish ordinance expressly prohibiting all vessels from navigating under the protection of British ships of war, it was unnecessary to look out for any further ground of condemnation. If such had been wanting, the destination to a British port would have been sufficient for the purpose. She is condemned, however, upon the former ground only, and from this sentence an appeal is prosecuted before a superior Court by which the sentence of condemnation is confirmed; but upon application to the royal authority the property is restored, and the master is again put into the possession of his ship. The sentences, then, of the Prize Court are abolished by an authority which, according to the constitution of that country, is perfectly competent to do such an act, and the legal fiction of conversion is completely done away by the fact of restitution. The master is redintegrated in his rights, and the vessel sails to this country exactly in the same state as if she had proceeded on her original voyage, and had suffered no interruption from the Danish cruiser.

Upon these grounds I am of opinion, in the first place, that the act of recapture by his Majesty's cutter the *Cheerful* is sufficiently established; and secondly, that nothing has since occurred to defeat the right of the receptors to salvage.

THE ANNA MARIA.

[1 Dods. 209.]

Licence—Variation by Order of Admiral.

A direction from the British admiral for a vessel to touch at W. and to come direct to the port of London will justify a departure from the terms of a licence requiring her to touch at L., there to take convoy.

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January 29.

This was the case of a Danish ship, laden with a cargo of corn and timber, and captured on a voyage from Copenhagen to London. A licence had been procured for this vessel, permitting her to come from the Baltic to the port of London, on condition that she should proceed from her port of lading to Leith, there to take convoy. The vessel had not gone to Leith as required by the licence, but had put herself under the protection of British convoy at Wingo Sound, having obtained a passport from the British admiral on the Baltic station permitting her so to do, and was proceeding from thence direct to the port of London. The question therefore was, whether this passport from the British admiral would justify a deviation from the condition of the licence requiring the vessel to touch at Leith.

Sir W. Scott.—This ship is asserted to have been coming under licence with articles of the first importance for the supply of this country. A British merchant, who states himself to be the consignee of the cargo, steps forward to support the claim, and there is nothing in the place of capture which can lead to any suspicion of a false destination. The case therefore presents itself to the notice of the Court under circumstances very favourable to the good faith of the claimants, and I should upon that account feel a strong disposition to uphold the transaction. But there may be gross errors, from the effect of which the Court can afford no relief. Those conditions of the licence which the government of the country has on grounds of public policy thought to be material must be strictly complied with; all such conditions it is the duty of the Court to sustain. Now, nothing can be more imperative than the terms of this licence, requiring that the vessel should come direct to Leith, there to take convoy; and if there were nothing else in the case the Court would, I fear, be under the necessity of

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proceeding to a sentence of condemnation. The master has no right to assume to himself a discretion of going elsewhere; his path is clearly chalked out in the licence, and he is not at liberty to deviate from it upon his own ideas of expediency. It is not a consideration of obtaining protection for a longer portion of the voyage which can justify him in departing from the course which has been deemed proper by his Majesty's Government; but if the British admiral has been in the habit of directing ships to proceed to Wingo Sound for the purpose of taking convoy, it would, I think, be a harsh measure to say that the property of persons acting under the sanction of such instructions should be liable to condemnation. It is natural that foreign masters should feel themselves protected by a practice founded on such authority. Looking at the licence with the eye of a lawyer, I confess that I should differ from Sir James Saumarez in the construction which he has put upon it. It is the safest way to adhere closely to the directions contained in the act of the government, and not to vary from them upon notions of greater or less convenience; but if it has been the practice of the British admiral to direct ships to go to Wingo Sound, that may afford a sufficient justification to the parties pursuing such a course. Taking the fact to be as represented by the claimants, I think the ship and cargo would be entitled to protection. As Sir James Saumarez is now in this town, I think it would be proper to make inquiries of him whether he can be certain that he did not give such an order. The Court would, in a case of this kind, think itself under an obligation to uphold the acts of the British admiral.

On a subsequent day a certificate from Sir James Saumarez was produced, stating his belief that the account given by the claimants was correct.

Ship and cargo restored.

THE HOPE AND OTHERS.

[1 Dods. 226.]

Consul—Admiral—Inability to exempt Enemy Property from Capture—Invalidity of Permission—Ratification by Government.

A consul, and an admiral on a station have no power to exempt the property of an enemy from capture, but an invalid permission may be ratified by the government of the captors.

1813
February 19.

These were four cases of American ships laden with corn and flour, and captured whilst proceeding from America to the ports of Spain and Portugal. They were claimed as protected by an instrument on board, granted by Mr. Allen, the British Consul at New York, accompanied by a certified copy of a letter from Admiral Sawyer, the British commander on the American station.

Sir W. Scott.—The destination of these vessels to the ports of Spain and Portugal is not disputed, but they would undoubtedly be liable to condemnation as enemy's property unless the claimants can show some special ground of exemption from hostilities.

The protection which has been set up consists in certain papers found on board each of these ships to which it would be difficult to give any precise designation. The first of them appears to be a kind of proclamation from Mr. Allen, who states himself to be a British Consul at New York, the other is a letter addressed to this same Mr. Allen by Admiral Sawyer, the commander-in-chief of his Majesty's ships on the Halifax station. The certificate or proclamation of Mr. Allen states, that "whereas from a consideration of the vital importance of continuing a full and regular supply of flour and other dry provisions to Spain and Portugal, or their colonies, it has been deemed expedient by his Majesty's Government that, notwithstanding the hostilities between this country and the United States, every degree of protection and encouragement should be given to the American vessels laden with flour and other dry provisions, and bound to Spain or Portugal, or their colonies; and whereas, in furtherance of these views of his Majesty's Government, Herbert Sawyer, Esquire, vice-admiral and commander-in-chief on the Halifax station, has directed to me a letter, under the date of the 5th of August, 1812 (a copy of which

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is herewith annexed), wherein I am instructed to furnish to American vessels so laden and destined a copy of his letter, certified under my consular seal, which documents are intended to serve as a perfect safeguard and protection to such vessels in the prosecution of their voyage. Now, therefore, in pursuance of these instructions, I have granted to the American schooner called the *Hope*, of one hundred and twenty-one tons burthen, whereof Benjamin Holbrook is master, now lying in the port of Philadelphia, and laden with flour, rice and corn, a copy of the said letter of Vice-Admiral Sawyer, certified under my consular seal, hereby requesting all officers of his Majesty's ships of war or private armed vessels belonging to the subjects of his Majesty, not only to offer no molestation to the said vessel, but, on the contrary, to grant her all proper assistance and protection on her passage to Corunna, in Spain, and on her return from thence to a port in the United States, whether laden with salt or in ballast only." The letter of Admiral Sawyer addressed to this gentleman, Mr. Allen, is in these terms: "I have fully considered that part of your letter which relates to the means of insuring a constant supply of flour and other dry provisions to Spain and Portugal, and to the West Indies, 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 unarmed and so laden *bonâ fide* bound to Portuguese or Spanish ports, whose papers shall be accompanied with a certified copy of this letter under your consular seal." And it is contended that these two papers, particularly as recognized by the Order in Council of the 26th of October, 1812, are of such a nature as to take from these vessels the character of hostility. It is much to be lamented that the previous correspondence which must have taken place between these gentlemen does not make its appearance. The Court is left to guess at the contents of the letter which must have been sent in the first place from Mr. Allen, the consul, to Admiral Sawyer; but it is, I think, fair to infer, that it contained a proposition that the transaction should take the shape which this has actually done, namely, that a copy of Admiral Sawyer's letter should be put on board for the purpose of guaranteeing, as far as

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he could, the safety of the ships to which it might be furnished. I think it perfectly clear that Mr. Allen's letter must have contained a proposition to that effect. Though not exhibited, it proves itself by the sequel of facts.

Now, taking it that there was nothing further in the way of safeguard than what is to be derived from these papers, it certainly would be impossible to hold that the property is sufficiently protected. The instrument of protection, in order to be effectual, must come from those who have a competent authority to grant such a protection, but these papers come from persons who are vested with no such authority.

To exempt the property of enemies from the effect of hostilities is a very high act of sovereign authority: if at any time delegated to persons in a subordinate situation, it must be exercised either by those who have a special commission granted to them for the particular business, and who, in legal language, are termed mandatories, or by persons in whom such a power is vested in virtue of any official situation to which it may be considered incidental. It is quite clear that no consul in any country, particularly in an enemy's country, is vested with any such power in virtue of his station. *Ei rei non præponitur*, and therefore his acts relating to it are not binding. Neither does the admiral, on any station, possess such authority. He has indeed power relative to the ships under his immediate command, and can restrain them from committing acts of hostility, but he cannot go beyond that; he cannot grant a safeguard of this kind beyond the limits of his own station. The protections, therefore, which have been set up do not result from any power incidental to the situation of the persons by whom they were granted; and it is not pretended that any such power was specially entrusted to them for the particular occasion. If the instruments which have been relied upon by the claimants are to be considered as the naked acts of these persons, then are they in every point of view totally invalid (*a*).

(*a*) The principle of this judgment was substantially confirmed by the decision of the Lords of Appeal in the case of the *Reward* (9th July, 1814), which was an appeal from the sentence of the Vice-Admiralty Court at Halifax, on the effect of the certificates or passports granted by Admiral Sawyer, in the form appearing in the *Hope*.

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But the question is, whether the British Government has taken any steps to ratify and confirm these proceedings, and thus to

No case of the class heard in the High Court of Admiralty was carried before the Lords Commissioners of Appeal, but the circumstances of the *Reward* were precisely similar to those in the *Hope*; and the Court of Appeal decided that the terms of the Order in Council, dated the 13th of October, 1812, were applicable to the certificates or passports as expressed in the letters of Mr. Allen, and of Admiral Sawyer in answer thereto, and sufficiently established the validity of the certificates or passports that had been granted according to the terms of the Order to American ships proceeding with cargoes of grain and flour from the ports of the United States to Spain or Portugal. In the case of the *Charles* (12th July, 1814), which was an appeal from the Vice-Admiralty Court at Barbadoes, and in some other cases, certificates or passports of the same kind, signed by Admiral Sawyer, and also by Don Luis de Onis, his most Catholic Majesty's Envoy Extraordinary and Minister Plenipotentiary to the United States, had been used for voyages from America to certain Spanish ports in the West Indies. The Lords of Appeal held that, these certificates or passports, not being within the terms of the Order in Council, did not afford protection, and their lordships accordingly affirmed the sentences of condemnation passed by the Vice-Admiralty Courts in those cases.

In the cases of the *Venus* and the *South Carolina* (25th June, 1814), a similar question arose on the effect of passports and certificates granted by Mr. Foster, his Majesty's Envoy Extraordinary and Minister Plenipotentiary, but not confirmed by an Order in Council, permitting American ships to sail with provisions from ports of the United States to the island of St. Bartholomew.

On the part of the claimant, it was contended that, although persons holding the situation which Mr. Foster did had not in strictness any authority to grant protection to vessels or cargoes otherwise subject to the operation of hostilities and the laws of war, yet the fact that he had exercised that authority for purposes that must be presumed to be agreeable to his instructions, and beneficial to the interest of his country, would establish an equitable claim which their lordships were bound to respect.

In support of the sentence of condemnation, it was argued that a Minister Plenipotentiary had no such power, as was indeed admitted; that this was a principle of general law, which persons taking such passports were bound to know and to notice; that the claimants had made no inquiries whether Mr. Foster was furnished with any special power to grant certificates of this kind, and were therefore not misled by false information upon that point; that it belonged to the Crown alone to grant such exemptions from the laws of war, as had been strongly expressed on several occasions (see the case of *Angelique*, 3 Rob. p. 7 of Appendix), and as the instruments were in themselves invalid, their lordships had no power to render them effective.

The Court affirmed the sentences of condemnation in all the cases in which the certificates or passports granted by Mr. Foster were not within the terms of the Order in Council by which certain descriptions of licences granted by him had been confirmed.

convert them into valid acts of State, for persons not having full powers may make what in law are termed *sponsiones*, or, in diplomatic language, treaties *sub spe rati*, to which a subsequent ratification may give validity. *Ratihabitio mandato aquiparatur.* Has the government done anything to give these papers an authority which they did not before possess?

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THE HOPE AND OTHERS.

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[The Court then examined the facts, and held that the Order in Council ratified the acts of the consul and admiral, and protected the property.]

I am satisfied that these are the certificates or passports contemplated in the Order of Council, and therefore I have no doubt as to the restitution of this property. At the same time, I think the captors were justified, under the circumstances of the case, in detaining these vessels, and consequently that they are entitled to their expenses.

Ships and cargoes restored, subject to the payment of captor's expenses.

THE ALERT.

[1 Dods. 236.]

Prize—Invalided Soldiers on Captor—45 Geo. III. c. 72, s. 2.

Invalided soldiers on board a man-of-war when she captures an enemy's ship are entitled to a share of the prize money (*a*).

THIS was a claim on behalf of 351 invalided soldiers, who were returning from Lisbon to this country on board his Majesty's ships *Vestal* and *Diadem*, to share in the proceeds of a prize captured by those ships in the course of the voyage.

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Against the claim, the *King's Advocate* and *Phillimore*.

Jenner, contra.

(*a*) By the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 2, "officers and crew" includes soldiers.

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February 24.

THE ALERT.

Sir W. Scott.

SIR W. SCOTT.—This is the case of a number of invalided soldiers who claim to share in a prize taken by two of his Majesty's ships, in which they were embarked, on their voyage from Portugal to England. A doubt has been started respecting the right of these men to participate in the proceeds of a prize taken under such circumstances, but I am of opinion that their claim is well founded. The Act of Parliament gives the whole interest and property in all prizes which they may take, "to the flag officers, commanders and other officers, seamen, marines and soldiers, on board any ship or vessel of war in his Majesty's pay," and perhaps the term "soldiers," standing as a component part of the text in this clause of the Act, may mean such military persons as may happen to be doing duty on board as marines. But the statute directs distribution to be made according to the King's Proclamation, and the Proclamation, according to ancient usage, gives a share "to all marines and other soldiers, and all other persons doing duty and assisting on board." This must be held to include all supernumeraries and passengers, since every person is presumed to be willing and able to give assistance, if required so to do, and the presumption with respect to soldiers is particularly strong. I understand from an inquiry which I caused to be made at the Admiralty that the maritime crew is usually lessened when soldiers are sent on board any of his Majesty's ships, and that they are considered as persons capable of affording assistance in a variety of ways. The right of soldiers to share in all prizes at the capture of which they may have been present has been invariably admitted in this Court, and the same doctrine has been held in the Court of King's Bench. In the case of *Wemyss and Linzee* (*a*), which was twice tried in that Court, the right of passengers to share was treated as a matter always acquiesced in; but it was ruled that they all took as supernumeraries only, and ranked in the lowest class of distribution. It is clear, therefore, that soldiers on board a capturing ship have, generally speaking, a right to prize money; and unless this case can be specially distinguished from others, the present claimants must be entitled to the benefit of the general rule. Now the only distinction which has been pointed out is that

(*a*) Douglas, 224.

these men are invalided, but this I think by no means a sufficient distinction; though invalided, they are still fit for some duty, even upon land; though disabled from field-service and the more active operations of war, they are still useful for the purposes of defence, and upon that account form part of the usual military force of every country. On board ships of war they may certainly be very serviceable during an engagement, and therefore I think the circumstance of their being invalided forms no solid ground of distinction. If any inconvenience arises from the increased practice of carrying soldiers on board the King's ships, a remedy for that inconvenience must be sought by means of some legislative provision. I understand that soldiers are usually put on board vessels armed *en flute*, and that much dependence is placed on their assistance in time of action. I am clearly of opinion that, according to the ancient practice of the service and the true construction of the Prize Act and the Proclamation, these invalided soldiers are entitled to share in the proceeds of this prize.

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THE ALERT.

Sir W. Scott.

THE SEYERSTADT.

[1 Dods. 241.

Licence—Contravention—Force—Hostile Government.

The violence of a hostile government will not entitle persons to act in contravention of the essential terms of a British licence.

THIS was the case of a ship under Danish colours, laden with a cargo of salt, copper, train oil and herrings, with which she was proceeding, at the time of capture, from Drontheim to Flensberg, in Jutland. A licence had been obtained for this vessel, permitting her to sail with a cargo "from Liverpool to any port in Denmark, with liberty to touch at a port in Norway for clearances." It appeared that she had sailed from Liverpool with a quantity of salt and some bales of British manufactures, the latter of which had been put on shore at Drontheim, and that she was about to proceed from that port to Flensberg, with her cargo of salt, when, according to the representation of the master, the custom-house officers compelled him to take on board a quantity of copper, train oil and herrings, for the use of the Victualling Board of Denmark.

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For the captors, the *King's Advocate* and *Daubeney* contended for condemnation under the authority of the *Catherina Maria*.

For the claimants, *Phillimore* and *Lushington* admitted that the ship and cargo would have been liable to condemnation, provided the goods had been taken on board voluntarily, but contended that a different rule must be applied to the present case, since the master had acted under duress and compulsion imposed upon him by the sovereign power of his own country. That the public faith was pledged to afford protection under the licence so long as the conditions of it were fulfilled as nearly as controlling circumstances would admit.

SIR W. SCOTT.—This is the case of a Danish ship, which sailed from Liverpool to Flensberg, under a licence permitting her to touch at Drontheim for clearances, and for clearances only. It turns out, however, that she puts part of her cargo on shore at that place, and takes on board other goods of a very noxious quality, consisting of copper and train oil for the use of the Danish Government. This is using a British licence for the most noxious purpose to which it can well be applied. It is true that the antecedent voyages of this master have been in the service of this country, but the present employment of the ship is of a very different kind, and must work a forfeiture of any protection to which she might otherwise be entitled.

It has been admitted that this ship and cargo would be liable to condemnation if the act of conveying these goods had been voluntary on the part of the master; but it is said that the measure was forced upon him by the act of the Danish Government, and that he was compelled to take them on board, having first protested against it, but without effect. I am afraid that it is necessary for the Court to adhere to the rule laid down in the case of the *Catherina Maria* (*a*), that the plea of compulsion is inadmissible. It would

[Edw. 338.]

(*a*) The *Catherina Maria* (November 7th, 1809). In this case a vessel with a licence to proceed in ballast *to* a port in the Baltic, and there load a cargo for the United Kingdom, was captured on her outward voyage *with* a cargo, and was of course liable to condemnation. As to the plea of compulsion, the following was Sir W. Scott's judgment:—Then again it has been urged, that the French authorities at Rostock compelled the master to take this cargo on board. I must observe, in the first place,

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be impossible for the Court to protect itself otherwise against the incessant attempts which might be made to elude its vigilance by pretences of that nature. It could never discover with certainty whether a transaction taking place in an enemy's port were voluntary or not. Compulsion would always be pleaded, though in many cases the parties might be acting collusively. It is necessary, therefore, to keep the door shut against such explanations.

The Court has always held, in cases of this kind, that the party must look for indemnification to the quarter from which he has received the injury; and in the present case the master himself holds the same language. He has made this matter the subject of a protest; but against whom does he protest?—against the inspector of the customs at Drontheim, upon whom he throws the responsibility. It is said that the master could not have proceeded to enforce his remedy, because he could not with safety have produced his British licence. But there was no necessity for producing the British licence in order to show the injustice of forcing him to go on a voyage from one Danish port to another by which he would be exposed to the danger of British capture. The licence would have been quite out of the question when the only charge was that he had been compelled to undertake a prohibited voyage. It would by no means occasion the difficulties which have been represented. I think myself under the necessity of adhering to the rule which has been laid down, that the violence of a hostile government shall not privilege persons to act in contravention of the essential terms of a British licence.

that this suggestion comes out in a manner not much calculated to inspire implicit confidence in the mind of the Court; but were it otherwise, such an excuse can never be admitted. What is to become of these Orders in Council if the enemy, by the mere introduction of a force which the master of a merchant vessel cannot resist, is to defeat their operation? Force would in all cases be employed, and in many cases collusively. In every instance in which the necessities of this country might require the introduction of Russian produce into the ports of England, the enemy would derive a concurrent advantage by the transfer and circulation of his own commodities. I am under the necessity of considering the vessel, therefore, as captured on a voyage which by no latitude of interpretation can be brought within the terms of the licence by which alone it could be protected, and the plea that the cargo was taken on board by compulsion, being in its own nature inadmissible, the cargo cannot be exempted from the fate of the ship.

[1 Dods. 244.]

THE ELIZA ANN AND OTHERS.

Seizure—Neutral Ship—Treaty of Peace—Ratification.

A declaration of war by the government of one country against another is evidence of the existence of a war between the two countries; and by the modern usage of States a subsequent ratification by the sovereign authority is necessary to give effect to a treaty of peace, although the treaty itself may have been signed by plenipotentiaries. A claim for restitution of enemy ship as having been seized in neutral territory rejected on ground that the government whose territory was alleged to have been violated was not in fact neutral, and that the place of capture was not within the territorial limits of that government.

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These were three cases of American ships, laden with hemp, iron, and other articles, and seized in Hanoe Bay on the 11th of August, 1812, by his Majesty's ship *Vigo*, which was then lying there with other British ships of war. A claim was given, under the direction of the Swedish minister, for the ships and cargoes, "as taken within one mile of the mainland of Sweden, and within the territory of his Majesty the King of Sweden, contrary to and in violation of the law of nations and the territory and jurisdiction of his said Majesty."

Sir W. Scott.—These vessels came into Hanoe Bay for the purpose of taking the benefit of British convoy, and were seized in consequence of the order for the detention of American property. This order has been since followed up by a declaration of war; the ships, therefore, would be liable to condemnation, unless it can be shown that they are entitled to some special protection.

A claim has been given by the Swedish consul for these ships and cargoes, as having been taken within the territories of the King of Sweden, and in violation of his territorial rights. This claim could not have been given by the Americans themselves, for it is the privilege not of the enemy but of the neutral country, which has a right to see that no act of violence is committed within its jurisdiction. When a violation of neutral territory takes place, that country alone, whose tranquility has been disturbed, possesses the right of demanding reparation for the injury which she has sustained. It is a principle which has been established by a variety of decisions, both in this and the superior Court, that the enemy

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whose property has been captured, cannot himself give the claim, but must resort to the neutral for his remedy (*a*). Acts of violence by one enemy against another are forbidden within the limits of a neutral territory, unless they are sanctioned by the authority of the neutral State which it has the power of granting to either of the belligerents, subject, of course, to a responsibility to the other. A neutral State may grant permission for such acts beforehand, or acquiesce in them after they shall have taken place; or it may, as has been done in the present instance, step forward and claim the property.

I do not observe it to be stated in the claim that the sovereign on whose behalf it is given was a neutral at the time when the transaction took place. But in order to give effect to a claim of this kind, it must be shown that the party making it was then in a state of clear and indisputable neutrality. If he has shown more favour to one side than to the other, if he has excluded the ships of one of the belligerents from his ports, and hospitably received those of the other, he cannot be considered as acting with the necessary impartiality. I do not think a country showing such an invidious distinction entitled to claim in the character of a neutral State. The high privileges of a neutral are forfeited by the abandonment of that perfect indifference between the contending powers in which the essence of neutrality consists.

A claim, however, has been given by the Swedish minister. Now, in order to support and give effect to this claim, two things are necessary to be established: First, it is requisite that Sweden should appear to have been in a state of perfect neutrality at the time when the seizure was made; secondly, it must be shown that the act of violence was committed within the limits of Swedish territory. For if the scene of hostility did not lie within the territories of the neutral State, then there has been no violation of its neutral rights, and consequently there exists no ground of complaint, and no foundation for the claim.

The first question then is how far, in August, 1812, Sweden was to be considered as a neutral country.

It is not to be disputed that the conduct of Sweden towards this

(*a*) *Etrusco*, Lords, January, 1795.

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country had been for a considerable time of a very unfriendly description. Impelled by fear, or some other motive, she had excluded British ships from her ports, and had, either from choice or compulsion, adopted that course of policy which has been imposed by the French ruler on the other nations of Europe, and which has been termed the Continental system. It is clear, too, that Sweden acted in this manner not from any private views respecting her own municipal regulations, but in the execution of a plan auxiliary to the enemy of this country. Sweden, therefore, by her conduct, afforded to Great Britain a legitimate cause of war, and perfectly justified the seizure of Hanoe by the British admiral. The seizure of this place has been countenanced by the government of this country, the British flag has been hoisted, and every act of sovereignty exercised on the island and the roadstead adjoining.

This was the state of things originally; British ships were excluded from the ports of Sweden, and the island of Hanoe was occupied by British forces.

After this a declaration of war was issued by the Government of Sweden; but it is said that the two countries were not in reality in a state of war, because the declaration was unilateral only. I am, however, perfectly clear that it was not the less a war on that account, for war may exist without a declaration on either side. It is so laid down by the best writers on the law of nations. A declaration of war by one country only is not, as has been represented, a mere challenge, to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may perhaps think proper to act on the defensive only. It is the less necessary for me to insist on the truth of this position, since the language of the treaty places the matter beyond dispute. What appears to have been the motive which led to the appointment of the plenipotentiaries? Why, "a reciprocal desire to put an end to the war which had taken place"; and this they are authorized to carry into effect. Here, then, is a direct recognition of the existence of an antecedent state of war between the two countries. I cannot dive into the motives which led to the hostile declaration on the part of the Swedish Government; I can only

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look to the broad fact, the existence of the war. It may be true that Sweden resorted to the measure with great reluctance. It is to be hoped that all countries are unwilling to enter upon hostilities, and that they have recourse to them only with a view of avoiding greater evils. It is said that Sweden acted from fear of the resentment of France, and it may be that she did so; but from whatever cause it proceeded, the fact is that a war did take place, though it was carried on with inertness by Sweden, and with forbearance by Great Britain. This war has, however, been happily terminated by a treaty of peace, which was signed by the plenipotentiaries of the two countries on the 18th of July, ratified by the Prince Regent of Great Britain on the 4th of August, and by the King of Sweden on the 17th of the same month. From the result of these dates it has been contended that the war had ceased, and that friendship had been re-established before the time when these vessels were seized. The question, therefore, comes to this: whether a ratification is or is not necessary to give effect and validity to a treaty signed by plenipotentiaries? Upon abstract principles we know that, either in public or private transactions, the acts of those who are vested with a plenary power are binding upon the principal. But as this rule was in many cases found to be attended with inconvenience, the later usage of States has been to require a ratification, although the treaty may have been signed by plenipotentiaries. According to the practice now prevailing, a subsequent ratification is essentially necessary, and a strong confirmation of the truth of this position is that there is hardly a modern treaty in which it is not expressly so stipulated; and therefore it is now to be presumed that the powers of plenipotentiaries are limited by the condition of a subsequent ratification. The ratification may be a form, but it is an essential form, for the instrument, in point of legal efficacy, is imperfect without it. I need not add that a ratification by one power alone is insufficient; that if necessary at all, it must be mutual; and that the treaty is incomplete till it has been reciprocally ratified.

It is said, however, that the treaty, when ratified, refers back to the time of its signature by the plenipotentiaries, and that it does so in this case more especially on account of the terms in which it is drawn. The words in one of the articles of the treaty, "Dès ce

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moment tout sujet de mésintelligence qui ait pu subsister sera regardé comme entièrement cessant et détruit," have been pointed out, and from these it has been contended that all hostilities were to cease the moment the treaty was signed. But I take that not to be the case; the positive and enacting part of the article is that there shall be a firm and inviolable peace between the two countries; the other part is descriptive only of the pacific intention of the parties, and of their agreement to bury in oblivion all the causes of the war. It does not stand in the same substantive way as the former part of the article, and must be considered as mere explanatory description. The nature of a treaty of peace is well explained by Vattel (*a*), who lays it down that "a treaty of peace can be no more than an agreement. Were the rules," he says, "of an exact and precise justice to be observed in it, each punctually receiving all that belongs to him, a peace would become impossible." He goes on to say that, "as in the most just cause we are never to lose sight of the restoration of peace, but are constantly to tend towards this salutary view, no other way is left than to agree on all the claims and grievances on both sides, and to extinguish all differences by the most equitable convention which the juncture will admit of." It is therefore an agreement to waive all discussion concerning the respective rights of the parties, and to bury in oblivion all the original causes of the war. It is an explanation of the nature of that peace and good understanding which is to take place between the two countries, whenever that event shall be happily accomplished. It would be a stretch beyond the limits to which a fair interpretation of these words could be carried to say they were intended to convey any other meaning. I am of opinion, therefore, that the ratification is the point from which the treaty must take effect. *Dès ce moment* must be referred to the moment at which the treaty received its valid existence by mutual ratification. It is perfectly clear that it was so considered on the part of Sweden. The British officer who was sent to the Swedish coast was still received with the same caution as in the time of war, and was blindfolded before he was permitted to enter Carlsham; Hanoe remained in British possession, and the only

(*a*) Book 4, c. 2.

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communication between that island and the mainland of Sweden was by flags of truce. Though it was reasonable to expect that Sweden would return to the relations of amity with this country, yet it is quite clear that she had not at that time confirmed the treaty, and therefore could not be entitled to the benefit of a neutral character.

But in order to give validity to the present claim another proposition must necessarily be maintained: it must be shown that the place of capture was within the Swedish territories, and I am of opinion that it was not. Hanoe had been taken possession of by a British force, and that possession had not been disturbed. If it was taken at first by connivance, and by a seizure that was hostile in appearance only, it was certainly in direct hostile possession afterwards. The fact that the roadstead was occupied by a British force is avowed by the Americans themselves, who say that they came there to obtain the protection of British ships of war. This must be considered as a direct recognition that it was a British, not a Swedish station, for British ships were excluded from the ports of Sweden. There was no semblance of Swedish authority, and the mere vicinity of the mainland of Sweden will not in the least degree alter the case. Where two countries are separated from each other by a very narrow space, it does not follow that one of them may not exercise the rights of war within the limits of that space, merely because it may occasion some inconvenience to its neighbour. Suppose Great Britain at war and Spain in a state of neutrality, can it be said that Spain could require this country to abstain from capturing the vessels of her enemy in the Straits of Gibraltar? Such a proceeding might be inconvenient to Spain on account of the proximity of her coast, but that is a circumstance which could not abridge the undoubted right of Great Britain. It is an incidental inconvenience, arising necessarily from the vicinity of the two countries. I am of opinion that the claim which has been given fails upon the two essential points, both in respect of the neutrality of Sweden and of the neutrality of the place of capture, and consequently that these ships and cargoes are liable to condemnation.

[1 Dods. 251.]

THE GUTE HOFFNUNG.

Licence—Foreign Ship—British Interest.

Where the ship to which a licence for a foreign ship has been granted bears every appearance of being foreign, the Court will not inquire whether there is any British interest in her.

A licence for a foreign ship will not protect one that is in fact and in appearance British.

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This was the case of a ship under the Rostock flag and pass, but described by the master in his depositions to belong to a person resident at Hull. She was captured on a voyage from Hull to Tonningen, having a British licence on board granted for "the Mecklenburg ship the *Gute Hoffnung*," and the question was, whether the representation made by the master that the owner resided in this country would take the ship out of the protection to which she would otherwise be entitled under the terms of the licence.

Sir W. Scott.—This ship was proceeding from Hull to Tonningen, under a licence in which she is described as "the Mecklenburg ship the *Gute Hoffnung*," and a Mecklenburg ship she is in everything that constitutes appearance, whatever may in reality be her national character. The master and crew are foreigners, belonging to the north of Germany, and the ship is furnished with the regular Mecklenburg papers. She has, therefore, every appearance of a Mecklenburg ship, and there is nothing to rebut the presumption that she is so in point of fact but the account given by the master, who says that the vessel belongs to Mr. Cosack, of Hull, whom he believes to be a foreigner, but he does not know in what country he was born or to whom he is a subject. The question is, whether under such circumstances I shall look further into the case for the purpose of inquiring whether there is any British interest in this ship, and I am of opinion that it is not necessary for me so to do. There can be nothing to alarm the jealousy of the Court in this ambiguous character of the vessel, because, as to any improper communication, that might as effectually be carried on by means of a Mecklenburg as a British ship. What might be the result of a more

prying investigation into the character of this vessel it is impossible for me to say, but I do not feel myself called upon to investigate this matter further. It must be understood that I do not in this case intend to decide that a ship in fact and in appearance British would be protected under a licence granted to a Mecklenburg ship.

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THE GUTE HOFFNUNG.

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Ship and cargo restored on payment of captor's expenses.

THE MANLY.

[1 Dods. 257.]

Licence—Voluntary Deviation—Intention of Licence.

A licence being an exceptional permission, the terms of it must not be voluntarily departed from. Thus, where a licence was granted to one port of the United Kingdom :—*Held*, it would not protect a voyage to another port. Ship condemned.

1813 *May* 12; affirmed *June* 11, 1814.

THIS ship, under Danish colours, laden with a cargo of tobacco, cotton, timber, and other goods, was captured on the 21st of March, 1813, whilst in the prosecution of a voyage from Christiansand to Leith. There was a licence on board permitting the vessel to bring a cargo from Christiansand to Dublin, on condition that she should sail north-about, but it was admitted in the claim that she was steering for Leith at the time of capture, and that it was intended to have delivered her cargo there, if permission could have been obtained for that purpose; otherwise that the vessel was to have proceeded with her cargo to Dublin. The question was whether the deviation to Leith was such a violation of the conditions of the licence as would subject the ship and cargo to condemnation.

SIR W. SCOTT.—This ship and cargo, both of them enemy's property, and belonging to the same persons, were coming with an undisputed destination to Leith, and with an intention if possible to dispose of the cargo at that port, for such, I think, is the fair interpretation of the affidavit of Mr. Morch, the son of the owner of this ship and cargo. He says "that he arrived in Leith on the 13th of October last from Christiansand for the purposes of trade

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and of attending to the concerns of his father in Great Britain, where he has remained ever since; that he has had considerable correspondence with his father's house, and with his brother, Peder Morch, who also acts for and superintends the business of his father respecting shipments by the *Manly;* that he was informed by his brother that his father had some intention of importing cotton wool into this country, provided such goods were permitted by law to be imported; that in consequence thereof he communicated the circumstance to Messrs. Corbett, Borthwick & Co., merchants, in Leith, the agents and correspondents of his father, who, having caused particular inquiries to be made at the custom houses of London and Leith, he was by them informed that it was learned from both custom houses that cotton wool could be imported, and would be admitted to entry, coming from Norway, as goods permitted by law to be imported; that he also applied personally at the custom house at Leith, where he was informed that cotton wool was importable as goods permitted by law, and under date of the 23rd of February last he wrote his father, 'It is said at the Leith custom house that they apprehend of no difficulty for the *Manly* to return here with cotton.'" There was then, it should seem, a clear intention of importing this cotton into Leith. He says that "as he was uncertain whether his father would ship cotton, and as the other articles of export from Christiansand would not find a good market at Leith, it was desirable to get such a licence as would enable the vessel to sail for another port if necessary." There can be no doubt, therefore, that if the cargo consisted of cotton, it was to be brought to Leith for importation; and the question is, whether a transaction of this kind is protected by the licence.

The ship and cargo are both of them enemy's property, and there is no proposition more universally admitted than that an enemy has no right to trade with the ports of this country, except by a special permission of the government, and that he must comply strictly with the conditions under which that permission is granted. No voluntary deviation from the course pointed out can be on any account tolerated; and the only excuse that can be allowed for a departure from the terms prescribed is, that it was done under the pressure of an irresistible necessity. Where the

party is not within the terms of the licence, the character of enemy revives, and the property of an enemy is subject to confiscation according to the laws of all civilized States. 1813 *May* 12. THE MANLY. Sir W. Scott.

The licence permits the vessel to go to Dublin, sailing north-about, and the fact is, that she was going to Leith, there to deposit her cargo. Now, I ask, whether it is possible to apply such a licence to such a voyage? What is the duty of a merchant, resident in a hostile country, who wishes to trade with the ports of this kingdom? Why, undoubtedly, to state to the government, in the most full and explicit manner, the purpose of his voyage and the place to which he intends to go; and it is then for his Majesty's government, being put in possession of the plan and design of the party, to decide whether it will permit such a course of proceeding. But to come with a representation of one kind, and to apply the licence obtained under that representation to the protection of a transaction totally different, can never, as it appears to me, be permitted. Such a course of proceeding must of necessity render the licence inoperative for the purpose to which it is applied. Mr. Morch applies to Messrs. Corbett, Borthwick & Co., of Leith, who are persons of great experience in the trade between Norway and this country, and they tell him "that it was very usual for ships under licences to different ports in England and Ireland to touch at Leith; and when thought advisable, the cargoes were permitted by the Board of Customs to be discharged at Leith, notwithstanding another port being named in the licence; that the said Corbett, Borthwick & Co. therefore recommended application being made for a licence for the *Manly* for Dublin, where deals and logs would sell to advantage if cotton should not be shipped, so as to require the discharge at Leith, and which would at any rate enable his father to send the vessel either to Dublin or Leith." This appears to me to be tantamount to saying that a licence for one port is good for all others, for I see no limitation: if it is to be deemed good for one other port, it must be equally so for every other port. Leith has no peculiar privilege, and is entitled to no advantages over any other place of trade. If the parties are at liberty under such a licence to go to Leith, then why not to Newcastle or Yarmouth, or, indeed, to any other port of the United Kingdom? Is this the transaction disclosed to government, and

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for which it issued its permission and directions? I think not. Application was made to the Privy Council to permit the enemy to trade with one of the ports of this country, and under the permission so obtained, the parties think proper to trade with another, and a distant port, very differently circumstanced, and in a different and distinct part of the United Kingdom. To permit such a departure from the terms of the licence would be to throw open not one port only, but all the ports of his Majesty's dominions to the enemy. Is that the way in which the trade of the country can with any safety be carried on in time of war? It appears to me to be quite incompatible with that vigilance and control which the government is bound to exercise over the trade of the enemy with its own subjects. A licence can never have any such unlimited effect, but must be confined to the port for which it was especially granted, or at least to one nearly allied and contiguous to it. If the parties want further liberty, they should so state it in their petition to the Privy Council; as in the present case, they ought to have applied for a licence to Dublin, with permission to touch at Leith; and when once the ship had arrived in that port, a further application might have been made for leave to land the cargo there, which would probably, as in other cases, have been granted. I think it is impossible to say that the present transaction is not a different one from that for which the licence was granted. The licence is to go to Dublin, and the ship is taken on a voyage to Leith without any intention of going to Dublin at all, unless permission to unload at Leith is refused. The transaction therefore is different from that which was represented to government, and for the protection of which it issued its *fiat*. The present case appears to me to bear no analogy to the cases which have been cited. Those were cases of ships coming to this country under the wish, rather than the intention, of the owners that they should proceed further, and which were acting in conformity to the terms of their licences, and were in the permitted branch of their voyage at the time when they were captured. Such was the case of the *Henrietta*, and the others which have been mentioned. But here the circumstances are altogether different; here is so entire a deviation both as to port and course, that I do not think it is in the power of this Court to carry the construction of the licence to

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the extent that is prayed. I do not say that there is any *mala fides* in these parties, but there is a strange misconception or misconstruction of the information which I should not have expected from such a source. How such a notion could have entered the minds of gentlemen of commercial experience is not distinctly explained. But whether the mistake has arisen from the ignorance of the person giving the information, or the misapprehension of the person receiving it, the event must still be the same. The Court cannot divest the captor of a right which he has acquired by the detention of a ship so denuded of all protection from the licence under which she is claimed. Where the parties have been acting under honest but erroneous impressions, one may feel a repugnance to follow up the mistakes with consequences detrimental to them, as the confiscation of their property. But though they may have been intentionally, still they may not have been legally innocent. The only question which the Court has to decide is whether the ship, belonging to an enemy, is protected by a licence which she had on board, and I am of opinion that she is not.

THE ÆOLUS.

[1 Dods. 300.]

Licence—Due Diligence—Prevention of Performance by Enemy.

Persons using due diligence are entitled to the benefit of a licence, notwithstanding its expiration and the refusal of government to renew it.

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July 3.

THIS ship, together with her cargo, consisting of 19,447 gallons of brandy, was seized by a custom-house officer in the London Docks in the month of April last.

There were four British licences on board at the time of seizure, the first of which was dated the 9th of July, 1812, and was to remain in force for the space of four months. By the terms of this licence, the claimants were permitted to export in this vessel, from London to Rochelle or Havre, a cargo of British goods, and to import from Rochelle, or to sail in ballast from that place to Havre, and import from thence a cargo of wine, spirits, &c., on condition that the wine and spirits should be imported only in

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return for sugar, coffee, &c., previously exported; the proportion of spirits to be not more than 120 gallons for every 12 cwt. of sugar; and on condition likewise that the spirits should be imported and warehoused for exportation only.

On the 31st of July a licence similar to the former was granted with an additional clause, permitting the ship to proceed in ballast from Rochelle or Havre to Bordeaux, and import the cargo from that port.

The quantity of sugar exported not entitling the vessel to bring back a complete cargo of spirits according to the terms of the above-mentioned licences, an additional licence was applied for, and granted on the 27th of August, 1812. By this licence the claimants were at liberty to import a full cargo of wine and spirits, on condition that the excess of such wine and spirits for which the export of sugar had not already been made, should be warehoused according to the regulations set forth in the licences dated the 9th and 31st of July.

This licence having likewise expired before the voyage was completed, a further application was made to the government, and on the 4th of January, 1813, a licence to be in force for three months was issued, permitting this vessel to import a cargo, according to the provision of the licences dated the 9th and 31st of July, 1812.

There was also an Order in Council, dated the 15th of April, 1813, directing the ship to be admitted to entry, according to the conditions of the licence, dated the 4th of January, 1813, notwithstanding the expiration of that licence.

The vessel proceeded to Rochelle, and there delivered a cargo of sugar pursuant to the terms of the several licences, but having been detained by order of the French Government, was unable to bring back a return cargo within the time prescribed. Upon her arrival in the London Docks, the ship and the whole of her cargo, consisting of 19,447 gallons of brandy, were seized; but as it appeared from the statement of the exports and imports, made by the proper officer, that the claimant had a right under the renewed licences to import 14,610 gallons of spirits, the seizor consented to the restitution of that quantity of brandy, and of the ship itself. The remaining 4,867 gallons of brandy, being the excess of the

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quantity allowed by the renewed licences, were proceeded against as droits of admiralty.

For the seizor it was said that the refusal of the British Government to grant an extension of the licence, dated the 27th of August, which alone permitted the importation of a full cargo, sufficiently declared its intention not to protect beyond the quantity covered by the other licences, and that it was incumbent on the Court to carry the intention of the government into execution by condemning the surplus.

To which it was replied that the government refused to renew the licence of August, 1812, merely in consequence of a general change of policy with respect to the future commercial intercourse with the ports of France; that it did not mean to interfere with what was past, but to refer all cases of existing licences to the decision of the Court; and that with reference to the principle of former decisions, the claimant, who had used every degree of diligence to complete the transaction within the time prescribed, was entitled to restitution.

SIR W. SCOTT.—Where the party has used his best endeavours to fulfil his engagement, and has been prevented by the violence of the enemy from finishing the transaction in due time, the Court will decree restitution, though the government may have refused to renew the licence. The refusal of the government to grant a fresh licence appears to me to leave the principle, upon which the Court has been in the habit of acting, untouched; and as the delay in this case has been occasioned solely by the restraint imposed by the hostile government, I shall restore the property to the claimant.

[1 Dods. 305.]

THE WOHLFORTH.

Licence—Cargo—Discharge—New Cargo.

Where the original cargo has been spoiled by unavoidable accident, the protection of a licence is not forfeited by taking in a fresh cargo of the same kind after the time for which the licence was granted had expired.

1813
July 13.

This was the case of a ship under Prussian colours, laden with a cargo consisting of 57,400 Edam cheeses, one cask of drugs, and one chest of coral beads. There was a licence on board permitting the vessel to import from Amsterdam to London a cargo of cheese, drugs, &c. (even if enemy's property), and to export from London to Amsterdam a cargo of permitted goods.

Sir W. Scott.—It appears that the ship, having taken on board her cargo, consisting of 57,400 cheeses, sailed from Amsterdam, and that she was obliged to put into Medemblick, which bears the same relative situation to Amsterdam that Gravesend does to London. At Medemblick it was necessary to unlade the cargo, and the cheese upon unlivery was found to be so much damaged that it was not fit to be put on board again; it was therefore thought advisable to sell the old cargo and purchase a new one of the same description, which was accordingly done. Now this circumstance of purchasing a cargo of precisely the same description does, I think, distinguish the present case very materially from those which have been alluded to, in which the original transactions were departed from and new adventures undertaken. Here the second cargo was of the same identical nature with the first, corresponding with it both in substance and quality. It does not appear that there was time to have obtained a fresh permission from the British Government. If the ship had received damage after her arrival in the Thames, and had then gone back to the Texel for the purpose of taking a fresh cargo, the same indulgence could not have been reasonably expected; because there the parties might have had access to government, and might have applied without loss of time for a new licence. The case is very different where the ship is in a distant port, and where the foreign shippers

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are acting for persons in this country without the ready means of communication with their principals. What more advisable method could the parties have adopted under the circumstances stated? Was the licence to be rendered abortive? Was the ship to come in ballast? That would not have been permitted. If the cheeses originally put on board had been brought hither, they must, under the terms of the licence, have been put into government warehouses, and there kept as a security till a return cargo had been exported. But what would have been the value of the security if the cheeses were of no value? I cannot think there has been such a departure from the licence as to deprive the parties of all protection under it. The case would have been widely different if goods of a different description had been taken instead of the former cargo. Here the original purpose was pursued; no new speculation was originated, nor any change, except such as was produced by time and unavoidable accidents. I am of opinion, therefore, that I do not go beyond a just and fair interpretation of the licence in saying that the transaction comes within the latitude that ought to be allowed.

Ship and cargo restored.

THE LOUISE CHARLOTTE DE GULDENERONI. [1 Dods. 308.]

Licence—Holder for Value—Fraudulent Alteration.

When a licence to trade with an enemy country has been fraudulently altered by a change of dates in such licence, a *bonâ fide* holder for value will not be protected by it.

1813
November 4.

THIS was the case of a ship, under Danish colours, laden with a cargo of corn, and taken in the prosecution of a voyage from Aarhuus with an asserted destination to the port of Newcastle. A claim was given for the ship and cargo, as protected by a licence, which purported to be dated on the 8th of October, 1812; but from an affidavit brought in on the part of the captor, it appeared that the licence, upon which the claimant relied for protection, had been granted by the Privy Council on the 8th of September, and

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THE LOUISE CHARLOTTE DE GULDENERONI.

not on the 8th of October. In consequence of this affidavit, the judge assigned the claimant to exhibit further proof as to the destination of the cargo, and to account for the alteration appearing to have been made in the date of the licence. An affidavit made by the Danish shipper was now offered, in which it was stated that he purchased the licence at Copenhagen in the presence of two merchants, and that if any alteration had been made in the licence it was so done before it came into his possession; that he was totally ignorant of any such alteration, and that he had paid a high price for the licence, conceiving that it was in all respects complete and regular. This statement was corroborated by the evidence of the two merchants who were asserted to have been present when the licence was purchased.

SIR W. SCOTT.—In this case two demands were made by the Court on a former day; first, the production of a letter asserted to have been written by Messrs. Armstrong & Co.; and, secondly, an explanation with respect to the falsification of the licence, which purports to be dated on the 8th of October, on which day it appears that no such licence was issued, though there was a licence to the same effect granted on the 8th of September.

With respect to the letter and its non-arrival no satisfactory explanation has been afforded to the Court, but it may be that it has miscarried, in consequence of the difficulties to which all foreign correspondence is now exposed. I shall therefore not lay any great stress upon the deficiency of the case in this respect.

The other objection is of greater weight, and is entitled to the most serious consideration of the Court. It appears very certain that the date of the licence under which the present claim is made has been altered, and consequently that the licence itself must become a mere nullity; it is said, however, that although there may have been a fraudulent alteration in the date of the licence, yet the present holders, who were entirely ignorant of that alteration, and who purchased the licence at a large price in the market overt, ought not to be the sufferers. But there are many cases in which it is unavoidable that an innocent man should suffer for the fraud of others. If I take adulterated money, it is every day's experience that I suffer for it by loss, though no party to the

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fraud. In the present case I profess that I do not see how it is possible to produce sufficient evidence to satisfy the Court that the individuals claiming the benefit of the licence for the protection of their property were not themselves guilty, or at least cognizant of the fraud which has been committed. Where a licence admitted to be adulterated is relied upon, the denial of the party himself, even upon oath, cannot be deemed sufficient to exonerate him from the responsibility to which he is liable, so far as the validity of that licence for any beneficial purpose is concerned. It is said that the Court might in this case be furnished not only with the affidavit of the party himself denying all knowledge of the alteration that has been made, but likewise with the evidence of two disinterested persons who were present when the licence was purchased in its present state for a valuable consideration; but I do not think that this would be sufficient to remove the difficulty. The whole transaction of the purchase and sale might be merely ostensible, and have been arranged beforehand between the pretended buyer and seller. There is hardly any evidence that would satisfy the Court that the alteration of the date might not be the act of the party himself by whom the benefit of the licence is claimed, and though it is not at all necessary for me to infer fraud against the party now before the Court, I must for the sake of guarding against fraudulent acts of this kind adhere to the general rule, that the party claiming the benefit of a licence must show a licence unimpeached. Take the facts, however, to be proved as stated, that the matter passed in the presence of others, and that a *bonâ fide* purchase was made. The party would in that case be entitled to his remedy against the person from whom he purchased. If any other rule than that which I have laid down were permitted to prevail, the consequence would be that a door would be opened to the indefinite extension of licences, for they might then be prolonged at will, not only by the hostile government itself, but by every person resident in the enemy's country. The present case may be one of great hardship upon an innocent individual, but I cannot take upon myself to say that a licence which has been vitiated in so material a point can be deemed valid, and I therefore feel myself under the necessity of pronouncing a sentence of condemnation.

[1 Dods. 346.]

THE UNION.

Joint Capture—Vessel not in Sight of Capture—Right to Share in Prize—Continuance of Common Undertaking.

If at the time of a capture by one vessel another associated in the chase is not visible owing to fog or darkness, such other vessel is entitled to share in the prize if it is proved that at the time of the capture she is still engaged on the common purpose.

1813
November 26.

This was the case of an American vessel laden with a cargo of cotton, and captured on the 18th of January, 1813, whilst in the prosecution of a voyage from Philadelphia to Bordeaux, by his Majesty's frigate *Iris*. Claims of joint capture were interposed by his Majesty's ships *Andromache*, *Rota*, and *Rover*, under the circumstances detailed in an allegation which is cited at length in the judgment.

The claim of the joint captors rested principally on this ground, that the ships were in chase and distinctly seen, both by the actual captor and by the prize, during the whole of the day previous to the capture; that they continued the chase during the night, and were prevented seeing the act of capture solely by the darkness of the night.

Judgment.—This is a case of asserted joint capture on the part of the *Andromache*, *Rota*, and *Rover*, to share in a prize taken by his Majesty's ship *Iris*. The allegation pleading the fact of joint capture was admitted without opposition at the time, but it is in effect now opposed, for the case has been argued for the actual captor on two grounds: first, that the facts pleaded in the allegation, if proved, would not entitle them to share; and, secondly, that the facts are not proved as laid. It will be proper, therefore, to consider the case first on the allegation.

The allegation pleads, "that on the 18th of January last, his Majesty's ship *Andromache*, George Tobin, Esq., commander, was on a cruise in the Bay of Biscay, in company with his Majesty's ships *Rota*, Philip Somerville, Esq., commander, and sloop *Rover*, Justice Finley, Esq., commander; that at about nine o'clock of

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the said morning, the said ship *Andromache* being in latitude 45° 28′ N., and longitude 4° 34′ W., and the Cordovan lighthouse bearing N. 87°, 45° E., distant about 150 miles, and being engaged in supplying the *Rota* with provisions, two strange sails were discovered from the masthead of the *Andromache*, in the S.E. quarter, whereupon the boats of the said ship were immediately hoisted in and all sail made in chase of the same; that a short time afterwards the said strange sails were made out to be a merchant vessel and a frigate in chase of her, the said merchant vessel steering N.E. by N.; that the *Andromache*, as also the *Rota* and *Rover* which had joined in the chase, approached the said merchant vessel, saw her plainly, and soon perceived her to alter her course more to the eastward, at which time the *Andromache* was seen from the said prize; that at about noon the said frigate exchanged private signals with the *Andromache* and *Rota*, whereby they all became known to each other, and the said frigate was found to be the *Iris*"; so that, according to this statement, no doubt can be thrown on the identity of the ships; "that the wind being from the westward and the chase to the eastward the *Andromache* kept the wind on her larboard side, which enabled her to near the chase and to prevent her from getting to windward of the *Iris;* that the *Andromache* continued the pursuit, though occasionally losing sight of the chase as well as of the *Iris* in the haze which came on; that at about five o'clock they were both clearly seen from the *Andromache* bearing N.E. by N. and distant about four miles, and she was then closing very fast with both the said ships; that shortly after, the weather becoming very foggy and darkness coming on, they were entirely lost sight of, but the *Andromache* persisted in the pursuit, and sailed to the N.E. with a view of intercepting the said chase, and at about half-past five or a quarter before six the flash of a gun was plainly seen and the report thereof distinctly heard on board the *Andromache* in the direction of the said chase, which the party proponent doth expressly allege and propound was fired from the *Iris* at the chase to bring her to, and the said gun brought her to accordingly, and she was immediately afterwards captured by the said frigate *Iris* at the distance of not more than three miles from the *Andromache*, and that the *Andromache* was prevented from being seen by the persons on

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board the prize at the time of capture aforesaid, as well as by those on board the said frigate *Iris*, by the fog and darkness of the night only." And I am clearly of opinion that upon this statement the ships would be entitled to share as joint captors, because if they were prevented seeing solely by the fog and darkness of the night, that circumstance would not be sufficient to bar them of a right to which they would otherwise have been entitled. It is certainly true that darkness preventing sight will not universally exclude from a right to share, nor can the rule be laid down universally the other way, for there may not in every case be evidence to show proximity to the scene of action; but where it can be shown that the asserted joint captor was in sight when the darkness came on, that it continued steering the same course by which it was before nearing the prize, and that the prize itself also continued the same course, it amounts almost to demonstration that the ships would have seen and been seen by each other if darkness had not intervened. Upon the allegation, therefore, the case appears to be quite clear, and I am of opinion that any opposition to its admission would have been perfectly vain (*a*).

And this brings me to the other part of the case, namely, how far the allegation is supported by the evidence.

[The Court then examined the evidence, and held that the alleged joint captors had proved the necessary facts.]

[2 Dods. 110.]

(*a*) In the *L'Etoile*, March 8th, 1816, the following passage occurs in the judgment: "I hold it to be a clear and indisputable rule of law, that if two vessels are associated for one common purpose, the continuance of the chase is sufficient to give the right of joint capture. Sight under such circumstances is by no means necessary; because, exclusive of that there exists that which is the very essence of the claim, encouragement to the friends, and intimidation to the enemy." After an elaborate examination of the facts the Court held that "the fact of sight, at the time of the action and capture, is made out," but added, "taking the fact to be otherwise, still I think that there is sufficient to establish the claim on the other grounds. She was a consort of the actual captor, had pursued the prize in conjunction with her, and had not discontinued the pursuit at the time when the capture was consummated."

THE BELVIDERE. [1 Dods. 353.]

Ship—Seizure—Claim by British Merchant—Security for Advances.

The claim of British merchants for advances made by them for the use of an American ship seized by the government upon the breaking out of hostilities with that country, cannot be allowed upon the mere averment of the parties themselves that the ship was put into their hands as a security for the debt so contracted; still less if the money was advanced, not for the immediate outfit of the vessel, but for the general mercantile transactions of the American owners.

1813 *July* 6.

This was an application on behalf of Messrs. Sansom & Co., British merchants, to obtain possession of an American ship, which was seized in the River Thames, under the embargo which preceded the declaration of hostilities between Great Britain and the United States of America.

It was stated in an affidavit made by one of the partners in the house of Sansom & Co., that they had advanced considerable sums to the American owners on account of this ship; and that it was put into their possession as a security for the repayment of the money advanced by their house of trade: that they sent the ship, under the protection of a licence, bearing date the 14th of August, 1811, to the Baltic and back; and that the amount of the freight earned on the voyage was placed to the credit of the ship: that they obtained another licence in February, 1812, for a similar voyage, but made no use of it, because it would have been necessary to have advanced money for the purchase of a cargo, which they declined to do, in consequence of the non-arrival of some remittances which they had expected from their American correspondents. It was stated, likewise, in the affidavit, that by way of further security, a power of attorney was executed on the 7th of March, 1812, authorising Sansom & Co. to sell the ship, or to employ her in any way that they might deem most eligible for their interest. A letter of attorney to this effect was annexed to the affidavit; and there was also exhibited an account current between the parties respecting the ship; from which it appeared that the balance due to Messrs. Sansom & Co. from the American owners on the 31st of December, 1812, amounted to 1,724*l.* 4*s.* 9*d.*

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The affidavit also stated, that the American house of trade were further indebted to Messrs. Sansom & Co. in the sum of 3,257*l.* 17*s.*, for which they had no security whatever.

SIR W. SCOTT.—This is the case of an American vessel which has been seized in the London Dock, and is liable to condemnation as the property of an enemy to the Crown of this country. No regular claim has been given for the ship, but an application is made to the Court by merchants in this town (Messrs. Sansom & Co.) to have the ship re-delivered to them, stating that it had been placed in their hands as a security for money advanced by them on account of this very ship. Cases have been stated in which the Court has certainly attended to claims somewhat similar; but in all those cases the parties had some certain evidence of their right: they had either a positive lien upon the ship, or were in possession of a bottomry bond, or some specific security. In this case nothing of the kind is made out by the claimants; and this does, I think, materially distinguish it from those cases which have been mentioned. Here is nothing but an affidavit of the claimants themselves, stating that they have at various times advanced money for the uses of this ship, and that the American owners had put them in possession of it as a security for the debt so contracted. No bottomry bond, or any instrument of any kind, is produced in support of the claim, which is left to rest upon the mere averment of the parties interested. The persons who have made this affidavit are certainly of the highest respectability in the class of persons to which they belong; but the Court cannot take a fact of this sort upon the bare averment of any persons, however respectable, or suffer itself to make personal distinctions in matters of this kind. It expects to be furnished with something more substantial than the mere affidavit of the parties themselves. Nothing more is offered in the present case; and this defect is, I think, fatal to the claim.

What Mr. Sansom swears is this: that the vessel was put into the possession of the house of trade to which he belongs as a security for money advanced by them; but this statement is wholly unsupported by documentary evidence, and rests on the assertion of Mr. Sansom himself. What sort of possession of the ship was

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given to this gentleman? According to his own statement it was entrusted to him partly for the sale of the ship, and partly for its employment in trade. But that any instrument to this effect was executed, or that there was any correspondence by letter relative to this business, does not at all appear. Thus far the matter rests upon mere verbal agreement between the parties; if, indeed, there was anything that can be treated as an actual agreement upon the subject. Then (at a very late date) comes a general power of attorney, such as might be very well granted to any other agent who had no claims whatever on the ship. The accounts, too, are made out in the way in which any other agent must be supposed to make out his accounts; for the profits earned by this ship in the way of freight are placed to the account of the principal in America. There is so manifest a deficiency in the evidence, that it is impossible for the Court to sustain the demand.

Another very important consideration in the present case is, that the advances, which are stated to have been made, were not merely for the purpose of covering expenses incurred in the repairs and outfit of this vessel, but for the general mercantile transactions of the American owner. The Court has never gone the length of allowing a claim so founded. What was done in the case of the *Vrow Sarah* (*a*), and the other cases which have been mentioned, was to give English merchants, from the bounty of the Crown, the expenses incurred in the outfit of the vessel immediately before

(*a*) This was the case of a Dutch ship, which sailed in July, 1802, on a voyage from the Texel to Surinam, but put into Cowes in distress in consequence of damage she had sustained at sea. On his arrival at Cowes the master applied for assistance to Messrs. Day, of that place, who, after a regular survey, caused the cargo to be unlivered and warehoused, and put the vessel into the hands of Messrs. Sieur and Mitchell, with directions to them to make the necessary repairs, which they accordingly did. After the repairs had been completed, the ship and cargo were seized under the embargo (15th May, 1803) which preceded the declaration of hostilities against the Batavian Republic, and were proceeded against as droits of Admiralty. A claim was given by Messrs. Sieur and Mitchell for the amount of the repairs done by them, and also on behalf of Messrs. Day for the money they had advanced for the unlivering and warehousing the cargo, and other incidental expenses. The Court pronounced in favour of the claims, referring it to the Registrar and merchants to ascertain the sums actually due to the claimants.

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the seizure was made. It was thought by the Court, and by the government also, that it would be a harsh measure to make British merchants sustain the loss of money so expended. But here the Court is called upon to investigate transactions which have no substantive affinity to the present, and to examine accounts of profit and loss upon a course of trade which was going on for a number of years. I am clearly of opinion that it is not within the province of this Court to enter upon such an investigation. There may exist counter-demands on the part of the American owners; there may be disputed accounts between them and Sansom's house of trade to which the Court can have no access. Differences may exist as to the employment or non-employment of this vessel. The owner may perhaps say that the ship was not employed according to his order. I think I should depart from all consistency of judgment, if I were to allow a claim like the present, which differs substantially from those to which it has been represented as similar, which is latent, ancient in point of time, and unaccompanied by any satisfactory proof. If I were to take this ship out of the possession of the seizor, I must probably be under the necessity of doing the same with every other ship which has been seized in the same way; for I suppose there is hardly any American ship in this country for which advances have not been made in a similar manner. Every agent to whom an American ship has been consigned for employment in European trade has the same kind of possession; and many of them have doubtless orders to sell the ship if no advantageous employment can be procured. All that Mr. Sansom states in his affidavit points rather to the direction and management of the ship, for the benefit of the American owner, than to any possession by way of security to himself. I am under the necessity of rejecting the claim.

THE SPARKLER. [1 Dods. 359.]

Joint Capture—Sight—False Information by Captor—Costs.

A ship in sight at the time of capture is entitled to share in the prize from that circumstance alone, and the claim is still stronger in favour of a ship which has joined in the pursuit of the prize.

A captor giving false information is liable to be condemned in costs.

1813
December 2.

This was a claim on behalf of his Majesty's ship *Armide* to share in the salvage which had been decreed to the *Nimrod* for the recapture of this British ship and cargo from the hands of the enemy. The claim was founded on the fact of sight and of joint chasing; there was also a question of costs arising upon the misconduct of the *Nimrod*, from which ship false information had been given respecting the prize, and had occasioned a necessity for the expenses attending this litigation.

Sir W. Scott.—This case, which is one of asserted joint capture, has been described in the argument as an extreme case; but I own that it does not appear to me to answer that description. The rule of law upon the subject is, that a ship in sight at the time of capture is entitled to share in the prize from that circumstance alone, unless the case happens to fall within one of the exceptions to that general rule, such as the circumstance of steering a directly contrary course, for that might defeat an interest which would otherwise have been supported upon the ground of being in sight. It may seem hard upon the actual captor that a vessel, which was perhaps scarcely in sight and contributed nothing to the capture, should be entitled to an equal share of the benefit with another ship, which may perhaps have been engaged in a long pursuit of the prize, and may likewise have sustained a very severe conflict. Where exertions of this kind have been made by the actual captor, and no assistance has been afforded by the vessel claiming to share as joint captor, the case may very properly be called an extreme one; but according to the statement contained in the allegation, there was in this case an actual contribution of assistance on the part of the *Armide*, for that ship is asserted to have joined in the pursuit with the *Nimrod*. Such a claim is not to be described as

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an extreme one, or as one which the Court would strain hard to reject; it is rather entitled to be considered in a favourable point of view, for the law is willing to favour the interests of all who contribute their endeavours to capture the vessels of the enemy.

Upon the facts of the case I can entertain no doubt. The fact that the *Armide* saw the prize and was also seen from the prize is indisputably proved. It is proved likewise that she was steering in a direction towards the prize; nor is it a sufficient contradiction to this to say that she steered a course different to that of the *Nimrod;* for it is not necessary that the joint captor should pursue the prize in exactly the same course with the actual captor; indeed, the situation and bearing of the ships to the prize and to each other may frequently make it proper that they should shape their courses in directions not precisely the same. The fact, as I before observed, is established that the *Armide* steered in pursuit of the prize, and that she was seen by the prize so to do, and though the sight was now and then obscured, yet the pursuit was continued up to the time of capture, and even after it had taken place. With respect to the identity of the three ships there can be no doubt, for it is next to an impossibility that the very same circumstances should have occurred to three other vessels precisely at the same time. According to the reasoning of the Court in other cases, I must hold the fact of identity to be satisfactorily established by the coincidence of several circumstances.

I proceed, in the next place, to consider the question of costs. Now it is evident that there has been such a degree of misconduct on the part of the actual captor that would justify the Court, if it was disposed to act rigorously, in visiting him with costs. It is a painful thing in any case to see that in the sworn answers less attention is paid to the sanctity of an oath than is due upon all occasions to so serious an obligation. After the prize had been boarded by the *Nimrod*, it appears that a lieutenant and midshipman were sent off to that ship from the *Armide* with directions to make inquiry respecting the name and other particulars of the vessel which had been boarded, and that upon their arrival on board the *Nimrod* they were assured that no prize had been made, but that a transaction of a totally different nature had taken place: that the vessel which they had been pursuing was found to be

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protected by a licence, and had on that account been dismissed. In consequence of the representation so made, and to which full credit was then given, the claim of the *Armide* was for a time abandoned, and it was from mere accident that the truth was afterwards discovered. The excuse which has been set up by the person who returned the answer, that he returned a false answer because the question was not put to him by the proper person, is unsatisfactory. Want of authority in the person putting the question might at the utmost be a reason for declining to answer altogether, but can never justify an attempt to mislead by returning an answer altogether false. According to the real demerits in this conduct, I should feel myself justified in condemning the party in the costs of this litigation; but it must at the same time be recollected that he is the actual captor, and that, from the size of the *Armide*, for whose interest I have pronounced, the share of the *Nimrod* will be very much diminished. It would be hard too to take away any of the rights of other officers and men who are not implicated in this act of misconduct. I shall, therefore, content myself with pronouncing for the claim of the *Armide*, and directing the expenses of the two commissions, for the examination of witnesses, to be deducted from the share of the *Nimrod*.

The counsel for the commander of the *Nimrod* having represented that the expense would exceed his share of the prize, which must be reduced very low by his own expenses, and by the magnitude of the share to which the *Armide* would be entitled, in consequence of the size of that ship, the Court directed the parties respectively to pay their own expenses, but expressed a wish that this should be understood as not withdrawing its disapprobation of the conduct of the officer of the *Nimrod*.

[1 Dods. 363.]

THE JOHN (No. 1).

Joint Capture—Practice—Burden of Proof.

The burden of proof lies upon the party setting up a claim of joint capture, and the testimony of releasing witnesses if unsupported by other evidence is insufficient to establish such a claim.

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December 2.

This was a claim on behalf of the commanding officers and crew of his Majesty's sloop *Royalist*, to share in the salvage due for the recapture of this British ship and cargo, which had been taken by the enemy and retaken by his Majesty's ship *Bermuda*. The circumstances of the case are fully stated in the judgment of the Court.

Sir W. Scott.—It is hardly necessary for me to repeat the observation which the Court has in very many cases occasion to make, that the actual captor is the favourite of the law, and that the Court will not suffer his interest to be affected but by evidence the most satisfactory. The *onus probandi* lies upon the party setting up a claim as joint captor, who in order to establish it must bring very clear proof in support of his case. The evidence of releasing witnesses, if unsupported by other testimony, has always been held insufficient for such a purpose. . . . It has been contended in argument, and the principle has not been denied, that if there is any ambiguity in the case it is sufficient to put an end to the claim of the asserted joint captors. Their case rests entirely upon the evidence of the releasing witnesses, which is not resting upon a rock, and the party has thrown away or lost the opportunity of examining other witnesses. As Captain Cunningham in his answer does not support, but denies, that he meant what should be more naturally understood from the terms of his answer, the Court is bound to apply that interpretation. The case, then, rests on the evidence of releasing witnesses only, which is not sufficient, and I am therefore under the necessity of pronouncing against the claim of the *Royalist*.

THE MOLLY. [1 Dods. 391.]

Capture and Condemnation by Enemy—Sale to Neutral—Lapse of Time—Claim by British Owner.

A claim was made by a British owner in respect of a ship captured and condemned by the enemy ten years previously, and sold to a neutral. *Held*, that having regard to the lapse of time the Court would not question the title of the neutral owner, or inquire into the validity of the condemnation.

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This ship, in the possession of a Spanish proprietor, was seized in the River Thames under a warrant of this Court obtained by the former British owner, but at the distance of ten years after the possession of the present Spanish proprietor acquired by purchase from the French captor, and after proceedings said to have been regularly conducted before the *Conseil des Prises* at Paris. Spain was in a state of neutrality at the time when the seizure was made, but hostilities were afterwards commenced by that country against Great Britain, and these have since terminated in a treaty of peace by the conditions of which Spain has been placed not merely in the character of a neutral, but in that of an ally of Great Britain in the war against France.

Sir W. Scott.—There are many considerations in this case to repel the party from entering into a discussion of the title to this ship, and particularly that which arises upon the length of time that has elapsed since the purchase was effected. Here has been an uninterrupted possession of ten years; and although the law has affixed no particular period of time after which possession shall not be disturbed, yet it is highly reasonable that there should in practice be some such limitation. It is merely owing to the accident of the ship's coming to this country that the question is now raised, and it might have been twenty years longer before that event occurred. Can it be said that it would then have been proper to enter upon such an investigation? I think, certainly not. It is, indeed, true as a general principle, *quod non valet ab initio, tractu temporis non valet*, yet, in practice, something different must be observed; a title which may have been originally faulty

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must of necessity become unimpeachable by great lapse of time. It is to be remembered, likewise, that this title stands upon a sale to a neutral, and is upon that account to be treated with a greater degree of tenderness.

There is, I think, something of laches observable in the conduct of the original British proprietor. It has been said that he could not have commenced proceedings at an earlier period, because the ship did not sooner make her appearance in an English port. But it must be remembered that Spain was neutral at the time of the capture, and that he (knowing as he did whither the ship was carried) might have made his application to the Courts of that country. I will not take upon myself to say with what success such an application might have been attended, but I am bound to presume that the Courts of Spain, which was at that time neutral, would not have suffered the claim of a British proprietor to be illegally divested. No attempt, however, appears to have been made to regain possession of the ship by any proceedings in the Courts of that country.

There is another circumstance likewise to be taken into the consideration of the present case, and that is the change of character in the relation of the two countries. Spain was at the time a neutral, afterwards an enemy, and has since become an intimate friend and ally of Great Britain. I will not take upon myself to say that a treaty of peace puts an end to all questions of property between the subjects of the States entering into the treaty; perhaps it may be more strictly correct to say that it quiets all titles of possession arising out of the war only. At the same time when a treaty of peace has been concluded, the revival of any grievances arising before the war comes with a very ill grace, and is by no means to be encouraged. Treaties of peace are intended to bury in oblivion all complaints, and if grievances are not brought forward at the time when peace is concluded, it must be presumed that it is not intended to bring them forward at any future time.

Now, upon all these considerations, the claim having been made only upon the accidental arrival of the vessel in a port of this country after a lapse of ten years, and after such changes in the relative situations of the two countries, I should feel very great reluctance in disturbing the possession of the Spanish proprietor.

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Under such circumstances it cannot be the duty of the Court to look minutely into the title, but rather to supply the defects if any such should be found to exist. The title, however, does not appear to be materially defective under the evidence now produced. Length of time alone may sufficiently account for the non-production of documents. The owner, perhaps, might not think it necessary, after ten years' possession, to preserve with exact care and to carry about with him all the title deeds. The Court has been called upon to look into the character in which the *Conseil des Prises* acted, whether it proceeded upon its original or its appellate jurisdiction, but this is a question upon which it does not feel itself called upon to enter on the present case. I shall presume that the proceedings before the *Conseil des Prises* were regularly conducted, and shall direct the warrant of arrest to be superseded, but without costs.

THE GEORGIANA.

[1 Dods. 397.]

Recapture—Prize—Enemy Ship—Prize Act—Setting forth for War—Authority of Commander—Condemnation.

The employment of a ship in the military service of the enemy is not a sufficient setting forth for war to entitle the re-captor to obtain her condemnation under the Prize Act, 45 Geo. III. s. 72 (*a*); but if there is a fair semblance of authority in the person directing the vessel to be so employed, and nothing upon the face of the proceedings to invalidate it, the Court will presume that such vessel is a ship of war.

The commander of a single ship may be vested with this authority as well as the commander of a squadron.

1814
April 26.

THIS was the case of a British ship engaged in the whale fishery, which was captured in the South Seas on the 28th of April, 1813, by the American frigate *Essex*, and recaptured on the 28th of November by his Majesty's sloop of war *Barossa*. When taken by the American frigate she was laden with a cargo of oil, and had eight guns and twenty-five men on board. The captain of the *Essex*, without carrying the vessel into port or taking out the cargo, supplied her with ten additional guns and sixty men, and employed her under the command of one of his lieutenants to

(*a*) See now Naval Prize Act, 1864 (27 & 28 Vict. c. 65), ss. 25, 40.

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cruise against the other British vessels in those seas, three of which were by this means actually taken. The force with which she had been supplied was afterwards reduced, and only four guns and fifteen men were found on board at the time when the recapture took place. The question was, whether this vessel should be condemned as prize to the recaptors or restored upon salvage to the British owners.

For the recaptors, the *King's Advocate* and *Phillimore* contended for condemnation.

For the owners, the *Advocate of the Admiralty* and *Adams*.

SIR W. SCOTT.—The depositions in this case were taken in so imperfect a manner that I was induced to admit an affidavit explanatory of some circumstances respecting which the Court was left very much in the dark; but I think that the affidavit which has been offered is not admissible in its present form. A great part of it contains merely a repetition of what has been already stated in the depositions, and another part of it appears to be still more exceptionable, for it amounts almost to a direct contradiction of what the witness had deposed to upon his original examination. He there says that "he knows she had a commission from the captain of the American frigate *Essex* to cruise against the ships of his Britannic Majesty." This is now attempted to be diluted and explained away by his affidavit, in which he swears that "he did not mean to say she had any commission in writing, but merely that the power or authority she had for so doing was derived from Captain Porter; that he never saw or heard of any such commission in writing." I think it would be dangerous to admit an affidavit containing so total a departure from the former statement made by the same witness; I cannot permit so direct and positive assertion to be withdrawn. The statement which follows in the affidavit is founded on conversation only. He says that "he heard repeatedly from the officers and crew that the *Essex* had sailed as a single ship from New York on a cruise to the coast of Brazil, and that she was not victualled or stored for a longer cruise, but that Captain Porter hearing there were a number of British vessels round Cape Horn, did of his own accord and without any instruc-

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tion from his government, proceed round Cape Horn to the coast of Chili and Peru." Now this is a matter upon which the Court does not require any explanation. Captain Porter was cruising in those seas, and how he came there is by no means material. The conversation of the officers and crew, supposing it to have been correctly represented by this man, is not to be depended on, for they may have been ignorant as to what were the real instructions to the superior officer, and it is quite impossible that the Court should take it from his understanding of their conversation. It is upon mere conversation, too, that he founds his belief that Captain Porter had no authority from his government to commission this ship, for he says, "that upon Captain Porter's charging him with piracy in having captured an American vessel when his letter of marque was not against the United States, this appearer told him that what he had himself done was much more irregular, for that he had armed and sent this vessel, the *Georgiana*, cruising without having any authority from his government to do so; and that the said Captain Porter in reply did not say or pretend that he had any such authority, but merely said that the officer he had put on board the said vessel was a commissioned officer." I think that I am not at liberty to consider this affidavit as any part of the evidence before the Court, and shall therefore dismiss it entirely from my consideration.

Then how stands the case upon the original evidence? The vessel, it appears, was captured by an American frigate, and a number of men and guns were put on board under a commissioned officer, who was directed to cruise against British vessels, which he accordingly did, and succeeded in making three captures. The vessel, therefore, was engaged in actual hostilities.

The question is, whether, under the words of the Prize Act, this ship is sufficiently "set forth for war" so as to entitle the captors to condemnation of her as prize of war, according to the original law of recapture, and also according to the clause of the statute excepting vessels which have been "set forth for war" from the more modern usage of restitution upon salvage.

It has been usual for the Court to look in the first place for the commission of war, because where that is to be found nothing more is wanted. Where the ship has been armed without any authority,

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that has not of itself been held sufficient to bring the case within the exception of the clause, for the Court has never gone so far as to say that a mere arming will do, notwithstanding the marginal note to the Prize Act, which "seems to make using as a ship of war" sufficient. The Court has always required that there should be some semblance of authority, although it has not thought it necessary in the cases which have been brought before it to look very minutely into the foundation of that authority. If sailors were merely to put arms on board a vessel and go out upon a cruise, I think there would be a deficiency of authority, and that the vessel could not be considered as "set forth for war," according to the true construction of the Act of Parliament. But where there is a fair semblance of authority, and nothing upon the face of the proceedings to invalidate it, that the Court has been in the habit of considering sufficient. In the case of the *Castor*, before the Lords of Appeal (1795), the authority of the commander of a fleet was considered as sufficient, though the vessel was not carried into port or adjudged. And in the case of the *Ceylon* (*a*), this Court held that the employment of a ship for the purposes of war, under the authority of the Governor of the Mauritius, was sufficient to constitute it a public ship of war. But it is said that this case goes further, that here was no authority from the commander of a fleet, but the mere act of an individual officer commanding a single frigate. Take it to be as stated, that it is the act of an officer commanding one ship only, the distinction does not appear to me to be very material. When it has been held that the commander of two or three ships may sufficiently "set forth for war," it is not going much further to say that the commander of a single ship may possess the same authority. There is nothing in the evidence to show that there were not other vessels under the command of this very officer; but taking it to be otherwise, the distinction, as I have already said, does not appear to me to be material. A great deal has been said with respect to the inconvenience that might arise to the commercial interests of this country, if the commanders of single frigates should be allowed to commission all the prizes they may happen to take. The argument *ab inconvenienti*

(*a*) *Ante*, p. 133.

may be very strong when applied to cases otherwise doubtful, but it is not to be intended that the law would introduce any inconvenience. No particular inconvenience has been pointed out, and I confess it does not occur to me how any could arise. It certainly would not occasion a greater number of captures by the enemy, for they may be as easily made without as with a commission; and if the American law be the same as our own, the only question would be whether the prize should be condemned to the individual captor or to the American Government; the decision of which question in either way could afford but little consolation to the British owner. There does not appear to me to be such an essential and solid distinction between this and the two other cases as should induce me to apply a different rule. The ship was supplied with additional arms, and was employed in cruising against British vessels, some of which she actually succeeded in capturing; *non constat* that she was not so employed under sufficient authority. I shall therefore condemn this vessel as prize to the recaptors.

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N.B.—The ship and cargo were in the first instance carried to the Bermudas and afterwards sent on to London with the consent of the parties and under the sanction of the Court. Freight was on a subsequent day (20th July) decreed to the recaptors for the voyage from the Bermudas to this country.

THE DILIGENTIA.

[1 Dods. 404.]

Capture—Abandonment by Captor—Act of Commander binding on all Subordinates.

If a captor of a vessel subsequently abandons her, he thereby gives up possession of such vessel, and she becomes lawful prize of a subsequent captor.

THIS Danish vessel, with various others of the same nation, was lying in the river Tagus, in the month of August, 1808, and was there blockaded by a fleet of his Majesty's ships under the command of Vice-Admiral Sir Charles Cotton. Upon the evacuation of Portugal by the French forces, in virtue of the Convention of Cintra, this, and the other Danish vessels in the Portuguese ports, were taken

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possession of by the squadron under the command of Sir C. Cotton, but were released by orders from him before his return to England. Upon the arrival of Admiral Berkeley, by whom Sir C. Cotton was succeeded, in January, 1809, the vessels were again seized and sent to England in consequence of an order issued by the Lords Commissioners of the Admiralty to send home for legal adjudication all Danish and other foreign vessels then in the Tagus which were in that river prior to the evacuation of Portugal by the French. The ship was originally condemned as taken by a squadron of his Majesty's ships under the command of Admiral Berkeley; but an appearance having been afterwards given for Sir C. Cotton and his fleet as the actual captors, the decree of condemnation was rescinded in order that the claim of Sir C. Cotton might be propounded. The question was, whether the fleet of Sir C. Cotton or that of Admiral Berkeley were entitled as the captors to the benefit of the prize.

SIR W. SCOTT.—This is a question affecting property of much greater value than that which stands for the immediate decision of the Court, and respects the interests of two highly meritorious officers, to both of whom the Court would be desirous of giving a share of the benefit; but it so happens that their interests are in perfect opposition to each other. As it is impossible, therefore, that the claims should co-exist, the Court is bound to decide upon them according to their legal merits, which must depend upon this question, which of them was the actual captor? that is, not only which is the person by whom a seizure was made, but which is the party legally entitled to the character of captor; for there may be many successive captors, but only one can be legally entitled as captor to the benefit of prize. If one party takes a vessel, and afterwards abandons her, and then another takes the same vessel, the last seizor is in law the only captor. To this it must be added, that the act of the commander is binding upon the interests of all under him, and that he alone is responsible for costs and damages. He has a right to examine the ship's papers, and to detain or not according to his own notions of propriety. He may perhaps act erroneously, and relinquish what would have been good prize to himself and his crew. But if he does dismiss what he had before

seized upon, the interest of himself and all under him is concluded by his act, and the same vessel lies open to seizure by any other captor who may exercise a sounder discretion. Subject to these principles, I have to examine the facts of this case.

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[The Court then examined all the facts at length, and concluded:]

I think there is evidence to show that Sir C. Cotton from motives of delicacy and a nice interpretation of the Convention, thought these vessels were not liable to be considered as prize, and either by mistake of fact or law relinquished possession; and, by so doing, abandoned the right of himself and of those under him. I must therefore pronounce for the exclusive interest of Admiral Berkeley, but I direct the expenses of Sir C. Cotton's claim to be paid out of the proceeds.

THE GALEN.

[1 Dods. 129.]

Prize—Convoy.

A convoy has a right to share in a prize if the other elements necessary to establish the right are present.

[The following dicta were stated in the judgment:]

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SIR W. SCOTT.—This is a case in which a reference has been made by the Privy Council to the judgment of this Court, to decide as in a matter of prize, though strictly speaking it is not so to be considered, the captors not being entitled to any benefit in their own right, but deriving their title altogether from the bounty of the Crown.

In a subsequent part of the allegation it is pleaded that the convoy, under the protection of the *Courageux*, again cast anchor within sight of the *Cressy* and the other ships of Captain Pater's convoy, and that they were in sight when the captures were actually effected. There can be no doubt, therefore, that if the facts should be proved, Captain Pater and his fleet would be entitled to share, for there is nothing in the convoying character which would

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deprive him of his right more than it would the actual captor, the duty of attending to the ships under their convoy being equally incumbent on both. Captain Pater had a knowledge of the existence of hostilities, which he communicated to the other, and actually made him an offer of assistance when the motion towards capture was made, though afterwards delayed on whatever ground. There was, also supposing the statement here made to be correct, sight, both at the time when the capture might first have been made, and afterwards when it actually was made. I have no doubt, therefore, of admitting this allegation to proof, the alteration which has been suggested being first made.

[1 Dods. 436.]

THE LA CLORINDE.

Head-money—Capture—No Conflict.

Where a vessel was fought and disabled by one ship, and then surrendered without resistance to another: *Held*, that both ships were entitled to share head-money.

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THIS was a claim on the part of the *Eurotas* to the head-money due on account of the capture of the French frigate *Clorinde*, exclusively of his Majesty's frigate the *Dryad*, which claimed as actual taker. The circumstances in favour of the claim of the *Eurotas* were pleaded in an allegation, which was opposed on the part of the *Dryad*.

The allegation stated in substance that the *Eurotas* brought the *Clorinde* to action on the evening of the 25th of February; that it continued nearly two hours, when the *Clorinde* had lost her main-mast, mizen-mast, and foretop-mast, and being much wounded in her hull, and having lost many men, stood off from the *Eurotas;* that the *Eurotas* likewise had lost all her masts, and was not able to keep within gunshot, but kept within sight all night; that she repaired herself by jury courses, &c., and by noon the next day was ready for action, and in chase of the *Clorinde*, and not more than six or seven miles distant at half-past twelve, when two strange sails hove in sight. After laying-to for some time to ascertain what they were, and finding they were British ships of war, the *Dryad* and *Achates*, she resumed her chase; that these two ships made sail towards the *Clorinde*, and the *Dryad* came up with

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THE LA CLORINDE.

her at half-past twelve, the *Eurotas* being distant only four miles, and came up at twenty minutes after one, when they found the *Clorinde* already in possession of the *Dryad* and *Achates;* that the *Clorinde* was so disabled by her engagement with the *Eurotas* that she was incapable of renewing the engagement, her guns being all disabled, and the ship unmanageable, and the crew panic-struck and skulking and refusing to fight, notwithstanding the threats and even force employed by her officers, and determined not to resist the *Eurotas* which was nearing her next morning, and on her approach expected to take possession without further defence; that no resistance was made to the *Dryad*, whose officers and crew considered her as prize to the *Eurotas*, which alone engaged her, and was prevented from taking first possession only by the superior sailing of the *Dryad*.

The *King's Advocate* and *Burnaby*, counsel for the *Dryad*.

Jenner and *Phillimore* for the *Eurotas*.

Sir W. Scott.—If the Court were at liberty to consult merely its own inclination, there are circumstances that might dispose it to decide this case in favour of the *Eurotas*, for she had certainly done most and suffered most in this transaction, but the Court is bound to follow where the authority of decided cases leads it, and must adhere to that which, by a series of decisions, has become the fixed rule of law.

The subject of head-money has undergone some variations. It is true, as stated by Dr. Phillimore, that originally it was the reward of actual combat only; in later times the necessity of actual combat has been dispensed with, and capture itself, whether produced by actual combat or not, has been held a sufficient foundation for the claim. But there is no case in which head-money has been granted where the act of capture has not been consummated; there may have been great demonstrations of valour, but if they have not ended in the actual surrender of the enemy they have not, that I know of, been held sufficient. In all cases a successful consummation of the engagement is required, and if it does happen that other vessels come in at a later hour, all that the Court can do is to confirm the capture as one common act, and, looking to its

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commencement, its progress, and its final accomplishment, to hold that all parties are entitled. It cannot weigh minutely the different proportions of merit; they may be, as in this instance, signal and marked, or they may be such as no exactness of attention could conveniently distinguish. It is possible to suppose an extreme case in which the whole conflict had been sustained by one vessel and the possession taken by another which casually came up; it may seem hard in such a case that one vessel should run away with any portion of the fruits of another's victory, but I fear that if no indication of surrender had been made, and the victor was in such a state as to be unable to compel it and to take possession, a decision could not easily be found that would authorise the Court to exclude the vessel that consummated the capture. What was the case in the present instance?

[The Court then examined the evidence, and concluded:]

Upon these grounds I reject this allegation claiming the head-money for the *Eurotas* exclusively, but pronounce for her interest in conjunction with that of the *Dryad*, inasmuch as by her conflict immediately preceding she is entitled to be considered as a joint taker, and I do not understand that the *Dryad* opposes it.

[1 Dods. 443.]

THE FANNY.

Recapture—Salvage—Neutral Property on Armed Ship of Belligerent.

If a neutral places goods on a belligerent ship of force which he may presume will be defended by force, he thereby adheres to the belligerent, and loses the benefit of his neutrality. The neutral property if captured is liable to condemnation, and on recapture is subject to salvage.

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THIS was a question of salvage upon neutral (Portuguese) property on board a British armed ship, which had been taken by an American schooner, and was afterwards retaken by one of his Majesty's ships of war. The vessel sailed on her outward voyage under convoy with a cargo from Liverpool to Rio de Janeiro, where the master increased his crew by hiring thirty additional men for the purpose of fighting his way home without the pro-

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tection of convoy, which he had obtained permission to do from the British admiral commanding on that station. The ship was furnished with a letter of marque, had sixteen guns mounted, with small-arms and ammunition in proportion. On her return voyage with a cargo consisting partly of Portuguese and partly of British property, she was captured on the 17th of April, 1814, by the American schooner *General Armstrong*, but did not surrender till after a very severe action, in which the mate was killed and several of the seamen, and the merchant himself, who happened to be on board, was dangerously wounded. The ship and cargo were recaptured on the 10th of May, 1814, by his Majesty's ship *Sceptre*, and for this service a salvage was demanded upon the Portuguese as well as the British property. The demand for salvage was resisted on the part of the Portuguese owners.

For the recaptors, the *King's Advocate* and *Jenner*.

Adams and *Stoddart*, *contra*.

SIR W. SCOTT.—This ship, having a commission for war, but employed likewise for purposes of commerce, sailed under the protection of a British convoy from Liverpool to Rio de Janeiro, and there obtained permission from the admiral on the station to return home without convoy. Thirty men were hired, and some additional guns were put on board for the express purpose of enabling the ship to fight her way home, and it was upon the prospect of her being competent to defend herself that the admiral permitted her to sail without convoy; the fact of her being armed must have been notorious at Rio de Janeiro, and consequently within the knowledge of the merchants who put their goods on board. It appears that the ship actually sustained an engagement, for the witness says that "she did not surrender till after a very severe action of fifty-five minutes, during which many guns were fired on both sides and the ship had her second mate killed, four men dangerously wounded, as was also the merchant himself, who happened to be on board, and her standing and running rigging all cut to pieces, so that they had no longer any command of the ship." Being so taken by the Americans and afterwards retaken by his Majesty's ship *Sceptre*, the question is, whether the

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Portuguese lader is entitled to the restitution of his goods absolutely, or subject to the payment of a salvage to the recaptors. Now, upon principle, I cannot but think that the goods would have been in very great danger of condemnation in an American court of prize. Reference has been made to an Act of the American Congress relative to salvage, but I do not think that it can have much bearing on the present case; the Act does not define the cases to which it is intended to be applied: that is left to the Courts to determine at their discretion. I shall therefore lay the American law entirely out of my consideration and consider the case upon the general principle. Is there a high degree of probability (for certainty is not required) that this property would have been condemned if it had been carried into an American port? In every point of view in which I can see the matter I cannot help thinking that it would have run a very considerable risk of condemnation, and that the Portuguese merchant would have no very good ground of complaint if it had actually been condemned; the ship, being furnished with a letter of marque is manifestly a ship of war, and is not otherwise to be considered because she acted also in a commercial capacity; the mercantile character being superadded does not predominate over or take away the other. There was formerly, indeed, a distinction made between privateers and merchant vessels furnished with a letter of marque, the one being entitled to head-money and the other not, but that distinction has since been entirely done away. A neutral subject is at liberty to put his goods on board a merchant vessel, though belonging to a belligerent, subject, nevertheless, to the rights of the enemy who may capture the vessel, but who has no right according to the modern practice of civilized States to condemn the neutral property; neither will the goods of the neutral be subject to condemnation, although a rescue should be attempted by the crew of the captured vessel, for that is an event which the merchant could not have foreseen; but if he puts his goods on board a ship of force, which he has every reason to presume will be defended against the enemy by that force, the case then becomes very different. He betrays an intention to resist visitation and search, which he could not do by putting them on board a mere merchant vessel, and so far as he does this he adheres to the bel-

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ligerent; he withdraws himself from his protection of neutrality, and resorts to another mode of defence; and I take it to be quite clear that if a party acts in association with a hostile force, and relies upon that force for protection, he is *pro hâc vice* to be considered as an enemy. It is not a sufficient excuse to say that the Portuguese are not possessed of shipping of their own sufficient for the whole of their commerce, and are therefore under the necessity of making use of those belonging to others. If they choose to take the protection of a hostile force instead of their own neutral character, they must take the inconvenience with the convenience; they must abide by the consequences resulting from the course of conduct which, upon the whole knowledge of the matter, they have thought proper to pursue. It could not in this case have been a secret that force was to be used for the protection of the property; it must have been known to the laders of the cargo that this ship was to sail as a single ship, and to fight her way home, since a large number of men were openly and publicly collected for the purpose of enabling her to resist a hostile force. I cannot entertain a doubt that the Americans might, upon just and sound principles, have condemned this property. The case which has been cited from the American Reports (*a*) is much too indistinct to assist the Court in forming its judgment upon the practice of the American Court. The ground upon which salvage was there given does not appear to be of great authority either one way or the other. I decree restitution of this property on payment of the usual salvage to the recaptor.

(*a*) *Talbot* v. *The Ship Amelia*, 4 Dallas, 34.

The *Actæon*, July 2nd, 1810, was also cited. In this case salvage was decreed in respect of the recapture of American ships not proceeding to a French port, but taken by the French. These ships had not on board certificates of origin as required by the French decrees. After examining the facts put before him, Sir W. Scott concluded: "On the whole of the circumstances of this case, without looking minutely into the varying policy of France, I think that there is very rational ground to apprehend that the French Prize Court would have considered these ships as legal captures, and therefore I shall pronounce for the usual salvage." See also vol. i. p. 239. [Edw. 254.]

[1 Dods. 450.]

THE FOLTINA.

Capture—Harbour in Hostile Territory in Possession of British Forces—Droit of Admiralty.

Ships seized in the harbour of an island conquered and taken possession of by British forces are condemnable as droits of Admiralty, though the conquest of the island may not have been confirmed to Great Britain by a treaty of peace.

1814 *July* 29.

This was the case of a ship and cargo seized on the 15th of December, 1811, whilst lying at anchor in the roadstead of Heligoland, which island had been surrendered to his Majesty's forces on the 5th of September, 1807. The question was whether the ship and cargo should be condemned as droits of Admiralty or otherwise.

Sir W. Scott.—This is the case of a vessel which was taken in the roadstead of Heligoland, not at the time of the surrender of the island, but afterwards, and the seizure is represented to have taken place within the harbour. The locality of the transaction is, I think, sufficiently described by the term made use of by the witnesses, who must be understood to mean that portion of the sea to which vessels are carried for the purpose of landing their cargoes at Heligoland; and whether the same portion of the sea is more or less inclosed, whether it is completely land-locked or not, does not appear to be material to the issue in the present case. The Gazette, too, describes the place as a haven, a compliment to which it is certainly not in strictness entitled; but it is used as a haven, and may therefore fairly be considered as such, at least for the purposes of the present question. There is certainly no reason for saying that the property is not within the grant of the Crown to the Lord High Admiral, so far as the locality of the seizure is concerned; for it is the ordinary rule that ships taken in such places during the existence of hostilities become droits of Admiralty.

But the chief point to be considered is, whether at the time this seizure was made, Heligoland formed part of the dominions of the Crown of Great Britain or not. The island, it appears, had been conquered and taken possession of by British forces, but the conquest had not been confirmed to this country by a treaty of peace.

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It was a firm capture in war, but was still subject to a kind of latent title in the enemy, by which he might have recovered it at the conclusion of the war, provided this country would have consented to its restitution.

It is somewhat extraordinary that in the course of the numerous and long wars in which this country has been engaged, no case should have been determined which might serve as a guide to the Court in the decision of the present question. It does not appear that any case of the kind has hitherto occurred, with the solitary exception of that which has been mentioned in the argument (the *Esperanza*), and that is admitted to have passed with very little notice, and without opposition. A case thus passing *sub silentio* cannot be considered of great weight in point of authority. I observe that the grant from the Crown to the Lord High Admiral applies to the King's dominions generally, and that there is nothing which points to a distinction between those parts of the King's dominions over which the Crown has *plenum dominium* or otherwise. No point is more clearly settled in the Courts of Common Law than that a conquered country forms immediately part of the King's dominions. (*Campbell* v. *Hall*, Cowper's Rep. 208.) In a late instance we know that an island so acquired (Guadaloupe) was transferred to a third power, subject, undoubtedly, to the shadowy right of the former proprietor. It is said that a conquest of this kind may be re-acquired *flagrante bello* by the State from which it was taken; but so may any other possession, though forming part of the original and established dominions of the Crown of this country, if the enemy has it in his power to make the conquest. The same observation is applicable to the Isle of Wight as well as to Heligoland, for the enemy has the same right to make a conquest of the one as the other. It is said that the enemy may recover back the island of Heligoland when peace takes place; but it is equally true that the conqueror may retain it if he can; and if nothing is said about it in the treaty, it remains with the possessor, whose title cannot afterwards be called in question. The distinction between the two species of territories is, in fact, rather more formal than real and substantial; at least, I must profess my inability to see any distinction between them that can materially affect the present question. The power of the British Government

1814 *July* 29. THE FOLTINA. Sir W. Scott.

was full and complete; and though the Lords Commissioners of the Admiralty might not have interposed the particular authority with which they are invested, yet the Crown had exercised its authority, and the Admiralty, as the grantee of the Crown, would succeed to its rights. It might have erected a Court there for the exercise of Admiralty jurisdiction; and if it did not, I presume that it only refrained from so doing because it was not thought that public convenience required it. The enemy certainly had no right to say that a Court of that kind should not be there erected. Under the circumstances, I think there is no solid ground for the distinction that has been taken; and though I am by no means disposed at this time of day to enlarge the bounds of the ancient grant from the Crown to the Lord High Admiral, which is now become of less consequence, yet it is the duty of the Court to maintain ancient landmarks. I shall pronounce for the claim of the Admiralty, and condemn this ship as droits of Admiralty.

[1 Dods. 480.]

THE HUNTER.

Spoliation of Papers.

By the law of every maritime Court of Europe, spoliation of papers not only excludes further proof, but does *per se* infer condemnation; English law has, however, modified the rule to this extent, that if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the act was done by a person who has interests of his own that might be benefited by the commission of this injurious act.

1815 *April* 15.

[In the course of the judgment the following dictum is stated:—]

SIR W. SCOTT.—It is certain that by the law of every maritime Court of Europe spoliation of papers not only excludes further proof, but does *per se* infer condemnation, founding a presumption *juris et de jure* that it was done for the purpose of fraudulently suppressing evidence, which if produced would lead to the same result, and this surely not without reason, although the lenity of our code has not adopted the rule in its full rigour, but has modified it to this extent, that, if all other circumstances are clear, this circumstance alone shall not be damnatory, particularly if the

act was done by a person who has interests of his own that might be benefitted by the commission of this injurious act. But though it does not found an absolute presumption *juris et de jure*, it only stops short of that, for it certainly generates a most unfavourable presumption. A case that escapes with such a brand upon it is only saved so as by fire; there must be that overwhelming proof arising from the concurrence of every other circumstance in its favour that forces a conviction of its truth, in spite of the powerful impression which such an act makes to its entire reprobation. It is the less necessary to examine this minutely, because the Court has admitted the introduction of proof not professedly and formally in that character of further proof, but manifestly so to be considered in substance and effect, consisting of affidavits and papers that do not appear to have been on board this vessel. The question remains, whether, with the advantage of all the evidence that has been admitted, it answers the description of a case in which an unfortunate act of spoliation occurs, but which in all other respects wears the aspect of perfect sincerity and truth. In considering that question it may be proper to consider the conduct of the parties, for conduct is a good expositor of facts; if the parties act in a way consistent with their statement, it greatly confirms the statement; if, on the other hand, they conduct themselves in a way that appears utterly irreconcilable with it, then it is not too much to say that the credibility of the statement is deeply affected by the contradiction of the facts.

1815 *April* 15. THE HUNTER. Sir W. Scott.

THE ACTÆON.

[2 Dods. 48.]

Neutral Ship — Destruction by Belligerent — Damages and Costs — Measure of Damages.

If a belligerent ship destroys a neutral vessel, the owner thereof is entitled to be put in the same position as he was before the destruction of his vessel, that is, to recover damages and costs.

The commander of a belligerent ship may have good reason for destroying a neutral vessel, but this fact does not relieve him from responsibility to the neutral owner for damages.

1815 *May* 11.

THIS was the case of an American ship, which on the 24th of January, 1813, sailed from Norfolk in Virginia to the port of

1815 *May* 11. THE ACTÆON.

Cadiz, laden with a cargo of about 4,200 barrels of flour, which had been shipped under a British (*a*) licence, dated the 13th of August, 1812, and was to be in force for nine months from the time of its date. On the 27th of February the vessel arrived at Cadiz, and the master having delivered his cargo produced the licence under which he had sailed, to the British Minister resident at that place, who granted him a further licence, permitting him to ship a cargo of lawful merchandise and to return with it to any port in the United States of America. The master having taken on board a few boxes of fruit, four quarter casks of wine, and some other trifling articles, set sail on the 1st of April, bound to Boston, in America. In the course of his voyage he was boarded by several British ships, the commanders of which examined his licence and permitted him to proceed on his voyage, which he accordingly did until about noon of the 12th of May, when he was captured by his Majesty's ship *La Hogue*, commanded by the Honourable Captain Capel, who on the evening of the same day set fire to the vessel and destroyed it.

A claim was given for the ship and cargo as the property of citizens of the United States of America, protected by licences granted by his Majesty's Government, and by his Excellency the Minister Plenipotentiary of Great Britain at the Court of Spain, and at the instance of the claimant a monition was issued, calling

(*a*) In the year 1812, the British Government being very desirous that the port of Cadiz should receive a constant supply of American flour, granted numerous licences authorizing any vessels, except French vessels, being unarmed, and not less than 100 tons burthen, and bearing any flag, except that of France, to import into Cadiz, from any port of the United States of America, cargoes of grain, meal, flour, or rice, without molestation on account of any hostilities which might exist between his Majesty and the United States, notwithstanding such ships and cargoes might be the property of any American citizens, and to whomsoever the same might belong, and to receive their freight, and to return to any port not blockaded, upon condition that the names and tonnage of the vessels, and the names of the masters should be endorsed on such licences at the time of the vessels clearing from their ports of lading, and such licences were to be in force for nine months from the time of their date. These licences were transmitted from this country, by the various merchants, brokers, or agents who applied for them, to the United States of America, where they were disposed of, and used as occasions might require.

upon the captors to proceed to the legal adjudication of the ship and cargo. An appearance was given under protest for the captor, and the case now came on for hearing. It was understood that the captors did not contend against a sentence of restitution, but objected to the payment of costs and damages.

1815 *May* 11.

THE ACTÆON.

For the captors, the *King's Advocate* and *Adams*.

Jenner and *Lushington*, contra.

SIR W. SCOTT.—This question arises on the act of destruction of a valuable ship and cargo by one of his Majesty's cruisers. On the part of the claimants restitution has been demanded, and there can be no doubt that they are entitled to receive it; indeed, I understand that it is not now opposed by the captor himself; but it remains to be settled what is to be the measure of restitution—how far it is to be carried. The natural rule is, that if a party be unjustly deprived of his property he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule upon the subject, but like all other general rules it must be subject to modification; if, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture, if he has by his own conduct in some degree contributed to the loss, then he is entitled to a somewhat less degree of compensation to what is technically called simple restitution.

This is the general rule of law applicable to cases of this description and the modification to which it is subject; neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not by any conduct of his own contributed to the loss. The destruction of the property by the captor may have been a meritorious act towards his own government, but still the person to whom the property belongs must not be a sufferer. As to him, it is an injury for which he is entitled to redress from the party who has inflicted it upon him,

1815 *May* 11.

THE ACTÆON.

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and if the captor has by the act of destruction conferred a benefit on the public he must look to the government for his indemnity. The loss must not be permitted to fall on the innocent sufferer.

This American vessel, having been invited into the service by the government of this country, had carried a cargo of corn to the port of Cadiz for the use of the army, which at that time stood greatly in need of a supply. It is true that the licence which had been here granted in the usual manner had afterwards been purchased for money in America; but I do not see what difference that can make in the consideration of this case, for if the licence was general, which it appears to have been, it could be of no consequence who were the individuals who acted under it, provided they complied with the conditions annexed to it. There is nothing whatever to show that the parties acted otherwise than in strict conformity to the spirit and letter of the original licence signed by the Secretary of State in London, and I must presume that they did so from the circumstance of their obtaining permission from the British Minister in Spain to carry back a cargo to America.

Let us now look a little to what has been said in justification of the capture and destruction of this vessel. Why, it is said in the first place that Captain Capel found the transfer of these licences from one vessel to another rendered such cases suspicious, and made it necessary for him to use great vigilance in detecting them; but that did not at all impose upon him a necessity of destroying the vessels which were furnished with them. It is said that the master acknowledged he had bought the licence, but supposing the fact to be that he had done so, that alone would not render the transaction illegal; neither could the circumstance of the expiration of the time for which the licence was granted have had any such effect, even supposing the fact to have been so, which it was not. It has been urged, too, that there were letters on board to America from the officers of Commodore Rogers' squadron. What were the contents of those letters does not at all appear; but, in the absence of all proof to the contrary, I must presume that they were of an innocent kind, and addressed to private individuals, for if they had been of a public nature and of a dangerous tendency I can have no doubt that they would have been preserved by Captain Capel, and exhibited in this cause. Lastly, it has been said that

Captain Capel could not spare men from his own ship to carry the captured vessel to a British port, and that he could not suffer her to go into Boston, because she would have furnished important information to the Americans. These are circumstances which may have afforded very good reasons for destroying this vessel, and may have made it a very meritorious act in Captain Capel as far as his own government is concerned, but they furnish no reason why the American owner should be a sufferer. I do not see that there is anything that can fairly be imputed to the owner as contributing in any degree to the necessity of capturing or destroying his property, and I think, therefore, that he is entitled to receive the fullest compensation from the captor. It does not appear that Captain Capel is chargeable with having acted from any corrupt or malicious motive, and if, as I believe to have been the case, he has acted from a sense of duty and of obedience to the orders he received, I can have no doubt that he will be indemnified upon a proper representation being made to the government. But this will not affect the right of the American claimant, whom I must pronounce to be entitled to restitution with costs and damages; and I beg it may be understood that I do so without meaning in the slightest degree to throw any imputation on the conduct and character of Captain Capel, but merely for the purpose of giving a due measure of restitution to the claimant (*a*).

1815 *May* 11. THE ACTÆON. Sir W. Scott.

THE LONDON. [2 Dods. 74.]

Salvage—Donation—Bill of Exchange.

Salvage on donation from the enemy.

THIS was the case of a British ship and cargo captured by an American privateer, the captain of which offered to restore the ship and cargo to the master, on condition of his drawing a bill for £1,000 payable in London. The master accepted the restitution

1815 *June* 13.

(*a*) The *Rufus* was the next case which came on for hearing.

The Court said, I cannot distinguish this case from the last, and must therefore make the same decree.

1815 *June* 13. THE LONDON.

on these terms, and accordingly drew a bill to that amount, but took care to send advices to London in time to prevent payment of it. A demand was now made by him for salvage on the cargo as recaptured from the enemy. The value of the cargo was stated to be from £1,500 to £2,000.

The Court gave him one-tenth and his expenses.

[2 Dods. 88.]

GENOA AND SAVONA.

Joint Capture—Ship of War—Actual Capture by Land Forces.

A ship of war being *in itinere*, and barely seeing or hearing a firing on the land, is not entitled to share in the beneficial effects of an attack made by a force with which she has no concert or communication.

1815 *November* 27.

THE towns of Genoa and Savona were taken in the month of April, 1814, by his Majesty's sea and land forces under the command of Lord William Bentick and Sir Edward Pellew, and the shipping, ordnance, &c., &c. there seized have since been condemned in the Court of Admiralty, the whole property being subject to his Majesty's direction for distribution amongst the captors. A suggestion having been made by the agents of the actual captors that his Majesty's ship *Pompèe* would not be allowed to participate in the benefit arising from the capture, a memorial was presented by Sir James Athol Wood, the commander of that vessel, to his Majesty in Council, praying that the *Pompèe* might be included in the list of the vessels entitled to share, or if doubts were entertained of her claim, that leave might be given for the usual measures to be taken in the Court of Admiralty to establish her right. The Lords of the Treasury signified their pleasure to the King's Proctor that Sir James Athol Wood might be at liberty to prefer the claim, and the King's Proctor, on behalf of his Majesty, consented accordingly. An allegation was now offered setting forth the interest of the *Pompèe*.

[In the course of the judgment the following dictum occurs:—]

SIR W. SCOTT.—The question then comes to this: whether a ship of war being *in itinere*, but barely seeing or hearing a firing on the

coast which she is passing in the prosecution of her voyage, without at all knowing the occasion of such firing, is entitled to share in the beneficial effects of an attack made by a force with which she has no communication or concert whatever—to say that she would be so entitled appears to me to be going further than has hitherto been done in any case with which I am acquainted. If the *Pompèe* and the actual captors had recognized each other the case perhaps might have been different, but here was a perfect ignorance on both sides. The *Pompèe* had no communication with the captors, no knowledge of what the force was that was employed in the operation, nor of the precise object of attack. The allegation goes on to plead that "the *Pompèe* and transports pursued their course for Leghorn agreeably to the order of the said Admiral Hallowell, and arrived there in the evening of the 19th of April; that he the said Sir James Athol Wood finding that no orders had been left for him by the said Lord William Bentick, determined to proceed with the *Pompèe* and transports for Genoa, and on the following morning they sailed accordingly and arrived off the same early in the morning of the 21st, but owing to light and contrary winds did not come to anchor off the mole until the morning of the 22nd, when the troops were landed, and when it was learnt that the town had surrendered by capitulation and that the colours had been hauled down on the preceding day, pursuant to the terms of the same, and whilst the said ship *Pompèe* and transports were in sight." From this surely they can derive no title to share if the former facts did not give it them.

1815 *November* 27.

GENOA AND SAVONA.

Sir W. Scott.

THE LA HENRIETTE.

[2 Dods. 96.]

Joint Capture—Blockade—Associated Ships.

Where a squadron is blockading a port, and one ship thereof captures a vessel leaving such port, all the ships of the blockading squadron, however distant from the place of capture, are entitled to a share of the prize-money.

1815 *November* 28.

THIS was the case of a French ship which was captured in the night of the 14th of August, 1814, in the Passage du Raz, by his Majesty's ship *Clarence*, under the command of Captain Henry

1815 *November* 28.

THE LA HENRIETTE.

Vansittart. A claim of joint capture was made on behalf of the commanders, officers, and crews of his Majesty's ships *Queen Charlotte*, *Pyramus*, *Nimrod*, *Rippon*, and *Ville de Paris*, and an allegation was brought in pleading the facts upon which their claim to share in the proceeds of the prize was founded. The allegation pleaded "that the above vessels were employed as a squadron, under the command of Rear-Admiral Sir Harry Neale, to blockade the port of Brest, in which there was at that time a French fleet, at least equal in point of number to the said squadron; that during the time the said squadron was employed in blockading the port of Brest some one vessel of the said squadron usually remained close off the entrance of the harbour of Brest, whilst the remainder of the said squadron remained at anchor in Douarne Nez Bay, near the said port of Brest; that on or about the 5th January, 1814, the *Clarence*, one of the said squadron, was ordered by the said Rear-Admiral Sir Harry Neale, to proceed from Douarne Nez Bay, where the said squadron was then at anchor, to watch the entrance of the harbour of Brest; that the *Clarence* proceeded from Douarne Nez Bay off the harbour of Brest, and continued there during the night between the 5th and 6th of the said month of January; and in the course of the said night captured the French national ship or vessel *Henriette*, which was then attempting to escape from the said port of Brest, and in the morning of the said 6th of January returned with the said ship or vessel *Henriette* to Douarne Nez Bay, where the *Clarence* and *Henriette* came to an anchor with the rest of the squadron."

The admission of this allegation was opposed on behalf of the actual captor.

SIR W. SCOTT.—This is a claim of joint capture on the ground of associated service, the object of the particular association being the blockade of the harbour of Brest. The Court has always held that a service of this kind associates vessels as intimately as it is possible for any service to do, since, from the very nature of it, it can only be performed by a combination of vessels. It is, I apprehend, a common practice to station one vessel close off the mouth of the harbour, whilst the remaining part of the squadron keeps at some distance, but still near enough to render assistance if neces-

sary. The mode, therefore, which was adopted in this particular instance for effecting the purpose cannot be considered as an unusual one, nor does it appear that this station, close to the mouth of the harbour, was always assigned to this individual ship, the *Clarence*, but that the several vessels under the command of Sir Harry Neale took it by turns to watch the entrance of the harbour. It has been said that the bay in which the squadron remained was not near Brest, and that the squadron therefore could not have come up in time to render assistance; but I am at present to take the facts as described in the allegation, and I find it there stated that the squadron remained at anchor in Douarne Nez Bay, near the port of Brest. If the fact be otherwise it may be counter-pleaded, but at present I must consider it as truly stated. The squadron itself, although at some distance, must still be considered as maintaining the blockade; it was impossible, indeed, that the *Clarence* could have maintained it without their assistance, for there was at that time a French fleet in the harbour of Brest at least equal in point of number to the British squadron. I think that the other ships of the squadron were as much connected with the service of the blockade of Brest, and as necessary to the due performance of it, as the *Clarence* herself was, and that, upon due proof of the facts now pleaded, they would be equally entitled to share in the proceeds of this prize which was taken coming out of the harbour of Brest. I shall therefore admit the allegation.

1815 *November* 28.

THE LA HENRIETTE.

Sir W. Scott.

THE LA MELANIE.

[2 Dods. 122.]

Joint Capture—Sight—Presumption of Assistance—Rebuttable by Evidence—Vessel at Anchor.

When a vessel of war is in sight both of a prize and of an actual captor at the moment of capture, there is a presumption that such vessel has caused intimidation to the enemy, and encouragement to the friend. But such presumption is rebuttable by evidence to show that a vessel in sight cannot have been of any assistance having regard to her state and position.

THIS was the case of a vessel under French colours and laden with a cargo of cotton, which in the prosecution of a voyage from

1816 *June* 18.

1816 *June* 18. THE LA MELANIE.

New Orleans to Bordeaux was captured on the 8th of March, 1813, by his Majesty's ship *Briton*, Sir Thomas Staines, commander, and brought to the port of Plymouth. A claim of joint capture was given on behalf of a squadron of his Majesty's ships which were lying at anchor in the Basque Roads, under the orders of Rear-Admiral Sir Harry Neale, and employed in blockading the enemy's ships at the Isle of Aix.

SIR W. SCOTT.—This is a claim on the part of a British squadron, consisting of his Majesty's ships the *Ville de Paris*, *Warspite*, *Rippon*, *Sultan*, and *Rover*, to share in this French vessel and cargo which was taken on the 8th of March, 1813, by his Majesty's frigate *Briton*, under the command of Sir Thomas Staines. The case on the part of the actual captor is stated pretty much to the following effect: That the *Briton* was upon her station off Bordeaux on the 8th of September, at about half-past ten o'clock a.m., Cordovan lighthouse bearing about E.S.E. five leagues, when a strange sail was discovered in the north-west quarter steering for Bordeaux; that the *Briton* made sail in chase, when such vessel hauled her wind and also made all sail, the wind N.W., and between two and three o'clock the *Briton* made the Isle of Oleron and soon afterwards saw the mastheads of the ships of his Majesty's squadron off Basque Roads over the island at anchor, and about five o'clock the *Briton* made her distinguishing signal to the admiral, the *Briton* being at such time between the chase and the shore, and after firing several guns at her came up and captured her about seven o'clock in the evening, the fleet still continuing at anchor. This is the statement on the part of the *Briton*, and it is likewise admitted by Sir Thomas Staines in his answers, that "he believes the capture may have been observed from the squadron." The case on the part of the squadron does not differ very materially from that which has just been stated.

. . . . The claim of the squadron, therefore, is put upon two distinct grounds, on the fact of sight and on the power and inclination to have joined in the chase, had any assistance been at all necessary. There can be no doubt that sight alone is, between King's ships, generally sufficient to establish a claim of joint

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capture. By sight I understand the being seen by the prize as well as by the captor, and thereby causing intimidation to the enemy and encouragement to the friend. I am not aware that one of these will do without the other; but sight, even if proved in the fullest and most satisfactory manner, does not universally give a right to share. The presumption arising from it, like all other presumptions, may be rebutted or evicted by adverse circumstances; ships, for instance, which are lying in a harbour under circumstances which render it physically impossible for them to get out, cannot be permitted to share merely because they happen to be in sight when a capture is effected. Where there is no such physical impossibility, where ships are at sea and have it in their power to render assistance, still, if they are unconscious of what is going on, and are pursuing a different course in complete ignorance of the transaction, they have no more right to share than if they had been in the opposite quarter of the globe. In such circumstances they can occasion no terror to the enemy, nor afford any encouragement to the friend, and therefore they are justly deemed not entitled to a share of the benefit. It would not be difficult to put other cases of the same kind; one occurred in this Court in the year 1746 (the *Margaret*). In that case there were three ships asserting an interest, one of which (the *Queen of Hungary*) was present at the time of capture, but performed no service. Another (the *Trial*) was in sight, but at a very considerable distance from the scene of action, and likewise performed no service. The third ship (the *Terrible*) engaged the enemy for three hours, and effected the capture. Sir Henry Penrice, who was at that time Judge of the Admiralty, awarded three-fourths of the prize to the *Terrible*, one-fourth to the *Queen of Hungary*, and nothing to the other ship, which performed no service, and was at a great distance, although within sight.

Where the claim is founded on the fact of sight by vessels lying in a harbour, there must, I think, be some such limit as this assigned to their claim; namely, that they must be in sight at the time when the capture is consummated, otherwise cases of the greatest hardship on the actual captor might frequently occur. Suppose, for instance, the case of a prize chased all the way up the Channel: would it not be monstrous to say that all the ships in

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all the different harbours which they passed, and which happened to see a part of the chase, should be entitled to share with the actual captor? The utmost that can be admitted is, that those ships alone which witnessed the last act of the chase—the consummation of the capture—should have a share of the prize.

It becomes necessary, therefore, to see what was the degree of sight in this case; how far it is proved at the time of capture.

. . . . Taking all these circumstances into consideration, that the chase was commenced by the *Briton* only; that the prize would never have been seen by the squadron if it had not been for the acts of the *Briton;* that the squadron was engaged in a blockade of the strictest kind, which rendered it imperative on them not to desert their post; that they were lying at anchor with their sails furled, in the bottom of a bay into which the wind was blowing strong, I think I should be going further than former cases would justify me in doing if I were to pronounce for the interest of the squadron, and therefore I shall decide in favour of the exclusive claim of the *Briton.*

[2 Dods. 301.]

THE VILLE DE VARSOVIE.

Head-money—Distribution—Associated Ships.

The rules as to head-money differ in the case of associated and unassociated ships. In the case of associated ships it is only necessary to prove that the claimant was part of a general body associated for a common purpose, and was within sufficient distance to give assistance to ships actively engaged.

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Sir W. Scott.—This is a question of head-money arising out of the destruction of five French ships of war, in the memorable engagement at Aix Roads, in the year 1809. They and other vessels had been long blockaded by a fleet under the command of Lord Gambier, and an attempt was at length proposed to destroy as many as could be reached by means of fireships, assisted of course by the blockading squadron. This attempt was carried into execution on the night of April the 11th, and in the following day, with the effect of destroying the five ships, at least as far as the present question is concerned. The head-money was applied for

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on the part of the fleet, and it was granted; but the distribution was prevented by a notice which was given, on the part of Lord Cochrane, to the agent of the fleet not to distribute. In consequence of this proceeding a monition was taken out calling upon Lord Cochrane to show cause why the head-money should not be distributed among the fleet in general, and it is in answer to this monition that his lordship appears and shows cause, the effect of which it is for the Court now to consider.

Some complaint has been made that the present mode of proceeding is disadvantageous to his lordship. If it be so, the objection comes too late. In the beginning it was open to his lordship to have adopted a different course, and at a later stage it was open to him to have represented to the Court any inconvenience to which that course had subjected him, and the Court would have given the matter another shape. But both parties have been content to go on in the course originally taken, and any complaint upon that matter now comes too late to be entitled to attention.

This being a question of head-money, it is to be admitted that it certainly has been the habit of this Court, supported by a consentaneous practice on the part of the superior Court, to restrict the benefit of head-money within much narrower limits than that of prize or property taken from the enemy. In the case of the latter property, it is well known that the benefit has travelled to a much greater distance by means of an enlarged interpretation of the word "taken," carrying the application of that word to an extent probably not within the contemplation of those who first used it. It has been extended so as to include, with few exceptions, all ships of force within visual distance, though perhaps otherwise unconnected with the act of capture, and even unconscious of its occurrence; a rule which falls hard in many particular cases affecting the interest of meritorious captors, but which is supported by the equity of an universal application, giving possibly an equal benefit to the same meritorious captors in other cases, where, but for this same rule, they would take no benefit at all.

In the distribution of head-money, the bounty of the State itself, and not the fruit of fortunate acquisition, a much stricter principle has been applied. It is considered more as a reward for real and active service and for meritorious personal exertion, though not

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very prominently called for by the mere textual expressions of the statute; it is not shared with those who have no title but that of the casual sight of a transaction in which they had no immediate share; it is not even an honest and anxious endeavour to share in the peril that shall bring the parties within the extent of the beneficial title, if the endeavour does not bring them within the capacity of actual sharing in that peril. If two ships of war, otherwise unconnected, chase, and the one comes up and fights and captures before the arrival of the other, the latter is not held entitled, because she had not, though using her best endeavours, brought herself within the sphere of action; but if she had so done, and only refrained from actually mixing in the fight then terminating, because the force immediately applied was already more than was necessary and the addition of any more could only have injured the value of the property in contest or produced an useless effusion of blood, and if such a state of facts were clearly established to the satisfaction of the Court, the Court would not consider that the party who withheld the use of his force upon such considerations only, being otherwise perfectly ready and disposed to combat, was disqualified from taking an interest in the head-money pronounced for thereon. The Court has gone still further, and upon principles from which it feels no disposition to recede it has pronounced for the interest of a vessel which had not been shown with any degree of certainty to have arrived within gunshot. Such was the case of the *Weser*, in which the *Rippon*, a large ship of force, was called in to assist two others which had contended a long time in vain with the enemy. On the appearance of the *Rippon* the *Weser* surrendered at once, and although there was no further action the immediate submission was held to entitle the *Rippon* to share in the head-money.

In the case of an united force acting for a general purpose, I take the rule to be, that it is a conflict of all with all. In point of fact, particular ships must and will be engaged at particular times during the engagement with particular ships; but as the co-operation and conflict are both general, and it may be hardly possible to distinguish the particular combats that take place in the course of a long mixed engagement which is varying its face every moment of its duration, it is considered by the law as throughout the com-

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bined effort of every one against every one, without particular attention to particular merits or sufferings. In the battle of Aboukir one ship which gallantly led the way into action grounded upon a shoal, and was prevented by that accident from taking any further share in that memorable engagement. That ship, I presume, shared in the head-money. At least, I am confident that this Court would have felt no hesitation in pronouncing for her interest, any more than for that of any other ship which had been disabled in the course of the action. It may happen, and I have reason to believe often does happen in fact, that in general engagements ships which are mutually engaged recede to a great distance from the general fleet and far out of its sight; but that elongation does not at all affect the unity of the transaction; it is still a general engagement, and the ship belonging to the superior party, whether successful or not against her particular opponent, shares with all the rest of the body of the fleet in the fruits of the general triumph of the day.

The rules, therefore, as to head-money differ widely as they regard claims arising out of general engagements, and as they regard those which are founded on particular combats; and in questions respecting that title, it is very necessary to distinguish to which class the case in question is to be referred. If to that of particular combat, it must be shown that the claimant has directed his force to the particular object in the requisite degree; not so if founded on something of the nature of general engagement. There it is only necessary to show that the claimant composed a part of the general body; that he was present within a sufficient distance to have given assistance still more active, if required, to that part of the common force which was immediately employed; that he was present, giving not a remote encouragement, but an immediate support, to the enterprise, as far as it was necessary for him so to do. It might happen, as it most certainly does in the present instance, that the active use of the whole force might be on many accounts extremely unadvisable; that the space for such an employment might, on account of its limits, be attended with much inconvenience and risk; that the use of one description of the component force might be more proper to sustain only an auxiliary and protecting part, though equally necessary to the success of the

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general enterprise; that the disposition of the whole force combined for the general purpose rested with the skill and discretion of the commander, who had assigned to each portion its proper station; that such a station had been assigned to the claimant in that transaction; and that the duties imposed upon him by such an assignment of station, whatever they were, had been adequately performed. If such be the character fairly attributable to the transaction, it will subject the case to the rules that apply to a combined force acting in the nature of a general engagement. If not—if it is to be understood upon the common principles applied to a separate force, or to a force that must be considered as acting separately—it must be considered less favourably for the fleet in this instance; for it has been established to the entire satisfaction of the Court, assisted in its judgment by gentlemen of the Trinity House, that the fleet never approached within gunshot of the scene of action. At no period did the *Caledonia* and the ships immediately associated with her do so, and therefore they could with great difficulty, if at all, support a claim to head-money for ships captured by other vessels, unless upon principles that in no degree belong to unassociated ships.

The questions proper to be considered in order to determine this case are therefore—

1. Whether these were the transactions of a fleet originally associated for one common purpose, to which these transactions immediately relate?

2. If so, whether a severance and dissociation was produced by any occurrence afterwards, at any period at which the fleet could be excluded from the benefit that it would have taken if it had continued in its original united character?

The first question refers necessarily to the origin of the transaction. [The Court examined the evidence on this point.]

Many other circumstances tend to support the conclusion that this must be fairly considered as a joint enterprise in which all concurred, though in very different degrees of hostile activity. It is not always the degree of hostile activity that determines the conflict. In the case of the *Rippon*, it is perfectly clear that it did not. That ship, of much superior force, had hardly arrived within gun-

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shot, and had not fired a shot, when the enemy which had beat off the former combatants, who had called in the *Rippon*, struck his colours, and yielded a submission which their efforts could never have compelled. It is therefore by no means accurate to lay it down universally that intimidation and encouragement are out of the question. They are certainly out of the question so far as concerns the general presumption raised by the mere construction of the law, that they necessarily operate on every presence; but if the matter does not rest there—if it is proved in fact that they did operate, and compelled a surrender which would not otherwise have taken place—to say that because they did not actually fire they are not entitled, is what cannot be maintained upon any other principle than such as ought to exclude all title to head-money in every case in which the enemy submitted without resistance to a superior force. Nobody, I presume, would contend that you cannot have head-money without a battle for it. The utmost length to which the Courts have gone is this: that if there has been a battle, they will not raise the presumption of intimidation from mere presence as in cases of prize. A ship unassociated must show a concurrence by actual proof of engaging in the combat, or of having actually contributed mainly to produce a surrender by her appearance at the scene of action. In this case there has been a contribution of endeavours on the part of the fleet that goes much beyond mere sight and presence. Every ship engaged is a member of the fleet at the time of action, and is so engaged by the directions of the commander of the fleet. How is the connection broken? Not by elongation of distance; for that often takes place in general engagements to a much greater extent. Not by being detached on a distinct service; for the whole fleet is instant and imminent, and with all its attentions and all its energies, as far as necessary, concentrated in the pursuit of this one object; not by being placed under a separate command, for the control and superintendence remain entirely with Lord Gambier. Different degrees of activity are assigned by him to different ships; for it would be inconvenient to them all to act in the same place and upon the same scale of effort, but all are contributing in those degrees to the general operation. The number and quality of the ships mixing immediately in the contest are

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determined by him. They are sent in successively as the occasion appears to mature and to require co-operation. On board the ships so sent in (the inshore squadron, as it is called) there are the usual traces of a battle—returns of killed and wounded. The fleet that stayed behind is looked to by Lord Cochrane for assistance and support as that which is co-operating. He is of opinion that he did not receive all that ought to have been afforded, and that had half the fleet been sent in, it would have effected the whole purpose. Those are opinions on which the other jurisdiction has decided in a way that excludes any judgment of mine upon such a question. I am bound to take it that as much was done as was proper to be done, and by all the means that were proper so to be applied. The other ships fled up the Charente by throwing overboard their guns and heavy stores; and this, I am to presume, could not be prevented by any efforts which a sound discretion should direct. Then how stands the whole of this matter? An expedition originally confided, in the material parts of its plan, as well as of its execution, to Lord Gambier—carried throughout under his care and superintendence—every movement directed by him—every situation assigned by him—every part of the business, principal or auxiliary, executed by ships which were as much members of his fleet as the *Caledonia* herself—from the beginning to the end, no interruption of command or association.

——— Servatur ad imum
Qualis ab incepto ———

To this view which I take, it adds a great corroboration that it appears to be the view which everyone else takes of it who has no interest in taking another. The opinion of the British fleet may be supposed to be produced or influenced by concurrent interests of their own. But what shall be said to the captured witnesses of the French fleet, attributing the disastrous events of the night and day to the fleet under the command of Lord Gambier? They have no interest in this matter of head-money. What shall be said to the inshore squadron who have all the same interest as the *Imperieuse* to deny the title of the fleet; but to them it never occurs to claim any title either to glory or profit from this transaction, but in partnership with the fleet. These are strong indica-

tions of what was dictated by common reason, and by common and just feeling upon the subject, and certainly lend no small confirmation to the more artificial conclusions of law upon it. With respect to the cases that have been cited and commented on, I do not think it necessary to enter into them minutely. I know of no general doctrine, nor of any particular dicta that, being fairly weighed, can be considered as adverse to the opinions I have intimated. Those that relate to unassociated ships are all foreign to the present question which I take to arise entirely upon the footing of a combined enterprise connected in its origin, and carried on throughout without any breach of continuity in its progress to its termination. If I am wrong in this view of it, I am wrong altogether in the foundation of my judgment, but I think I am warranted and compelled by the facts to assume it, and to decide by that assumption the disputed interests.

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The Court accordingly pronounced against the cause shown by Lord Cochrane, and in favour of the right of the whole fleet to share in the head-money.

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[2 Dods. 313.]

Head-money—45 Geo. III. c. 72, s. 5—Limitation to Officers and Crew of the Navy—Conjunct Naval and Military Expedition.

The bounty awardable under 45 Geo. III. c. 72, s. 5, is not distributable to officers and crews of the Navy after conjoint naval and military operations (*a*).

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THIS was the case of one of the French ships of war which was lying in the harbour of Port Louis, in the Isle of France, when that island was blockaded by his Majesty's land and sea forces, under the command of Vice-Admiral Bertie and Lieutenant-General the Honourable Ralph Abercrombie, and was surrendered and delivered up on the 3rd of December, 1810, together with the town and fortress of Port Louis and the other public property belonging to the French Government, by virtue of a capitulation, under which the French officers and crew were permitted to proceed to France.

(*a*) The operative words of 45 Geo. III. c. 72, s. 5, are similar to those of the Naval Prize Act, 1864 (27 & 28 Vict. c. 25), s. 42.

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On the 12th of December, 1811, the ship and cargo were condemned to his Majesty, as taken by his Majesty's sea and land forces.

SIR W. SCOTT.—This is a question of the right of head-money claimed by the captors of the vessel in question, and I consider it as not put by the one side or the other on any particular circumstances distinguishing the present from similar cases, but upon the general title of the army and navy to head-money on ships captured, not at sea and by ships alone, but in harbours and rivers and other such places as are the objects of joint attack, in conjunct expeditions conducted by both species of force acting on the common service in the way that their instructions or the discretion of their commanders may concur in deeming most effective for the common purpose.

All specialties, therefore, are entirely out of the case. It is a sufficient statement of the facts necessary to found the question that these ships, for the capture of which head-money is claimed, were taken at the surrender of the Isle of France to a conjunct force acting under the command of Vice-Admiral Bertie and Lieutenant-General Abercrombie, and that the claim is given on behalf of these officers and of the persons under their command. The number of men to which head-money is proportioned on board the captured ships has been ascertained by the Court, not certainly by way of helping out the claim in any manner, but merely for the purpose of removing the difficulties that might otherwise be in the way of applying the decision to the facts if the decision should prove favourable to the claim.

The question is referred to this Court for decision by the Board of Treasury, and expressly for a legal decision, thereby meaning certainly to intimate that nothing that could be so deemed had to their knowledge taken place, and therefore clearly that no opinions or acts of their own were so to be considered.

The statute enacts that in cases in which doubts shall arise whether the parties claiming head-money are entitled thereto, the same shall be summarily determined in the course now taken, the legislature probably thinking that the history of this particular subject being more familiar to this Court, a question of this kind

might probably receive a readier illustration from its knowledge of the history of the law than might possibly be within the immediate view of those judicatures which are the more regular and constitutional interpreters of statutes.

The decision which is required is a legal decision, and if a decision so to be qualified had been given before, it would be the duty of this Court, in the consideration of the present question, to weigh that decision, and to allow it all the authority which is justly due to all former legal considerations of the same matter. But no such decision has been offered to the view of the Court. All that is alleged is a practice that has obtained in some instances by the will of persons who, whatever be the respect due to their stations and characters, are in law incapable of giving a legal decision. It appears that on applications for head-money in some cases of conjunct expeditions to the Commissioners of the Navy, they have not submitted immediately to the claim as they would have done in pursuance of the Act of Parliament upon a clear judgment of its validity, but have invoked the judgment, or at least the authority of the Treasury, to sanction any payment, and the Treasury has in some instances exercised either its judgment or its authority in sanctioning such payments. The number of instances in which this has been done is not exactly ascertained; the Commissioners in their return made to the Treasury mention but two, the industry of the claimants has furnished several more, and two or three of them are in the cases of some other ships taken upon the very same occasion with those for which the present claim is instituted. I should have thought that the whole number for which the head-money had been so given bore a very small proportion indeed to the number of those which had occurred in the numerous expeditions of this kind that took place in the course of the late protracted wars, and for which no such claim had been made, or if made had not been assented to; the contrary, however, is asserted, and I have not the means of either contradicting or confirming that assertion. Take it any way, it is impossible to ascribe to such a limited practice as this the reverence due to a course of legal decisions.

The first board to which application is made plainly hesitated in opinion. It referred the matter to another authority, and that

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authority, acting on its financial powers rather than on anything that can be deemed judicial, and in a just confidence that Parliament would ratify and confirm such exercises of discretion in such cases, directed the payments to be made in those instances. To such exercises of discretion, if they were much more numerous even than they are, no judicial character can be applied; the utmost effect that could be attributed to them in a legal discussion would be to incline the judgment, in a case of extreme doubt, in favour of the existing practice, countenanced as it was by opinions though not judicial yet respectable in themselves, and resting upon considerations of apparent equity. But to admit them to that operation it must appear that the question is one of extreme doubt, and that the Court is not shut up from entertaining any such remote grounds of interpretation by the intelligible language of positive law; for the whole of this subject is the creature of mere positive law. Head-money is not property acquired in any manner by the captors, or to be demanded on the ground of any antecedent title; it is a mere voluntary grant of public money, and the grantees must be content to take what is actually given and no more. The Court cannot amplify the grant by constructive analogy, and by so doing take upon itself the double impropriety of imputing blame to the legislature for a supposed omission and arrogating to itself the further disposal of public money. By every rule of interpretation that can apply to such a matter the Court is bound to confine its exposition within the very letter of the statute, if that letter speaks an intelligible language.

Now it has been admitted that in the present instance the case does not come within the specific terms of the grant. The grant is to naval persons acting in a capacity merely naval in the capture of ships, and effected by persons acting on board the ships that make the capture. Soldiers are not recognized as grantees in any other manner than when they are clothed with a naval character by serving on board ships. The grant in the whole of its extent relates to naval capture only; where it is not purely naval the statute has thought fit to be silent, and it is not for this Court to introduce a different description of service into a grant where it is not.

The whole history of this matter confirms the limitation. Till late times the distribution of prize property was wholly within the

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authority of the Crown, and till very lately, in regard to conjunct expeditions, the course was for the Crown to give instructions for the distribution of all property taken on conjunct expeditions. All Prize Acts until the last have been purely naval; the parties entitled under them have been entitled by naval description only; they recite the royal grant on which the whole right is originally founded as confined to naval captors. The subject-matter is within the maritime jurisdiction alone. The army is not recognised in any one of these Acts until the very last (that of the 55th of the King) as having any title to prize, much less to head-money. Head-money is a bounty which was first introduced into what is called the Cruisers Act (passed in the 6th of Queen Anne), and then rested on grounds of naval policy only. It had reference to naval capture, and goes no further in its terms than to reward services of that description.

It long remained a subject of some uneasiness between the two services what was the claim of a military force acting with the navy on conjunct expeditions. Certainly no such claim even to prize could be maintained on the statutes (for, as I have said, they pointed only to naval captors), and much less to head-money, which, if granted at all, could be applied only to the naval service in the very terms in which it was expressed. At length came the case of the *Hoogskarpel*, which was one of several Dutch ships taken in Saldanha Bay, near the Cape of Good Hope, in 1781, by a conjoint force under Commodore Johnstone and General Meadows, acting according to instructions under the King's sign manual, which directed that all the booty taken should be divided between the land and sea forces. The question of interest in these captures made at sea was first agitated in this Court, where the judge, according to the expressions used in his sentence, pronounced for the interest of the army, agreeably to the spirit of his Majesty's instructions." On appeal to the Lords the case was argued with great ability for several successive days, and an elaborate judgment was pronounced on the 30th of June, 1786, by Earl Camden, then President of the Council, assisted, as I best recollect, by Lords Kenyon and Grantley. They laid it down that conjunct expeditions were entirely out of the statute with respect to both the services, and that the whole property captured was at the disposi-

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tion of the Crown, whose equity and liberality in justly estimating the merits of both could not be doubted. The same arguments were urged then as have with great propriety and with great ability been urged now: such as that the co-operation of the army could not divest the title of the navy; that their interests were still preserved, for that they were takers in a sufficient degree to answer the descriptive terms employed in the statute. But these arguments were urged in vain; the property was condemned to the Crown, and no head-money allowed.

This being the settlement of the law at that time by the highest authority, it is clear that no interest can now be communicated to either service on conjunct expeditions, except such as arises from new matter in later statutes. So far as that new matter goes, so far an interest is communicated, and no further. Now a limited interest, under strict regulations therein prescribed, has been conveyed by the last statute (the 55th of the King) to both services, but it is an interest in prize only; the subject of bounty or head-money remains exactly as it did upon the more ancient statutes, without any amplification or enlargement whatever. If the law did not then convey an interest in head-money to either service, it cannot do so now; it cannot now apply to a conjunct expedition if it did not at that time.

On these grounds I feel myself bound to a strict interpretation of the statute; the statute does not apply to conjunct expeditions, and therefore I am clearly of opinion that the parties in the present case are not entitled to head-money.

[2 Dods. 336.]

THE JOHN (No. 2).

Capture—Invincible Ignorance of Captor—Damages.

A vessel was seized in ignorance by the captor of the conclusion of peace, which fact it was impossible could be known to him. During his possession the prize was lost without negligence of the captor. *Held*, that the captor was not liable for damages.

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THIS was the case of an American ship and cargo which, in ignorance of the peace which had been concluded between Great

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Britain and the United States, was seized on the 5th March, 1815, and was lost after the capture. A claim was put in by the owner.

SIR W. SCOTT.— This case began with a monition to proceed to adjudication. The party monished appears under protest to show cause why he should not be compelled to proceed to adjudication. The grounds of the protest, and the answer, bring the merits sufficiently before the Court to enable it to decide the question whether it should enforce the monition; for if there should appear in the protest sufficient grounds to release the party from so proceeding, of course the monition would not be enforced. If no sufficient matter is shown, the course must be different; and the sufficiency depends upon this: whether the parties, upon their representations, have shown such a state of facts as would entitle the mover to recover upon the result of further proceedings; for if it would not, the Court would certainly be disinclined to compel the parties to incur an expense that would lead to nothing—and this more particularly by an inquiry into transactions of four years ago, when all the witnesses on one side are dispersed beyond all hope of recovery, when the person charged with wrong-doing will find himself totally disabled to obtain the testimony that might be absolutely necessary for his defence, although he might have obtained quite sufficient for it, in the course of such an inquiry, if instituted in proper time. It is impossible to state a case in which the obligation of an immediate proceeding on the part of the complainant could be more visible. He must know that the witnesses of the defendant must be the crew of his ship of war; that a peace having taken place, all that crew must have been discharged near four years ago, and that the defendant must search the world over to recover them if possible; but that the case must, in all probability, be maintained upon its facts by witnesses all on one side, and those on the side of a penal prosecution, without any means of defence on the other. The defendant must blame himself, if a Court feels a great indisposition to consider a case so to be brought before it. The present question is whether enough does or does not appear to exonerate the party from being placed in a situation of such extreme and unfair disadvantage. These considerations lead to a view of the representations of fact

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as contained in the protest, and the affidavits which support them.

The complainant in this reply appears to put his case on two grounds: first, the general right to restitution in the case of a capture made out of the due time and place. Second, on mismanagement of the ship while in the possession of the captors, by which the misfortune was occasioned. I shall consider this latter question first, because, if proved, the responsibility clearly attaches. It would do so upon a capture made *flagrante bello*. Whether the misfortune is to fall upon the British captor or the American owner, it is perfectly clear that if the British captor is to be considered as a *bonâ fide* possessor, using due care in the possession, he is not answerable for mere misfortune. That misfortune must fall where it immediately lights; and I have no doubt, on a view of all the circumstances represented to the Court, that due care under the possession was applied.

The only remaining question, therefore, is whether the original act of possession was a *bonâ fide* possession. A *bonâ fide* possession I understand to be, that which is honestly taken under all the knowledge of rights which the party had, or could have had, upon due and practical injury. The very title of *bonâ fide* refers more to the integrity of the party than to the legality of the act, appearing afterwards by circumstances not within his reach at the time of the transaction. It is an attribute of the person, not of the act. He may err, but he errs *optimâ fide* if he acts honestly, according to all the information he either had or could have procured. Most certainly it is not sufficient for a party to plead ignorance as a legal excuse for making compensation to another for an act under which he had suffered, if his ignorance was vincible by himself, and ought not, therefore, to have existed at the time at which the transaction complained of took place. But if the ignorance was invincible by any endeavours to which he could have resorted, it certainly leaves him in full possession of his title of *bonâ fide* in the original act. And I take this to be a distinction between the common law cases cited by counsel and such a one as the present. The bailiff who executes a warrant is bound to look to its legality at the time of execution. It may, perhaps, involve a question of law of no easy solution to such a person; and it may afterwards

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exercise the sagacity of a whole Court to ascertain whether, under all circumstances, it was legal or not; but, if so determined, its effect is retro-active on the person who executed it. He cannot plead ignorance of the law in excuse of his act; every man is bound to know his own domestic law, wherever he applies it, and, if he mistakes, he is answerable for the effects of his own misapprehension. But the present case is an ignorance, not of a law, but of a fact out of which the law is to arise: the ignorance of a foreign fact, not governed by his own domestic law, but dependent on transactions of State, with which he is wholly and unavoidably unacquainted till they are actually communicated. No practicable endeavours of his own could have removed that ignorance; it is therefore an ignorance honest and invincible on his part, and he has the full benefit of all the privileges which honest and invincible ignorance can confer. He is acting upon rights which he could have no reason to suppose were divested, and, so acting, he is certainly acting with as much *bonâ fide* as if these rights were in the fullest actual existence.

The law therefore compels me to attribute to this person all the privileges of *bonâ fide* conduct in the original act; and if nothing follows but what naturally and usually follows such conduct, nothing is imputable. He puts it into the hands of his own agent; assuredly so, and with the most perfect right so to do, not merely on the duty he owes his own Sovereign (for that would be no defence against the complaint of the subject of a foreign State), but on the general law and practice of capture. He is the officer of the law, taking a *bonâ fide* possession, and he is acting regularly in pursuance of that possession by means of his agents; and any mere misfortune which happens in such a custody is a misfortune to the owner, the custody not being tortious. I am therefore clearly of opinion that this individual is not answerable in the way of compensation for the damage this misfortune has produced, though if no such misfortune had happened he must have relinquished the possession, and returned the property to the owner.

In determining thus, I certainly go no further than the expressions warrant, that this individual captor is not liable to this individual sufferer. That does not exclude a liability elsewhere, if it exists. Whether there be such a liability in the government

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is a question which I am not called upon to examine. I have neither the proper parties nor the proper evidence before me. It is sufficient to observe upon that matter, that there may possibly be such a liability. There doubtless would, if the government had not used due diligence in advertising the cessation of hostilities in the quarters, and at the periods stipulated, if that were practicable. If it appeared that no want of due activity could be imputed, but that the conveyance of intelligence was not physically practicable within those quarters, then this question might result: whether the two governments had mutually bound themselves to answer to each other for mere casualties occurring under a possession justly taken? The terms of the contract do not go so far as to outrage that case. They continue the right of capture absolutely to the full effect of vesting the interest in the captors by prorogations founded on a reference to the possibilities of conveying information to various distances upon the globe where such captures might take place beyond. Within such times captures are valid, to the effect of justifying the seizure, if made; with the information, that they impose the duty of restitution. Whether, if the property is lost by mere chance, without any fault on the part of the governor or the captain, an obligation is incurred to restore in value what has been taken away by mere misfortune, the terms of the contract have not specifically provided for; and just principle seems to point another way. That, however, is not the question now before me for my decision. All that I have to decide upon is the liability of the captor in this particular case; and I am clearly of opinion that he ought to be exonerated.

THE FELICITY. [2 Dods. 381.]

Capture—Enemy Property—Neutral Property—Destruction of Prize—Duty of Captor.

If a ship of war captures property which is undoubtedly enemy property, the first duty of the captor is to bring in such property for condemnation; if such bringing in is impossible, then the duty of the captor is to destroy the property. If the property in such prize is doubtful or neutral, the proper course of the captor is to dismiss, if impossible to bring in for adjudication; for an act of destruction of neutral property cannot be justified to the neutral owner by any necessity on the part of a belligerent.

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This was the case of an American ship which originally sailed from Charleston with a cargo of rice for Cadiz, where she arrived about the end of May, 1813, and delivered her cargo. At Cadiz she took on board a return cargo consisting of wine and fruit. She sailed therewith on the 31st October, 1813, bound for Boston, but having met with bad weather and sprung a leak, and being in great distress, 900 boxes of raisins were, between the 14th and 16th of December, thrown overboard. The leak still continuing, and the vessel being within 100 miles of the Bermudas, the master and crew resolved to steer for those islands, and approached within seven leagues of them; but the wind proving adverse, it was determined to shape the course of the vessel for Charleston. On the 1st January, 1814, they fell in with his Majesty's ship *Endymion*, Henry Hope, Esquire, commander, it blowing at that time a strong gale. The *Endymion* immediately hoisted English colours, and fired a gun for the purpose of bringing to the *Felicity*, which hoisted American colours. About eleven o'clock a.m., Lieutenant Ormond and a boat's crew of the *Endymion* boarded the said ship, and found her in a leaky state, with her sails split, and her rigging in an unserviceable state, and otherwise much disabled. Smith, the master, then went on board the *Endymion* with his papers, when the same were inspected and examined by Captain Hope; and there being no licence, Captain Hope asked the master if he had any such document, when he declared, and several times repeated such declaration, that he had no licence, and that he was otherwise unprovided with any protection. The state and condition of the *Felicity* at the time she was so fallen in with was such

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as to raise considerable doubt whether she could, without assistance from the *Endymion*, reach a British port in safety, and Captain Hope was unwilling to lessen the number of his officers and crew in consequence of the service upon which the *Endymion* was then specially engaged—she having been detached, by Admiral Warren, to watch the movements of the American ship *President*, then lying ready for sea at Rhode Island; the *Endymion* being the only British frigate upon that station of corresponding force with the *President*. Under these circumstances, Captain Hope informed the master of his determination to destroy the ship and cargo; and Lieutenant Fanshawe, who was dispatched by Captain Hope for that purpose, enquired of the supercargo and mate of the *Felicity* if there was any licence, who assured him that no such document existed so far as they knew of, and the trunks and baggage being removed, Lieutenant Fanshawe, in pursuance of a preconcerted signal from the *Endymion*, set fire to the *Felicity*. When the master perceived the vessel to be on fire, he called for his chest, and from a concealed place produced a paper purporting to be a licence, and requested Captain Hope to put him again on board his ship. This, however, was wholly impracticable from her then burning state, and the extreme difficulty of communication, there being a heavy sea, and the gale having increased so much that the cutter of the *Endymion* was stove, and the boats could not lay alongside.

A claim was given by C. Coolidge, of Boston in Massachusetts, an American citizen, for the ship and cargo, as the property of citizens of the United States of America, protected from capture by a licence, granted by his Excellency Sir Henry Wellesley, his Majesty's envoy extraordinary and minister plenipotentiary at the Court of Spain, in pursuance of an Order in Council bearing date the 13th of April, 1812, on board the said ship at the time she was seized by the *Endymion*.

SIR W. SCOTT.—The present question arises upon the destruction of an American ship, which took place on the 1st of January, 1814; no proceeding whatever is commenced till the 13th of October, 1818, nearly five years afterwards.

[The Court commented on the delay in the proceedings.]

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This ship and cargo, American property, were destroyed by Captain Hope, of his Majesty's ship *Endymion*, on the 1st of January, 1814, being then in the prosecution of a voyage from Cadiz (where she had carried provisions) to Boston, where her owners resided. She had encountered a continuance of most tempestuous weather, and had suffered most severely under it, so as to make it more than doubtful whether she could possibly reach America. Under a strong sense of their danger, they had determined, upon a general council of the master and mariners, to make for the island of Bermuda, but were baffled by the opposition of a head-wind, and compelled to resume their course to America in their shattered condition; and under the unsettled and boisterous weather which belongs to that season of the year in such latitudes, she is met with by his Majesty's ship *Endymion*, Captain Hope, by whose orders she was destroyed, after her captain and crew, with their baggage, were removed on board the *Endymion*, and after other transactions to which I shall have occasion to advert.

Taking this vessel and cargo to be merely American, the owners could have no right to complain of this act of hostility, for their property was liable to it in the character it bore at that period of enemy's property. There was no doubt that the *Endymion* had a full right to inflict it if any grave call of public service required it. Regularly a captor is bound by the law of his own country, conforming to the general law of nations, to bring in for adjudication, in order that it may be ascertained whether it be enemy's property; and that mistakes may not be committed by captors, in the eager pursuit of gain, by which injustice may be done to neutral subjects, and national quarrels produced with the foreign states to which they belong. Here is a clear American vessel and cargo, alleged by the claimants themselves to be such, and consequently the property of enemies at that time. They share no inconvenience by not being brought in for the condemnation, which must have followed if it were mere American property; and the captors fully justify themselves to the law of their own country, which prescribes the bringing in, by showing that the immediate service in which they were engaged, that of watching the enemy's ship of war, the *President*, with intent to encounter her, though of inferior force, would not permit them to part with any of their own crew to carry

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her into a British port. Under this collision of duties nothing was left but to destroy her, for they could not, consistently with their general duty to their own country, or indeed its express injunctions, permit enemy's property to sail away unmolested. If impossible to bring in, their next duty is to destroy enemy's property. Where doubtful whether enemy's property, and impossible to bring in, no such obligation arises, and the safe and proper course is to dismiss. Where it is neutral, the act of destruction cannot be justified to the neutral owner by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value. These are rules so clear in principle and established in practice that they require neither reasoning nor precedent to illustrate or support them. In the present case it is contended that the hostile character was disarmed by a licence, and I see no reason to dispute either the existence of the licence or its authority. It had been granted under circumstances that have been justly described as highly favourable. The vessel had carried a most seasonable supply from America to Cadiz, a city much connected with and protected by this country during the severe pressure of our war with France for the liberation of Spain, of which this city had become the only remaining stronghold. She had undertaken this duty under the dangers of a heavy responsibility to her own country, then at war with Great Britain, and having successfully performed it, was returning home under the protection of a renewed licence from the British minister at Cadiz. It is not to be denied that these facts create claims of a very strong and commanding nature—claims which are quite irresistible if urged in a proper manner. And the only question is whether these claims are so brought forward as to affect the captor with responsibility. I take it to be clear that if the captor knew of this licence, either from its production or from other circumstances which ought to have satisfied him of its existence, he is liable to the whole extent of the mischief done, which is estimated at the sum of 12,000*l*. It is as clear a proposition that if the existence of the licence was not disclosed to him by those whose duty it was to inform him, and he had no sufficient means to inform himself, he is not a wrongdoer. The act, if tortious, is the act of the

persons who withheld the information they were bound to have given him before the act of destruction took place. If they held out the ship and cargo to be enemy's property, he had still more right to treat it as such. There is no case in which the rule, *de non existentibus et non apparentibus*, can more justly apply, than where a man is called upon to answer for a loss occasioned by the act of concealment of the complainant himself. If a ship, armed with a protecting licence which is not alleged or produced at the time of capture, is brought in under circumstances that did not at all compel and authorize an immediate destruction, the Court would subsequently restore that vessel, but it would indemnify the captor to the utmost extent of all the expense he had been put to by that act of concealment or denial. The ship in this case being destroyed, cannot be restored, but if she was justifiably destroyed under an ignorance produced by such an act, the Court owes the captor the same protection to the fullest extent. These are the principles which I must apply to this issue of fact. Was the knowledge of this licence communicated to the captor, or was it necessarily to be inferred by him before the act of destruction took place?

[The Court then examined the evidence.]

Of all the evidence, therefore, respecting the indication or production of a licence in proper time, the fair result is that no such fact took place in either form till it was too late to prevent the burning; but it is said that Captain Hope might have presumed from circumstances, independent of any such fact—a very unfair duty imposed upon Captain Hope of presuming and acting upon his own presumptions in direct opposition to the asseverations of the other party. But what are these circumstances?

[The Court held there was no such presumption, and concluded.]

The important question of fact is, did these persons hold out this ship as an unprotected ship, and thereby authorize Captain Hope to deal with her as an enemy till after the act of destruction was beyond prevention or remedy? I am of opinion that it is clearly proved that they did so, and I therefore assoil the captor of all responsibility, and condemn the claimant in the costs of this proceeding.

[Spinks, 1.](a)

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Practice — Enemy Claimant — Affidavit of Grounds of Claim — Capture — Blockade — Order in Council, 29th March, 1854 — Condemnation.

An enemy must show by affidavit the grounds of his claim.

A vessel belonging to Bjorneborg, in Finland, sailed from Hartlepool to Copenhagen with a cargo of coals, which she there discharged, for the use of the British fleet, prior to the declaration of war, which took place on the 29th of March. She was unable to sail to Bjorneborg immediately after her cargo was discharged, by reason of the ice; but on the 10th of April she left Copenhagen, bound for that port, in ballast, and was captured on the 12th. *Held*, she was not protected by the Orders in Council, which referred solely to ports within her Majesty's dominions. An Order in Council relaxing the belligerents' rights should be construed in favour of the party whom it is intended to benefit.

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THE *Fenix*, otherwise the *Phœnix*, was a barque belonging to Anton Bjorneborg, Isaac Carstrom, and Carl Martin, of Bjorneborg, in the Grand Duchy of Finland. In December, 1853, she was in London, and had an advantageous charter-party for Lisbon, but owing to the unsettled state of affairs between England and Russia, she was ordered home to Bjorneborg. The charter-party to Lisbon was therefore given up at some sacrifice; and the London agent, in order to some extent to compensate the owners, directed the master to take a cargo of coals, and leave them at Copenhagen in passing, it being, at such time, impossible to enter Bjorneborg on account of the ice.

The *Phœnix*, therefore, left Gravesend for Hartlepool on the 31st of December, 1853; took on board a cargo of coals, and sailed from Hartlepool on the 15th of February, 1854; put into Copen-

(a) The following cases in Spinks are not republished:—

The Froija, p. 37.—The same point of practice was decided in the *Phœnix* (see p. 238), and the case was only brought before the Court because the question had arisen before the decision in the *Phœnix*.

The Soglasie, p. 104.—A question of fact as to whether a master was also owner, and what his national character was.

The Steen Bille, p. 161.—A question of fact.

The Union, p. 164.—Reversed on appeal. See p. 73.

The Nornell, p. 171.—A question of credibility of evidence.

The Rapide, p. 172.—Whether sufficient ground on the facts was shown for giving further time for claim.

The Ionian Ships, p. 193.—As to the status in 1855 of the Ionian Islands, and their relation to Great Britain.

The Aina, p. 242.—As to remuneration of navy agents, now regulated by 27 & 28 Vict. c. 24.

The Fortuna, p. 307.—A question of fact to which the principles laid down in the *Ostsee* were applied.

The Baltica, p. 264.—Reversed on appeal. See p. 628.

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hagen on the 20th of the same month, and delivered her coals for the use of the English fleet. The discharge was completed on the 19th of March; but, at such time, the ice still preventing her entering Bjorneborg, she was compelled to remain at Copenhagen.

War was declared on the 29th of March, on which day, also, an Order in Council (*a*) was published, "allowing Russian merchant vessels, in any ports or places within her Majesty's dominions, until the 10th of May, six weeks from the date thereof, for loading their cargoes, and departing from such ports or places." This Order appears to have been misunderstood, for the opinion prevailed at Copenhagen that Finland ships might proceed to their own ports unmolested up to the 10th of May. Accordingly, as soon as information arrived that the ice was broken up sufficiently to allow a vessel to enter Bjorneborg, the *Phœnix* prepared to sail, and the Russian consul, in his official capacity, sent fifty-seven sailors, the crews of vessels which had been sold, on board the *Phœnix*, to be conveyed home to Bjorneborg.

She sailed from Copenhagen on the 10th of April in ballast, and,

(*a*) Her Majesty, being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof, is pleased, by and with the advice of her Privy Council, to order, and it is hereby ordered, that Russian merchant vessels, in any ports or places within her Majesty's dominions, shall be allowed until the tenth day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, shall be permitted to continue their voyage, if on examination of their papers it shall appear that their cargoes were taken on board before the expiration of the above term: Provided, that nothing herein contained shall extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government.

And it is hereby further ordered by her Majesty, by and with the advice of her Privy Council as aforesaid, that any Russian merchant vessel which, prior to the date of this Order, shall have sailed from any foreign port bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith to depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded.

And the right honourable the Lords Commissioners of her Majesty's Treasury, the Lords Commissioners of the Admiralty, and the Lord Warden of the Cinque Ports, are to give the necessary directions herein as to them may respectively appertain.

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it appears, passed the English fleet unmolested; but upon the 12th she was captured near Gothland by her Majesty's ship *Tribune*, and sent to London for condemnation.

The master, mate, and an able seaman were examined upon the standing interrogatories, and the case now came on for hearing, upon their evidence and the ship's papers. A claim was made for the vessel by John Gabriel Alcenius, of St. Bennet's Place, Gracechurch Street, London, ship agent, who made an affidavit, "That he was duly authorized to claim the vessel on behalf of Anton Bjorneborg, Isaac Carstrom, and Carl Martin, respectively residing at Bjorneborg, in the Grand Duchy of Finland, the true, lawful, and sole owners and proprietors thereof at the time when the same was taken and seized by her Britannic Majesty's screw steam-frigate *Tribune*, Carnegie, Esquire, commander, whilst in the prosecution of a voyage from Hartlepool, in the county of Durham, by way of Copenhagen, to Bjorneborg, and brought to the port of London; that the claim thereunto annexed was a just and true claim; and that he should be able to make due proof and specification."

The *Queen's Advocate* (*Sir J. D. Harding*) and *Dr. Jenner* appeared for the captors; *Dr. Addams* and *Dr. Twiss* for the claimants.

The *Queen's Advocate* took a preliminary objection to the form of the affidavit of claim. Though it might not be of any great importance in the present, it might be in future cases. Neither the affidavit nor the claim annexed stated any ground whatever upon which the claim was made. He certainly could not speak from any experience of his own, but he had availed himself of that of the learned Advocate of the Admiralty (*b*), who informed him that when a claim was made by an enemy it was always necessary to set forth on what ground the claim was made, whether under a licence, under an Order in Council, or on what other ground. Unless such course were adopted, it would be impossible for the counsel for the Crown to know against what they had to contend.

Dr. Addams contended it was quite unnecessary. There could be no doubt in the present case upon what ground the claim was made; but if the Court thought it necessary, another affidavit could be brought in.

(*b*) Dr. Phillimore.

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Per Curiam.—In the last war the principle and practice was that in the case of enemy claimants it was always necessary to state something to show that they had a *locus standi*. The same course must be followed in the present war; but, in the present case, instead of having a further affidavit, setting forth the ground of claim, let us assume that it has been made, and proceed to the argument.

The *Queen's Advocate*, having stated the history of the ship's proceedings, submitted that it was clear from the ship's papers and the evidence that she was a Russian vessel belonging to enemies; that having been captured after the declaration of war, she was clearly, by the law of nations, lawful prize, unless she was in any way exempted from the operation of that law. It would, perhaps, be contended that her voyage was continuous from Hartlepool to Bjorneborg; if it were so, that would not protect her; but the evidence proves completion of voyage at Copenhagen. Her charter-party was for Copenhagen, and her cargo was destined for that place, and there discharged. From Copenhagen she sailed on a fresh voyage for Bjorneborg, after having received on board fifty-seven passengers. He could not conjecture on what ground, or under what Order in Council, the claim could be supported until he had heard the counsel for the claimants, when he would reply.

Dr. Jenner followed on the same side.

Dr. Addams, contra.—It does not much affect the question whether the voyage was continuous or not; but the tenor of the evidence on the interrogatories is that it was a continuous voyage. The master was directed to take the vessel home to Finland, where her owners resided, by way of Copenhagen. She sails from Hartlepool, and arrives at Copenhagen before war was declared. She was detained there until after the declaration of war by the ice not permitting entrance into Bjorneborg. She sailed from Copenhagen on the 10th of April, and by the true construction of the Order in Council of the 29th of March, she should have been protected in her voyage home until the 10th of May.

The true construction of that order is the question for the consideration of the Court. That document must be taken in connec-

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tion with the others issued by the same authority about the same time, and must be construed with the utmost liberality. The language of all the documents is so loose that no strict interpretation can fairly be put upon them. If this vessel is not protected by the strict letter of the Order in Council of the 29th of March, it is by its spirit. By its spirit it must be construed, otherwise this absurdity is the result—those Russian vessels which are in our ports, and therefore in our power, we are to let go; but those which are not, we are to search for, and capture as lawful prize. By the strict letter of the order, a vessel in Plymouth on the 29th of March, and sailing subsequently, would be protected, while a vessel sailing from the same port on the 28th might be captured and brought back into the port as lawful prize on the 31st. Such an interpretation would make the Order in Council a mere trap for Russian merchant vessels, for such a construction could never have been anticipated. From whatever port they sailed, they were entitled to protection until the 10th of May.

Dr. Twiss followed on the same side.

The *Queen's Advocate*, in reply.—Liberality of construction cannot be carried to the length of considering vessels out of her Majesty's dominions as in her Majesty's dominions. The exemption specifies, "Russian merchant vessels in any ports or places within her Majesty's dominions," and the vessel now claimed was at such time in Copenhagen, and cannot by any liberality of construction be brought within that exemption.

DR. LUSHINGTON.—It is very probable that this may not be the only case under similar circumstances brought under the cognizance of this Court; but whether it is the only case or not it is my duty, as it is the first brought under consideration, to state the grounds upon which my judgment will be founded.

I will first address myself to the facts of the case. It is admitted on both sides that this is a Russian vessel; that she was lying in the port of London for the purpose of taking a cargo for Lisbon, when, in consequence of the unsettled state of affairs, her destination was changed, and she sailed in December, 1853, to Hartlepool, to take in a cargo of coals; that in the middle of February she

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sailed from Hartlepool to Copenhagen. All these facts took place prior to the declaration of hostilities to which I must presently advert. She discharged her cargo at Copenhagen about the middle of March, sailed from Copenhagen on the 10th of April, and was captured on the 12th on her voyage to the port of Bjorneborg, in Finland.

These being the facts of the case, two questions appear to have arisen with respect to the Order in Council, to which of course reference must be made: first, whether the *Phœnix* comes fairly within the meaning of that order; and secondly, whether the voyage in which she was engaged was a continuous voyage or not.

Now the order for general reprisals having been issued on the 28th of March, and the declaration of war upon the day following, it is quite clear that unless something has passed under the authority of the government to exempt any of them, all Russian vessels would be liable to detention on the high seas, and to condemnation in the Court of Admiralty. But it appears that her Majesty's Government have thought it right to introduce certain modifications of the belligerent rights which her Majesty is entitled to exercise. These modifications are to be found in the various Orders in Council, to which allusion has been made in argument.

I agree in thinking that all these documents are to be construed fairly together—that if there be any doubt as to the interpretation to be put upon one, it must be construed with reference to others issued on the same subject, in order, if possible, to discover the true intention of the government in issuing it; but I cannot agree with the argument that in documents of this kind we should expect to find a statement of the reasons which actuated the government in the modification of the belligerent rights to which it has seemed proper to resort. It is not according to the custom of former times to set forth the facts and circumstances which induced the Sovereign to adopt measures of this description. Indeed, very great inconvenience might arise from the adoption of such a course of proceeding. We must judge of the document by itself alone.

Much of the argument in the present case has turned upon that document which bears date the 29th of March last, and which

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immediately succeeds an Order in Council for preventing vessels clearing out for Russia, and ordering, as is customary in all wars, a general embargo or stoppage of enemies' vessels. Now upon what principle am I to put a construction upon this document? I am perfectly free to confess that I think it to be quite clear, that whenever the Government of Great Britain or of any other country, by a public document in the nature of an Order in Council, relaxes the severity of belligerent rights, it ought to be taken in favour of the party for whom it is intended, and that a liberal construction should be put upon it. If it were necessary to confirm my opinion by authority, I could resort without difficulty to that of Lord Stowell. However, it is perfectly clear that that is the true principle. When discussion arises with regard to the intention of those from whom the document emanates, we can only look for that intention to the words in which they express it. The principle being to put upon the words the most extensive interpretation which is consistent with them, I take it for granted there must be words in the document sufficient to justify that interpretation. I am not at liberty to travel out of the document. If the words of the document are capable of two constructions, then I am clearly of opinion that the one most favourable to the belligerent party in whose favour the document is issued ought to be adopted; but the Court must bear in mind that its province is not *jus dare* but *jus dicere*, and I must again refer to the principle which I have often enunciated in this Court, *verbis plane expressis omnino standum est.*

I must now refer to the document in question; it is an Order in Council for exempting from capture enemies' vessels under special circumstances; it is in these words: "Her Majesty being compelled to declare war against his Imperial Majesty the Emperor of all the Russias, and being desirous to lessen as much as possible the evils thereof"—much might be said upon the precise meaning of these words, whether it was intended to lessen the evils suffered by British subjects engaged in commerce with Russia, or by the subjects of Russia; at all events, it appears to me that it would not be correct to take the words as only operating in favour of the latter, though no doubt one part of the document is intended to confer great favour upon them—"is pleased to order that Russian

merchant vessels in any ports or places within her Majesty's dominions"—we must recollect that we are speaking of a matter over which the Queen of England is supreme; with the advice of her constitutional advisers she may make any relaxations she pleases of the rights of war against belligerents, and whatever she may declare in relaxation of her own belligerent rights becomes the law of these Courts—"shall be allowed until the 10th day of May next, for loading their cargoes and departing from such port or places."

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Now the first division, I find, is that this order applies to vessels in certain ports and places within her Majesty's dominions. Then I am to consider whether I can by any latitude of construction apply this to a vessel which on the 29th of March was lying at Copenhagen. The only ground upon which that could be contended for would be either that the words had no real meaning and were perfectly superfluous, or that it might be said that having been once in her Majesty's dominions she was to be considered in the same position with respect to the protection as a vessel remaining there on the 29th of March. What would be the effect of either of these constructions? Take the first: it would have the effect of protecting the whole of the Russian merchant navy wherever they had sailed from all over the world at any period anterior to the 29th of March; and the argument which was addressed to the Court, went the length of saying that I might put that construction on the words. Take the other construction, and see whether, by any latitude of interpretation, it can come within the meaning of the words. If I were to consider that a vessel which sailed from Hartlepool in February, and proceeded to Copenhagen, was included, then any Russian vessel that had taken a cargo out of Great Britain, or, rather, out of any of the dominions of her Majesty, at any time prior to the Order in Council, would be entitled to protection. I cannot possibly give this effect to the words. I confess I cannot get over the limitation of the time by reference to the words of this or of any other Order in Council.

But besides this limitation of the time of six weeks from the 29th of March, there is another, viz., the loading their cargoes. There is a limitation of six weeks for loading their cargoes, and

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not the least reference to a cargo taken on board in February. It goes on to say, "and that such Russian merchant vessels"—what is the meaning of "such"? It means Russian vessels which, having been in her Majesty's dominions on the 29th of March, had loaded their cargoes and departed prior to the 10th of May; that is the meaning of the word "such"; it is a word of limitation and qualification; and it is these vessels which shall be permitted to continue their voyage.

The Order in Council goes on to say, "And it is hereby further ordered by her Majesty, &c., that any Russian merchant vessel which, prior to the date of this Order, shall have sailed from any foreign port, bound for any port or place in her Majesty's dominions, shall be permitted to enter such port or place, and to discharge her cargo, and afterwards forthwith depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded." What is the meaning of this? It clearly has reference to trade with her Majesty's dominions. The vessel, to be entitled to protection, must have sailed from some foreign port bound for a port in her Majesty's dominions. It is there the trade is to be brought. If I were to put the construction on this Order in Council which has been prayed, and apply it to all Russian vessels which sailed with cargoes antecedent to the 29th of March, must not the order have been expressed in totally different words?

Then, again, with reference to the further order, dated the 7th of April, respecting the East Indies and the colonies, it is of precisely the same character. It allows Russian vessels which may be in any of the Indian or colonial ports, at the time of the publication of the order there, thirty days for taking their cargoes on board and departing; and it further allows Russian vessels which had sailed from any foreign port prior to the declaration of war, bound for any port or place in any of her Majesty's Indian territories, or foreign or colonial possessions, to enter such port or place, and to discharge her cargo, and forthwith to depart without molestation.

For all these reasons, looking at the first head, the Court can have no hesitation in pronouncing this vessel liable to condemnation.

With regard to the second point, whether this was a continuous voyage or not, I do not think the Court is called upon to decide it; I shall therefore give no opinion upon it, but leave it unprejudiced.

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I am bound to condemn this vessel, as being enemy's property, and as not being within those exceptions which her Majesty has been pleased to make.

Dr. Lushington.

THE AINA (No. 1).

[Spinks, 8.]

National Character—Neutral Resident in Enemy's Country—Enemy Vessel—Mortgage—Invalidity—Condemnation.

A neutral, resident as merchant and consul in the enemy's country, loses his neutral character during such residence.

A claim for one-third of the proceeds of the ship founded on a mortgage deed, on behalf of a citizen of Lubeck resident at Helsingfors, in Finland, as consul of the King of the Netherlands, disallowed.

Foreigners cannot set up a mortgage deed on the ship against captors, though under certain circumstances the lien of British merchants may be allowed.

THIS was a Russian vessel captured by her Majesty's steamship *Alban*, on the 21st of April, in the Cattegat, sailing under Danish colours, on a voyage from Lisbon to Elsinore.

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A claim was made by Messrs. Sieveking, of Sise Lane, London, as the agents and on behalf of "Carl Frederick Degener, a citizen of the Free Hanse Town of Lubeck, and Consul of his Majesty the King of the Netherlands, at Helsingfors, in Finland, the true, lawful, and sole mortgagee of one third part or share of the above-named vessel." In the affidavit of Mr. Sieveking, accompanying the claim, it was stated that "by a certain instrument, bearing date the 2nd day of January, 1854, Eric Nils Sundman, the lawful owner of one third part of the said ship, mortgaged his said one third part thereof to the said C. F. Degener, as a security for repayment of 7,200 silver roubles, lent by him to Eric Nils Sundman as therein mentioned; that at the time of the capture of the said ship, as he verily believed, no part of the said mortgage debt had been paid, but that the whole thereof was due and out-

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standing and unsatisfied; that the said C. F. Degener was, at the time of the said capture, and now is, a citizen of the Free Hanse Town of Lubeck, and that no person, being a subject or subjects of Russia, nor their factors or agents, nor any other enemies of the Crown of Great Britain, had at the time of the said capture or now have, directly or indirectly, any right, title, or interest in the said mortgage debt, or any part thereof."

The case came on for hearing on the evidence upon the standing interrogatories and this affidavit.

The *Queen's Advocate*, for the captor.

The evidence leaves no doubt as to the ship being enemy's property, and no witness seems to know anything of this mortgage. There is nothing but the affidavit of Mr. Sieveking. That is a singular one. It states that the claimant is residing in the enemy's country, and does not say he is not a Russian subject. He is clearly adhering to the enemy, and therefore cannot sustain this claim.

But if there were no objection to the claimant, the claim could not be sustained. Captors take without reference to such lien, supposing this mortgage was perfectly regular and duly executed, of which not a syllable appears in the evidence or the ship's papers.

Dr. Deane, on the same side.

It appears that the claimant was residing in the enemy's country for the purposes of trade, and though born in a country now neutral, he has lost his neutral character. His being consul for the Netherlands does not protect him. In the *Indian Chief* (*c*), Lord Stowell said, it was a point fully established in these Courts, that the character of consul does not protect that of merchant united in the same person.

Dr. Addams, for the claimant.—It is objected that there is no evidence of this mortgage, and that we have withheld information we might have given. That was not the practice of the Court. At the present stage we have no right to give evidence; we can only state what we can prove if allowed further proof. We can

(*c*) Vol. I. p. 251.

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prove the due execution of this mortgage deed, and on that we claim one-third of the proceeds of this ship. The principle adopted by the Court respecting these liens is laid down by Lord Stowell in the *Belvidere* (*f*); it rejects the claim on secret liens, but admits them where the claimant has some specific security. Here the claimant is in possession of such specific security, and is entitled to the third part of this vessel.

Dr. Twiss, on the same side.—The Court may have discouraged secret liens, but there are many cases where *bonâ fide* claims of this nature have been admitted. [*Per Curiam.* Were not all those cases where the claimants were British subjects, and the vessel had been seized in a British port? Can you show me any case at all similar to the present where the claim has been allowed?] The principle of those cases may be extended. Lord Stowell regarded bottomry bonds with favour—*Constantia Harlessen* (*g*). A mortgage may be put at least on an equal footing.

The *Queen's Advocate*, in reply.—No attempt has been made to answer the objection that the claimant does not state that he is not an enemy. He must know whether he is a Russian subject or not, and he has suppressed the information. This is no case for further proof. The question of the lien seems disposed of by the judgment of Lord Stowell in the *Marianna* (*h*).

[*Dr. Addams.*—The remarks of the judge in that case were directed against secret liens.]

DR. LUSHINGTON.—Two questions have arisen with respect to the present claim: first, as to the national character of the claimant, whether he is to be considered an enemy or a neutral; and, secondly, whether supposing him to be neutral he would be entitled to come to this Court and claim one-third of his ship by virtue of an alleged mortgage executed prior to the declaration of hostilities.

Now, with reference to the first question, it is stated that "he is a citizen of the Free Hanse Town of Lubeck, and consul of his Majesty the King of the Netherlands at Helsingfors in Finland."

(*f*) *Ante*, p. 183. (*g*) *Ante*, p. 28, note. (*h*) Vol. I. p. 518.

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Upon this I can put but one construction, that he is resident in Finland, and carrying on his business there. I take it to be a point beyond controversy that where a neutral, after the commencement of war, continues to reside in the enemy's country for the purposes of trade, he is considered as adhering to the enemy, and as disqualified for claiming as a neutral altogether.

But with regard to the claim on the mortgage, I asked whether there was any case where such a claim had been allowed to any but British merchants, and counsel were unable to furnish me with any. The case of the *Belvidere* (*i*) was of quite a different character. That was an American vessel which was seized in the river Thames, under an embargo which preceded the declaration of hostilities between Great Britain and the United States. A claim was made by some British merchants for advances made by them for the use of the ship, and it was alleged that the ship had been put into their hands as a security for the debt so contracted. In that case there was a bare claim without any evidence; the claim was not allowed; and it is only on certain words which fell from Lord Stowell that any argument can be founded in support of the present claim. Alluding to certain cases where the claim of lien had been allowed, he says, "They had either a positive lien upon the ship, or were in possession of a bottomry bond, or some specific security;" but it so happens that on referring to the case, we find the distinction to which I alluded; for Lord Stowell there says, "It was thought by the Court and by the government also, that it would be a hard measure to make British merchants sustain the loss of money so expended."

But it is a very different question whether lenity should be shown to British merchants when the captured vessel has been lying in a British port, where they have had transactions in the way of business with it; and whether, as in cases of this kind, the Court should allow an alien to put in a claim to defeat the right of the captors. If I am to do it in the present case, innumerable questions would arise, and the Court might be called upon to inquire into the validity of the mortgage, and be compelled to determine that validity, not by the law of England, but by the

(*i*) *Ante*, p. 183.

law of the country where it was executed. I accede to the argument of Dr. Addams, that in the first instance they would only state the fact of the mortgage without entering into any particulars or proof. That would be done if further proof were admitted. But having no doubt whatever in my own mind that the case fails on both grounds, viz., the national character of the claimant and the nature of the claim, I cannot admit further proof. The vessel must be condemned.

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THE AINA.

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THE AINA (No. 2).

[Spinks, 12.]

Enemy Master—Restoration of Property.

The Court cannot restore property to an enemy master without the consent of the captors.

Dr. Addams moved the Court to decree the restoration to the master of two casks of red wine and three smaller casks of white wine, together of the value of about 13*l.*, which he had purchased at Lisbon on his own private adventure.

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Dr. Lushington.—No doubt the Court has power, and has continued to exercise it, of restoring property to neutral masters, but I have no authority to restore to an enemy master except by consent of the captors.

The *Queen's Advocate*.—We have no objection.

The Court.—Well, then, it may be given up; but I wish it to be understood that I have no authority, as far as I can discover, to restore to an enemy master without the consent of the Crown.

[Spinks, 12.]

THE JOHANNA EMILIE, OTHERWISE EMILIA.

Ship—Transfer by Belligerent Owner to Neutral before Declaration of War—Proofs of bonâ fide *Transfer—Spoliation of Papers—Further Proof.*

A vessel built in Hanover in 1853, sailed in ballast to Riga, with a crew of Hanoverians. She then sailed, under Russian colours, to Havre, thence to Newcastle—and on the 23rd of January was transferred by her Russian owner to a Hanoverian—thence she sailed to Lisbon. There she took in a cargo, and sailed for London on the 4th of April, under Hanoverian colours. Shortly after her arrival in the London Docks she was seized by a Custom House officer. She was claimed on the ground that, while lying at Newcastle, she had been, under a power of attorney given by the owner to the master, sold and transferred to a Hanoverian. Further proofs of *bona fides* of transfer required.

The legal consequences of destruction or spoliation of papers depend for the most part upon the circumstances of each case, but unless the case is one of grave suspicion, further proof will be allowed.

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This schooner was seized in the London Docks early in May, 1854, by Mr. Cox, Acting Landing Surveyor of the Customs, who had received information that, though sailing under Hanoverian colours, she was really a Russian vessel.

The master, mate, and cook were examined on the standing interrogatories, and a claim was given in by Theodor Schlutow, of Mincing Lane, London, who made an affidavit "that he was authorized to make the claim on behalf of Georg Schwers, of Leer, in the kingdom of Hanover, merchant and shipowner, a subject of the King of Hanover, sole owner and proprietor of the said schooner at the time of her seizure in the London Docks."

The facts of the case, as stated in the evidence, were these:—The schooner was built in 1853 at Leer, in the kingdom of Hanover, and sailed thence on the 20th of October, entirely manned with Hanoverians. She first sailed to Riga in ballast, thence to Havre, and on the 3rd of January to Newcastle, where she took in a cargo of coals for Lisbon, where she arrived on the 16th of February; and, having delivered her cargo, took in another for London. She sailed from Lisbon on the 4th of April, and arrived in the London Docks on the 1st of May. A few days afterwards she was seized. The master stated that for some reason or other, which he could not set forth, the schooner, from first leaving Leer until her arrival at Lisbon, was navigated under the

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Russian flag; that while at Newcastle he received a power of attorney from Mr. Rucker, her then owner, the Hanoverian Consul-General at Riga, authorising him to sell her, in consequence of which he proceeded to Leer and transferred her to Mr. Schwers, the claimant; that on completing the transfer he returned to Newcastle and proceeded with her to Lisbon, where he received instructions from Mr. Schwers to give up the Russian papers and colours, which he did, to the Russian consul; after which she sailed under Hanoverian colours and papers. The purchase-money was stated to have been 8,000 dollars, which were received by a notary at Leer and remitted to Mr. Rucker.

The *Queen's Advocate* and the *Admiralty Advocate* for the Crown.

The evidence shows the vessel to have been a Russian, not a Hanoverian. The alleged transfer from Mr. Rucker to Mr. Schwers was a sham sale to defeat our belligerent rights. No money passed at the time of the alleged sale, and after that time the vessel sailed from Newcastle to Lisbon under Russian colours, without any Hanoverian colours on board, and in the same trade as before.

There has been a distinct spoliation of papers by the master on the outward voyage to Lisbon, at Lisbon, and on the homeward voyage from Lisbon to London. That is a sufficient ground for condemnation, or at least a bar to restitution without further proof. The *Hunter* (*l*), *Two Brothers* (*m*), *Rising Sun* (*n*), *Polly* (*o*).

Dr. Addams and *Dr. Twiss* for the claimant.

The seizure of this vessel was made in violation of the Orders in Council. Revenue officers have no right whatever to seize vessels and proceed against them as prizes. This schooner was built in Hanover, belonged to a Hanoverian subject, not a Russian. The transfer was a *bonâ fide* transaction between one Hanoverian and another, previous to a declaration of war. There is no law to prevent a neutral from purchasing a ship from an enemy. As to there being no entry of the sale in the log-book, that cannot affect

(*l*) *Ante*, p. 208.
(*m*) See *post*, p. 263.
(*n*) See *post*, p. 263.
(*o*) Vol. I. p. 248.

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the sale; there is a regular bill of sale transferring the vessel according to the forms used in Hanover.

There has been no spoliation of papers to affect this ship. When it is alleged to have taken place the master could not have known that war had been declared; it was not therefore a spoliation in the proper sense of the term. There was no ground whatever for the seizure, and the Court must therefore not only restore the vessel but condemn the seizor in costs.

The *Queen's Advocate* and *Admiralty Advocate* in reply.

It is objected that the Custom-house officers, having no commission, had no right to seize this vessel, and that this Court has no jurisdiction to try such a case; but in *La Rosine* (*q*), seizure was made by an officer in the Fife Dragoons. It is common for captures to be made by non-commissioned persons. The capture is equally good, but it belongs to the Queen in her office of Admiralty. The *Rebeckah* (*r*).

DR. LUSHINGTON.—I will address myself in the first instance to the observations which have been made on behalf of the claimant with regard to the course of proceeding which has been adopted on the present occasion, and perhaps I ought to take some little blame to myself for having elicited some of those observations in consequence of what had dropped from me in reference to the embargo which is placed on Russian vessels—vessels bearing the Russian flag at the time they entered these ports. It had no reference to the case of vessels seized under other colours, but which subsequently turned out to be Russian. With regard to an enemy's property coming to any part of the kingdom or being found there, being seizable, I confess I am astonished that a doubt could exist on the subject. I apprehend the law has been this, that it is competent for any person to take possession of such property, unless it had any protection by licence or by some declaration emanating by the authority of the Crown, and to assist the Crown to proceed against it to adjudication. There are many instances in which a capture has been made in port by non-com-

[2 C. Rob. 373.]

(*q*) The *La Rosine*. Tin plates for canister shot seized as stated in the text. Sir W. Scott said: "On this evidence I shall condemn these boxes of tin as droits of Admiralty."

(*r*) Vol. I. p. 118.

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missioned captors, and the usual form has been for the proceedings to be conducted under the authority of the Proctor for the Admiralty, and condemnation has passed to her Majesty in her office of Admiralty. If the property was on land, according to the ancient law it was also seizable; and certainly during the American war there were not wanting instances in which such property was seized and condemned by law, not by the authority of this Court but of another. That rigour was afterwards relaxed. I believe no such instance has occurred from the time of the American war to the present day, no instance in which property inland was subject to search or seizure, but no doubt it would be competent to the authority of the Crown if it thought fit.

The *Queen's Advocate*.—Recently, during the present war, ships on land have been seized, I believe.

THE COURT.—That was under peculiar circumstances.

The *Queen's Advocate*.—Not in this Court, but by inquisition *in rem*.

THE COURT.—But that was property belonging to the Emperor of Russia, and not to a subject. The munitions of war fall under different rules. I am not aware that it has pleased her Majesty to take measures to seize property which might be lying in a merchant's hands in the City of London or elsewhere. I believe that the proceedings to which you allude are of a different character. I cannot entertain a doubt that these proceedings have been duly instituted, and they have been sanctioned by those who advise her Majesty in her office of Admiralty, as well as by her Majesty's Advocate.

Then the only question, or rather the great question which remains for me to decide is whether the claim for the ship ought to be admitted, whether further proof is necessary, or whether it ought to be condemned. Now, the facts of this case are somewhat peculiar. The fact of the vessel having been seized while lying in the London Docks does to some extent account for her not having the usual papers on board, because it is customary for them, while the ship is lying in port, to be in the hands of the consul acting for the State to which the ship alleges itself to belong.

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Therefore I am not surprised myself that no further papers have been found than those attached to the affidavit of Mr. Cox, the seizing officer. There are papers to which I will presently advert, but these are not the papers of primary importance in this case. The general features of the case are as follows:—This vessel was built in the kingdom of Hanover in 1853, her master throughout the whole period was a Hanoverian, and so were the whole of the crew, and, as appears from certain parts of his evidence, the present claimant is the individual who, to a certain extent, had the direction of her commercial transactions. The claim on the present occasion is entirely founded on her transfer, and it is ludicrous to contend that the property of the ship was not, immediately after her building, in Mr. Rucker, who was resident at Riga, because the claim is founded on the ship having been bought of Mr. Rucker; therefore, so far as the Prize Court is concerned, that must be taken to be an admitted fact. She was the property of Mr. Rucker, and she sailed under Russian colours from the time she was built up to the period of sailing from the port of Lisbon.

Now, Mr. Rucker is a gentleman who, according to the evidence, is a Hanoverian subject, acting as the Hanoverian Consul, resident at Riga, a Russian port. He has been domiciled there for many years, and must therefore, in consequence of his domicile, in all that relates to his national character be taken to be a Russian, not a Hanoverian. There is no principle, I apprehend, so well laid down—no principle so generally followed as this, that whatever country a gentleman may belong to, if he is resident in and carries on trade for a period of time in another country, he must be taken, for the purposes of trade, to belong to that other country, and not to his original domicile. With regard to the possibility of there being a *locus penitentiæ*, that argument might have been addressed to the Court, supposing the claim had been on behalf of Mr. Rucker, but it can have no bearing when the claim is on behalf of another person.

What I have to see, therefore, is whether there is sufficient proof of a valid transfer from the Russian owner of the ship to the present claimant, who is a Hanoverian subject. That proof may be wholly insufficient, or it may be sufficient, coupled with other evidence, to call on the Court for the admission of further

proof, or it may be so mixed up with transactions reflecting on the *bona fides* of the proceeding, that the Court may be called upon to condemn the vessel. Looking at the state of public affairs at the latter end of 1853 and the beginning of 1854, it is perfectly consistent with probability that every person possessed of a Russian vessel would be desirous of selling it, though at a considerable sacrifice; and I have no doubt that many Russian vessels have been sold, or attempted to be sold, during that period. I say, such a sale is probable, but is also suspicious; it is suspicious for the obvious reason that a sale made under these circumstances—particularly to a person in the situation of the present claimant—is undoubtedly questionable, because it is well known that there is a mode of carrying on trade without being the actual owner of the vessel, namely, by transferring her to a pretended purchaser. Certainly, when a transaction of this kind is done under pressure, there always exists a certain degree of suspicion that it is not *bonâ fide*. With regard to the legality of the sale, assuming it to be *bonâ fide*, it is not denied that it is competent to neutrals to purchase the property of enemies to another country, whether consisting of ships or anything else; they have a perfect right to do so, and no belligerent right can override it. The present inquiry, therefore, is limited to whether there has been a *bonâ fide* transfer or not.

Looking at this case on legal principles, I must consider what is the evidence which has been given on deposition, and also what is to be found in the ship's papers; both those attached to Mr. Cox's affidavit and those annexed to the depositions, and subsequently brought in by Mr. Currey, the examiner on the present occasion. With regard to the facts of the case, the evidence of the master is by far the most important, and I must advert to that somewhat in detail. The account which, upon the third interrogatory, the master gives is, that "the schooner sailed on her voyage from Leer on the 20th of October, 1853, under Russian colours"—if I understand him rightly, this is the commencement of the only voyage he undertook—"Why she did so, is a thing belonging to the owners. I never knew or asked to know. She had no other colours then on board." In my judgment, not the least suspicion arises from this evidence—none

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whatever. It was in October, 1853, that these colours were hoisted, and undoubtedly Russian colours could not then have been hoisted to interfere with the rights of England and France. Russian colours might be used for the purpose of taking advantage of sailing into Russian ports, where Russian flags were entitled to enter; but, supposing that was the case: supposing they were used for the purpose of practising fraud on Russian ports: that is a matter of which this Court can take no cognizance whatever, for there is no maxim better laid down than that the Court of Prize never takes cognizance of any practices to which ships may resort to obtain advantages in other States. Then, assuming it to be true, it is consistent with probability that Russian colours were used for the purpose stated, and it does not in any degree derogate from the good faith of the present transaction. I must confess I was astonished at the argument of counsel on that point, for I cannot see how using Russian colours in October, 1853, could possibly have any effect on our belligerent rights at the present time. With regard to the subsequent change of colours, the facts of the case appear to have been these: that the master, when lying in the port of Newcastle, received a letter, according to his statement, from Mr. Rucker, in which was enclosed, as stated in answer to the 11th interrogatory, a power of attorney to sell the vessel. Of course, up to this time she had sailed under Russian colours, and his account is this: "When I was in Newcastle, in January last, I received a power of attorney to sell the said ship from the said Mr. Rucker, referred to in my 8th answer. This power was sent from Riga, where Mr. Rucker lives, to my house at Leer, and was sent on thence to me at Newcastle by my wife. The said Mr. Rucker also sent me a letter to Newcastle desiring me to sell the schooner to whomsoever. Mr. Rucker is the Hanoverian consul," and so on. He says, "I believe Mr. Rucker is a Hanoverian subject. I have known him personally for ten years, and he has been consul-general as aforesaid all that time, and I know he is a German. I was thunderstruck to receive the said power, for I was always under the impression, up to that time, that the schooner belonged to the said George Schwers," *i.e.*, to the present claimant. Now, this has been open to a great deal of observation, and at first, I confess, I was myself struck with this

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part of his evidence, but, upon consideration, my surprise has ceased. It appears, from another part of his evidence, that he was appointed to the command of the schooner in 1853, by Mr. Schwers, and that he corresponded with this gentleman chiefly, though occasionally with Mr. Rucker; therefore I am not at all surprised that he laboured under the impression that, though sailing under Russian colours, the property was in reality Mr. Schwers'. I may observe that it is a matter at which no one ought to be much surprised, because it is perfectly notorious that the merchants of Great Britain have repeatedly, at various times, been owners of foreign vessels sailing under foreign flags—a privilege of which they would be very sorry to be deprived—a privilege which, though it may subject them to difficulty in case of war, they are entitled to exercise, except so far as the rights of war may interfere with it. He then goes on to say, "Mr. Rucker's name appeared on the Russian sea-pass"—now he is accounting for this—"which I then had (and of which I shall depose hereafter), but I thought that was only a pretext." He was under the impression, not an unnatural one, that it was for pretence that the name of Mr. Rucker was inserted in the sea-pass.

Then it appears that, upon receiving this power of attorney, he goes over immediately to Hanover for the purpose of acting upon it; and he says that, by virtue of the said power, he transferred the schooner to Mr. Schwers. It appears that he was there on the 22nd of January, that is the date of the sale, and he came back to Newcastle, having accomplished his voyage with as much expedition as he could, and thence sailed to Lisbon on the 28th. Now, with regard to the power of attorney under which he acted, no doubt it is not binding in the same manner in which such a document would be framed in England. It begins by appointing him master, he having stated that he derived his appointment before from the present claimant; it then requires him to keep an account, and to recompense himself for all the services he might perform; but the clear gist of the whole is, that it fully empowers him to sell the ship and receive the purchase-money. Accordingly, this bill of sale is executed, and it fairly states that the vessel was at that time voyaging under Russian colours, and lying in the harbour of Newcastle-on-Tyne with all her appurtenances. That

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appears a fact in favour of the present claimant; there was no concealment of the circumstance—none whatever—at the time the sale took place. The exhibition of this document, supposing it to be shown to the captors, would undoubtedly have given information with regard to the proceedings of the vessel herself. Now, in section 4 of the bill of sale is the following important statement: "The purchase-money for the sold ship, with her appurtenances, is fixed at the sum of 8,000 rix-dollars, which have already been carried into account between the contracting parties before the signing of these presents." Here I must say this is a very unsatisfactory mode of effecting a sale, though I do not mean to say it is unusual. I do not mean to say that it was not effectual, but the mode of payment by merely carrying the purchase-money to an account, which of course is hidden from the view of any Court having to investigate the transaction, produces in a matter of this kind a considerable degree of doubt. The effect on my mind of this mode of paying the purchase-money is not favourable to the proceeding with regard to the transfer of the ship.

The bill of sale bears date on the 23rd of January, and there has been a great deal of conflict as to the master sailing from Newcastle under Russian colours after this date; and it does appear to me to be a fact requiring explanation why, after the transfer of this vessel on the 23rd of January, Hanoverian colours were not hoisted, and the Russian colours put on one side; why the vessel should not have sailed from the port of Newcastle under Hanoverian colours, having then become Hanoverian. I do not know that I have a satisfactory account of it, except in this way: by supposing that a certain time must elapse before it was possible for the master to acquire Hanoverian colours and papers, namely, the sea-pass, &c.; and therefore he was compelled for the present to continue his Russian colours. He does continue the Russian colours till he proceeds from the port of Lisbon.

An observation was made in argument with respect to the paper No. 2, which is the account of the master respecting the payment made to the Russian consul at Newcastle. I see little in that, inasmuch as the master stated that when they give up the Russian papers, they make a payment, as well as on receiving them. I see nothing of importance in that; besides, at that time the vessel continued under Russian colours.

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Now, as to the sea-pass. I presume all the Russian papers were on board at the time; but the sea-pass is a very remarkable document. It bears date the 29th of November, 1853, and it is not to come into force till the 4th of February, 1854, and is to last till 1855. No explanation of this is given in the evidence. Undoubtedly, so it stands. Assuming it to be, as it was argued on behalf of the captor, that the application was made on the 29th of November, 1853, it would be a circumstance tending very strongly to impeach the integrity of all these proceedings, because the power of attorney is not dated till the 14th of December. But presuming this pass to have been utterly blank, and afterwards filled up, of the probability of which I say nothing, then the matter would be capable of some further explanation; for it would appear the pass was given to operate on the ship from a given time, namely, I presume, from about the time she would arrive at Aurich. It stands thus; the captain is bound to produce this sea-pass at every foreign port where a royal Hanoverian consul or vice-consul is appointed. Then it seems to be exhibited at Lisbon on the 3rd of April, and in London on the 29th of April, upon his return. It had been issued at Hanover on the 29th of November, 1853, and was delivered at Aurich on the 4th of February, 1854—I apprehend by the officer whose business and duty it was to have the care of matters of that kind—to come into force at that period. There are certainly circumstances attending this part of the transaction which are not altogether satisfactory on the face of the papers.

I am not aware that there are any other papers to which it is necessary to advert. Upon the vessel arriving at Lisbon, I think it is of very little importance whether the papers were laid before the consul on one day or the other. Then on the return voyage the master sailed under Hanoverian colours; I apprehend for this reason: he sailed then, and not before, because he was not in possession of the sea-pass, and not in possession of the right to use Hanoverian colours at all. But several objections have been taken to the evidence in support of this claim. It has been said that the master is entirely discredited by various circumstances; and the fact principally relied upon is the circumstance of his having denied that there was any spoliation of papers. Now in truth and verity

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there was a spoliation of papers. I must say a word as to the spoliation of papers generally before I address myself to this fact. I do not know that there is to be found in any of Lord Stowell's judgments any direct definition of the word "spoliation." I am of opinion that the mere destruction of papers is not, under all circumstances, to be considered a spoliation; I say under all circumstances, because the principle might be carried to a very absurd length. I apprehend it might be said, if at any time during a long voyage the master destroyed papers that had no relevancy to it relating to a former voyage, the matter would not be put in issue. To say that was a spoliation of papers would be going the length of saying that nothing in the nature even of a private letter was to be destroyed after the vessel had left her port. I am not, however, disposed to relax the practical effect of the rules laid down by Lord Stowell, because they are consistent with good sense and with justice to all parties; but they must not be pressed beyond his true intention with reference to all the facts of the case, because there is not one of the cases cited to me yesterday, when I came to examine them, which I have done with a great deal of care, in which I do not find that to form an accurate judgment of them you must be acquainted with the whole facts of the case. To pick out a single sentence would give no accurate idea of Lord Stowell's opinion on the rules which he intended to prescribe to himself in matters of that kind.

The case of the *Hunter* (*s*) was a case of a very peculiar kind. There the mate was caught in the act of spoliation after the voyage was begun. Neither the master nor the supercargo were produced, but they had been allowed by mutual consent to quit the vessel and go away, so that the best evidence, either for the captor or the claimant, was wholly wanting. But notwithstanding the fact of this spoliation of papers—and a grave spoliation it was, no doubt—further proof had been allowed in that case, and the question which was there discussed was whether still further proof should be allowed, the further proof being insufficient. The spoliation of papers clearly appeared on the face of the depositions, and yet further proof was allowed under these circumstances; therefore it

(*s*) *Ante*, p. 208.

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cannot be contended that the spoliation of papers uniformly and always shuts out a right to further proof. That proposition is negatived by the facts of this case to which I have now adverted. That was a case under peculiar circumstances; I find upon looking at my note-book that it was appealed and afterwards compromised.

The *Two Brothers* (*t*) is another case which has been cited. That has but a very slight bearing on the question of spoliation at all, because on looking at the case it will be seen that Lord Stowell thus expresses himself: he says that he decided it on the ground that the claimant did not appear to have any interest in the question. To be sure, that was quite a sufficient ground without resorting to what would be the effect of the spoliation of papers. Now, it is true, in that case the fact of destroying papers is commented upon by Lord Stowell, and he states the effect on his mind, but it does not appear how the spoliation took place so as to form any direct guide to my judgment. It is stated that the master burnt some papers before the capture—when, how long before, or what, there is no information. But I need not rely on that case or advert to it more, because it is quite clear that it did not turn on the spoliation of papers, but on a defect of proof on the part of the claimant.

In the *Rising Sun* (*u*) Lord Stowell lays down the doctrine that although spoliation does not inure to condemnation, with other sus-

(*t*) 1 C. Rob. 131. [Not republished. A decision on a question of fact.]

(*u*) The *Rising Sun* (July 16, 1799).—This was a claim by the master for the greater part of the cargo on an American vessel. A small part was claimed by the owner of the vessel, and a small part by one Leaman, a passenger. It was admitted that there was a spoliation of papers, the parties to it being the master and Leaman. The master said that there were eight or nine letters under the care of Leaman, but that he took them from him on the appearance of the chasing vessel, which he supposed to be a French vessel. No reason was given for destroying these letters. Sir W. Scott said:—"Here there is a spoliation, unaccounted for and unexplained, traced home to the master of the vessel, who is also the asserted owner of a great part of the cargo. Spoliation is not alone in our Courts a cause of condemnation; but if other circumstances occur to raise suspicion, it is not too much to say of a spoliation of papers, that the person guilty of that act shall not have the aid of the Court, or be permitted to give further proof, if further proof is necessary." The Court then considered the history of the case, and found the story "excessively improbable;" and therefore rejected the claim of the master, and allowed further proof in the case of the owner and of Leaman. Freight to the owner was also refused. [2 C. Rob. 104.]

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picious circumstances it shuts the door against further proof. To that doctrine I entirely assent; where there has been spoliation in some cases we may allow further proof, in other cases which you cannot describe, if the circumstances are full of strong suspicion, then, to use his own expression, the door is shut against further proof. In that case the spoliation was strong indeed, because the papers were destroyed on the appearance of the chasing vessel.

Now let me say a word on this, as to the time at which the papers are destroyed. I pray that my meaning may not be understood beyond the words I use. I hold time to be of great importance; if papers are destroyed when the capturing vessel is in sight or there is a chance of capture, it is the strongest proof that these papers contain some matter which would inure to condemnation; so it is if they are destroyed at the time of capture, and if they are destroyed clandestinely after capture; but if the papers are destroyed a long time antecedently, before there is any probability that they were destroyed for fraudulent purposes, and there is no evidence that it was for fraudulent purposes, then, though there is spoliation, and though no doubt the inference of law is against the act during war, yet the case is of a less stringent nature.

The *Polly* was also cited (*x*); that is a very important case. There it is said that the spoliation makes a case for further proof; not that the spoliation of papers is a reason why no further proof should be granted, but it makes a case for further proof.

The *Queen's Advocate*.—It cannot be released without further proof.

THE COURT.—That is the doctrine laid down there, and it is perfectly true. So far as appears, the spoliation in that case was at the time of capture or afterwards, but in that case the property was restored, as you see at the end of the *Polly*; so that spoliation, on that occasion, did not extend to inure to condemnation.

The *Queen's Advocate*.—Upon further proof.

Dr. Twiss.—Lord Stowell says it is impossible for the Court to relax the rule; where there has been suppression of papers there must be further proof.

(*x*) Vol. I. p. 248.

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THE COURT.—He uses the word "suppression"; these are the words I am using.

Now, to come to the fact of the suppression of papers in this case, and see to what extent it goes. An observation was made by Dr. Addams which induced me immediately to send for the standing interrogatories, and the 17th is in these words: "What papers, charter-parties, bills of lading, invoices, letters, or other writings were on board the ship at the time she took her departure from the last clearing port, before she was taken as prize? Were any, and, if yea, which of them burned, torn, or thrown overboard?" I apprehend Dr. Addams was right in his observation thus far; what may have taken place on a previous voyage does not directly come within the purport of that interrogatory. I in no degree blame the examiner for taking down the evidence, for it is better that the examiner should take it down, and that it should be expunged, than that it should be suppressed, and the Court know nothing about it. I apprehend, strictly speaking, that interrogatory is intended to apply to the destruction of papers after the last clearing port, the effect of which would be here that it would exclude that part of the evidence given by the mate as to the destruction of papers upon the voyage from Newcastle to Lisbon. The cook swears positively to the destruction of certain papers after the departure from Lisbon, and upon the way on the voyage home.

I must first see what is said by the mate. He states that the papers were destroyed on the passage from Newcastle, and were papers obtained from Riga.

I leave that out of consideration. He states the nature of these papers; and then he goes on and says: "I also saw the captain burn some papers, I do not know what, whilst we were lying at Lisbon"; that would run very nearly, I should say, within the line, but what follows, it would be safer, if I were not to consider it as evidence, because it does not appear to relate to the same transaction.

The cook says, in answer to the 17th interrogatory, "I know nothing whatever respecting any of the ship's papers, for I never saw any of them to read them. On one occasion, during our last voyage from Lisbon to London, the captain brought to me, when I was in my cooking-place on the deck, a handful of papers, and

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directed me to burn them, which I did in my fire, being alone at the time. What they were, or what were their contents, or whether they were written or printed, I cannot say, for I did not read or look at them." Now, this is positive evidence, in my judgment, as to the destruction of some papers on this voyage; and though I am of opinion that the destruction of papers antecedent to a known declaration of war does not operate with the same force and effect that it operates during the time of war, yet, at the same time, I think that it is of very considerable importance. The distinction I take is this: I do not think that the destruction of papers antecedent to war draws upon it the same penal consequences which it does during war; but I think it gives rise to very strong suspicion, which suspicion must be removed, or it will be fatal to the case. There are cases of destruction of papers, which in themselves draw immediate penal consequences, and call upon the Court for immediate condemnation.

The captain, on the 17th interrogatory, says: "There were no papers or documents relating to the said schooner or cargo in any way burned, torn, thrown overboard, destroyed, altered, cancelled, concealed, or attempted to be concealed, either during her last or previous voyage, or at any time whatever."

I conceive that with regard to the fact I must rely upon the evidence of the cook, and that there were papers destroyed; but whether it follows from the fact being so, that this captain has wilfully perjured himself, is another and a very different consideration; for we know not what the nature of these papers was; and the answer is in these words: "No papers or documents relating to the said schooner or cargo were in any way burned, torn, thrown overboard, or destroyed." It may be,—for it is a conjecture which I will not much rely upon,—it may be that the papers which were so destroyed were papers which had no reference to the schooner or cargo at all, and so far the captain may be relieved from the charge of having sworn falsely; and yet at the same time the Court must deal with the fact as a fact. With regard to its operation in this case, I am not under the necessity, from any consequences that will follow, of going the length of saying that the master has been wilfully perjured.

Then this case, in my judgment, stands thus: There has been

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what the law terms the spoliation of papers, and in addition to that I am not satisfied on two points: I am not satisfied as to the payment for the ship, and I am not satisfied exactly as to the manner in which the sea-pass was obtained. It appears to me, under these circumstances, that it is a case for further proof. I do not think the spoliation of these papers connected with circumstances of such grave suspicion as would justify me in condemnation. I think the party is entitled to the benefit of further proof; I shall therefore admit further proof.

Her Majesty's Advocate asked if I would direct evidence to be taken by plea and proof, and open the case to the captors. That is most unusual; so unusual, that in the course of my recollection I hardly remember its being done. I would rather refer to the memory of the learned Advocate for the Admiralty, and ask if he remembers that there were cases by plea and proof open to the captors? *Dr. Phillimore.*—No, sir.

THE COURT.—I cannot charge my memory with more than one or two. There is the case of the *Magnus* (*y*). The effect of

(*y*) The *Magnus* (Nov. 20, 1798).—The question in this case was whether cargo belonged to a native of Switzerland, as alleged, or of France. The cargo had been referred to further proof by plea and proof. The Court found that there was a defect of evidence. It proceeded:—"Thus stands the case on defect of evidence, and condemnation, it is urged, must necessarily ensue. Total defect of evidence is certainly, on the general rule, a legal ground of condemnation, especially where the party has been indulged with the opportunity of supplying the defect. But it is always a painful thing to the Court to decide on mere defects; they arise sometimes from ignorance, from negligence often, or perhaps from accident. [1 C. Rob. 31.]

"On mere defect, it would have been with great pain that I should have proceeded to condemn so considerable a mass of property as is involved in these causes; it would relieve me from this anxiety to find also, in addition to these defects, some affirmative proofs of fraud. I have, therefore, looked into the case with this view, and I think it is a case which will afford me that satisfaction.

[The Court examined the evidence.]

"Thus stands the whole case. On a view of all these symptoms of fraud, in addition to defects of evidence, I think I should be fully justified in pronouncing it subject to condemnation: I should still, however, feel reluctant to condemn so large a property if I thought there were any means of obtaining further information, but I fear there are none.

"If the experience of the counsel can furnish any instance in which a second reference has been made for further proof, after the cause had undergone a trial of this nature by plea and proof, I should be glad to be informed

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opening the case to further proof on the part of the claimants is not to open it to the captors. All I shall do is to require further proof, and to state of what that must, independently of other things, consist. I must be satisfied that the sum given for the vessel was an adequate amount under all the circumstances; I must be satisfied that that money was *bonâ fide* paid; I must have all the correspondence produced which passed between the master and the gentleman resident at Riga; and I must have evidence from the claimant himself of all the facts and circumstances within his knowledge. With less than that the Court will not feel itself satisfied and at liberty to restore the ship.

Queen's Advocate.—We are not to bring in any further proof?

THE COURT.—No; I follow the course of Lord Stowell.

[Spinks, 26.]

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Lien—Restitution—Simulated Papers—Further Proof.

A lien, however honest, of a third party on captured property is no ground for its restitution.

The claim of a neutral merchant for 2,650 bags of coffee consigned to him on the credit of advances made by him, disallowed. Further proof cannot be allowed when there has been an attempt to deceive the Court by simulated papers.

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THIS vessel, a brig of 174 tons burthen, under Russian colours, sailed from Rio de Janeiro on the 15th January, 1854, with a cargo of 2,650 bags of coffee, bound to Helsingfors, in Finland, but on her voyage put into Elsinore, whence she sailed on the 11th of April. On the 17th she was captured off Dagerort, in the Gulf of Finland, by her Majesty's ship *Gorgon*.

The master and cook were examined in preparatory on the standing interrogatories, and a claim was given in by Mr. Henry Sharpe, of Broad Street Buildings, London, merchant, on behalf of Messrs. Behrens & Sons, of Hamburg, for 2,650 bags of coffee, laden on board this ship.

He made oath that he was duly authorised to make the claim for them, "the consignees, and as such the true and lawful owners

of it; if the Lords of Appeal think they can go beyond the forms of this Court and admit further proof, I cannot say I should regret it; but I fear I cannot make such a deviation from the established rules of practice."

Condemnation; but suspended to search for precedents on this point. Dec. 3.—Condemnation final; no precedents being produced.

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and proprietors" of the said bags of coffee. And he further made oath that "he is informed and believes that the said bags of coffee were so shipped in the month of January last past at Rio de Janeiro, and consigned to the said Messrs. L. Behrens & Sons, on the credit of advances made by them, and by means of their acceptances, to the amount of marks banco 102431 . 12, for the securing of the payment of which advances bills of lading of the said 2,650 bags of coffee, whereof the exhibit hereto annexed, marked A., is a counterpart, were made to them or their assigns; and that the said advances have not been repaid to the said Messrs. Behrens, but that the said consignment remains their only security; that until the said Messrs. Behrens shall be repaid or otherwise indemnified for the said advances, neither the Emperor of Russia nor any person being a subject of or inhabiting within any of the dominions or territories of the Emperor of Russia hath, directly or indirectly, any right, title to, or interest in the said goods."

Annexed to the affidavit and claim was a bill of lading for 2,650 bags of coffee, stated to be shipped by G. & W. Heyman on board this vessel, and bound to Elsinore for orders, to be delivered at such port of destination unto Messrs. Behrens & Sons, of Hamburg, or to their assigns, paying freight for the same as per charter-party, dated Rio de Janeiro, 14th of December, 1853, the bill of lading being dated 4th of January, 1854.

At the hearing a further affidavit of Mr. Sharpe was tendered and allowed by the Queen's Advocate, to be received as evidence. He made oath that, since filing the claim, Messrs. Behrens had transmitted to him three original letters in the German language marked A., B., and C., and six bills of lading inclosed in the said letter marked B.; that the said letters and inclosures were received by Messrs. Behrens in due course of post from Messrs. G. & W. Heyman, of Rio de Janeiro, merchants, the shippers of 2,650 bags of coffee aforesaid, and are (save the bill of lading No. 6) true and genuine, and in no manner false or colourable. That the said bill of lading, No. 6, is, as mentioned in the said letter marked B., a colourable bill of lading, but that the deponent, at the time of giving in the claim aforesaid, had no knowledge of the same, or the counterpart annexed by him to the said claim, being other than a true and genuine document, for the deponent at such time was

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not informed of, nor in possession of any other bill or bills of lading of a different term; and he verily believes that the bill of lading annexed to his said claim was sent to him for the mere purpose of specifying the property to be claimed. And he further made oath that the hereunto annexed bills of lading, marked 1, 2, 3, 4 and 5, transmitted to the said Messrs. Behrens as aforesaid, are indorsed according to the custom of merchants, and have the effect, until indorsed over by the aforesaid Messrs. Behrens, of constituting them, on their order, the lawful consignees of the several parcels of goods in the said bills of lading mentioned; and that the said bills of lading are still held by the said Messrs. Behrens as security for the advances made by them in respect of the said cargo, the whole of which advances are still due and owing to them save a very small sum, &c.

The contents of these exhibits are fully set forth in the judgment.

The *Queen's Advocate*, for the captors.

This is a claim for a portion of the cargo. It seems to be a claim of lien for advances for this coffee. The whole transaction is a disgraceful fraud; but, if not, the Court would disregard such lien. In the case *Aina* (*z*), the Court held that a mortgage could not be sustained against captors. He should ask the Court to condemn the claimant in the costs for the fraud. An affidavit has been brought in this morning on behalf of Messrs. Behrens, with certain letters and documents annexed. From these it appears that by desire of the captain simulated papers were put on board this vessel. There has been clearly an attempt to impose upon the Court, and to defeat our belligerent rights. The legal consequence is condemnation, without the privilege of further proof. (*Oswell* v. *Vigne* (*a*); the *Ecnrom* (*b*).)

It cannot be said that Messrs. Behrens are not responsible for the fraud. They are bound by the acts of their agents. (The *Ecnrom* (*b*); the *Calypso* (*c*).) The present case is quite analogous; the Messrs. Heyman were the agents of the claimant, who must be bound by their acts. In such a case the Court must condemn the claimant in costs.

Dr. R. Phillimore on the same side.

(*z*) *Ante*, p. 247. (*a*) 15 East, 75. (*b*) Vol. I. p. 168. (*c*) Vol. I. p. 238.

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Two questions arise respecting this cargo: 1st. The indorsement of the bills of lading; 2nd, the fraud respecting the papers. With regard to the first question, it is, in fact, a claim of lien, of which the Court will not take cognizance. This lien, too, would be revocable, and, therefore, least favourable. Besides, the indorsement is not an indorsement over to Messrs. Behrens, for whom the claim is made. As to the second question, it is a direct instance of fraud when compared with the evidence of the captain that no simulated papers were on board.

Dr. Deane, for the claimant.

This is not a case of lien, but of ownership. Certain Finlanders sent a ship to Brazil for coffee, but, having no credit there, the coffee was shipped on account of Behrens & Company, neutrals, residing at Hamburg. On B. & Co. the shippers drew bills, and to them, by the bills of lading, consigned the property. B. & Co. are the consignees in Europe. The bills of lading found on board the ship, and annexed to the ship's papers, are not indorsed, and the master could not pass the property described in them; but the bills of lading sent to B. & Co. are indorsed, and thereby they become entitled as owners to the property. This is the true meaning and effect of the indorsed bills of lading. Consequently the ultimate loss, if the property be condemned, will fall on B. & Co.; and the ultimate loss is the true test of ownership in the Court of Prize, according to Lord Stowell in the *Packet de Bilboa* (*d*).

It is said there was a fraudulent intention on the part of Messrs. Heyman & Company, the consignors in Brazil, to furnish the master with double sets of papers, the one true and the other colourable: the true, the charter-party, as well as bills of lading, in the names of several Finlanders; the simulated, or colourable, in the names of B. & Co. But there is no evidence of this, and the expression in the letter of Messrs. Heyman does not bear the argument out to that extent. At all events, it must have been a mere intention, never carried into effect; for only one set of papers in the name of B. & Co. were found on board, and there is no charge against the master of spoliation of papers. There is no case of condemnation on the ground of an intention to sail under

(*d*) Vol. I. p. 209.

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false papers. That would be carrying the case of *Oswell* v. *Vigne* (*g*) to an extravagant length.

The Helsingfors charter-party will be brought in as soon as it can be procured, if the Court will allow further proof, to which the neutral owners of this cargo are, it is submitted, entitled. The property was made over to B. & Co. by the indorsed bills of lading; it remains in them until such time as they are paid the amount advanced. As to the alleged fraud, they must have been ignorant of that, or, if informed of it, they had no time to countermand the orders.

Dr. Twiss on the same side.

There is one question only, viz., in whom is the property? It is not in any way a question of simulated papers. It must be borne in mind that it was a neutral shipper, not an enemy shipper. The bills of lading on board, not being indorsed, convey no property. (Abbott on Shipping (*h*).) In this case the property remains in the neutral shipper. [The *Queen's Advocate*.—There is no claim on his behalf; the claim is for the alleged consignee.] As to the indorsement, cases abound at Common Law; and the law of the Prize Court as to ownership is the same. [*Per Curiam*.—If you can establish that the Common Law and the law of the Prize Court as to property or ownership are identical, you will prove wonders. If this were in the time of peace, there would be no doubt whatever that the bill of lading indorsed by the consignors to the consignee would vest the property, but in the time of war the law is very different.] Mr. Justice Story seems to speak of the law being the same in these Courts as at Common Law, in the *San Jose Indiano and Cargo* (*i*), and Lord Stowell states the principle of effectual transfer of property in the *Cousine Marianne* (*k*).

There is no ground for refusing the claimant the privilege of further proof. There was no fraudulent intention with regard to the ship's papers; besides, the whole of those circumstances were antecedent to the declaration of war.

The *Queen's Advocate*, in reply.

The principle is clearly laid down in the *Jan Frederick* (*l*), that

(*g*) 15 East, 75. (*h*) 7th edit. p. 330. (*i*) 2 Gallison (Amer.), 225.
(*k*) *Ante*, p. 85. (*l*) Vol. I. p. 435.

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transactions in contemplation of war are judged by the same rules as during actual hostilities. These papers were simulated in the immediate contemplation of war, and for the express purpose of defeating the rights of one of the belligerents. The property would be, therefore, liable to condemnation. But it is not a question of ownership, but one of lien. These bills of lading were intended merely as securities for advances. The claim of lien will not avail in this Court.

Dr. R. Phillimore.—In the case of the *San Jose Indiano*, whatever may appear to be the opinions of Mr. Justice Story, they are founded entirely on English cases to which he refers.

DR. LUSHINGTON.—There are three courses open to the Court on the present occasion, either to condemn the property, to restore it, or to direct further proof. The course which the Court will adopt must depend on a consideration of the facts of the case, and the law applicable to them.

In the first instance, I look to what is found on board the ship, and to the examinations which have taken place upon the standing interrogatories. It is the cardinal rule of this Court that, *primâ facie*, the evidence upon which the Court must form its judgment is the ship's papers and the evidence of the master. It is very easy to set forth the contents of the examination of the master.

It appears that this was a Russian ship, and that she sailed under a charter-party from Finland to Rio de Janeiro; that there was to be purchased a cargo of coffee, which was to be brought back, and delivered in Finland, on account and at the risk of Finnish merchants. That is his representation. As far as he is concerned, he has no knowledge of the property now claimed belonging to neutrals; he believes it all to be Finnish property.

With regard to the papers found on board, there is neither a Finnish charter-party nor any other: a circumstance which appears to me a little surprising. But there are certain bills of lading to which it is necessary to advert. There are six of them, but it will be necessary to consider one only. It is as follows:—"Shipped by G. & W. Heyman, in the ship *Ida*, bound to Elsinore for orders." Then they state the quantity of coffee, the marks and

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numbers, "to be delivered at the port of destination unto order or to assigns;" nothing more being said except that the freight is to be paid as per charter-party, which is not forthcoming. This bill of lading is signed by the master, and I find in the margin the following words:—"To be cleared at Elsinore, at Messrs. A. Goadman & Gloerfeldt." Now, the master, I apprehend, could have hardly had any alternative but to have delivered these goods according to the bill of lading to some order. What that order was intended to be is left in perfect obscurity. There is no indorsement on this bill of lading, so there is no information given to the master how to act when he arrived at Elsinore. This being the state of things, there is no evidence whatever of any portion of the cargo belonging to a neutral.

I now come to the claim preferred for the purpose of considering whether the parties are entitled to immediate restitution, or to give in further proof.

The original claim is given in by Mr. Sharpe, a merchant of this town, who states that he is duly authorized to make the present claim on behalf of Behrens & Sons, who are neutral merchants, and he states them to be the consignees, and, as such, the true and lawful owners and proprietors of 2,650 bags of coffee. Then he goes on to state that they were shipped in the month of January last, and consigned to Behrens & Co. on the credit of advances made by them.

This appears to be a very clear statement with respect to this claim, which is founded on two things: on Behrens & Co. being the consignees, and on the cargo having been purchased on the credit of advances made by them. He then states that the bills of lading were made for securing the payment of such advances, and the advances have not been repaid. He further says that he verily believes, that until Behrens & Co. should be repaid or otherwise indemnified for the advances, no subject of the Emperor of Russia is entitled to the property.

The bill of lading was annexed to the original claim, and is in these words:—"Shipped in good order and well-conditioned," and so on. It then states that the master was bound to Elsinore for orders; not bound, as is stated in the other bills of lading, to Helsingfors, but to Elsinore, for orders. There is a difference with regard to the destination. In some cases a difference of

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destination has been held to be of great importance; whether it is so in the present case we shall see when we have further examined it. It also states that the bags of coffee are to be delivered to Behrens & Co., of Hamburg, or to their assigns, he or they paying freight for the said goods, as per charter-party, dated Rio de Janeiro, 14th of December, 1853, but which charter-party is not forthcoming. This bill of lading is signed by A. G. Steen.

On these papers the Court could certainly not have granted the claim; it could only have been asked to allow further proof; and whether it would have complied or not would have depended on the whole facts of the case, and whether there was any attempt to deceive the Court by the manufacture of papers which were not of a true and genuine character. But Mr. Sharpe, on behalf of Behrens & Co., has offered an affidavit, with sundry documents annexed; and her Majesty's Advocate, on behalf of the Crown, has assented to their introduction as evidence. I may therefore address myself at once to these documents.

Mr. Sharpe states that, since he made his claim, Messrs. Behrens have transmitted to him three additional letters in the German language and six bills of lading. He states that these letters were received by them from the shippers of the coffee, and are, save the bill of lading No. 6, true and genuine, and in no manner false or colourable. With regard to No. 6, he says: "The said bill of lading, No. 6, is, as mentioned in the said letter marked B., a colourable bill of lading."

The question will be: Colourable for what purpose? because there are circumstances in which a colourable bill of lading might be innocent, and circumstances in which it might draw after it legal consequences. Mr. Sharpe says, that at the time of giving in the claim he had no knowledge of the same, or the counterpart annexed to the same, being other than a true and genuine document. He says: "The five bills of lading are indorsed according to the custom of merchants, and have the effect, until indorsed over by Behrens & Co., of constituting them or their order the lawful consignees of the several parcels of goods." Upon that I apprehend there can be no dispute. Then, he says, the bills of lading are still held by Behrens & Co. as security for the advances made by them in respect of the cargo, the whole of which are still due

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save a very small sum. They appear to be all indorsed by G. & W. Heyman, except the last, for the genuineness of which he does not vouch.

I must now direct my attention to the three letters referred to, which certainly give the Court a considerable insight into the nature of these transactions. The first bears date the 14th of December, 1853, and therein the Messrs. Heyman acknowledge themselves in receipt of letters of a certain date, and say they observe thereby the confirmation of the credit for sundry shipments to Finland by sundry ships, of which the *Ida* is one. Now from this we get at one fact, viz.: that Behrens & Co. had given them credit of themselves, and they confirmed that credit for the purpose of making that shipment by the *Ida*. They say: "We request you to effect a provisional insurance." This insurance, which is not undeserving of consideration, is to be made on account of these persons who are represented by the master to be the real owners of the property. At the end of this letter the following words are added: "By the desire of the captain we shall give to the *Ida* double sets of papers." The captain, in his evidence, has not mentioned that fact at all; he says he knows the papers are all true and genuine; therefore, either this letter or the evidence of the captain is false. If the captain's is false, we all know the consequences, and there is no reason to suppose that Messrs. Heyman would assert a matter of this kind unless it were true. They go on to say: "That is to say, bill of lading and manifest, the original whereof is filled up to orders for Helsingfors; on the other hand, the duplicate relating to the before-mentioned coffee is made out in your names to Elsinore for orders." Now, that simulated bill of lading was certainly framed for some purpose or other by desire of the master. It is a well-known rule of this Court, that where there are contradictory papers the burden of proof lies on the claimant, to show that the contradiction is not inconsistent with the rights of a belligerent power; and I must say I have not heard any satisfactory explanation of how or why these papers were framed, except it was for the purpose of deceiving those who might have to determine whether it was an enemy's property or not. The second letter seems a mere duplicate of the first. In the third, marked C., they say: "Enclosed we now have the satisfaction

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to hand you letter of advice, invoice, and bill of lading for 2,650 sacks coffee, per Russian brig *Ida*, &c." This invoice, of course, the Court has not; but the bill of lading, I apprehend, can be no other than that now brought in by Mr. Sharpe. They then go on to say: "Agreeably to the credit opened for us with you, and confirmed by you, we have now taken the liberty to draw upon you for the account of the above-named friends"—so that bills of exchange have been drawn and placed to the debit account of the Russian merchants. Then we find these words: "We furthermore delivered to him," *i.e.*, the captain, "a charter-party which was made out for her *pro formâ*, and as he by this proceeding has no papers on board which would compromise the cargo, consequently we trust that, in case of war, it will be an easy matter for you to reclaim the cargo." This, of course, means that by their putting papers on board which do not say whose property the cargo is, in case of a war it will be no proof that the cargo belongs to a Finnish subject.

These being the facts of the case, I will now address myself to some of the law which has been quoted as applicable to them. The claim, I have said, is founded on two grounds: First, on Messrs. Behrens & Co. being the consignees of the cargo; and, secondly, upon their having a lien on the property. It has been contended by counsel that the property is in Behrens & Co. by virtue of the indorsement of the bills of lading; and cases from common law have been cited in support of this. I believe that, under some circumstances, that would be the case. They would have a legal title to the property; but I have considerable doubt whether it is not the law of this Court that the claimant must show that he has not only a legal, but an equitable title. If a mere legal title would justify the Court in restoring property, the consequences would be most alarming; for nothing would be more easy than to cover enemies' property from one end of the kingdom to the other. I strongly object to the doctrine that if a legal title be shown this Court is bound to restore; for I hold that an equitable title is also necessary to support a claim in this Court. With reference to the case (*m*) which was cited from the American Reports, it does not appear to me that the remarks of Mr. Justice Story have any applicability to the present case, or to

(*m*) *The San Jose Indiano and Cargo*, 2 Gallison, 267.

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the law which I am bound to administer. It appears that, in that case, an order had been given for certain goods to Messrs. Dyson & Co., merchants in England, an enemy country, by Mr. J. Lizam, of ——, in Brazil; that they executed the order, but, not being willing altogether to trust Mr. Lizam, consigned the goods to Messrs. Dyson & Finney, of Rio de Janeiro—a commercial house composed of the same partners, but trading in a neutral country. In fact, the shippers in England consigned the goods to themselves in Rio; and the question being whether, *in transitu*, the property was in Mr. Lizam or not, it was held that it was still in Messrs. Dyson, the shippers, who were also the consignees.

To the remarks of the learned judge I fully subscribe, but I do not see their applicability to the present case.

It would, perhaps, be as well to notice as I go on, the case of the *Cousine Marianne* (*n*), of which a sentence was cited. That was a question whether certain goods, which had been imported into England under a licence in which the words "to whomsoever the property may appear to belong" were omitted, and which were shipped by enemy merchants, had become the property of the British consignee, or whether they still remained in the enemy shipper? Lord Stowell there said: "It is a settled principle in this Court, that in order to constitute an effectual transfer of the property there must be either an order for the goods, or an acceptance of them by the consignee, prior to the capture." In construing Lord Stowell's words we must always be careful to remember the facts of the case, for it is impossible to arrive at his opinion from an isolated sentence. He goes on to say: "If the capture takes place where no order has been given, and before the goods have been accepted, they must be considered the property of the persons who have so consigned them." Who can possibly doubt that? If no order have been given, it would be contrary to common sense to say that a man should be bound to take and to pay for that which he had neither ordered nor subsequently accepted. He then says: "In this case, therefore, the Court has called for evidence to show whether any order had been given by the British merchants, or any act done by them in the nature of an acceptance before the capture. It is not pretended by the

(*n*) *Ante*, p. 83.

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claimants that any specific order was given for these goods, and so on." So that the circumstances of that case were very different from the present; and if it was at all applicable, it would tend to show that the property in the present case was in the shipper, for whom no claim whatever has been made.

There was a case cited the other day which appears to me to have much more bearing on the present question. I allude to the *Marianna* (*o*). In that case the vessel had been sold at Buenos Ayres, by an American, to a Spanish merchant; the purchase money, however, had not been paid, but was to be satisfied out of the proceeds of a quantity of tallow consigned to England on board this vessel for sale. The vessel was seized on her voyage to this country, documented as belonging to a Spanish merchant, and a claim was given on behalf of the former American proprietor, in virtue of the lien which he professed to have retained on the property for the payment of the purchase money. That case more closely resembled, in fact it is a much stronger case than, the present; it was a claim much more in the nature of a lien. But what does Lord Stowell say? Does he admit this to be a claim which must be upheld? No. He says: "Such an interest cannot, I conceive, be deemed sufficient to support a claim of property in a Court of Prize. Captors are supposed to lay their hands on the gross tangible property, on which there may be many just claims outstanding between other parties which can have no operation as to them." Yet a stronger case of lien could scarcely exist. Further on, he says: "Then as to the title of property in the goods, which are said to have been going as the funds out of which the payment for the ship was to have been made. That they were going for the payment of a debt will not alter the property; there must be something more. Even if bills of lading are delivered, that circumstance will not be sufficient, unless accompanied with an understanding that he who holds the bill of lading is to bear the risk of the goods as to the voyage, and as to the market to which they are consigned; otherwise, though the security may avail *pro tanto*, it cannot be held to work any change in the property." It is not pretended in the present case that any such risk fell on Messrs. Behrens & Co. They may have held the bills of lading as a security; but, if I

(*o*) Vol. I. p. 518.

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wanted authority, I have that of Lord Stowell for saying that is not sufficient to convert the property so as to defeat the right of a captor.

But, wholly independent of authority, it is an established principle of this Court that no lien, however honest, affords sufficient ground for restitution. It was asserted to its fullest extent in the *Tobago* (*p*), than which a harder case can scarcely be conceived. A British merchant had lent money to the master of a French vessel on a bottomry bond previous to hostilities, but Lord Stowell refused to allow the claim as against the captors, and said there was no instance in which the Court had recognized bonds of this kind as titles of property, and that they were not entitled to be recognized as such in the Prize Courts.

Such is the law. But, looking at the facts of the present case, can I doubt where the property lies? I am clearly of opinion that the property belongs to an enemy, subject to Messrs. Behrens' charge.

The property was ordered from Finland by persons whose names are set forth by the master, and Messrs. Heyman would not have given effect to those orders had it not been for the intervention of Messrs. Behrens & Co.; the consignors were paid for the property, which became wholly divested, and the consignees were to indemnify themselves for the advances they had made. There is no case on record, that I am aware of, in which, when a lien existed even prior to the commencement of a war, the Court thought itself justified, on account of that lien, in making restitution. I cannot hold that the present claim stands in a more favourable light.

There is another point of law to which I must now refer. It is not possible to doubt for a single moment that there was an intention in this case, by means of colourable bills of lading and of this non-apparent charter-party, to deceive and defraud this country of its belligerent rights. Human ingenuity can discover no other reason for such a proceeding than to cover enemy's property as neutral. But it is said that Behrens & Co. cannot be affected by this, because it was not done under their authority. It appears, however, to have been the act of the master, who must be responsible, and the act of their own agents, Messrs. Heyman.

(*p*) Vol. I. p. 456.

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Looking, then, at the whole of the case, I entertain no doubt that I must condemn the property, because the claim, which is simply that of lien, is in no degree strengthened by the fact of Behrens & Co. being consignees. I cannot see that further proof would alter the nature of this claim; besides, it is contrary to the rule of this Court to allow any further proof where there has been an attempt to deceive the Court by the manufacture of false papers. I have been pressed by the Queen's Advocate to condemn the claimant in the present case in costs, but to that I cannot accede, as it has not been usual to condemn neutrals in costs, unless under very peculiar circumstances.

THE FIDENTIA (No. 1).

[Spinks, 39.]

Practice—Further Proof—Evidence of Master Insufficient—Standing Interrogatories—Further Time—Affidavit.

When the evidence of the master as to the ownership of the property claimed is deficient, it cannot be restored without further proof. Evidence by standing interrogatories should be taken in full, and one interrogatory should not be answered by reference to the answer to another.

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THE Russian barque *Fidentia* sailed from Cadiz on the 9th of March, 1854, bound for Loviso, with a cargo of salt, wine, corks and olive oil, and was captured by her Majesty's ship of war *Tribune* upon the 9th of April.

A claim given for the ship by an enemy was directed to be amended, as in the previous case, but was afterwards abandoned. A claim for a portion of the cargo, specified in two bills of lading, was made by Elias Charles Unonius, of Winchester Street, London, on behalf of "John Duncan Shaw, of the City of Cadiz, a British subject, the sole owner and proprietor thereof."

These bills of lading, which were annexed to the affidavit of the claimant, were dated March the 7th, 1854, and stated the goods to have been "shipped by John Duncan Shaw, to be delivered to Elias Unonius & Son, Esqs., or to assigns; freight for the same goods paid in Cadiz." On each of these bills, and bearing the same date, was a certificate of the British Consul at Cadiz, to the effect that "Enrique Campagne, *pro* John Duncan Shaw, a

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British merchant established in that city, personally appeared, and voluntarily declared upon oath that the goods described in the bill of lading were *bonâ fide* his own property, and had been shipped on that day by his sole account and risk to the consignment of El. Unonius & Son, Esqs."

The master, mate, and cook were examined on the interrogatories.

The *Queen's Advocate* and *Dr. Robinson*, for the captors.—The claim for the ship must be amended. That for the cargo stands on a different footing. But there is a deficiency in the affidavit accompanying that claim sufficient to induce the Court to reject it. The agent does not swear to his belief that the property, if restored, will belong to his principal. The principal question will be: to whom will the property belong, if restored? It might belong to him when it left Cadiz, but still might not belong to him if returned. That is the only principle on which it can be claimed in this Court. The affidavit is carefully drawn, yet that important point is omitted. The agent might easily have communicated with his principal at Cadiz. The omission, therefore, is a very suspicious circumstance.

The claim itself, as to the property of the cargo, fails on the evidence and the ship's papers. The master, on the eighth interrogatory says: "Mr. Unonius is the corresponding owner, having the direction and management of the trade of the ship and cargo, and with whom I corresponded thereon." Here he first touches on the cargo, and says nothing whatever of Mr. Shaw, but distinctly puts another person in as the owner.

[*Per Curiam.*—You must bear in mind, Queen's Advocate, the terms of the interrogatory: "With whom do you correspond on the concerns of the vessel or her cargo?"]

Certainly; but this is the first time the cargo is mentioned; and he makes no allusion whatever to the claimant. And to the twenty-first interrogatory he gives a most prevaricating answer, and professes to know nothing about the matter. He cannot tell whether or not the cargo, if it had arrived at its destined port,

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would have been the property of the consignees or of Mr. Shaw, or whether it was then their property, or to be sold by them for Mr. Shaw. This is a most unsatisfactory answer. The answer to the thirty-third interrogatory is still more unsatisfactory, for it merely refers to what he has said before, without giving any information whatever. The object of such interrogatories is to test and compare the answers of a witness; and this object is defeated if the examiner does not require full answers to each interrogatory, but allows the witness merely to refer to a former answer.

[*Per Curiam.*—Certainly, that is quite correct; full answers must be taken to every interrogatory. I regret to find frequently in these cases that the evidence is not sufficiently full. I wish it to be understood, that in every case the examiners are to take the evidence in full, and not to allow the witness under any circumstances to answer one interrogatory by a reference to his answer to another. Such a course defeats the object of the examination.]

Now, as to the papers, the bills of lading are dated March 7th. At that time the Russian Ambassador had withdrawn from England, and war was closely impending. The vessel sailed from Cadiz in immediate contemplation of war. This accounts for the state of the ship's papers, upon which nothing turns. But annexed to the affidavit of claims are two bills of lading, and a certificate that Mr. Shaw is a British subject. The bills of lading bear an indorsement to the effect that the property mentioned therein belongs to Mr. Shaw. But what is the law? It is stated by Pothier, in the following passage: "C'est aussi une chose qui est de la nature du contrat de vente, qu'aussitôt que ce contrat a reçu sa perfection par le consentement des parties, quoiqu'avant la tradition la chose vendue soit aux risques de l'acheteur, et que si elle vient à périr sans la faute du vendeur, la perte doive tomber sur l'acheteur, qui ne sera pour cela déchargé du prix; mais comme cela est de la nature seulement, et non de l'essence du contrat de vente, on peut en contractant convenir du contraire" (*r*). This is the general law, and in the

(*r*) Pothier, *Traité des Obligations*, Part i. C. i. § 1, Art. i. § 3.

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time of war or in immediate contemplation of war, it is not competent to parties to make particular exceptions to shift the risk. In the *Packet de Bilboa* (*s*), Lord Stowell says: "The ordinary state of commerce is, that goods ordered and delivered to the master are considered as delivered to the consignee, whose agent the master is in this respect"—in this case the master swears he had consignees—"but that general contract of the law may be varied by special agreement, &c. In the time of peace they may divide their risk as they please, and nobody has a right to say they shall not; it would not be at all illegal, that goods not shipped in time of war, or in contemplation of war, should be at the risk of the shipper." Certainly not; but that would be done by special contract, and in this case they have not done so. Lord Stowell goes on to say: "In time of war this cannot be permitted, for it would at once put an end to all captures at sea; the risk would in all cases be laid on the consignor, where it suited the purpose of protection. On every contemplation of a war this contrivance would be practised in all consignments from neutral ports to the enemy's country, to the manifest defrauding of the rights of capture; it is therefore considered to be an invalid contract in the time of war, &c." Supposing this contract to have been made in this case, it must have been, on the 7th of March, made in immediate contemplation of war, and could not therefore be sustained. The *Packet de Bilboa* establishes this: that *primâ facie* goods shipped belong to the consignee. This is the doctrine laid down in Abbott on Shipping. In this case there is not the slightest evidence to rebut the presumption of law. The property must therefore be considered as belonging to the enemy consignee.

Dr. *Addams*, for the claimant, was stopped by the Court, and—

DR. LUSHINGTON said: "I will hear you, Dr. Addams, if you think you can satisfy my mind that it is a case in which I can order immediate restitution. I am clearly of opinion that you are entitled in this case to give further proof; but I do not think I could possibly decree restitution without it; for, unfortunately, the

(*s*) Vol. I. p. 209.

evidence of the master is by no means satisfactory, and it is a rule of the Prize Court, that where the evidence of the master fails as to the ownership of the property claimed, further proof is indispensable before restitution can be decreed."

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The case stood over for further proof.

THE ABO.

[Spinks, 42.]

Practice—Further Proof—Bill of Lading—Property in Cargo.

A bill of lading did not state on whose account the property therein named was shipped. At the time when such shipment was made, war was not imminent. *Held*, that there must be an order for further proof.

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THIS vessel, a Russian, which sailed from Cadiz on the 27th February, 1854, was bound to Abo, with a cargo of salt, olive oil, and other goods, and was captured on the 15th April by her Majesty's ship *Tribune*.

No claim was given for the ship, but Mr. Quincey Rew, of Old Broad Street, gave a claim for seven pipes, four hogsheads, and eight quarter casks of olive oil, and a box containing 1,000 leeches, on behalf of Charles Younger, a merchant of the city of Cadiz, and a British subject, as the sole owner and proprietor thereof. Annexed to the affidavit and claim was a bill of lading, signed by the master, acknowledging the receipt on board his ship of the property claimed, and binding himself, on his safe arrival, to deliver the same to Messrs. E. Julin & Company or order, against a stipulated freight, &c. On this bill of lading was the following indorsement:—

"British Consulate, Cadiz, 2nd March, 1854.

"These are to certify that on this day personally appeared before me, Charles Younger, a British merchant and Swedish consul, residing in this city, and voluntarily declared, upon oath, that the seven pipes, four hogsheads, and eight quarter casks of olive oil, and one box containing 1,000 leeches, as described in the

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annexed bill of lading, are *bonâ fide* his own property, and have been shipped on his sole account and risk on board the Russian ship *Abo*, G. A. Goös, bound for Abo.

"Given under my hand and seal of office, at Cadiz, on this 2nd day of March, in the year of our Lord 1854.

"M. BRACHENBURY, Consul."

The master of the captured vessel, being extremely ill, was put ashore at Copenhagen by the commander of the *Tribune*, and his examination on the standing interrogatories was therefore dispensed with. The mate, second mate, and one seaman were examined.

DR. LUSHINGTON.—I think it is expedient in this case to address myself first to the primary evidence, viz., the papers found on board the ship, to the examination on the interrogatories, and to the facts admitted. It is admitted that this is a Russian ship, and that part of the cargo is Russian property. There is no claim for that, which will, therefore, of course be condemned. A claim, however, has been set up on behalf of a gentleman stating himself to be a British subject resident at Cadiz; but as far as any rule of law can be applied, this gentleman holds a Spanish national character, and not that of a British subject, because it is a very just principle, that in time of war a person is considered as belonging to that country where he is resident and where he carries on his trade.

Now with respect to the papers found on board the ship, independently of what I may more properly call the ship's papers, there is a bill of lading for a quantity of salt and other articles, which are admitted to be Russian property and liable to condemnation. There is also another bill of lading, which contains an order to receive certain specified articles from Mr. Younger, the gentleman on whose behalf this claim is made; but it is to be remarked that this bill does not state on whose account and risk this shipment was made, but it bears date on the 24th of February, three days before the vessel sailed.

The Court has heard much as to what was the state of things as regards persons carrying on trade at the period when this transac-

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tion took place. It has been contended that at that time the Russian Ambassador had quitted Great Britain, and that a declaration of war might be considered as imminent, but it did not take place until the 29th of March following. I am, however, of opinion that in such a state of things the rights of neutral merchants to carry on their trade were in no degree altered. It would be utterly impossible to fix a period at which, in consequence of the probability of hostilities, they were to be deprived of their accustomed rights; but it is perfectly true that, if in so carrying on their trade shortly antecedent to the commencement of a war, and when it is known to be imminent, they resort to any practice which is not customary in a time of peace, their conduct lays them open to the suspicion of covering an enemy's property under the guise of their neutral character. If this cargo had been shipped, to use the expression of Lord Stowell, *flagrante bello*, the bill of lading ought on the face of it to have expressed for whose account and risk the property was shipped. On this point it is silent; but I know of no law that a neutral merchant may not, if he thinks fit, ship property without saying on whose account and risk it is so shipped; it is, I believe, customary not to state on whose account and risk the property is shipped, though sometimes it is done.

It has been contended that I ought to conclude the property to be in the consignee, and that therefore there is an end to the claim of the consignor. In support of this argument the *Packet de Bilboa* (*u*) was cited, but, on referring to that case, I cannot think it furnishes sufficient authority for what I am asked to do on the present occasion, viz., merely attend to the bill of lading. The heading of that case is this: "Shipment at the risk of consignor till delivery; allowed as being made before the war. Particular mode of Spanish trade." So that *primâ facie* it does not appear to be an authority for the captors; but some remarks of Lord Stowell in the course of his judgment have been relied on, and I must say that more important words could scarcely be found in any documents. What Lord Stowell said was this: that where goods had been ordered by the consignee and delivered to the master, they

(*u*) Vol. I. p. 209.

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were to be considered as delivered to the consignee. To this proposition I fully accede; but I apprehend that, when the goods have not been ordered, a very different state of things exists; it is a most important ingredient, in considering the question of the property, that the order should have been given by the consignee. Throughout the whole of that case the remarks of Lord Stowell have reference to such a state of circumstances, and I give unqualified assent to them, but I do not consider them any authority to govern my decision in the present case, in which the circumstances are different.

I was also referred to Abbott on Shipping, and I would here observe that it is always important to bear in mind, that there is a totally different question arising in the Prize Court from that which arises in the Court of Common Law. At common law it may be very true that by a bill of lading property may be so vested in the consignee that he may be capable of selling it, though he would be responsible to the consignor. It may be true that, between the consignor and third parties, he would have a good title to sell, but that is not the question which the Court looks to here. This Court inquires in whom the property is vested, and not merely at what is called a legal title at common law. Lord Tenterden says: "Where goods are sent by a vendor to a vendee, the delivery of them to the carrier usually vests the property in the latter" (*x*). Usually, but not always, there are excepted cases. To this proposition I also assent, but it must be remembered that it refers to a question between a vendor and vendee, and that the question now to be considered is between a consignor and consignee, and I know of no principle laid down in the Prize Court by which I am bound to hold that under such circumstances as the present, the consignor has divested himself of his right and title. There are innumerable cases in which a merchant may send property to some agent, some consignee, and yet retain a right and control over it. There are innumerable instances where goods are sent to a consignee without previous order or direction, and, in a great many cases, without previous communication with the consignee himself. I cannot think that the hands of the Court are tied in this case by

(*x*) Abbott on Shipping, 9th edit. p. 269.

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anything decided by any of the authorities to which I have referred.

How stands the case now? I have the bill of lading, and nothing else. Unfortunately, I have not the benefit of the master's evidence; no blame attaches to any party for the absence of his examination, for it was a matter of necessity and humanity, and it may be said to be a common loss to both parties. It might be that the master would prove it to be enemy's property, and condemnation would follow. On the other hand, he might prove it to belong to a neutral, and restitution would be decreed. It is impossible to conjecture what evidence he might have given.

How, then, is the Court to deal with the case in the unavoidable absence of the evidence of the master? I apprehend that, according to ordinary usage, that circumstance opens the door to further proof, supposing the other circumstances of the case are such as to justify such a course.

I now come to the affidavit of claim; and I will here observe that the Court, with great reluctance, looks beyond the mere affidavit of claim. I apprehend the course of the Court to be this: in the first instance, the Court considers the evidence, whether found on board the ship, or taken on the preparatory examination, and the fact of the claim only. In perfect strictness, the Court ought to attribute no weight to any document brought in and annexed to the affidavit of claim. Such documents are altogether *ex parte*, and entitled to but little weight.

In the present case there is annexed to the affidavit a bill of lading of the property claimed, with an indorsement made by the British consul at Cadiz, after the ship had sailed, to the effect that the property belonged to Mr. Shaw. The Court must be destitute of common sense if it did not see for what purpose this indorsement was made. It was clearly made for the express purpose of doing that which he had previously omitted, in order to give the appearance, at least, of its being the property of the claimant. It is manifest that no great reliance can be placed upon a document so framed. I may observe that, in the present state of the world and the present state of commerce, one cannot expect to find such lengthened correspondence as in former times. Then there were a

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variety of documents on board ship relating both to ship and cargo, which now, from the great change of circumstances, we can hardly expect to find on board a vessel at the commencement of a war.

Looking at the whole of the case, I entertain no doubt whatever that it is the duty of the Court to order further proof.

[Spinks, 48.]

THE PRIMUS.

Neutral's shares in Enemy Ship—Condemnation—Neutral Cargo—Expenses of Capture.

A neutral having shares in an enemy ship is bound by the character of such ship, and his shares are therefore liable to condemnation. Motion for the expenses arising from the capture of a neutral cargo laden on an enemy ship, which was condemned and sold, to be paid from the proceeds, refused.

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THIS vessel sailed under a charter-party early in the month of March last, under Russian colours and with a Russian pass, from St. Ubes, with a cargo of salt, bound to Elsinore for orders. At Elsinore she received orders to proceed to any Russian or Finnish port, and accordingly put into Maarsund, a port in the island of Aland, where she delivered half of the salt into small boats to be sent to Abo, then sailed on the 7th of May with the remainder of the cargo, and was captured on the following day by her Majesty's ships *Valourous* and *Vulture*.

Four claims were given in: one for two-eighths shares of the vessel, another for three-eighths, both on behalf of Russian subjects; a third for three-eighths, as the property of Johan Gustaf Bergborn, of Altona, a subject of the King of Denmark; and a fourth for the cargo of salt, as the property of Messrs. Banck & Durkoop, citizens and burghers of the Free Hanseatic town of Hamburg. The first two claims having been abandoned, the argument was confined to the third and fourth.

[A part of the arguments and judgment had reference to the claim for the restitution of the cargo which was decreed; this portion of the case depended, however, solely on questions of fact which are too shortly set out in the original report to be of value.—ED.]

The *Queen's Advocate* and *Dr. Haggard*, for the captors.

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The claim of Mr. Bergborn cannot be supported. If he be a neutral, his shares in this vessel are liable to condemnation, for the law, clearly laid down by Lord Stowell in the *Vrow Elizabeth* (*y*), is that neutrals cannot claim, on the ground of their neutrality, a vessel sailing under the colours and pass of the enemy. It is, as far as the belligerents are concerned, enemy's property. Besides, it is very doubtful from the evidence whether this gentleman is a neutral. He has been living in Russia all his life, and only removed to Denmark in the year 1852. There is no proof of his title to the shares. The only bill of sale among the papers is three-fourths of the vessel, which does not correspond with the present claim, which is for three-eighths. The bill of sale under which he claims is not forthcoming.

Dr. Addams and *Dr. Twiss*, for the claimants.

The doctrine that neutrals sailing under the flag and pass of the enemy are liable to have their ships condemned, does not apply to such cases as the present—occurring just in the very commencement of a war. Under such circumstances the neutral cannot be precluded from his claim. No case whatever has been produced to that effect.

DR. LUSHINGTON.—There are two questions to be disposed of in this case: the one regarding certain claims for a share in the ship, and the other relating to the cargo. The first is a pure question of law, whether the persons who now claim, and who are admitted, for the purpose of argument, to be neutral subjects, are entitled to have the ship restored. On the part of the Crown it has been contended that the flag and pass are binding upon all persons having property or shares in the ship. In support of this principle, authorities have been brought before the Court which must govern it in this and all similar cases. The only distinction attempted to be established in the present case is, that this is

(*y*) Vol. I. p. 409.

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property in the vessel belonging to neutral subjects, which existed antecedent to the breaking out of the war. It has been argued that I ought to take notice of that distinction, but I apprehend that not only the authority of Lord Stowell, but every argument he used, go the whole length of saying, that whoever embarks his property in shares of a ship is bound by the character of that ship, whatever it may happen to be. If he reap the benefit accruing during peace, he must also take the consequence of war. Unless this were so, it would be very difficult to find out the time when neutrals would cease to have an interest in an enemy's ship. I am of opinion that this great principle is one that ought not to be infringed.

Another argument has been addressed to the Court, which, if valid, would place the judge of this Court in such a predicament as no judge was ever placed in before. It arises from the terms of her Majesty's Order in Council of the 29th of March, which requires me to "take cognizance of, and judicially proceed upon, all and all manner of captures, seizures, prizes, and reprisals of all ships, vessels, and goods, that are or shall be taken, and to hear and determine the same; and, according to the course of Admiralty and the Law of Nations, to adjudge and condemn all such ships, vessels, and goods as shall belong to the Emperor of all the Russias, or his subjects, or to any others inhabiting within any of his countries, territories or dominions." It is contended that it is not within the terms of my commission to condemn this vessel, and that I am restricted to the condemnation of ships exclusively belonging to Russians. If this were the true construction of the Order in Council, it would go to show that the Court has no power to condemn neutral vessels committing a breach of blockade, or carrying articles contraband of war, because they did not belong to subjects of the Emperor of Russia. Certainly no judge who ever occupied this chair before was so tied, nor have I any intention to place such manacles upon my own hands. I must remind the learned counsel that the principle which governs the proceedings in this Court is to condemn as enemy's property all which is not entitled to be restored by the Law of Nations. To establish a title to restitution, it ought to be perfectly clear that the property does not belong to an enemy; and where the claimant

fails to establish that, the property is condemned as enemy's property. 1854 *July* 21.

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Without further adverting to the general law or the terms of the commission I now hold, I have no doubt that I ought to condemn the three-eighths of this ship, which have been claimed on behalf of a neutral.

[Spinks, 59.]

On October 6th the Court was moved on behalf of the owners of the cargo to decree to them out of the proceeds of the ship the expenses which they had incurred in consequence of her capture.

DR. LUSHINGTON.—I am at a loss to understand upon what ground this application is made. No instance has been cited, and I certainly cannot call to my recollection any one, in which the owners of a cargo, under similar circumstances, have been held to be entitled to their expenses. It is quite clear that at the time of shipment of this cargo war between this country and Russia was imminent. This was notorious to Europe; yet, notwithstanding, the owners of this cargo think proper to put on board a Russian vessel and send it to the Baltic. Accordingly, they must be held to have done so at their own risk. They must be bound, moreover, by the conduct of the master. What was that, according to his own account? He sailed for Abo, but being unable to reach it, he broke bulk and discharged a large portion of his cargo into small boats to be conveyed to Abo, and subsequently ran his ship ashore in Saggo Bay to avoid capture. Certainly no blame attaches to this master for his endeavours to save his ship, but undoubtedly the neutral owners must suffer for his act.

This motion is, in my opinion, without precedent and without justification, and must be rejected, with costs.

[Spinks, 52.]

THE ARGO.

Capture—Exemption—Order in Council, March 29th, 1854—Continuous Voyage.

The Order in Council of 29th March, 1854, exempted from capture Russian vessels which, prior to the 29th of March, should have sailed from any foreign port bound for any port in her Majesty's dominions. A vessel under a charter-party for a voyage from Havannah or Matanzas to Cork, sailed from Havannah in ballast prior to such date, took in her cargo at Matanzas, and sailed thence subsequently thereto. *Held*, that it was a continuous voyage; that it commenced at Havannah, where the charter-party was entered into; and that the ship must be restored under the Order in Council.

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This vessel, belonging to a Russian owner, and sailing under Russian colours, bound on a voyage from Havannah and Matanzas to Cork, for orders, was captured on the 6th of May, 1854, off Cork harbour, by her Majesty's revenue cruiser *Eliza*.

By permission of the Lords of the Admiralty she subsequently proceeded from Cork to Liverpool, where she discharged her cargo.

A claim was made by Mr. Henry Sharpe, of 26, Broad Street Buildings, London, Merchant, on behalf of Gustaf Bergborn, of Uleaborg, in the Grand Duchy of Finland, the sole owner of the vessel. This claim was ordered to be amended, and Mr. Sharpe made a further affidavit: "That he is advised and believes that the ship *Argo*, although the property of a Russian subject, was, at the time and under the circumstances of her seizure by her Majesty's revenue cutter *Eliza*, on the 6th day of May last, within the protection of her Majesty's Order in Council (issued expressly for the purpose of lessening the evils of war) of the 29th of March last, exempting from capture or detention Russian vessels under special circumstances, and as so being ought to be restored to her Russian owner."

The special circumstances are stated in the judgment.

The *Queen's Advocate* and the *Admiralty Advocate* appeared for the captor.

Dr. Addams and *Dr. Twiss*, for the claimant.

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DR. LUSHINGTON.—This is a Russian vessel, captured on May 6th. She left Cuba on April 2nd, with a cargo belonging to Kirkland & Co., Glasgow; she reached Queenstown on May 6th, and was there seized by a revenue cutter. The cargo was restored and a claim is now made for the ship and freight. The ship, being enemy's property, must be condemned unless she is protected by some act of the British Government; and it is alleged that she is so protected by the Order in Council of March 29th.

With regard to the construction of that Order, I have already stated in a former case the principles which will guide my judgment (*a*), and to which I intend to adhere till better informed by a higher tribunal.

I am of opinion that all relaxation of belligerent rights emanating from the Government of this country, and declared in authentic documents, should receive a liberal construction, as liberal a construction as the terms of those documents will admit of; but in so doing I must be governed and restricted by the words which are used, and abstain from giving an interpretation which cannot be borne out by the instrument to be construed.

First, then, what are the facts of the case? In the month of February this vessel was lying in the port of Havannah, whence she had come from the port of Antwerp, with a cargo landed at Havannah; whilst at Havannah she took in ballast, then sailed for Matanzas, and there shipped her cargo. Matanzas was the last clearing port, and she left it on April 2nd. According to the evidence of the master on the ninth interrogatory, the cargo was begun to be put on board on February 28th, and completed on March 30th.

This vessel sailed under a charter-party bearing date February the 7th, at the Havannah, and by the charter-party it was stipulated that the vessel should load at Havannah and/or (*b*) Matanzas; forty-two running days were to be allowed, at the end of which demurrage was to be paid. Should the vessel be ordered to Matanzas, sufficient cargo or ballast should be given at Havannah to keep her safe.

(*a*) The *Phœnix*, *ante*, p. 228.

(*b*) In the charter-party it was so expressed: "and or Matanzas."

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I must here observe that the contract, beyond all doubt, was made at the Havannah, and, as I understand it, the charterers had the option to load at the Havannah or at Matanzas, or partly at one or partly at the other; and not only was the contract entered into at the Havannah, but it began to be executed there, first, by taking in the ballast as mentioned in the charter-party, and secondly, by the running of the lay days as appears by the indorsement of the charter-party itself.

Such being the facts, I now turn to the Order in Council. It has been contended that this vessel ought to be released within the terms of the first part of the Order, which directs that Russian vessels within her Majesty's dominions shall be allowed till May 10th for loading and departing. Now, this vessel, at the date of that Order, was clearly not within her Majesty's dominions, and in my judgment was neither within the words nor the spirit of the first part of this Order.

The next branch of this Order directs that any Russian merchant vessel, which prior to this Order shall have sailed from any foreign port bound for any port or place in the Queen's dominions, shall be permitted to enter and depart without molestation. This vessel did sail from the Havannah prior to the date of the Order; she sailed from Matanzas subsequently to the date of the Order. When she left the Havannah she was in ballast, bound for Cork, according to the charter-party.

It has been contended that this Order in Council contemplated that the Russian vessel should have been laden at the date of the Order; but I find no words in the Order that would justify my putting so strict a construction upon it; neither do I think that there are any words which impose the necessity of not touching at or taking a cargo at some other port than that where the voyage commenced. For instance, I apprehend that a vessel might have taken in a part of her cargo from one foreign port, having left that port prior to the 29th of March, and taken in another part of the cargo at another foreign port subsequently.

The real meaning of the Order in Council, according to my view of it, is: that the vessel shall have sailed prior to the 29th of March, on a voyage to end in Great Britain, and I am clearly of opinion that this was one continuous voyage, the commencement

of which was at the Havannah, and that the sailing from the Havannah prior to March the 29th is a substantial compliance with the terms of the Order. I must therefore restore this vessel.

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THE INDUSTRIE.

[Spinks, 54.]

Neutral's Shares in Enemy Ship—Condemnation.

A vessel under Russian colours, with a Russian pass, and whose papers disclosed only Russian owners, being captured, a claim was made by the master as being a neutral, and the lawful owner of one-fourth part thereof. *Held*, that the claim could not be sustained, as the enemy's flag and pass imprinted a hostile character on the whole ship.

THIS vessel, a Russian ship, left Hull with a cargo of salt, bound to Riga, on the 18th of December, 1853, and after meeting various mischances, was captured off Memel on the 26th of April.

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Three-fourths of the ship, having been admitted to belong to Russian merchants, was condemned; but a claim was made for one-fourth by Jens Neilson Fuhl, the master, who was, as alleged, a subject of Denmark.

The *Queen's Advocate* and *Dr. R. Phillimore*, for the captor, cited the *Vrow Elizabeth* (*d*) and the *Primus* (*e*).

Dr. Addams and *Dr. Twiss*, for the claimant, cited *The Fortuna* (*f*), *Donna Marianna* (*g*), *Success* (*h*), *Onderneeming* (*i*), *Diana* (*k*), *Calma* (*l*), and the *San Francisco Antonius* (*m*).

DR. LUSHINGTON.—In all cases of doubt and difficulty, or where there is any novelty, the Court is desirous of taking time, in order

(*d*) Vol. I. p. 409.

(*e*) *Ante*, p. 290.

(*f*) 1 Dod. 86 (case on the slave trade Acts, as to nationality of ship).

(*g*) 1 Dod. 91 (appeal from a Vice-Admiralty Court on the slave trade Acts. Question whether the ship was British or Portuguese).

(*h*) *Ante*, p. 140.

(*i*) Vol. I. p. 41 (note).

(*k*) Vol. I. p. 424.

(*l*) Life of Sir Leoline Jenkyns, Vol. ii. p. 783.

(*m*) Not reported, but cited from a MS. volume of the late Sir James Marriott, in the possession of late Dr. Twiss.

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that its determination may be expressed in clear and intelligible words; but where the Court entertains no doubt whatever as to the judgment to which it will arrive, and where it sees no difficulty whatever in expressing its reasons with sufficient perspicuity to satisfy its own view of the justice of the case, it is very desirable that no delay should be interposed, lest it should be imagined that it does entertain any doubt at all. Upon the present occasion I am fully prepared, according to the judgment I have formed, to pronounce my opinion. I think, in so doing, I may entirely lay out of consideration what I said in the case of the *Primus*, because, if it should so happen that I expressed myself hastily, or saw reason to depart from anything I said, I should have the candour and the courage to be ready and willing to reconsider the matter, and to correct it if I were in error.

The facts of this case appear to me to be these: This was a vessel sailing under Russian colours, and, as I understand, with Russian papers, not divulging any other interest than that the ship was wholly owned by Russians. She is now claimed by the master, who contends that he is a subject of Denmark, and is entitled to a restoration of one-fourth of the vessel, because he was a neutral at the time; and that he is not prevented from asserting that claim by reason of the vessel being under Russian colours, or by reason of the papers not disclosing any such interest.

I will entirely divert my mind from anything relating to the national character of this individual for the purpose of argument; but I must candidly state that there are facts appearing on the face of the evidence which would, undoubtedly, create some doubt in my mind as to whether this man is entitled to the national character of a Dane or not. I will state what could not come under the cognizance of counsel. When the interrogatory is first put to him, he states that his home is partly at Riga and partly elsewhere, and then the former is struck out.

The question then comes simply to this: Can he maintain a title to restitution at this period—the commencement of a war—by reason of being *bonâ fide* entitled to one-fourth part of the vessel at a period antecedent to the war, and up to the time of seizure? I will give him the benefit of all these facts. If this be a question already concluded by high authority, and acquiesced in in various

judgments by Lord Stowell, and never carried up to the Appeal Court, which then had jurisdiction in prize matters, it is vain for the Court to inquire whether it is bound by such authority. In the case of the *Vrow Elizabeth* (*o*), Lord Stowell has expressed himself in the most decided terms with regard to the law. He said: "It would, I think, be extremely hazardous to admit a claim in opposition to this evidence." That relates merely to the question of evidence, but as to the rule of law, he says, "I will go farther, and say that I hold the claim to be also against the established rules of law, by which it has been decided that a vessel sailing under the colours and pass of a nation is to be considered as clothed with the national character of that country." There cannot be a stronger expression than this, and the proposition cannot be more clearly enunciated. It may be said that Lord Stowell would condemn the property on other grounds; but of that I know nothing. He stated the reasons which led to his judgment, and the principles of law on which he proceeded.

In a note to this case, it is said, in the *Onderneeming* (*p*), a British subject obtained restitution of seven-eighths of the ship, under a Dutch flag and pass. Now, assuming there was no Order in Council, and assuming there were no special directions from the Crown, he would have obtained restitution against the whole law laid down by Lord Stowell, and it would have been remarkable if that had been adverted to in a note instead of coming forward as a prominent case, showing the doctrine of the Court. But I cannot doubt what the fact was, for the note goes on, "The King's instructions, July 23, 1803, direct restitutions of ships and cargoes *bonâ fide* belonging to British subjects, sailing before the knowledge of hostilities from the colonies of France and Holland, to whatever country they might be going." This opinion which I have formed appears to be borne out by a note at the end of the volume (*q*): "Since the decision of the Court of Admiralty in the case of the *Vrow Elizabeth*, where the flag and pass of the enemy was held conclusive for the claim of the ship on behalf of a neutral proprietor, though adopted prior to hostilities, and without any prospect of such an event, the same question has been fully agitated before the

(*o*) Vol. I. p. 409. (*p*) Vol. I. p. 411. (*q*) 5 C. Rob. 410.

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Court of Appeal in several cases, and with a similar result." No distinction was made between the flag being adopted prior to the commencement of hostilities, and when there was no reason to suppose that hostilities would have taken place, and the flag being adopted *flagrante bello*. By these authorities I must hold myself concluded.

If there be an exception on the present occasion, it must be shown to be in circumstances which have not been brought to my attention, but which will take it out of the principle. When the vessel is sailing under a neutral flag, the captors may show that all the property is not neutral, but that part of it belongs to an enemy, and in that case you divide it, and condemn the part which is hostile, and not the part which is neutral; but the converse proposition is not true, that where a vessel is sailing under a hostile flag, you can claim, on behalf of a neutral, any part of the property under such flag.

From the cases cited from Sir Leoline Jenkyns and Sir James Marriott, I cannot draw deductions contrary to the principles to which I have adverted. What would become of belligerent rights, if, when you search vessels under hostile colours, you are to be told, "This is not a Russian vessel; it is neutral, or nine-tenths is neutral. You are quite mistaken; it is entitled to restitution at the hands of the Court." It is manifest that the right of search, under these circumstances, would be destroyed. It is clear that the whole trade of an enemy might be carried on with perfect impunity, and all the naval force of France and Great Britain would never be able to carry into execution those rights which they are undoubtedly justified in exercising by the Law of Nations. I entertain no doubt in this case, and I condemn the vessel.

THE POLKA. [Spinks, 57.]

Prize in Neutral Port—Condemnation—Special Circumstances.

The general rule of law is that a prize shall be brought into a port belonging to the captor's country, but under special circumstances the Court will condemn a prize which has been taken into and lies in a neutral port and allow it to be sold there.

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The commanders of her Majesty's ships *Amphion* and *Conflict* having received information that a number of Russian merchant vessels were lying in the port of Libau, anchored within gunshot of the town on the 17th of May last, and summoned the governor to surrender the said vessels within three hours. At half-past three p.m. of the same day an answer was received from the authorities, to the effect that they were without the means of defence, and would readily send the vessels out, but could not possibly do it within the time specified. Whereupon the captains of the *Amphion* and *Conflict* caused the ships' boats to be manned and armed, and they proceeded with them to the port. Having had the Russian vessels—seven schooners and one brigantine—pointed out, they took possession of them, brought them out into the roads, and finding them not to be in a condition to perform a voyage to England, took them to the port of Memel, where they remained to await the decision of the Court.

At the time of their capture the vessels were found all dismantled, their sails unbent, and some of them aground. Two of them were scuttled, the whole of them deserted by their crews, and no papers whatever were found on board, neither could the captors obtain any information whatever respecting them, but believed they had been taken away by the masters when they deserted the vessels.

The *Queen's Advocate* moved the Court to condemn the vessels and decree their sale in the port of Memel, stating that an intimation had been received from the Prussian Government that no objection would be made to such a course, provided they were sold by private contract, without being advertised or put up to auction.

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DR. LUSHINGTON.—The circumstances under which the present application is made are quite peculiar, and form an exception to the general principle upon which this Court proceeds. Though there is no direct evidence that the vessels are Russian, yet there is no claim, and the Court entertains no doubt upon the subject. I have no hesitation in condemning them; and, looking at the fact deposed to, that they are not in a fit state to be brought to England, and the consent of the Prussian Government to their sale at Memel, the Court will allow that course in the present case, but with the proviso that the wishes of the Prussian Government shall be fully observed with respect to the sale.

I wish it, moreover, to be expressly understood, that this case is decided upon its own peculiar circumstances, and is not to be considered as a precedent for the condemnation of a prize while lying in a neutral port. The rule is that the prize shall be brought into a port belonging to the captors' country, and the Court must guard itself against allowing a precedent to the contrary to be established.

[Spinks, 60.]

THE JOHANN CHRISTOPH.

Ship—Fictitious Transfer—National Character of Alleged Purchaser—Proof of Purchase—Order in Council, April 15th, 1854—*Condemnation.*

A ship sailing under neutral colours and with neutral papers from a Russian to a British port with a cargo, within the time granted to Russian vessels by the Order in Council, was seized by the Custom House officers, and claimed by the master as the *bonâ fide* purchaser and a neutral. *Held*, on further proof, that, 1st, the neutral character was not established; 2nd, the transfer to the master was merely colourable; 3rd, the Court could not restore the ship as Russian, but protected by the Order in Council, when it had been previously claimed as neutral.

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THIS vessel, sailing under Danish colours, was seized by the Custom House officers at Grimsby. The circumstances of the case were these:—

Mr. Christiansen, a native of Denmark, who for six years had been carrying on business as a merchant at Leith, on the 4th of April wrote to Lord Clarendon, informing him of some purchases he had made at Libau, of Mr. H. Sorensen, the Danish Consul at

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that place, and inquiring "whether, in the event of his goods being shipped on board neutral vessels, they would be subject to seizure and condemnation either by and at the instance of the commanders of her Majesty's cruisers, or by her Majesty's officers of Customs on the arrival of the vessels in the ports of this country." On the 22nd of April a letter was sent from the Foreign Office to Mr. Christiansen, "referring him, in reply to his inquiry, to her Majesty's Order in Council of the 15th of April, which permits the importation of the goods in question in neutral vessels." Mr. Sorensen chartered the *Johann Christoph*, and, about the 4th or 5th of May, put the cargo, consisting chiefly of railway sleepers, on board, consigned to Mr. Christiansen. The ship sailed from Libau on the 9th of May, arrived at Grimsby, and delivered her cargo. She was then seized by the Custom House officers on the 18th of June on suspicion of being a Russian vessel, and her papers were taken away. On the 25th she was liberated, and her papers restored. She prepared to take her departure in ballast, and on the 28th received from the Custom House authorities at Grimsby her clearance certificate (*r*); but upon the following day she was again seized by the officers of the Customs.

A claim was given in by Mr. A. H. Lindgren, of Crown Court, Old Broad Street, on behalf of "Johann Gottlieb Bohss, of Altona, master mariner, a subject of the King of Denmark, the true, lawful, and sole owner and proprietor of the said ship."

The master, mate, and carpenter were examined on the standing interrogatories.

The evidence of the master with respect to his own national character was to the effect "that he was born at sea, in the Baltic, and christened at Libau; that during the seven years last past, up to February last, he has lived at Riga; that since February last he has lived at Altona, which he considers his present home when he is not at sea; that he is now a subject of the King of Denmark; that in 1840 he became a Russian subject, but ceased to be so in February last; that he has taken an oath of allegiance

(*r*) "This is to certify that the ship *Johann Christoph* (Bohss, master), which has this day been cleared outwards at this Custom House for Copenhagen, is free to depart from this port and to proceed on her voyage without any stop or impediment whatever."

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to the Emperor of Russia in 1840, and another to the King of Denmark on the 8th of April, 1854; that he obtained a certificate of being a subject of the Emperor of Russia in 1840; that on becoming a Danish subject he obtained a certificate of being a subject of the King of Denmark; that he has been admitted a burgher of the city of Altona, and was so admitted by taking an oath of allegiance before the magistrates, which he did on the 8th of April, in the usual manner; that he has resided there ever since, except when on board ship; that he paid about 200 Danish dollars for his admission; that he is married; that his wife and family have hitherto resided in Riga, but that his wife was with him on his last voyage before he left Libau; that she left him at Libau with the intention of returning to Riga, and selling off all their property there, and then joining her own family, who reside near Copenhagen, but that he has not yet heard what has become of them."

On the admission of the claim the Court intimated its opinion that it was a case for further proof, and that it should expect some more satisfactory evidence of the national character of the claimant, and stringent proof that the sale was *bonâ fide*, and not merely a colourable transfer.

The case now came on for hearing on the further proof. The *Queen's Advocate* and the *Admiralty Advocate* for the seizor, cited, on the question of the national character of the master, the *Endraught* (*s*) and the *Graaff Bernstorf* (*t*).

Dr. Twiss and *Dr. Spinks* appeared for the claimant.

DR. LUSHINGTON.—In this case, when it originally came before the Court, two questions were raised: first, what is the national character of the claimant? and, secondly, whether the purchase of the vessel by the claimant was a *bonâ fide* purchase, or not? The Court directed that further proof should be adduced upon both these points, and intimated at the same time that it should expect clear and positive evidence of the actual payment of the purchase-money. I have now to decide whether the evidence produced is

(*s*) Vol. I. p. 30. (*t*) Vol. I. p. 265.

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sufficient to justify me in restoring this vessel. Of course, it must be sufficient to satisfy my mind upon both the questions at issue, or she must be condemned; because, if the claimant fails to prove the purchase, he is not entitled to restitution; and, where a person claims as a Danish subject, notwithstanding the ingenious argument of the learned counsel, I have no power to restore to him in any other character, or under the Order in Council, whereby it is directed that a Russian owner coming before the Court shall, under certain circumstances, have his vessel restored (*u*).

I will first address myself to the question of the national character of Mr. Bohss; and I would observe, that with respect to national character, it has been over and over again laid down, that the application of the general principle must depend on the circumstances of each individual case. Now what are the circumstances of this case, according to Mr. Bohss's own representation? His father, he says, was a Dutchman, and he was born at sea, somewhere in the Baltic; he seems to have been christened at Libau, but that circumstance would not affect his native character as a Dutchman. In that character he followed the vocation of a seaman until the year 1840, when, for the purpose of obtaining certain advantages in his profession, he took the oath of allegiance to the Emperor of Russia, became a Russian subject, and subsequently resided with his family at Riga for seven years up to February last. So that there can be no doubt that, at the commencement of the year 1854, there was impressed upon him the quality of a Russian subject; and the question for the Court now to decide is whether anything occurred between February, 1854, and the purchase of this vessel on the 12th of April following which could divest him of that quality, and convert him into a Danish subject, in which character he now claims restitution.

(*u*) Order in Council, April 15, 1854. It was contended that if the Court were satisfied of the *bonâ fide* character of the sale, but thought the neutral character of the claimant was not established, it must give him the benefit of the Order in Council and allow him to claim as a Russian, because the claimant attempted no fraud but was guilty only of ignorance of what the law required to effect a change of national character; and had therefore committed a venial error in calling himself a Dane instead of a Russian.

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He left Russia, according to his statement, in February last; and on the 8th of April took the oath of allegiance to the King of Denmark, and was admitted as a burgher of the city of Altona. But I am clearly of opinion that that circumstance alone never could confer upon him a national character. I apprehend that five minutes' notice and the payment of so many dollars might entitle him at any time to exercise all the rights of a Dane within the dominions of Denmark; but I must protest against the argument that he is therefore to be considered in the Prize Courts of belligerent nations as having changed his national character. To enable him to do this the Law of Nations, by which these Courts are governed, requires several other things to concur. He must have actually abandoned his previous national character—not be merely in the course of abandonment; he must have taken up his abode with his wife and family, with the intention of remaining in the country of which he claimed to be a subject. Do the circumstances answer these requirements? Mr. Bohss, according to his own representation, having heard, in January, 1854, that this ship was advertised for sale, conversed with its owners at Libau with respect to it; and it then entered into his head that as the ship was likely to be sold he would make himself a Danish subject and purchase her, and that he should be able to navigate her under the Danish flag. What does he do? He goes to Altona, and after a residence of a few days, without having taken any house or given any proof of his intention to fix his domicile there, on the 12th of April he purchases the ship. He does not even pretend that his wife and family were about to join him at Altona. On the contrary, he expressly states that when he parted from her at Libau, she repaired to Riga to sell off their goods, with the intention of proceeding immediately to reside with her relations at Copenhagen. This might certainly be evidence of an intention to abandon Russia, but it is no evidence of an intention to become the subjects of Denmark. But whether even this intention has been carried into effect we have no certain information.

I am clearly of opinion that the assumption of the national character of a Dane is a fiction from the beginning to the end; and further, that even if the facts stated are true, there is not sufficient to effect any change in the national character of Mr. Bohss. After

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living at Riga, and having become to all intents and purposes a Russian subject, the mere proceeding to Denmark, and going through a few formalities, would not enable him to lose his national character and to become a Dane at once; he must actually have quitted his former domicile. I do not mean to say that a character assumed for the purposes of trade may not be changed with greater facility than under other circumstances; but I do say it must be a real and not merely a nominal change, as I hold it to have been in the present case.

The Court being of this opinion with respect to the national character of the claimant, the determination of the second question becomes of minor importance. I will, however, give my opinion upon it, that there may be no doubt as to the grounds of the Court's decision.

The circumstances of the purchase of the ship are stated to be the following:—Mr. Bohss, having been in command of the ship, and become attached to her, was anxious, when he heard she was advertised for sale, to become the purchaser from the former owners, and for that purpose proceeded to Hamburg. Now it does appear to me a little curious, if this was intended to be a *bonâ fide* sale, that he should have heard of the sale by an advertisement in Hamburg, and that he should not have communicated with the owners upon it when he was at Libau, instead of proceeding to Hamburg and purchasing it of Messrs. Merck & Co., by virtue of a power of attorney which they had from the owners for that purpose. These are circumstances of suspicion which naturally induce the Court to look more closely into the evidence of the purchase, and, above all, of the actual payment of the money. But of what does that evidence consist?

A certificate from the British Vice-Consul at Libau has been produced; it is in these words—"I, the undersigned, do hereby declare and certify that the former Russian bark, *Johann Christoph*, has been sold to the Danish subject, Johann Gottlieb Bohss, Esq., of Altona; and that the sale has taken place at Altona on the 12th of April, at the price of 45,000 mares Hamburg banco. I further declare and certify, that the bill of emption of the bark, *Johann Christoph*, has been delivered by the magistrate of Altona, and produced to me this day, the 15/27th of April. Given

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under my hand and seal of office.—Libau, April 15/27th, 1854." And it is signed by her Majesty's Vice-Consul. Now what is the value of this document as evidence? The Vice-Consul could not be cognizant of the facts to which he certifies, except from documents shown to him, or from the statements of others; and yet it would appear that he was certifying to something within his own knowledge. The certificate comes to nothing—the facts could not be within the knowledge or grasp of this gentleman at all. It is, moreover, not a little extraordinary that he certifies the sale to have taken place at Altona, whereas the copy of the bill of sale expressly states the transaction to have taken place at Hamburg.

That copy—for the original has not been produced—is attached to the affidavit of a Dr. Schram, a notary public of Hamburg, who appears to carry on what, no doubt, will shortly become a very lucrative business, in assisting at and attesting the conversion of Russians into Danes, and the fictitious transfer of the enemy's property. He does not, however, in this case, depose to the payment of the purchase-money for the ship; and here lies the gist of the whole matter. He merely says, "that the receipt of the consideration money for the said ship, to wit, the sum of 45,000 mares Hamburg banco, was acknowledged by Justus Carl Wilhelm Ruperti, one of the firm of H. J. Merck & Co., the sellers, in his presence." From Mr. Ruperti or Messrs. Merck no evidence whatever is produced; for some reason or other, they have made no affidavit. Now I have stated before, and I repeat it again, that in all purchases of this kind, made under similar circumstances, proof of actual payment of the money is most stringently required; but in this case I have nothing but a declaration—even the appearance of a receipt is not produced, and there is no evidence whatever, from the agent of the vendors; and yet I am asked to believe that this master mariner has been the *bonâ fide* purchaser of this vessel at the price of 45,000 mares banco. I do not believe in the truthfulness of the whole transaction, but am of opinion that the sale to Mr. Bohss was merely colourable. The vessel, therefore, must be condemned on both grounds—the national character of the claimant, and the want of proof of the sale.

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[Spinks, 66.]

Recapture — Restitution — Municipal Law — Jurisdiction of Prize Court to recognise British Rules as to Registration.

The Prize Court, if a British owner is entitled to restoration of his ship, will not inquire into questions of municipal law—such as the registration of ownership—unless it is shown without doubt that the owner is not entitled to restoration through a clear breach of municipal law. A British ship fictitiously transferred to Russian merchants to prevent her seizure by the Russian authorities, while lying ice-bound in a Russian port at the outbreak of the war, but seized as Russian property by the officers of the Customs on her arrival at Leith, restored to the British owners on payment of the seizor's expenses.

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This vessel, a British built ship, sailed from this country for Archangel in September, 1853, was there frozen in, and detained by the ice until some time after the outbreak of the war. She sailed in the beginning of June, and arrived at Leith about the 10th of July, when she was seized with her cargo by the Custom House officers as a Russian prize. On the 29th of July the cargo was restored by consent on payment of costs and freight; and on the 2nd of August a claim for the ship was given in by a Mr. Clark on behalf of the asserted owners, Messrs. Stewart & Smith. The admission of the claim was argued on the 14th of August, when the Court directed that further proof should be given on both sides.

The case of the claimants was, that this vessel was a British ship, duly registered in 1853 at the port of Dundee, but that being detained by the ice at Archangel at the outbreak of the war, her owners, Messrs. Stewart & Smith, of Dundee, became alarmed lest she should be seized in Russia as the property of British subjects, and, in order to protect her, assigned her by vendition, or bill of sale, dated 11th March, 1854, to Messrs. William Brandt & Sons, of Archangel and London; that such bill of sale was granted by the owners to Messrs. Brandt without any sale taking place, or any price paid, and truly that they might hold the vessel in trust for behoof of the owners, and that she might appear to the Russian authorities as the property of Messrs. Brandt & Sons of Archangel; that the transaction was explained to Mr. Wrongham, merchant of Dundee, the agent of Messrs. Brandt, and to Mr. Kerr, the solicitor

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employed, before the bill of sale was signed; that the owners transmitted this bill of sale to Mr. Wrongham on the 14th of March, with a letter stating the object thereof, and Mr. Wrongham transmitted the bill of sale to Messrs. Brandt & Son of London, who immediately returned it with the request that the signatures might be attested by the Russian Consul; and that when this was done it was again transmitted to Messrs. Brandt. That, on the 8th of April following, Messrs. Brandt of London transmitted to Mr. Wrongham a letter from Captain Smith, the master of the vessel, and a draft by him upon Mr. Stewart, one of the owners, for 137*l.* 16*s.*, the amount of advances of money he had received at Archangel for the use of the vessel, that Mr. Wrongham might obtain payment from the owners; and Mr. Brandt further required a sum of 270*l.* to defray the necessary expense of repairing and placing the vessel in safety from the ice. That the said sum of 137*l.* 16*s.*, with interest, was paid to Mr. Wrongham, and transmitted by him to Mr. Brandt of London, who acknowledged its receipt on the 28th of April, and after stating that his Archangel friends would not allow the vessel to leave before the deposit they required was made, the vendition or bill of sale being of no use to them, suggested that the owners should give a bond on the vessel. That on the 1st of May Mr. Wrongham wrote Mr. Brandt of London, recommending that the captain of the vessel should grant a bottomry bond for any advances he might receive at Archangel; whereupon Mr. Brandt, in reply, requested Mr. Wrongham also to procure from the owners a bond for the advances to be made in his own name as a collateral security. That accordingly on the 10th of May the owners executed a bond and vendition in security, conveying the vessel, in further security of such advances, to Mr. Wrongham. That on the 8th of July Messrs. Brandt & Sons, by vendition or bill of sale, conveyed the vessel to Mr. Wrongham, who presented this bill of sale for registration at the Custom House, Dundee, on the 10th of July. That the vessel is *bonâ fide* the property of Messrs. Stewart & Smith, and that the transfer of her to Messrs. Brandt & Sons was truly made for the purpose of preventing her being seized by the Russian authorities, and that Messrs. Brandt and Mr. Wrongham are ready to transfer and reconvey the vessel to the owners on payment of their advances.

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The *Queen's Advocate* and the *Admiralty Advocate* appeared for the seizor; *Dr. Addams* and *Dr. Twiss* for the claimant.

[The Court examined the evidence, and held, that on the facts, the sale to Messrs. Brandt was fictitious and conveyed no right or title to them, and that they could not engraft a lien upon a transaction which was a nullity; it then proceeded to deal with the question of restitution.]

DR. LUSHINGTON.—If then, according to my view of this case, if according to prize law there has been no legal transfer, if that law requires that to divest the title from the original owners the transaction should be *bonâ fide*, and there should be a legal and equitable title conferred, or other considerations which I need not mention, what is there to prevent me decreeing restitution of the ship to the claimants?

The first objection is, that this vessel is registered in the names of Wrongham, and of Brandt & Co. of Archangel, and that by statute law no other person can have a legal or equitable title thereto. I state this proposition generally, because it is true generally. I apprehend, to put it as shortly as I can, that by the law at present in force and operation, a bill of sale duly registered, notwithstanding it may have been offered as a security, gives a title to those in whose favour it is registered against any person whatever. But there is no such case here: there is no one claims under the registry, because the persons who claim are neither more nor less than Stewart & Smith, the vendors.

Here arise several questions; whether I shall be successful in disposing of them I do not know, but at any rate I must have the courage to meet them. Nothing, in my opinion, is more undesirable than to put the case vaguely. If the Court is unable to come to a right conclusion, its judgment may be afterwards corrected; but if the Court gives a judgment, and that appears easy, and the difficulty is never noticed, it leads to a supposition that the real point of the case never did arise. Now I will endeavour not to avoid the difficulties; I grant that they are not small.

First, how far is it the duty of this Court to take cognizance of the municipal law of this country, sitting as a Court of Prize?

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And this head, I am sorry to say, may be again divided: first, as to a breach of the municipal law; and secondly, as to pronouncing a decision which may be incompatible with it.

As to the first point, it is settled by various cases, that property claimed by British merchants cannot be restored, if at the time of capture the trade is contrary to British statute law. This is expressly laid down in the *Walsingham Packet* (*x*), and the cases there cited, and in the *Etrusco* (*y*).

This rule of law cannot, I think, apply to the present case, for I am not aware that it has ever been contended that this ship was illegally engaged in trade. To whomsoever she belonged she might lawfully bring this cargo to Great Britain. It is also fit to observe, that I deem the protection of British property from hostile confiscation a lawful and praiseworthy object, and that this circumstance renders this case wholly different from those I have cited.

The principle of the *Walsingham Packet* is, that you are not merely violating the law of the country in name and appearance, but doing an act held by the statute law to be injurious to Great Britain. You are endeavouring to obtain for yourself, for your own commercial purposes, the advantage of a trade prohibited by that statute law; therefore, as Lord Stowell very properly said, it was a great moral and legal principle. Stronger words I need not use, and the whole of that judgment proceeds on that ground. The *Etrusco* was a similar case. There the claimants of the *Etrusco* were carrying on a trade prohibited by the law.

Now the second point is undoubtedly one of great difficulty, and of no ordinary magnitude, namely, that a decree of restitution would convey the ship to claimants not on the register, and that this ship is a British ship.

Upon this I will observe, I do not recollect, and I do not believe, that there has been any case of a British ship being claimed in which any inquiry or question has arisen in the Prize

(*x*) Vol. I. p. 189.

(*y*) "In the case of the *Etrusco*, Lords, 11th Aug. 1803, it was decided, after long deliberation, that property condemned in consequence of the inadmissibility of such a claim is to be condemned, not to the individual captor, but to the king." Vol. I. p. 388, note.

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Court as to the British registry, or as to a compliance with all our navigation laws. Such formalities have not been entered upon, and, unless it was my bounden duty to do so, I should be reluctant to embarrass the Court with such questions, perhaps less embarrassing and perplexing now than they were in those days, but still quite sufficiently difficult not to induce the Court to volunteer to go into them unless it was distinctly a part of its duty.

Again, it is a serious question how far the register alone would be binding in a Court of Prize. Could I, for instance, condemn this ship as the property of Brandt & Co. merely because she was registered in their names, when I am of opinion that there was no transfer, and that the proceeding was merely colourable? I apprehend I could not. I might condemn her for another reason, but I could not on the ground that she was the property of Brandt & Co., because the Court of Prize never goes on a mere formal instrument. Over and over again Lord Stowell has said, it is not the documents themselves which the Court goes upon—they must be true, they must be *bonâ fide*—it never goes on formalities. This is a broad distinction, which I consider not only indispensable to prize law, but to be one of the most honourable distinctions which exist between a prize and a municipal court; that a Prize Court looks to that which is *bonâ fide* true, while a Court of law is sometimes bound by formality, which prevents real justice being done in the case.

But supposing this colourable bill of sale, and consequent registry, to be made to a neutral merchant, could I restore to him, on the ground that no one else had a legal or equitable title? Now, what would be the effect of a decree of restitution in the Court of Prize? The possession of the vessel would be given to the claimant. This Court does not decide that the vessel is entitled to a British register—it has nothing to do with that question. It does not say whether there has been a forfeiture according to statute law or not; that is the province of another Court. It is silent, as it ought to be, as to penalties. The vessel may have been forfeited twice over by municipal law, but the Court would act exactly as if no such thing had taken place.

Might there not be cases in which a Prize Court would restore, whatever might be the circumstances with respect to a British

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register? There are no such cases on record; no such cases have occurred, as I believe; I know of none. But let us suppose one. Suppose a British vessel sold abroad to a neutral subject. I apprehend a neutral subject might acquire a title which this Court must recognize, whatever was the state of the register. I apprehend that, although, perhaps, it might give no title to a British subject, it would convey a good title to a neutral, which I should be bound to respect; for this Court restores—not with any reference to the national character of the ship—but simply as a ship *bonâ fide* sold. I should not generally inquire by what law a vessel has been sold. See what the consequence would be if I did. If I were bound, in case a vessel was claimed by a subject of any one of the states at present neutral, to ascertain precisely what was their law, whether he had acquired a good title by their law, I should be under the necessity of becoming—what I am sure I never shall be—master of the navigation laws of all these countries. Supposing I could, by possibility, get a glimpse of them, I never could ascertain whether there had been a fraudulent use made of it, if they had a register answering to something like our own, or whether all the formalities had been strictly complied with.

Sometimes, certainly, the Court does make the inquiry. But why? For the purpose of ascertaining if the sale was *bonâ fide*. For that purpose I confess it might be considered important. But supposing you take the case of a neutral subject claiming a ship, and supposing the neutral in possession of the ship, and I was satisfied that the possession was a *bonâ fide* possession, I certainly should not inquire if he had obtained his title through all the formalities of the country, both of the vendor and the vendee, because both would be necessary to be inquired into. I should not enter into that inquiry, provided I was satisfied that he was the *bonâ fide* owner.

I am well aware, with respect to English laws, that the obligation upon this Court may in some respects be different; but still, I think, according to the best of my judgment, it does not go to the extent of requiring me minutely to examine the title not contested by any other claimant. I am of opinion, therefore, that I am at liberty to make a decree restoring this vessel to the claimants not as a British ship entitled to a British register, for of

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that I do not judge, nor do I say, I repeat it again, that there has not been a forfeiture or penalty incurred. With that I have nothing to do.

Before I come to a conclusion, I must consider what are the other objections so properly raised, and so very ably supported, on the present occasion.

One, I think, I may dispose of, though not unimportant, in few words. It was argued, in opposition to the *bona fides* of this transaction, that the claim was made by an agent, and ought to have been made by the parties. I entirely agree with the truth of that observation, and think it was a circumstance of some suspicion; but I cannot say it was really anything more. I cannot consider, as it is the commencement of the war, that the parties who are concerned in this matter, or their advisers in Scotland, ought to have been so well aware of the ordinary practice of this Court, that their adoption of this course of proceeding cannot be considered a venial error; though at the same time, it would be of importance, unless the other facts removed the suspicion that arose from this circumstance.

It is said, secondly, I might restore the ship, and condemn the enemy's interest in it, if he has one. Now what is that interest? A bottomry bond is admitted in the memorial. That fact never was kept back. As to the master not having mentioned the circumstance of a bottomry bond, I was originally struck with the argument as to his silence; but I have had reference to the interrogatories, and I do not see that the interrogatories pointed to a bottomry bond at all. I do not see that there was an intentional concealment, and it comes out from the mate. I do not see that the interrogatories distinctly, or indeed at all, required the master to allude to it.

I may here observe that it is not improbable—though I think I might have had more information on the subject, had some of the parties thought proper to give it—that Messrs. Brandt & Company having a bottomry bond, and knowing or believing they could not enforce it here, for that reason, among others, offered to restore the ship on condition of their advances being paid. They say, first, we have got a mortgage deed of doubtful validity; and again, we have got a bottomry bond of still more doubtful validity;

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we cannot enforce it, but we will not transfer the ship, we will not be active unless we get our money back again. That I believe to be the real condition of the deed of the 8th of July.

But how can I follow the course suggested of condemning this interest? If the bond be considered as given to an enemy, it is a nullity, it could not be enforced; if it is not given to an enemy, then I could not condemn such interest. Again, it is wholly contrary to the usage of this Court to take notice of either a mortgage or bottomry bond. I believe there is no instance in which it has been done; and all the cases, principles, and decisions are to the contrary. I should be very unwilling so to do in the present state of the law with reference to mere declarations and Orders in Council.

If I do not restore this vessel to the claimants, I have no alternative but to condemn her to the Crown. And how? Not as taken by a non-commissioned captor, but I must condemn her as the *Etrusco* was condemned—for a violation of British law—to the Crown. This, I think, I could not do; first, because I have no proof of a violation of British law, which, by British law, would entail such consequences as condemnation; secondly, because there has been no intention to commit a *malâ fide* act in violation of British law; lastly, because the whole transaction is a deception on the British Customs for the purpose of protecting British property—not for the purpose of deceiving British authorities, not with the intention of violating British law, but for rescuing property supposed to be in the grasp of the enemy.

I do not say that this course of proceeding, even for a laudable purpose, is quite correct; but I think it ought not to stay my hand in pronouncing a decree, restoring the ship. I trust, in coming to this conclusion, whether well founded or not, I have at least fairly stated and met all the difficulties of the case. This inquiry has been most properly instituted. Neither the officers of the Customs, nor the officers of the Crown, would in my opinion have been justified in releasing this vessel without the judgment of this Court. It has had to steer through many difficulties of a perfectly novel character; and where there are great difficulties, according to my view of the case, a ship never ought to be restored except by a competent jurisdiction.

The judgment of the Court will be, to restore the ship on payment of the expenses which have been incurred by the Crown.

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THE RAPID (No. 2).

[Spinks, 80.]

Purchase immediately antecedent to War—Invalidity.

A purchase purporting to be made just antecedent to a war cannot be upheld unless it is proved that the transfer was *bonâ fide*, the money was paid, and that the transferee was a neutral subject (*z*).

THIS vessel, under Danish colours, arrived from Archangel at Hull with a cargo on the 19th of August, and on the 21st was seized as Russian property. The cargo, belonging to British subjects, was restored.

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A claim for the ship was given on behalf of Mr. Hansen, her master, as her sole owner and a Danish subject. The vessel was built at Libau in 1853, and purchased by Messrs. Brandt & Sons, of Riga, who appointed Mr. Hansen master.

He alleged himself to have become the purchaser of the vessel on the 13th of April last, subsequently to which he made a voyage from Riga to London with a cargo, whence he proceeded in ballast to Archangel, where he took on board the cargo with which he arrived at Hull.

The *Queen's Advocate* and the *Admiralty Advocate* appeared for the seizor; *Dr. Deane* for the claimant.

DR. LUSHINGTON.—It has been contended, on behalf of the captors in this case, that the ship is liable to condemnation on two grounds: either on the ground that the transfer was colourable and fictitious; or that, if *bonâ fide*, the master who purchased the vessel was a Russian subject, and consequently that the ship is Russian property.

(*z*) See the *Ernest Merck*, *post*. In the *Soglasie*, Dec. 16, 1854, Spinks, 104, the same principle was acted on. The case depended solely on special facts, and is therefore not here reprinted.

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I will consider in the first instance whether there was a *bonâ fide* transfer of the ship. It is necessary to state that this was a purchase purporting to be made just antecedent to the war by the master who had commanded her before, and who had sailed in her as a Russian subject. This, according to all the rules and principles laid down and established in the Prize Court, has been always considered as a transaction that cannot be upheld, unless it be indisputably clear that the transfer was *bonâ fide*, that the money agreed to be paid was paid, and that the person to whom the vessel was transferred was a neutral subject.

The case has been very fully discussed, and all the documents have been brought under the notice of the Court; and though I must, in justification of the opinion which I am about to give, refer to some of them, yet I shall refer more briefly to them than I should otherwise have done in consequence of my adopting the arguments which I have heard on one side and on the other.

I will first read the answer of the master to the eighth interrogatory for the purpose of seeing how far that evidence is borne out and supported by the documents which have been produced in this case. He swears that "on the 18th of March he was told by the Russian Consul at Lubeck that the vessel was sold." Therefore the information which he received from the Russian Consul was, that on the 18th of March that sale had actually taken place. "That he then went over to Hamburg"—I suppose I must understand from that, without any delay in consequence of hearing that report; "where he learnt"—that is, for the first time information was given him—"that Messrs. Wagner & Enet had bought the vessel, and he thereupon called upon them and offered to buy it." He concludes by saying that he has had no correspondence with any one upon the ship since the purchase.

The ship had been originally built by Buckhoff in 1853, and was sold by him to Brandt & Co., merchants, carrying on a trade at Riga. It is stated in the papers that they were merchants at Archangel. It is a matter of no consequence, because it is clear, from previous cases, that the house of Brandt & Co. at Archangel and Riga are connected, to a certain extent, with the house in London.

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I may here observe, because it may be of use in other cases, that it is the custom of the Court, where information has been acquired in one case, to use it in others. Lord Stowell over and over again states, "I do not forget the information which I have derived from other cases."

Soon after the month of April, it appears, according to a previous part of the master's evidence, that the vessel went from Lubeck to Riga in ballast, from Riga to London with a cargo of hemp, from London to Archangel in ballast, and from Archangel to Hull with a cargo of linseed, and there she was seized. This is the history of the vessel, according to the statement of the master.

Let us now see whether the documents are conformable to the evidence; whether it is consistent with probability that he received the information which he alleged he received from the Russian Consul at Lubeck as to the vessel being sold, and whether in consequence of that information he did go to Hamburg and purchase her on his own account. Now the alleged account is, that Brandt & Co. of Riga, being determined to get rid of the vessel, in consequence of the impending war, authorized Wagner & Co. to dispose of her. A strange circumstance then took place. Those who had the power of attorney to sell the vessel, sold it to one of themselves; and it was almost immediately afterwards transferred to the master—a still more striking circumstance.

[The learned judge then referred to several of the documents, with a view of testing the truth of these statements, and said:] It appears to me that the master has deposed falsely and untruly; therefore I have not the least hesitation in saying that the transfer of the property was merely colourable, and I condemn the vessel. With regard to the very important argument respecting the national character of the master, it is of no use for me to enter into it, because I entertain no doubt that the other ground is a very sufficient one for condemning the vessel.

[Spinks, 82.]

THE CHRISTINE.

Seizure—Agreement for Sale—Non-payment of Purchase-money—Further Proof refused.

A vessel, under Lubeck colours, was seized by Custom House officers. Her master claimed her on the ground that he was a neutral, and had purchased her of her Russian owners. He admitted that he had paid no part of the purchase-money, and no bill of sale was on board at the time of seizure. Further proof was refused, and the vessel was condemned.

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This vessel, having arrived at Liverpool, from Memel, under Lubeck colours, on the 31st of July, was seized by the Custom House officers on the 11th of August. She was claimed by Mr. Schwartz, her master, on the ground that he was a neutral, being a citizen of Lubeck, and had purchased her of Russian owners. He admitted, however, that he had not paid any part of the purchase-money, nor given any security beyond his own personal engagement, but stated that his property at Lubeck was liable to satisfy the claim against him for that purchase.

The *Queen's Advocate* and the *Admiralty Advocate* for the Crown.

Dr. Addams and *Dr. Twiss*, for the claimant, cited the *Marianna* (*a*), the *Bernon* (*b*) and the *Jemmy* (*c*).

Dr. Lushington.—For the purpose of the judgment I am about to deliver, I will assume that the master is entitled to the neutral character which he claims as a citizen of Lubeck, and confine myself to the circumstances of the purchase of this vessel.

According to the master's own statement, this purchase was made at Libau, by a contract between himself and the owner, executed at Libau in February or March, 1854, he having been previously master of the vessel from June, 1853, and sailing under Russian colours. This contract is a very suspicious one, not only on the ground that it was immediately antecedent to the war, but also on the ground that it was a purchase by the master. I very much doubt, if all the records of this Court were examined, during the last war, whether there would be found a single instance in which restitution passed to a master, who was master of the vessel at the time of the sale and who afterwards continued master, the vessel being still employed in the same or an analogous trade. Be

(*a*) Vol. I. p. 518. (*b*) Vol. I. p. 70. (*c*) Vol. I. p. 331.

that as it may, and not considering it to be a fatal objection, yet it is abundantly clear that a party coming forward under such circumstances, and claiming a ship in a neutral character as a burgess of Lubeck, is bound, not only to produce but to have on board sufficient documents to satisfy the Court that he possesses a *bonâ fide* title. I do not say that the Court would bind him down to the production, in the first instance, of all the papers which it might ultimately deem necessary, to induce it to pronounce for a restitution; but I do say it ought to be a contract of that nature in itself, supported by such documents found on board, as would give the Court good reason to suppose that, if the opportunity of producing further proof was allowed, it would give him a title to restitution; otherwise, further proof is a mockery.

Now, in the present case, there are two capital defects. The master's answer to the thirty-first interrogatory is in substance this: that he, the party who now claims as the purchaser of the vessel, has not paid one single shilling of the purchase-money, 4,000 roubles; that he has given no security for it, but that he believes his property at Lubeck would be liable to pay for it, and perhaps the ship, if it went back, would be also liable. He then goes on to say, that after the payment of expenses he should remit the earnings of the ship to liquidate the interest, and reduce the principal.

I am of opinion, looking at all the decisions which have taken place in this Court, that the case is *felo de se*, on the statement of the master. It has been laid down, not in one but in half-a-dozen cases, that there must be proof of payment in all cases where any suspicion arises as to the validity of the contract at the time of sale. It is quite vain to say, "Mine is a *bonâ fide* valid contract." The money must have been paid before the master assumes the command or ventures out on the high seas during war; otherwise, the ship would be liable to be condemned. I have been asked in the course of the argument whether it is necessary that the money should be paid in all cases; whether a bill of exchange would not do? That question I will answer when such a case comes before me for my decision. But I will say this, that if in any case it appeared to me that one ship had been exchanged against another, or that some equivalent had been actually paid over, that would,

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in my opinion, be a totally different case from the one now under discussion. All that is now stated by the master is, that he had agreed to purchase the ship, but had not paid one farthing. That is a title of which no Prize Court can take cognizance.

That, however, is not the only defect in the case; the title on which the master claims—the bill of sale—is not here. Now this may be a *bonâ fide* claim; I do not decide whether it is or not; but I decide that it is not legal, according to the usage and practice of the Court, and the laws which regulate the Court in matters of prize. If this important paper, which is the sole title deed, is not produced, what satisfaction can the Court have? The title deed to the ship should be on board the ship. If further proof were allowed in this particular case, could the Court feel satisfied that it would receive a genuine document? The case is teeming with suspicion throughout. Is there any one document whatever produced that can satisfy the Court that the transaction was *bonâ fide*, independently of all the circumstances I have mentioned? Certainly, there is one document, marked No. 5, to this effect:—"We, the Senate of the Free Hanseatic town of Lubeck, do hereby make known and declare, that before the senator, H. C. Dettmer, by us specially hereunto appointed, hath in our Chancery personally appeared the local ships' clearer, J. C. F. Schutt, of the firm of Schutt & Company, as lawfully authorized by the local burgher, and Captain Johann Frederick Schwartz, by his power of attorney, dated Libau, the 12th of February, 1854, a burgher of this town, and deposed, and upon corporeal oath affirmed, that the aforesaid ship *Christine*, commanded by the local burgher and captain J. F. Schwartz, doth solely and *bonâ fide* to the last-mentioned belong, and that none other, whether directly or indirectly, hath any share or interest therein."

So that this gentleman makes oath, by virtue of a power of attorney from Captain Schwartz, which power of attorney is not produced. I have simply this document, which in no degree corroborates the claim. No case could be produced which would alter my impression of the present one. The *Marianna* (*a*) was a totally different case; that was an enemy's ship, and the ques-

(*a*) Vol. I. p. 518.

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tion before the Court was the title of property in some goods and in the freight, for which a claim was made by the former owner of the vessel, on the ground that he had a lien on the property for the purchase-money, which had not been paid. Lord Stowell's remark, that the fact of the purchase-money not having been paid could have little weight, since it was a matter solely for the consideration of the person who sells to judge what mode of payment he will accept, applied (and I perfectly agree with him) to the circumstances of that and similar cases; but not to a case where the question in dispute is the *bona fides* of the sale, for in such cases it has always been held that proof of actual payment was essential.

I cannot allow further proof, and have no hesitation whatever in condemning this vessel.

THE FIDENTIA (No. 2).

[Spinks, 85.]

Practice—Further Proof—Cargo Owner—Condemnation.

Further time to bring in proof of the ownership of the cargo, when the asserted owner has made no affidavit and produced no correspondence, *refused*, and the cargo condemned.

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On the 21st of July the Court allowed further proof in this case as to the cargo (*b*). The proof not being brought in within the time allowed, an application was now made for further time.

Dr. Addams appeared in support of the application; the *Queen's Advocate, contra.*

Dr. Lushington.—The present question is, whether the Court ought to allow more time for the purpose of giving in the further proof which was ordered when the case came before it on the 21st of July last. Before I proceed to the circumstances of this case, it is very expedient that I should remark, that such an application for the extension of time, made in so informal a manner, will not again be entertained by the Court, because it

(*b*) *Ante*, p. 281.

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is necessary in all such cases that the application should be founded on an affidavit which should be delivered to the Court, together with the papers in the cause, in due time before the motion comes on to be heard. As observed by Dr. Addams, the main question before the Court is, whether it should allow further time or not; yet it is not irrelevant in many cases to refer not only to the papers and to the facts adduced, in order to induce it to give further time, but also to the evidence in the original cause. I do not think it necessary upon the present occasion that I should comment upon the evidence in the original cause. It appeared to me perfectly clear at the hearing, that the Court would not restore the property, under the circumstances of the case, unless perfect and adequate proof were given. The facts of the case are, that this was a Finnish vessel, and that she was proceeding with a cargo to a Finnish port. She sailed, so far as I recollect, towards the latter end of March, and was captured on the 9th of April. A claim was given on the 27th of May, according to a statement in an affidavit made by a gentleman who appears to be a merchant resident in this town, and connected he must be, by inference, with a house in Finland. He says: "I received a letter from Elias Unonius, of Lovisa, in Finland, dated the 12th of May, enclosing a power of attorney from himself and A. Sundman, authorizing me to claim the above-named barque *Fidentia* as their property"—it was claimed as Russian property; that claim was rejected and the ship condemned—"and the cargo as the property of Johan Duncan Shaw, of Cadiz." I must say this case does not set out under very favourable auspices, because the claim is made on behalf of Mr. Shaw, who, though a British subject, yet in fact is entitled on the present occasion to no other character than that of a neutral merchant resident in Cadiz; and the claim comes, not from any authority from him, but from the authority of consignees, who are the enemy merchants in an enemy's country.

It does not appear that even up to the 21st of July, according to the statement of this letter, this gentleman had interfered in this case. The affidavit then goes on: "On ascertaining from my proctor that the judge had directed the claim on behalf of the said Johan Duncan Shaw to stand over for further proof as to its being his property, I, on the 27th of July last, transmitted, per

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post, to the said Johan Duncan Shaw, at Cadiz, a sketch of an affidavit to be sworn to by him in further proof of the said cargo being his *bonâ fide* property, with directions to him to annex to such affidavit as exhibits copies of the letters which had been addressed and sent by him to the said Elias Unonius and A. Sundman, transmitting to them the bills of lading of the respective portions of the cargo consigned to them by the said Johan Duncan Shaw, and containing his directions as to the disposal thereof." Now this letter was sent, and the form of an affidavit. So far as the Court can collect from the brief statement contained in this affidavit, if correct and true, the affidavit forwarded to Mr. Shaw must have been to the effect that the property belonged to him, and the letter required him to transmit the correspondence. "On the 19th of August following, I received a letter dated the 8th of that month,"—I do not see that there was any delay in this—"from Mr. Shaw, returning the said affidavit for amendment, by reason that he was unable to furnish copies of the letters so sent to the said Elias Unonius and A. Sundman, inasmuch as by some accident they had not been entered in his letter-book." Now it will be observed, that in this letter, whatever else might have been its contents, there is not only no proof that no letters were written on such occasion, but there is proof by necessary inference that there were letters accompanying the bill of lading, and their not being annexed is attributed to the accident that they had not been entered in the letter-book.

It is rather, I confess, to me a startling circumstance, that a merchant making a consignment at that period, especially under the circumstances of this case, who wrote letters representing what was to be done with the cargo when it arrived in Finland, should by some unaccountable accident not have entered them in the letter-book.

Mr. Unonius says, on the 29th of August, having conferred with his proctor, he sent a letter to Mr. Shaw, stating that he feared it would be useless again to apply to the Court for the restitution of the goods, unless the original letters were produced. On the 29th of September he received a further letter from Mr. Shaw, dated the 20th of that month, informing him that

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he was unable to furnish him with copies, as he had also stated in his former letter, but suggesting that he (Mr. Unonius) should claim the originals, which had been sent to Finland. I must say, I am a little surprised that at the time the correspondence took place Mr. Shaw did not make an affidavit stating that the property claimed did belong to him, and giving the reasons why he was unable to produce copies of the papers. There would then have been a very strong ground laid for the extension of the time. Mr. Shaw, however, does not appear to have taken any step of that kind. Mr. Unonius in this country writes to Mr. Unonius in Finland, requesting him to send the letters addressed to him. He wrote to Mr. Shaw, acquainting him that he had done so, and transmitted a copy of the letter so written. On the 28th October he received a letter from Mr. Shaw, dated the 16th of that month, in reply to his letter addressed to him on the 30th September, and on the 20th of October he says, "I received a reply from Mr. Unonius to my said letter to him of the 29th September last, acquainting me that neither he nor Mr. Sundman had any further documents in their hands from Mr. Shaw concerning the *Fidentia's* cargo."

Then as to what had become of those letters, or where they were at any time, there is no statement; but a still more extraordinary accident is, the original letters which had been addressed to Mr. Unonius in Finland have disappeared altogether. If I am to believe Mr. Shaw's letter, they were written, though not copied into his letter-book, and it is not stated they were ever received. All that is said is, that the house of Unonius at Carleby, in Finland, had not got them in their possession.

If I were to order further proof, under the circumstances, what do they offer as satisfactory evidence that this cargo belongs to Mr. Shaw? They offer me Mr. Unonius's affidavit, of Finland—the affidavit of an enemy merchant. Does any man believe that I do not require the original documents; that I do not require proof that, not now, but in March last, *bonâ fide* documents were written and sent to Finland, giving directions as to the disposition of this property, or that any amount of affidavit will now induce the Court to restore it? I have not altogether

forgotten the practice of former days. I am not going to suppose that the world has undergone so great a change that those practices which then prevailed have vanished. It is my duty to take care, and I will take care, that when these claims are made under suspicious circumstances, they shall be supported by proofs that ought to be in the power of a *bonâ fide* claimant. 1854 *November* 14. THE FIDENTIA. Dr. Lushington.

I will attribute no blame to Mr. Shaw; but if any merchant ships goods in a vessel without ordinary and due prudence, he must expect to take the consequences. It appears to me, on all these and other grounds, that there is no satisfactory reason assigned for giving further time; that all the facts as they appear in the original evidence, and as they appear in the affidavits that ask for further time, can lead the Court to no other conclusion than to the rejection of this motion and the condemnation of the cargo.

THE ELIZE, OTHERWISE ELISE WILHELMINE. [Spinks, 88.]

Unjustifiable Seizure by Custom-house Officer—Damages and Costs.

A Customs officer having seized a neutral vessel on her arrival at Leith, on the ground of an alleged breach of the blockade of Archangel, *Held*, that as on the facts the seizure was not justifiable he must be condemned in damages and costs.

A bare offer of restitution should be accepted, reserving the question of costs and damages.

THIS vessel, belonging to a Danish merchant and sailing under Danish colours, arrived at Archangel on the 10th of August last. On the 13th, the commanders of the English and French squadrons sent in a flag of truce, and officially announced that, from that day, Archangel would be effectively blockaded, and that any vessel attempting to enter that port would be seized for a breach of the blockade; but that all vessels which had already entered would be allowed fourteen days from such date to load their cargoes and depart unmolested. On the 20th this vessel, in company with many others, sailed from Archangel with a cargo of mats and tar, passed unmolested through the blockading squadron, and arrived safely at Leith. She had there discharged about half her cargo, when, upon the 11th of October, she was seized by 1854 *November* 22.

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the Custom House officers for breach of the blockade of the port of Archangel.

The usual examinations in preparatory having been taken were brought in, together with the ship's papers, on the 20th of October, when the judge directed them to be opened; and, at the petition of the Admiralty Proctor, decreed the usual monition. On the 4th of November a proctor appeared and claimed the vessel on behalf of her owner, a Danish merchant. On the 8th of November, the proctor for the seizor offered to restore the vessel, which offer the proctor for the claimant refused to accept without damages and costs.

The case now came on for argument simply upon the question of damages and costs.

The *Queen's Advocate* (with whom was the *Admiralty Advocate*), for the seizor.

Restitution having been offered, the sole question is, whether the seizor is to be condemned in costs and damages. There is no ground for such condemnation. This vessel sailed from Archangel after the commencement of the blockade, which was duly notified at that port, and was subsequently announced in the Gazette. As soon as it was found that licence had been given to vessels to come out for fourteen days, the offer of restitution was made—four days only after the claim had been given in.

The seizure, too, was justifiable on another ground. There was, among the ship's papers, no Danish sea-pass—a most essential document to foreign neutral ships, and the absence of which would alone justify the seizure. (Story's Prize Practice, p. 193.) It is difficult to conceive upon what principle, or upon what case, the complainant can rely after the decided opinion which the Court has already expressed in other cases, with respect to giving costs and damages against captors. (The *Ostsee* (*c*).)

Dr. Addams, for the claimant.

No cases need be cited. On the broad principles of justice,

(*c*) *Post*, p. 432. [The *Ostsee* was reversed on appeal, and the judgment of the Prize Court is printed with the judgment of the Privy Council.]

where one party has suffered damage by the wrongful act of another, he is entitled to compensation. It is his right *ex debito justitiæ*. Unless it is to be the rule laid down by this Court with respect to neutrals trading with this country, that every Custom House officer is to be at liberty to arrest their vessels and cargoes, and to interrupt their trade, without being liable to make good the losses they may occasion by a wrongful act, the seizors in this case must be condemned in costs and damages. There was not a shadow of a pretence for seizing this vessel. There was clearly no breach of blockade; and if there had been, the *delictum* was purged by the termination of the voyage, and the discharge in part of the cargo. But it is said this ship had no Danish sea-pass on board. That matters not; there is no question as to the Danish character of the vessel, and the having a Danish sea-pass on board is a matter belonging to the domestic regulations of Denmark, of which this Court does not take cognizance. On the principle laid down by Lord Stowell, the claimants are clearly entitled to full costs and damages. (The *Actæon* (*d*).)

Dr. Twiss on the same side cited the *Welvaart* (*e*), and the note appended to that case from Bynkershoek (*f*), *Juffrow Maria Schroeder* (*g*), *Hurtige Hane* (*h*), *Lisette* (*i*), *General Hamilton* (*k*), and the *Actæon* (*l*).

The *Queen's Advocate* and *Admiralty Advocate* replied.

DR. LUSHINGTON.—The question for the decision of the Court is, not whether the ship should be restored, because that is assented to on behalf of the seizors, but whether she ought to be restored with costs and damages.

It may be expedient, in the first instance, before considering this question, to state what voyage this vessel has been engaged

(*d*) *Ante*, p. 209.
(*e*) Vol. I. p. 207.
(*f*) Bynkers. Quæst. Jur. Pub., lib. 1, ch. 11.
(*g*) Vol. I. p. 279.
(*h*) Vol. I. p. 317.
(*i*) Vol. I. p. 587.
(*k*) Vol. I. p. 528.
(*l*) *Ante*, p. 209.

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in, and how far that was a legitimate proceeding. It appears by the memorandum of charter-party, that, at the time of its date, this vessel was lying at Leith, and it was agreed that she should proceed to Archangel, there load a certain quantity of tar and mats, and bring them to this country. Amongst other things, it was stipulated that, if Archangel should be blockaded, the charterers guaranteed to the master 100*l.* sterling. This charter-party is dated on the 21st of June, 1854; and I apprehend that this was a perfectly legitimate undertaking, because it entirely corresponds with the Order in Council of the 15th of April, 1854, which is to this effect:—"That all vessels under a neutral or friendly flag, being neutral or friendly property, shall be permitted to import into any port or place in her Majesty's dominions all goods and merchandise whatever, to whomsoever the same may belong." Now the effect of that clause undoubtedly is this: that a neutral vessel might import into this country the property of the enemy, and no inquiry should be made into the ownership of the cargo. The Order in Council further provides "that, save and except only as aforesaid, all the subjects of her Majesty, and the subjects or citizens of any neutral or friendly State, shall and may, during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate, which shall not be in a state of blockade." It was therefore perfectly competent to this vessel to sail to Archangel, and to bring back a cargo, provided that port was not blockaded, whether the property in that cargo belonged to a neutral, or a British subject, or an enemy—certainly a very great change from the state of things which existed in all former wars.

This being so, I will now, before I consider the subsequent facts of the case, address myself to the law of costs and damages. That law, as a general principle, though subject to many modifications, I apprehend to be precisely what is laid down by Lord Stowell in the *Acteon* (*n*). He there says: "The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place"—that is, he is entitled to restitution with costs and

(*n*) *Ante*, p. 209.

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damages. This is a proposition which, I apprehend, no person would be inclined to dispute generally; but *error versatur in generalibus*, and it is very difficult to collect from all the cases that have been decided any very definite principle by which we may determine what is to be considered an unjust deprivation of property. With regard to the practice, however, I repeat what I said on a former occasion, that within my knowledge and recollection there have been but very few cases in which costs and damages were given; certainly not more than ten or a dozen. It was a rule laid down by Lord Stowell, that restitution was to be granted on the ship's papers and depositions, and that the captor was not to be condemned in costs and damages without having the opportunity given him of showing that the seizure was justifiable, for which purpose he would be entitled to produce evidence if he thought fit.

I must determine, in each individual case, by reference to its own particular circumstances, whether the seizure was just or unjust, and decide accordingly with respect to the liability to costs and damages. One observation, however, I think I am justified in making, viz., that there is, in my opinion, a wide distinction between commissioned and non-commissioned captors. It is the bounden duty of persons acting under the commission of her Majesty, namely, officers in the navy, to seize all vessels whatever to which a hostile character might reasonably be attributed; and, when they fairly discharge that duty, the Courts have been astute in discovering reasons to release them, as far as possible, from any liability. That was clearly the principle upon which Lord Stowell acted in the case of the *Actæon*, though it ended in a condemnation in costs and damages. That was a very peculiar case, and not at all like an ordinary one. In consequence of a scarcity of wheat, the British Government, in the year 1812, being very anxious that the port of Cadiz should receive a constant supply of American flour, this country being at that time at war with America, granted numerous licences, authorizing any vessels except French vessels, and bearing any flag except that of France, to import into Cadiz from any port of the United States of America cargoes of grain, meal, flour, or rice, without molestation, on account of any hostilities which might exist between this country and the United

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States, notwithstanding such ships and cargoes might belong to any American citizens, and to return to any port not blockaded. These licences were to be in force for nine months. Under one of these licences the *Actæon* imported a cargo into Cadiz, and there received from the British minister a further licence, permitting her to ship a cargo of lawful merchandise, and to return with it to any port in the United States of America. In the course of the voyage she was boarded by several British ships, but on her licence being shown was permitted to proceed. But on the day before her original licence would have expired she was captured by one of her Majesty's ships, the commander of which, for certain reasons, being unable to retain her as prize, on the same evening set fire to and destroyed her. Under these circumstances Lord Stowell, though he expressed a belief that the captor had acted from a sense of duty, held that the American claimant was entitled to costs and damages.

I now come to the question whether, in the present case, the seizors, who were non-commissioned captors, mere Custom House officers, were justified in making the seizure in a port in this country, for I must observe that this circumstance also makes an essential difference. Where a vessel is captured at sea, the captor has very little opportunity of forming his judgment as to the course he should adopt beyond a few interrogatories addressed by him to persons who would naturally be unwilling to give him information; and a mistake under such circumstances would be infinitely more venial than when committed in a British port, where there is ample opportunity of obtaining advice, and of ascertaining the truth with respect to all the circumstances of the case.

Now this vessel, it appears, left Archangel on the 20th of August last, laden with a cargo of tar and mats, bound for Leith, where she arrived on the 29th of September. She was seized by the Custom House officers on the 11th of October, part of her cargo having been discharged. She was claimed on behalf of the present claimants on the 4th of November, and on the 8th there was a proposition to restore her. I speak of the ship only; with the cargo I have nothing to do at present. That proposition, it appears, was refused, except upon payment of costs and damages.

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Let us see, then, what was the original ground of seizure. As I understand it, the justification is now placed upon two facts: first, that this vessel had violated the blockade of Archangel; secondly, that she had no sea-pass. It has also been urged that the master in his depositions will not speak to the property of the cargo; but this argument can, I apprehend, have no weight, except upon the supposition that this was Russian property, because the Order in Council allows neutral vessels to import into any place of her Majesty's dominions all goods and merchandise whatsoever, to whomsoever the same may belong. It would not follow that the cargo, though Russian, ought to be condemned also, even if the vessel were condemned: because, if it were clear that the vessel was a neutral, it would not follow that the Russian merchant who had put his property on board in the *bonâ fide* belief that it would be protected by the Order in Council of the British Government, should lose that property through the act of the neutral.

With respect, then, to the first point, how must I deal with the blockade of Archangel? The Court must refer to the Gazette (*p*), a public document which it is bound to notice, and also to the evidence given by the master. The Gazette states, that the blockade had been imposed on the 12th of August last on the port of Archangel, and upon divers other ports of that part of Russia, and it makes no exception whatever. It must be observed, that from the date of that notification, as we all know, the blockade would be considered as announced to all neutral States; but it does not follow, because this notification was so made, that therefore it is to be taken as an absolute fact that the blockade was actually imposed at that period. The Gazette is only *primâ facie* evidence of the blockade, and not conclusive. What is the master's evidence on this point? He says, in answer to the thirty-sixth interrogatory: "While I was lying in the port of Archangel a Custom House officer boarded my ship, bringing with him a notice of communication from the Russian governor of the district, containing a notification from the officer commanding the combined men-of-war—English and French—in the White Sea, to the effect that from the 1st of August (old style), or from the 13th of

(*p*) 29th Sept. 1854.

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August (new style), the blockade of Archangel and other Russian ports in the White Sea was to commence and come into operation as respects ships coming into those ports; and, as respects ships leaving those ports, the blockade thereof was to commence fifteen days afterwards. The Custom House officer called upon me to sign my name to that notice, and to a certificate thereon of my having read it, and become aware of its contents, which I did, and he then took it away with him. I passed the blockading squadron while lying at anchor behind Cross island, on the 24th of August last, and showed my colours to them on passing." He then says, he did not receive any instructions from any one else regarding any blockade established or about to be established.

There cannot exist a doubt that, supposing this evidence true, this master committed no breach of blockade at all. He came out of port with the permission of the blockading squadrons, and sailed direct to the port of Leith. He is perfectly innocent, and consequently the owner is entitled to stand as perfectly innocent also. This seems to be admitted by the proposition to restore, as well as by the arguments in the case; but it is said that the non-commissioned officer was entitled to avail himself of the Gazette, and that he was not bound to know whether there was any such permission given to the master or not. I confess I entertain very grave doubts as to the truth of that proposition. I very much doubt whether, after a vessel has performed a voyage from a blockaded port by the express permission of the blockading squadrons, and has arrived and delivered part of her cargo in a British port, it is competent to a non-commissioned seizor to say, "I relied upon the Gazette; and, though it turns out that the master was innocent in all his conduct, yet I was justified in the seizure." I am much inclined to think, that if those in command of the British force gave full permission to certain vessels to come out of a port which appears from the Gazette to have been blockaded, the seizor must take the consequence if he did not get information as soon as possible from the Government; the loss is not to fall on the innocent owner.

Before, however, I come to that conclusion, I must notice another argument on the part of the claimant, viz., that, even supposing there had been a breach of blockade, still that breach

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has been purged. That is a question of very great difficulty, and one which I am not inclined to dispose of unless it is necessary so to do. As far as I am aware, that question never arose in the former war. It did not arise even during the whole of that period when all the coasts of England were under what is called a paper blockade. I think it is not incumbent on me to decide it now, because I am of opinion that the seizure of this vessel by a non-commissioned officer for a breach of blockade was not a justifiable proceeding

Another argument has been pressed by her Majesty's Advocate, which is entitled to consideration, viz., that a captor is entitled to avail himself of all the evidence which comes out upon examination, though unconnected with the pretence or ground upon which the vessel was originally seized. But though this may be true of an officer commanding one of her Majesty's vessels on the high seas, who has seized a neutral vessel and brought her in for adjudication, yet I am not so clear that it can be permitted a non-commissioned captor, when it is not denied that it is a neutral vessel, to say, "You should condemn her because she has no sea-brief. I did not seize her on that account, but having found out that she had no sea-pass, therefore you shall condemn her." Clearly this was not the ground on which the seizure was made; it is *ex post facto*. Let us see to what weight this is entitled. It may be true that, according to the laws of Denmark, she is not entitled to carry the flag of that country; but there is no doubt about this being a Danish vessel, for she has an admeasurement bill, wherein she is described as being of the Custom district of Flensburg, and as belonging to Mr. Andersen, of Flensburg; and it is further stated, that her tonnage, as also the initials of the royal names, and the words "Danish property," had been branded on the deck-beam at the mainmast. That document bears date the 29th of December, 1848, and it shows that at that time she was entitled to the character of a Danish vessel. It has never been customary to interfere with the domestic law of other countries; but at the same time I am bound to say this, that the sea-pass is not only a document constantly required by the municipal law of other countries, but by the Court of Prize also, in certain cases, where there is reason to believe that the vessel proceeded against is not a

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neutral. Under such circumstances the absence of the sea-pass is highly important, if not fatal.

I do not apprehend, however, that that principle can be strained to the case of a Custom House seizure of a vessel, manifestly, from all the circumstances, possessing a Danish character, manned with a Danish crew, having been engaged in a legitimate voyage, chartered by a British merchant, and bringing home a cargo on his account.

On these grounds I am strongly inclined to think that the claimant has made out his claim to some extent; but there has been a mistake on his part in these proceedings. Restitution was offered on the 8th of November; this was refused unless accompanied by costs and damages. This was an error; it ought to have been accepted, with the reservation of the question of costs and damages. Unfortunately, that was not done, and the ship has remained under arrest up to the present period.

I must condemn the seizor in costs and damages; but the damages must cease on the 8th of November, at the time when the claimant might have had the vessel restored to him.

No claim was given in for the cargo until the 16th of November, and restitution was offered and accepted by the claimants upon the 22nd. They, however, desired to be heard on the question of costs and damages.

The only difference between the cases of the claimants for the ship and the claimants for the cargo was, that the latter were British subjects, and had neglected to claim until the 16th of November. It was stated in the course of the argument that they had mistaken their course of proceeding, and had commenced an action for damages against the seizor in a Scotch Court.

The same counsel appeared.

DR. LUSHINGTON.—This is a question as to the restitution of the cargo, the Court having on a former day restored the ship, with costs and damages. This vessel and cargo having been seized as prize, I conceive it to be a proposition perfectly evident in law that

the sole and exclusive jurisdiction of the whole matter belongs to the High Court of Admiralty, under the commission that has been issued by her Majesty in prize matters, and that no other Court whatsoever within the United Kingdom is entitled to exercise any jurisdiction at all. Supposing that an action had been brought in any other Court for costs and damages, it would be a good and sufficient defence to say that this was a matter of prize. That was a lesson which I learned early in life, and I believe I was correctly taught.

The Court has already expressed its opinion that there was no sufficient ground for this seizure, and that it ought never to have been made. The seizure took place on the 11th of October, but the claim for the cargo was not made till the 16th of November. The Court is disposed to make a distinction between the claimants of the cargo and the claimants of the ship on this ground: the ship was Danish property, and it appeared consistent with equity and the ordinary practice of the Court that more time should be allowed to a foreign claimant to prefer his claim than to a British subject resident on the spot who had every opportunity to acquire a knowledge of the course to be pursued.

Now it appears that the present claimants of the cargo were either misinformed as to the course of proceedings which they ought to adopt, or were in utter ignorance of it; and it appears to me that, whichever was the case, it would not be just for the Court to lay the burden on the party who originally made the seizure. I cannot, therefore, direct the costs and damages to begin before the claim was made, viz., on the 16th of November. With respect to their continuance, it appears that on notice being given of a motion for restitution, with costs and damages, the claimants were informed that the restitution would not be opposed. They might, therefore, have taken possession of their property on the 22nd of November. Where it is intended to prefer a claim for costs and damages, restitution should be accepted, praying that the question of costs and damages may be reserved. If restitution were declined until the question of costs and damages was discussed, great delay might take place, and very large expenses be unnecessarily incurred.

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The parties in this case are fairly entitled to restitution, with damages from the 16th to the 22nd of November, and costs (*q*).

[Spinks, 98.]

THE ERNST MERCK.

Ship—Sale immediately before outbreak of War—National Character—Onus of Proof—Legal Title of Claimant.

Where an enemy ship is alleged to have been sold to a neutral immediately before the outbreak of war, the burden is on the neutral claimant, who must show a good legal title in order to obtain restitution of the vessel.

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THIS vessel sailed from Pillau to England under Mecklenburg colours, and was seized in Hull on the 1st of June, 1854, by the Custom House officers. She had a cargo of wheat and hemp on board, which was restored.

On the 11th of August a claim was given in by Mr. Gustav Menkow, of Schwerin, in the Grand Duchy of Mecklenburg-Schwerin, on behalf of himself and Mr. Frederic Albrecht, of the same place, as the sole owners and proprietors of the said ship. On the 30th of August the Court ordered further proof, which being brought in, the case came on for hearing.

The *Queen's Advocate* and the *Admiralty Advocate* appeared for the seizors; *Dr. Haggard* and *Dr. Bayford* for the claimants.

DR. LUSHINGTON.—In order to state clearly the opinion which I have formed upon this case, it will be necessary to specify the alleged facts with more than ordinary minuteness, and with equal care to notice the evidence by which such facts are supported.

The principal persons concerned in these transactions are: first, the house of Knock & Co., Russian subjects, resident at Riga, the alleged vendors of the vessel claimed; secondly, Messrs. Albrecht and Menkow, subjects of the Duke of Mecklenburg, and resident

(*q*) On a reference to the registrar and merchants to assess the damages, a claim for 129*l.* 12*s.* 4*d.* was made on behalf of the owner of the ship; but the report of the registrar and merchants, to which no objection was taken, reduced the amount to 40*l.* No claim was made on behalf of the owner of the cargo.

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at Schwerin, said to be the purchasers; thirdly, Krüger, the master, a Prussian born, afterwards having the national character of a Russian, and now alleged to have the national character of an inhabitant of Mecklenburg; fourthly, Mr. Charles Bolsche, described in the document marked 2A as of Riga, merchant, the undoubted agent of Knock & Co., of Riga, and the asserted agent of Albrecht and Menkow, for certain purposes; fifthly, the house of Merck & Co., of Hamburg, bankers, who are stated to have been bankers both to Albrecht and to Knock & Co., and through whom it is alleged certain payments were made. The ultimate decision of this case will depend principally upon what has been said and done by these parties, taken in connection with the documents herein produced.

The history of the voyage is as follows: this vessel sailed from Pillau to England under Mecklenburg colours, and was seized in the port of Hull, on the 1st of June last, by the Custom House officers. She had a cargo of wheat and hemp on board, which has been restored.

On the 11th of August, 1854, a claim was given for this ship by Mr. Menkow, whereby he claimed her as the property of himself and Mr. Albrecht, of Schwerin. On the 30th of August the Court ordered further proof to be given in support of this claim; that further proof has now been brought in and fully discussed.

It is now necessary for the Court carefully to inquire what is really and truly the history of this ship antecedent to the voyage. First, she was built at Libau, in 1853; and she was built for the joint account of Knock & Co., and Krüger, the master. It has been argued that by the law of Russia, the master had a peculiar right with respect to this vessel, which did not entitle him to be what we call in this country a registered owner, but that he was placed in this peculiar position, that he had a right to have some given share in the profits of the vessel, and was subject to any losses arising to the concerns of the vessel, and could sell such right, but that Knock, the principal owner, could transfer the vessel without Krüger's consent. It is sworn that such right exists by custom both in Russia and Germany. How, in such case, Krüger was to be paid for his interest in the vessel when

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sold; whether by the purchaser, or by Knock, the vendor, is left wholly in the dark; in some way or other, of course, he was to be indemnified, either by retaining his proportionate share, or by payment from some one. I can well understand how such a right as I have now described may exist, but I cannot so well comprehend how a transfer can be made of this vessel without some distinct provision for the securing such a master's interest. I can easily conceive that there may be a share in a brewery and not in the premises, or in a newspaper, and not in the house where it is printed and sold; but it appears to me that a perpetual share in the profits and loss of a ship cannot be separated from the ship, though a share in the profits and loss of a voyage may. The case put by Dr. Haggard, viz., that of a whaling voyage, in which the master shares the profits, is entirely different; it is confined to the voyage, and is not, as in this case, a perpetual lien remaining on the ship.

Now, the claim is, as I have said, for the ship, as the property of Albrecht and Menkow. It is exceedingly important that no doubt or obscurity should be allowed to hang about the law as administered in the Courts of Prize with respect to such claims. First, I apprehend that I cannot restore the ship to the claimants unless they show that they are the sole legal owners; and secondly, that though in the case of an enemy's ship, or a ship condemned by the Court of Prize, I cannot take notice of any lien or interest, yet, in the case of a claim and restitution asked for, I cannot restore, if there be any interest in the ship belonging to any one else, for which no claim has been given. This proposition, perhaps, requires some elucidation. If A. B. claims a ship as his property, and it should turn out that he is a trustee for shares in that ship belonging to another person, I cannot restore that ship to A. B.—I will not say in no case,—but certainly not unless the *cestui que trust* is himself entitled to restitution. There ought in such cases to be a claim for a person equitably interested. This will render it necessary for me presently to examine and determine whether the master has any, and what, interest in the ship. For the present I will proceed with what I will call the history of the claim.

The representation on the part of the claimants is, that Bolsche,

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by virtue of a power of attorney, which was general and not special, as the agent of Messrs. Knock & Co., did, on March 13th of the present year, transfer to Mr. Albrecht, his father-in-law, all his right, interest, and title to this vessel; and it is represented that at such time Mr. Albrecht had one-tenth, Mr. Menkow another one-tenth, the master, Krüger, an undefined right to four-tenths, and the remaining four-tenths belonged to Mr. Knock,—I say the remaining four-tenths, because such would be the whole interest remaining in Mr. Knock, supposing the agreement with the master has been fully carried out. It is, then, an indisputable proposition, that as this vessel sailed under Russian colours up to the 13th of March, and was to all intents and purposes a Russian vessel, if she had been seized before that date, whatever had been the right of Albrecht, Menkow, and Krüger, it would have been condemnable as Russian property.

This being a sale by a merchant, now become an enemy, very shortly before the war, is a transaction requiring to be very narrowly investigated, and respecting which the Court must exercise great vigilance lest the property of the enemy should be sheltered under a fictitious sale. A real *bonâ fide* sale is, no doubt, within the bounds of lawful commerce — of commerce lawful to the neutral; but if a neutral merchant chooses to engage for the purpose of extraordinary profit in dangerous speculations of this kind, he must be bound to satisfy the Court of the fairness of the transaction by the clearest evidence, complete in all legal form, and not only in legal form, but in truth and reality. If he does not produce such proof, or produces it in part only, when the *res gestæ* show that better proof might have been adduced, he must not expect restitution upon such incomplete evidence.

[The learned judge then examined with great minuteness the evidence of the transfer and of the master's alleged interest, and having pointed out numerous discrepancies and deficiencies, continued.]

I now come to the payment; we all know that one of the most important matters to be established by a claimant is undoubted proof of payment. It is alleged and it is argued that 8,000 dollars have been paid to Mr. Knock through the house of

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Merck & Co., of Hamburg; and it is said that this money was paid in the following manner: that Knock & Co. drew bills upon Albrecht for larger sums, which included this 8,000 dollars; that Albrecht accepted those bills and sent them to Merck & Co. to be placed to the credit of Knock & Co., and which they promised to do by their letters "after recovery." I was very anxious to get some solution of these words "after recovery"; it is to be observed that this transaction is by bill of exchange, *i.e.*, a promise to pay but not a bill made payable at their house. What, then, is the meaning of "after recovery"? If we look at the German we find that what is translated "after recovery" is literally "after receipt" or "after payment." I apprehend that they retained the bills for the benefit of Knock & Co., and that when put in cash for the amount of the bills, they would place the amount to Knock's account. It is singular that Mr. Albrecht does not swear to this payment at all; Mr. Menkow, indeed, swears that the payment was made by drafts, dated the 30th of March and the 6th of April; but is this payment, according to the established rules of this Court, satisfactorily made out? First, there is no proof whatever that these bills were ever paid or the proceeds transferred to the account of Knock & Co. This might easily have been given by extracts from the books of Merck & Co. Secondly, there is not a syllable coming from Knock & Co. as to the receipt of payment.

It appears to me that there are deficiencies in this case which can scarcely be accounted for; there must have been some correspondence between Knock and Albrecht antecedent to the sale, and subsequent also; but only one letter is produced, and that not from Knock but from Albrecht. The master says he received a letter from Knock informing him of the sale—that is not produced. There is no affidavit from Bolsche, none from Knock, nor is there any attempt to explain the want of a proof so manifestly necessary in a transaction of so suspicious a nature.

But to proceed with the facts of the case. I will consider the acquisition of the national character of the master, and also the obtaining for the ship the rights of the Mecklenburg flag, together.

With respect to the national character of the master—a Prussian

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by birth, a Russian by national character up to the 4th of April, 1854—it may be as well to say a few words on the doctrine so strongly insisted on by the learned counsel for the claimants, and which I think is founded on sound principles. It is this—that a national character, acquired by occupation only, may be changed with greater facility than a national character arising from birth or from long domicile; but though I admit this to be true, yet I hold that it is also true that a national character acquired by occupation must remain until another is *bonâ fide* acquired. How has such domicile been acquired in the present case? By a residence of two days afterwards and the payment of a few dollars. It must be observed, moreover, that this was not a return to the national character of origin, but the acquisition of a new national character in a State to which the master was altogether a stranger.

The master is said to have been naturalized on the 4th of April, to have been made a burgher on the 5th of April, and to have had four shares transferred to him on the 6th of April, on which day also the passport is dated; he admits that he was resident in Schwerin for two days, not before but afterwards; he acquired, therefore, his right, if indeed he acquired any, to a citizenship at Mecklenburg by purchase, and not by residence. If this be a legitimate mode of changing a national character, then such change may take place in twenty-four hours.

But is this new acquisition of national character of the master connected with change of character of the vessel, and how was this effected?

First, there is a paper, No. 6, admitted to be false, that the vessel was built at Rostock; secondly, there is a pass, equally false, permitting the vessel to sail from Rostock, where she had never been. What, then, is the necessary inference from these facts? Either that the Mecklenburg government was deceived by false representations as to this vessel, or that the government granted Mecklenburg papers, knowing that they were granted upon false grounds.

The Court is disposed, as it is its duty, to protect the just rights of neutrals and the proper exercise of municipal powers by independent States within their own dominions; but if for its own

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advantage any State will sanction, either in form or reality, such measures as these, it is also the Court's bounden duty to take care that they do not operate as an infringement on the just rights of belligerents.

Let us now see what was the course followed with respect to the employment of this vessel. Who was the agent employed to have the conduct of, and the control over her? Mr. Bolsche, the agent of Knock & Co. Whither was she going had not accident prevented it? To Riga, to resume her former trade—Riga, the residence of Knock & Co.

Under these circumstances can it be seriously contended that the national character of the master was changed, and that the ship became a *bonâ fide* Mecklenburg ship?

There are other facts, however, in this case which the Court is bound to notice. There has been a suppression of important papers in no degree accounted for by the master, though he has had ample opportunity of so doing. There are grave deficiencies in this case. The law requires, where a vessel has been purchased shortly before the commencement of the war or during the war, clear and satisfactory proof of the right and title of the neutral claimant, and of the entire divestment of all right and interest in the enemy vendor. The onus is upon the claimant to produce this proof; if he does not do so the Court cannot restore. The Court is not called upon to say that the transaction is proved to be fraudulent; it is not required that the Court should declare affirmatively that the enemy's interest remains; it is sufficient to bar restitution if the neutral claim is not unequivocally sustained by the evidence. This being the law, how then does this case stand? First, a purchase, where what was bought, and what was sold, and what was the interest of the master, is wrapped in impenetrable mystery, and this even if the alleged custom as to the interest of the master should be admitted to be true—a custom not argued to extend to Germany, though it is sworn so to extend in the affidavits. Secondly, no previous correspondence between Knock and Albrecht, though the papers point to it; the bill of sale and the letter of Albrecht being inconsistent with each other, inasmuch as the bill of sale declares the transfer to have taken place at the desire of Albrecht and Menkow, whereas the letter states it to have been at

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the desire of Knock. This letter is the only one produced, and proves nothing, though it is evidently one of a correspondence which might have proved all. Thirdly, no satisfactory proof of the payment. Fourthly, no evidence from Knock or from Bolsche, and no correspondence after the sale. Fifthly, the acquisition of Mecklenburg papers upon false grounds. Sixthly, the suppression of papers. Seventhly, the continued employment of the vessel under the agency of Bolsche, and the intended destination to Riga.

Under these circumstances, having carefully weighed all the arguments so industriously urged on behalf of the claimants, I have no hesitation in saying that, according to my understanding of the law and practice of the Prize Court, restitution cannot take place, and I therefore condemn the vessel.

THE ATLANTIQUE.

[Spinks, 104.]

Damages and Costs—Fraudulent Claimant.

Parties knowingly making a fraudulent claim condemned in the costs of the proceedings.

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Dec. 6.

THIS vessel was seized by the Custom House officers at Leith on suspicion of being Russian property. A claim was given in for her by a firm in Liverpool, who made an affidavit that no enemy had any direct or indirect interest in her. The claim, however, was withdrawn before the hearing.

The Court, being of opinion that there had been an attempt to practise a great fraud upon the Court, not only condemned the ship, but condemned the claimants in the costs of the proceedings.

[Spinks, 287.]
[10 Moore, P. C. 37.]

THE FRANCISKA (*t*).

Blockade — Relaxation of Blockade in favour of Belligerent — Liability of Neutral—Notice—Restitution without Costs and Damages—Further Proof.

Where doubts exist with respect to matter which does not appear upon evidence furnished by the ship itself (namely, the papers on board, or the examination of the master and crew), such as the existence or non-existence, the sufficiency or insufficiency, of a blockade, a Prize Court will allow further proof, and such further proof is not limited to the claimant, but may be granted to the captor also.

Whatever may be the demerits of a ship, she cannot be condemned for a breach of blockade unless, at the time when she committed the alleged offence, the port for which she was sailing was legally in a state of blockade, and was known to be so, by the master or owner.

The Admiral of the Fleet must be presumed to have carried with him from England sufficient authority to blockade such of the enemy's ports as he might deem advisable.

Principles which regulate the right of a belligerent to exclude neutrals from a blockaded port explained.

Relaxation of blockade in favour of belligerents, to the exclusion of neutrals, is illegal.

Semble.—The blockade would not be valid if the same indulgence was extended to neutrals.

Notice of a blockade must not be more extensive than the blockade itself.

The existence and extent of a blockade may be so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and such knowledge may supply the place of a direct communication from a blockading squadron, yet the fact, with notice of which an individual is so to be fixed, must be one which admits of no reasonable doubt.

On the 15th of April, 1854, the commander of the Baltic fleet blockaded, *de facto*, the coast of Courland, but his notice to the British Ministers, including the British Minister at Copenhagen, was of that character that the impression was that all the Russian ports in the Baltic were blockaded. The English Government also on that date issued an Order in Council, giving permission up to the 15th of May for Russian vessels to discharge their cargoes from Russian ports in the

(*t*) This was one of a class of cases, consisting of the *Johanna Maria*, *Union*, *Annechina Jantina*, *Steen Bille*, *Vrouw Alida*, *Jeanne Maria*, and *Nornen*, taken as prizes for a breach of the blockade of the coast of Courland. The *Franciska* was selected to try the question of ingress, and the *Johanna Maria* of egress, of the port of Riga. The cases of the *Franciska* and the *Johanna Maria* were argued together.

Baltic and White Sea to their port of destination, even though those ports were in a state of blockade. A similar permission was granted by the French Government. And the Russian Government by a ukase allowed the same indulgence to English and French ships. On the 14th of May, 1854, a neutral vessel, under Danish colours, sailed from Copenhagen for Riga, and was captured off Riga by an English ship of war on the 22nd of that month, for a breach of the blockade of that port.

Held:—First, that the vessel was improperly seized, as there was no legal blockade at the time of the seizure.

Second, that as the Order in Council must be taken to have extended to British and French ships, and as it relaxed the blockade in favour of the belligerents to the exclusion of neutrals, the blockade was illegal.

Third, that assuming the blockade to be legal, yet the master of the ship must be fixed with personal knowledge of all that was publicly known at Copenhagen on the 14th of May, and that as the general notoriety, so far as it existed at that time and place, was that all the Russian ports in the Baltic were blockaded, which was not the fact, the notice, therefore, of the blockade being more extensive than the blockade itself, it was of no effect against a neutral.

In such circumstances the sentence of condemnation was reversed, and simple restitution decreed, but without costs.

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THE *Franciska*, a neutral ship under Danish colours, was captured on the 22nd of May, 1854, off Lyser Ort, at the entrance of the Gulf of Riga, for a breach of the blockade of that port.

This ship sailed in March, 1854, from Tarragona, in Spain, with a cargo of wine and salt, the property of subjects of her Majesty the Queen of Spain, bound for Elsinore for orders, and thence for Lubeck, or some other safe port in the Baltic, not further north than Stockholm or Revel. On the 13th of May she left Elsinore, and passed the Sound, where she cleared for the Baltic generally, without naming any port, and was captured on the 22nd of the same month, off the entrance of the Gulf of Riga, by her Majesty's ship *Cruiser*, under the command of the respondent, Captain Douglas, for a breach of the blockade of Riga, and sent to England for adjudication.

A claim was entered by the appellant, a shipbroker in London, on behalf of Jorgen Peter Arboe, of Copenhagen, the sole owner, for restitution of the ship and freight. It was alleged by him that the master had orders to proceed to Riga if it was not in a state of blockade; that to ascertain whether it was so or not he made inquiries at Copenhagen, and also of her Majesty's ship *Rosamond*,

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but without effect, and that upon descrying the *Cruiser*, the *Franciska* sailed towards her with a view of making the same inquiry, when she was captured.

The case was heard on this claim on the 6th of October, 1854, when the learned judge of the High Court of Admiralty (the Right Hon. Dr. Lushington) admitted the claim, but allowed both the captor and the claimant to bring in further proof, which he directed to be confined to the fact of the blockade only. Further proof was brought in, and evidence entered into at great length by both parties, the material parts of which are mentioned and referred to in the judgment of their Lordships on appeal.

On the 27th of January, 1855, the judge of the Admiralty Court delivered judgment (*u*), condemning the ship and freight for a breach of blockade, on the grounds, first, that the blockade was notorious at Elsinore on the 14th of May, the day the *Franciska* had sailed from that port; and secondly, that the master had deposed falsely, as in the opinion of the Court he was proceeding to violate the blockade with a full knowledge of the same, and that, under such circumstances, the owner could derive no benefit from the treaty of Great Britain with Denmark, made in the year 1670.

From this sentence of condemnation the present appeal was brought by the claimant.

The arguments at the hearing of the appeal were chiefly upon these two points:—

First, whether at the hearing of the claim further proof as to the time at which the port of Riga was put in a state of blockade ought to have been allowed to the captor. The cases cited upon this question were the *Henrick and Maria* (*x*), the *Haabet* (*y*), the *Apollo* (*z*).

Secondly, whether upon the further proof there was sufficient evidence that the port of Riga, if at all in a state of blockade at the time of the capture of the *Franciska*, was so known to be by those in charge of the ship, and if the conduct

(*u*) [The judgment of Dr. Lushington, though reversed, covers many important points, and is printed at the end of the judgment of the Privy Council.—Ed.]

(*x*) Vol. I. p. 84.

(*y*) Vol. I. p. 524.

(*z*) Vol. I. p. 481.

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imputed to them constituted such a breach of blockade as made the ship liable to condemnation. Upon this point the evidence in the cause was referred to, and the following cases and authorities were cited: The *Courier* (*a*), the *Vrouw Judith* (*b*), the *Columbia* (*c*), the *Henrick and Maria* (*d*), the *Betsey* (*e*), the *Frederick Molke* (*f*), the *Apollo* (*g*), the *Juffrow Maria Schroeder* (*h*), the *Jonge Petronella* (*i*), the *Neptunus* (*k*), the *Rolla* (*l*), the *Charlotte* (*m*), the *Hoffnung* (*n*), the *Triheten* (*o*), the *Adelaide* (*p*), the *Flad Oyen* (*q*), the *Welvaart Van Pillaw* (*r*), the *Hurtige Hane* (*s*), the *Nancy* (*t*), *Naylor* v. *Taylor* (*u*), the *Fox* (*x*); 1 Kent's Comms. p. 147; 1 Kent's Law of Nations, p. 113; 2 Wheaton's Elem. of Inter. Law, 238 (3rd edit.); Traité de Prize Maritime, p. 378; Annual Reg. 1793; State Papers, p. 174.

The appeal was argued by

Dr. Addams and *Dr. Twiss* for the appellant; and

The *Queen's Advocate* (*Sir John Harding*) and *Dr. Jenner* for the respondents.

The case, with that of the *Johanna Maria* (*y*), involving a similar question of a breach of the blockade of the port of Riga, stood over for consideration. Judgment was now delivered by

The Right Hon. T. PEMBERTON LEIGH.—In the month of March, 1854, the Danish schooner *Franciska*, Mechelsen, master, was lying in the port of Barcelona, in Spain. On the 4th of that month a charter-party was signed by the master and certain mer-

(*a*) *Ante*, p. 50.
(*b*) Vol. I. p. 86.
(*c*) Vol. I. p. 89.
(*d*) Vol. I. p. 84.
(*e*) Vol. I. p. 63.
(*f*) Vol. I. p. 58.
(*g*) Vol. I. p. 481.
(*h*) Vol. I. p. 279.
(*i*) Vol. I. p. 208.
(*k*) Vol. I. p. 194.
(*l*) Vol. I. p. 573.
(*m*) *Ante*, p. 52.
(*n*) Vol. I. p. 533.
(*o*) Vol. I. p. 534, note.
(*p*) Vol. I. p. 306.
(*q*) Vol. I. p. 78.
(*r*) Vol. I. p. 207.
(*s*) Vol. I. p. 317.
(*t*) *Ante*, p. 108.
(*u*) 1 Moo. & Mal. 207.
(*x*) *Ante*, p. 61.
(*y*) *Post*, p. 370.

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chants at Barcelona, whereby the ship was hired for a voyage with a cargo of wine and salt "to Elsinore for orders, and thence for Lubeck or some other safe port in the Baltic, not further north than Stockholm or Revel." Twenty-four hours were allowed for receiving orders at Elsinore, and the captain was to consign his ship, on the passage of the Sound, to Messrs. Ahman & Lindberg at Elsinore.

On the 14th of March the master took on board a quantity of wines at Tarragona, and having completed her cargo with salt at Torreviega, on the 13th of April sailed from that port for Elsinore. On the 13th of May the ship passed the Sound, where she cleared "for the Baltic" generally without naming any port. On the 22nd of May she was seized near the entrance to the Gulf of Riga by her Majesty's steam frigate *Cruiser*, under the command of Captain Douglas, for an alleged breach of the blockade of Riga, and sent home for adjudication. On the 3rd of August a claim was entered for the ship by Northcote, a shipbroker in London, on behalf of Jorgen Peter Arboe, of Copenhagen, as the sole owner.

On the 6th of October the case was heard on the claim, when the judge admitted the claim, but allowed the proctors on both sides "to bring in further proofs, but only as to the blockade."

Further proofs were accordingly brought in, and on the 27th of January, 1855, the judge condemned the ship and freight. From this sentence of condemnation the present appeal is brought.

At the hearing of the appeal it was contended by the appellant:—

First, that the ship ought to have been restored on hearing the claim, or that, at all events, further proof ought not to have been allowed to the captors.

Second, that upon the further proof (if properly received) restitution ought to have been decreed with costs and damages.

As to the first point, the course of proceeding to be observed on the original hearing is very clear. In everything that regards the ship and cargo the case is to be considered in the first instance exclusively upon the evidence furnished by the ship itself, namely, the papers on board and the examination on the standing interrogatories of the master and some of the crew. If the case be

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clear upon this evidence, restitution or condemnation is decreed at once. If upon such evidence the case be left in doubt further proof is usually allowed to the claimant only, but it may also be allowed to the captors if, in the opinion of the judge who hears the case, such a course appears to be required. With respect to matters which cannot appear upon evidence furnished by the ship, as the existence or non-existence, the sufficiency or insufficiency, of a blockade, the Court must necessarily resort to other means of information. In this case the ship was labouring under the utmost suspicion. She had no Latin pass, which the Danish Government provides for a ship of that country; she had no paper whatever on board showing the port for which she was bound; she did not appear to have had any communication with the firm of Ahman & Lindberg at Elsinore, from which by the terms of her charter-party she was to receive orders as to her further destination. The master stated that he had received his orders from Arboe, the owner of the ship, at Copenhagen (who, as far as appeared, had no authority to give any), and that his orders were to proceed to Memel, but if there was no blockade, and if the English warships would permit him, to proceed to Riga; and that before he was captured he was sailing for Memel. Yet it clearly appeared that he had never steered for Memel at all, but had passed that port without approaching it, and had been captured at the Lyser Ort, at the mouth of the Gulf of Riga.

There was every reason, therefore, to suspect, if Riga was at this time in a state of blockade, that the master had notice of it, and intended to break it; but the existence of the blockade and its legality, as well as the master's knowledge of it, were disputed by the claimant. On reference to the *London Gazette* there appeared to be some confusion as to the time when the blockade had commenced, and under these circumstances the learned judge allowed "further proof, but only with respect to the blockade, to both parties." Their Lordships are of opinion that he was perfectly right in taking this course.

The second question is, what is the effect of the whole evidence ultimately before the Court?

Whatever may be the demerits of the ship she cannot be condemned, unless at the time when she committed the alleged offence

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the port for which she was sailing was legally in a state of blockade, and was known to be so by the master or owner.

The offence imputed to the ship in the affidavit of Captain Douglas, the captor, is that she was sailing for Riga, "and the deponent had reason to believe that the fact of the blockade of the Gulf of Riga was known at Copenhagen on the 13th day of May, the day of her departure from that port."

The grounds of the condemnation are thus stated in the judgment: "I condemn this ship, first, because I hold that the blockade was notorious at Elsinore on May the 14th, the day this vessel sailed; secondly, because the master has deposed falsely, and was proceeding to violate the blockade with a full knowledge thereof. Under such circumstances he can derive no benefit from the treaty with Denmark."

It is not contended by the captors that after the ship sailed from Copenhagen she received any notice to affect her with knowledge of the blockade, and the questions, therefore, are:—

First, was the port of Riga on the 14th of May legally in a state of blockade?

Second, if so, had the master or owner at that time such notice of the fact as to subject his ship to condemnation?

With respect to the evidence on the first point, it is established that on the 15th or 17th of April (on which of those days it is not material to determine, and there is some discrepancy in the affidavits), the admiral did establish, by a competent force properly stationed for the purpose, an effective blockade of the ports of Libau, Windau, and the Gulf of Riga; that, with the exception of the 3rd and 4th of May, on which days all the blockading ships were absent from their stations, the blockade was maintained to a time subsequent to that at which the *Franciska* was seized, and their Lordships agree with the learned judge in the Court below in thinking that the admiral must be presumed to have carried with him from England authority from her Majesty's Government to institute such blockade of the Russian ports as he might deem advisable.

But while the admiral was taking these measures in the Baltic, the English and French Governments were taking measures at

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home of which he was ignorant, and which it is contended seriously affect the validity of the blockade in point of law.

By an Order of her Majesty in Council, issued on the breaking out of the war and dated the 29th of March, 1854, provision had been made for the case of Russian merchant vessels which at the date of the Order should be in British ports, or which, prior to the date of the Order, should have sailed for any foreign port, bound for any port or place in her Majesty's dominions; and by another Order dated the 15th of April, after reciting the former Order as far as regarded the last-mentioned class of vessels, and that her Majesty, with the advice of her Privy Council, was now pleased to alter and extend it, it was ordered, by and with such advice as aforesaid, as follows: "That any Russian merchant vessel which, prior to the 15th day of May, 1854, shall have sailed from any port of Russia situated either in or upon the shore or coasts of the Baltic Sea or of the White Sea, bound for any port or place in her Majesty's dominions, shall be permitted to enter such last-mentioned port or place, and to discharge her cargo and afterwards forthwith to depart without molestation, and that any such vessel, if met at sea by any of her Majesty's ships, should be permitted to continue her voyage to any port not blockaded."

It has been held, and in their Lordships' opinion properly held, in the Court below, that the permission given by this Order to export goods from Russian ports in the Baltic and the White Sea, would authorize such exports from places which might at the time be in a state of blockade. Indeed, as it appears to have been the intention of the Allied Powers, as soon as possible after the commencement of the war, to blockade all the Russian ports in the Baltic, any other construction would make the Order almost nugatory. The same construction must, in their Lordships' opinion, be put upon the corresponding Ordonnance of the French Government, issued on the same 15th of April, by which Russian vessels bound for any place in France or Algeria were to be at liberty to leave any Russian ports in the Baltic and White Sea before the 15th of May, and pursue their voyage and return to any port not blockaded.

By a Russian Ukase issued on the ground of the Orders made by the Allied Powers, six weeks from the 25th of April were

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allowed to English and French vessels in Russian ports in the Baltic "for taking on board their cargoes, and for an unobstructed departure for foreign ports."

The English Order in Council of the 15th of April had provided only for Russian vessels bound to British ports, and the French Ordonnance of the same date for Russian vessels bound to French ports; but by a further French Ordonnance dated the 26th of April (containing instructions to French cruisers), free passage was ordered to be given to all Russian vessels loaded in Russian ports on French account for French ports, or on English account for English ports, up to the 15th of May.

As regards export, therefore, from the Baltic ports, by the effect of these several Ordinances all restriction up to the 15th of May, on the conveyance of cargoes in Russian vessels to British and French ports, was removed; and though British and French vessels would, by the general Law of Nations, be liable to confiscation for breach of blockade, by sailing from blockaded ports with cargoes taken on board after notice of the blockade, and the permission to export is, by the Orders, in terms, confined to Russian vessels, it seems improbable that the Allied Powers could intend to deprive their subjects of the indulgence granted to them by the Russian Government, or to subject their property to confiscation for doing what the enemy was permitted to do with impunity.

In effect, therefore, neutrals only would be excluded from that commerce which belligerents might safely carry on; and the question is, whether by the Law of Nations such exclusion be justifiable; and, if not, in what manner and to what extent neutral powers are entitled to avail themselves of the objection?

That such exclusion is not justifiable is laid down in the clearest and most forcible language in the following passage of the judgment now under review:—"The argument stands thus: By the Law of Nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations; and, therefore, no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of States not engaged in the war. The foundation of the principle is clear, and rooted in justice; for

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interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy, all relations of trade being by war itself suspended. To this principle I entirely accede, and I should regret to think if any authority could be cited from the decisions of any British Court administering the Law of Nations, which could be with truth asserted to maintain a contrary doctrine."

The learned judge, after discussing the question how far licences to enter blockaded ports would invalidate a blockade, and pointing out the important distinctions between blockades according to the ordinary Law of Nations, and the blockades introduced during the last war by the Berlin and Milan Decrees on the one hand, and the British Orders in Council on the other, and between special licences granted for a particular occasion and licences granted indiscriminately, proceeds: "I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit." And he concludes his able discussion of this part of the case in these words: "With respect to the present question I, therefore, have come to the conclusion, that as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral States ought to be entitled to the same advantages, and if there be any vessel so circumstanced, I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance." The learned judge holds that such relaxation does not affect the general validity of the blockade.

In order to judge how far this conclusion can be maintained, it is necessary to consider upon what principles the right of a belligerent to exclude neutrals from a blockaded port rests. That right is founded not on any general unlimited right to cripple the enemy's commerce with neutrals by all means effectual for that purpose, for it is admitted on all hands that a neutral has a right to carry on with each of two belligerents during war all the trade that was open to him in times of peace, subject to the exceptions of trade in contraband goods and trade with blockaded ports.

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Both these exceptions seem founded on the same reason, namely, that a neutral has no right to interfere with the military operations of a belligerent either by supplying his enemy with materials of war, or by holding intercourse with a place which he has besieged or blockaded.

Grotius expresses himself upon the subject in these terms:—"Si juris mei executionem rerum subvectio impedierit, idque scire potuerit, qui advexit, ut si oppidum obsessum tenebam, si portus clausos, et jam deditio aut pax expectabatur, tenebitur ille mihi de damno culpâ dato." (*De Jure Belli ac Pacis*, lib. iii. c. i. § v.)

Bynkershoek's commentary on this passage is to the effect that it is unlawful to carry anything, whether contraband or not, to a place thus circumstanced, since those who are within may be compelled to surrender, not merely by the direct application of force, but also by the want of provisions and other necessaries. "Sola obsidio in causâ est, cur nihil obsessis subvehere liceat, sive contrabandum sit, sive non sit, nam obsessi non tantum vi coguntur ad deditionem, sed et fame, et alia aliarum rerum penuria." (*Quæ. Jur. Pub.*, lib. i. c. 11.)

Wheaton, in his "Elements of International Law," vol. ii., pp. 228—230, justly observes, that this passage in Bynkershoek goes too far, and that a blockade is not confined to the case where there is a siege or blockade with a view to the capture of a place or the expectation of peace. But these passages seem to point to the reason on which this interference with the ordinary rights of neutrals was originally justified.

Vattel lays down the same doctrine:—"Quand je tiens une place assiégée, ou seulement bloquée, je suis en droit d'empêcher que personne n'y entre, et de traiter en ennemi quiconque entreprend d'y entrer sans ma permission, ou d'y porter quoi que ce soit: car il s'oppose à mon entreprise, il peut contribuer à la faire échouer, et par là me faire tomber dans tous les maux d'une guerre malheureuse." (B. iii. c. vii. ss. 1, 17.)

These passages refer only to ingress and the importation of goods, but it is clear that the operations of the siege or blockade may be interrupted by any communication of the blockaded or besieged place with foreigners; and Lord Stowell, when he defines

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a blockade, always speaks of it as the exclusion of the blockaded place from all commerce, whether by egress or ingress. In the *Frederick Molke* (*c*), he says: "What is the object of a blockade? Not merely to prevent an importation of supplies, but to prevent export as well as import, and to cut off all communication of commerce with the blockaded place." In the *Betsey* (*d*): "After the commencement of a blockade, a neutral cannot, I conceive, be allowed to interpose in any way to assist the exportation of the property of the enemy." In the *Vrouw Judith* (*e*): "A blockade is a sort of circumvallation round a place, by which all foreign connexion and correspondence is, as far as human force can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place; and a neutral is no more at liberty to assist the traffic of exportation than of importation." In the *Rolla* (*f*): "What is a blockade but a uniform universal exclusion of all vessels not privileged by law?" In the *Success* (*g*): "The measure which has been resorted to, being in the nature of a blockade, must operate to the entire exclusion of British as well as of neutral ships; for it would be a gross violation of neutral rights to prohibit their trade, and to permit the subjects of this country to carry on an unrestricted commerce at the very same ports from which neutrals are excluded."

It is contended that the objection of a neutral to the validity of a blockade, on the ground of its relaxation by a belligerent in his own favour, is removed if a Court of Admiralty allows to the neutral the same indulgence which the belligerent has reserved to himself or granted to his enemy. But their Lordships have great difficulty in assenting to this proposition. In the first place, the particular relaxation, which may be of the greatest value to the belligerents, may be of little or no value to the neutral. In the instance now before the Court, it may have been of the utmost importance to Great Britain that there should be brought into her ports cargoes which, at the institution of the blockade, were in Riga; and it may have been for her advantage, with that view, to relax the blockade. But a relaxation of the blockade to that

(*c*) Vol. I. p. 58. (*d*) Vol. I. p. 63. (*e*) Vol. I. p. 86.
(*f*) Vol. I. p. 573. (*g*) *Ante*, p. 140.

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extent, and a permission to neutrals to bring such cargoes to British ports may have been of little or no value to neutrals.

The counsel on both sides at their Lordships' bar understood that the learned judge in this case intended thus to limit the rights of neutrals, and to place neutral vessels only in the same situation as Russians under the Order in Council. Their Lordships would be inclined to give a more liberal interpretation to the language of the judgment; yet, if this be done, the allowance of a general freedom of commerce, by way of export, to all vessels and to all places from a blockaded port, seems hardly consistent with the existence of any blockade at all.

Again, it is not easy to answer the objections which a neutral might make, that the condition of things which alone authorizes any interference with his commerce does not exist, namely, the necessity of interdicting all communication by way of commerce with the place in question; that a belligerent, if he inflicts upon neutrals the inconvenience of exclusion from commerce with such place, must submit to the same inconvenience himself; and that if he is to be at liberty to select particular points in which it suits his purpose that the blockade should be violated with impunity, each neutral, in order to be placed on equal terms with the belligerent, should be at liberty to make such selection for himself.

But the ambiguity in which all these questions are left by the Order in Council of the 15th of April: the doubt whether the liberty accorded to enemies' vessels extends to neutral, and, if so, whether such liberty is subject to the same restrictions, or to any other and what restrictions, affords, in the opinion of their Lordships, another strong argument against the legality of the blockade in this case. If a partial modified blockade is to be enforced against neutrals, justice seems to require that the modifications intended to be introduced should be notified to neutral States, and that they should be fully apprized what acts their subjects may or may not do. They cannot reasonably be exposed to the hardship of either abstaining from all commerce with a place in such a state of uncertain blockade, or of having their ships seized and sent to the country of the belligerent, in order to learn there, from the decision of its Court of Admiralty, whether the conduct they have

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pursued is, or is not, protected by an equitable interpretation of an instrument in which they are not expressly included.

If these views of the law be correct, this ship cannot be considered to have had notice of any blockade of Riga at the time when she sailed for that port; for, in truth, no legal blockade was then in existence, and it would be hard to require a neutral to speculate on the probability, however great, of a legal blockade *de facto* being established at a future time, when he is not permitted to speculate on the chance of its discontinuance after he has once had notice of its existence.

Their Lordships have considered the objections to the blockade only as it is affected by the Orders in Council of the 15th of April, which relate to egress from Russian ports, and to this view of the case the argument at the bar was confined, both before the judge below and before their Lordships. But it may not be immaterial to advert to the position in which Russian vessels at this time stood with respect to ingress into the Baltic ports, and to consider whether a certain class of such vessels, namely, those which at the breaking out of the war were in British or French ports were not at liberty to sail with their cargoes for the ports to which they were bound, although such ports might be blockaded.

By the Order in Council of the 29th March, already referred to, it was ordered "that Russian merchant vessels in any ports or places of her Majesty's dominions should be allowed until the 10th day of May next, six weeks from the date hereof, for loading their cargoes and departing from such ports or places; and that such Russian merchant vessels, if met at sea by any of her Majesty's ships, should be permitted to continue their voyage if on examination of their papers it should appear that their cargoes were taken on board before the expiration of the above term. Provided that nothing therein contained should extend or be taken to extend to Russian vessels having on board any officer in the military or naval service of the enemy, or any article prohibited or contraband of war, or any despatch of or to the Russian Government."

There is here an enumeration of the several particulars which are to exempt a vessel from the Order, and to leave her, of course, subject to capture as enemy's property. But the attempt to enter

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a blockaded port is not among the exceptions, nor is there any prohibition against entering such port. An enemy's ship commits no offence against the law of nations by attempting to elude a hostile squadron and enter a blockaded port; she has a perfect right to do so, if she can. She is already subject to seizure in another character, but does not incur any penalty by breach of blockade. If, therefore, her liability to seizure as an enemy is to be removed, but her liberty to sail in security to her port of destination is to be restricted to such ports as may not be in a state of blockade, it should seem that such restriction ought to be specified.

Accordingly, in the next paragraph of this Order, which applies to a different class of vessels, the restriction is specified. Russian merchant ships, which at the date of the Order are on their voyage from foreign to British ports, are to be permitted to unload their cargoes, and forthwith to depart and continue their voyage to any port not blockaded.

By the corresponding Ordonnance of the French Government of the 27th of March, permission is granted to Russian vessels in French ports for six weeks, "de se rendre directement au port de destination sans qu'ils soient dans l'intervalle susceptibles d'être capturés." There is no exception of blockaded ports. By subsequent Orders of both Governments the period for leaving certain distant ports was extended to six weeks after promulgation of the Order. The same observation which has been made with respect to the cases of egress may be repeated with respect to ingress, namely, that if all the Russian ports were to be blockaded, and if a permission to a Russian vessel to sail to her port of destination was to be subject to a tacit exception of blockaded ports, such permission would be delusive, and hardly consistent with good faith towards the enemy.

No doubt, ships of one belligerent at the outbreak of war found in the ports of another, into which they have entered for peaceful purposes with the expectation of the continuance of peace, form an exceptional class which has a strong claim to an indulgent exercise of the right of capture; and an express permission to such ships to enter their port of destination, though blockaded, might, perhaps, not affect the validity of the blockade. It might fall within the class of cases alluded to by the learned judge of the Court below,

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of licence granted in particular cases upon special grounds. Such a case is very distinguishable from one where a belligerent, with a view to the interests of his own commerce, permits enemies' ships to bring to him cargoes from their own ports, though he at the same time insists on a blockade of such ports against neutrals.

Supposing, however, the blockade in this case to be open to no objections in point of law during the interval between the 15th of April and the 15th of May, it remains to be inquired whether the notice which this ship received of its existence was of such a character as to subject her to the penalty of confiscation for disregarding it. Notice has been imputed to the claimant in the Court below from the alleged notoriety of the blockade on the 14th of May, at Elsinore where the ship touched, and at Copenhagen where the owner resided.

It is contended by the appellant that in a case of ingress of a port subject to a blockade only *de facto* of which there has not been any official notification, guilty knowledge cannot be inferred in an individual from general notoriety, and that a ship is always entitled under such circumstances to warning from the blockading squadron before she is exposed to seizure.

To this proposition their Lordships are unable to accede. If a blockade *de facto* be good in law without notification, and a wilful violation of a known legal blockade be punishable with confiscation —propositions which are free from doubt—the mode in which the knowledge has been acquired by the offender, if it be clearly proved to exist, cannot be of importance. Nor does there seem for this purpose to be much difference between ingress, in which a warning is said to be indispensable, and egress, in which it is admitted to be unnecessary.

The fact of knowledge is capable of much easier proof in the one case than in the other; but when once the fact is clearly proved, the consequences must be the same. The reasoning of the learned judge of the Court below in this case, and the language of Lord Stowell in the *Adelaide*, reported in the note to the *Neptunus* (*h*), are conclusive upon this point.

But while their Lordships are quite prepared to hold that the

(*h*) Vol. I. p. 195.

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existence and extent of a blockade may be so well and so generally known that knowledge of it in an individual may be presumed without distinct proof of personal knowledge, and that knowledge so acquired may supply the place of a direct communication from the blockading squadron, yet the fact, with notice of which the individual is so to be fixed, must be one which admits of no reasonable doubt. "Any communication which brings it to the knowledge of the party," to use the language of Lord Stowell, in the *Rolla* (*i*), "in a way which could leave no doubt in his mind as to the authenticity of the information."

Again, the notice to be inferred from general notoriety must be of such a character that, if conveyed by distinct intimation from a competent authority, it would have been binding; the notice cannot be more effectual because its existence is presumed, than it would be if it were directly established in evidence. The notice to be inferred from the acts of a belligerent, which is to supply the place of a public notification or of a particular warning, must be such as, if given in the form of a public notification or of a particular warning, would have been legal and effectual.

For this purpose the notice of the blockade must not be more extensive than the blockade itself. A belligerent cannot be allowed to proclaim that he has instituted a blockade of several ports of the enemy, when in truth he has only blockaded one; such a course would introduce all the evils of what is termed a paper blockade, and would be attended with the grossest injustice to the commerce of neutrals. Accordingly a neutral is at liberty to disregard such a notice, and is not liable to the penalties attending a breach of blockade for afterwards attempting to enter the port which really is blockaded.

This was distinctly laid down by Lord Stowell in the case of the *Henrick and Maria* (*k*), where an officer of the blockading squadron had informed a neutral that all the Dutch ports were in a state of blockade, whereas the blockade was confined to Amsterdam. The ship was afterwards captured for an alleged attempt to enter Amsterdam, and Lord Stowell, in decreeing restitution, observed: "The notice is, I think, in point of authority, illegal; at the time

(*i*) Vol. I. p. 573. (*k*) Vol. I. pp. 84, 339.

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when it was given there was no blockade which extended to all Dutch ports. A declaration of blockade is a high act of sovereignty, and a commander of a King's ship is not to extend it. The notice is also, I think, as illegal in effect as in authority; it cannot be said that such a notice, though bad for other ports, is good for Amsterdam. It takes from the neutral all power of election as to what other port of Holland he should go, when he found the port of his destination under blockade. A commander of a ship must not reduce a neutral to this kind of distress; and I am of opinion, that if the neutral had contravened the notice, he would not have been subject to condemnation."

The authority of this case is fully recognized by Dr. Lushington in the present case, who observes that such an administration of the law, in protecting the party misled, was most just.

Applying these principles to the evidence before them, their Lordships can have no doubt that the master and owner in this case are to be fixed with notice of all that was publicly known at Copenhagen on the 14th of May, on the subject of the blockade; that it was known there that merchant vessels had been turned back from ports on the coast of Courland, and that a general impression prevailed that vessels seeking to enter Russian ports ran great risk of seizure; and that the owner in this case shared that impression, and that to this cause are to be attributed the want of proper ships' papers, which has been already alluded to, and the absence, on the further proof, of any affidavit on the part of the owner denying knowledge of the blockade.

But it is contended by the appellant that the impression which thus prevailed at Copenhagen (if, in fact, there existed any general impression) on the 14th of May, was, and of necessity from the acts of the belligerent powers must have been, not that the ports of Libau, Windau, and the Gulf of Riga were blockaded (which they really were), but that all the Russian ports in the Baltic were blockaded, which they certainly were not; and that a notice to be gathered from such erroneous impressions was, on the principles already referred to, of no effect.

In order to determine the question of fact upon this point, it is necessary to examine with some minuteness the details of the evidence as it applies to Copenhagen at the time when this ship

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left that city. On the 11th of April, 1854, the admiral made the following communication to Mr. Buchanan, her Majesty's Envoy Extraordinary at the Court of Denmark:—

Duke of Wellington, in Kioge Bay,
April 11, 1854.

Sir,

I have the honour to acquaint your Excellency, for the information of the foreign ministers, consuls, vice-consuls, and consular agents residing in the Kingdom of Denmark, that her Britannic Majesty's fleet will sail this day for the Gulf of Finland, to place in a state of blockade the whole of the Russian ports in the Baltic and in the Gulfs of Finland and Bothnia.

I have, &c.
(Signed) CHAS. NAPIER,
Vice-Admiral and Commander-in-Chief.

On the following day, the 12th of April, Mr. Buchanan published the following circular at Copenhagen:—

To ministers, chargés d'affaires, and consuls of all nations:—
The undersigned, her Britannic Majesty's Envoy Extraordinary and Minister Plenipotentiary at the Court of Denmark, has the honour to inform you that her Majesty's fleet, under the command of Vice-Admiral Sir Charles Napier, sailed this morning from Kioge Bay to take measures for placing in a state of blockade all the Russian ports in the Baltic and in the Gulfs of Finland and Bothnia.

(Signed) ANDREW BUCHANAN.

On the 15th of April, a notification of the official communications thus received was published by the Danish Government in the public newspapers.

A letter in the same terms with that to Mr. Buchanan was at the same time sent by the admiral to her Majesty's Ministers at Berlin and Stockholm, and the Hanse towns.

The effect of this letter was communicated on the 14th of April, by Mr. Lloyd Hodges, her Majesty's Chargé d'Affaires to the Hanse towns, to the Governments of Hamburg, Lubeck and Bremen, and by the Minister at Stockholm to the Swedish Government.

On the 15th of April, Lord Bloomfield, the British Minister at

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Berlin, made a similar communication to her Majesty's Consuls at Dantzic, Stettin, Konigsberg, Memel, Pillau and Swinemunde.

The effect of these communications was that the admiral had sailed with the British fleet up the Baltic for the purpose of immediately placing in a state of blockade all the Russian ports in that sea, not that he had actually blockaded any.

But, by a most unfortunate mistake, Mr. Hertslet, the British Vice-Consul at Memel, announced not merely that such a blockade had been actually instituted, but that he was ordered by the British Minister at Berlin to make such an announcement.

On the 17th April, he published at Memel, in the German language, a notice to the following effect :—

> Memel, April 17th, 1854.—I hereby most respectfully inform the Honourable Corporation of Merchants at this place, that I am ordered by the Royal British Ambassador at Berlin, to make known: that Admiral Sir C. Napier has placed the whole of the Russian ports in the East Sea in a state of blockade.
>
> W. J. HERTSLET, her Britannic Majesty's Vice-Consul.

On the 18th of April this notice was posted by the authority of the Corporation of Merchants at Memel, on the Royal Exchange of that city, and remained there the two following days.

There is nowhere to be found any public correction or qualification of this most important error. Indeed, it does not appear by anybody to have been considered an error as regarded the fact of the blockade. The admiral himself seems to have considered that he had both established and notified a general blockade. The officers of his fleet might naturally share the impression. Captain Foote and Lieutenant Hall, as is observed in the judgment below, had been in communication with Mr. Hertslet, and he probably made public the impression which he had received from them. There is not the least reason for imputing to him any intentional misrepresentation.

But the important point for consideration is: what impressions would these proceedings create on the public mind, and what reports on the subject would be likely in consequence of them to circulate through the ports of the Baltic? The belief which they would occasion, as it appears to their Lordships, must necessarily be

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that whatever the blockade might be it was general, and extended to all the Russian ports in the Baltic and was not confined to a few ports or to a particular division of the coast.

There is evidence that this actually was the belief created.

On the 21st of April the Lubeck newspapers contained the following notice:—"The closing of the Russian ports, which has now taken place through the blockade of them ordered by the English Government, cannot fail to exercise great influence on the value of Russian produce." On the same day the Gottenburg newspaper contained the following notice: "Stockholm, April 21.—It has already been made known at the different places, by the official paper of last Tuesday's post, that the British fleet has proceeded up the Gulf of Finland, and that all Russian and Finland ports have been declared in a state of blockade."

Nothing appears to have taken place which could have been known at Copenhagen, on the 14th of May, calculated to correct this impression. That ships had been warned off from Libau, Windau, and the Gulf of Riga, would in no degree tend to raise a belief that the blockade was confined to those ports, unless the masters of the vessels had been informed that they might proceed to other Russian ports, which does not appear to have been the case. One ship, indeed, the *Frithiof*, appears by Captain Key's affidavit to have been permitted on the 1st of May "to proceed on her voyage to the Gulf of Bothnia, because that gulf was not then blockaded"; but the ship could not have returned from her voyage or have made that fact public at Copenhagen by the 14th. That ships coming out of the blockaded ports were warned of the existence of the blockade was quite consistent with the existence of a blockade of other ports. The earliest document, in point of date, which refers to the blockade of the particular ports, as distinct from the supposed general blockade, is Captain Key's letter of the 12th of May, to Mr. Hertslet, at Memel; but that letter, if its contents had been more material than they are to the point now under consideration, could not have been generally known at Copenhagen on the 14th, the communication between those places, as appears by Mr. Hertslet's affidavit, occupying five days.

But there is conclusive evidence that, long after this period, the individual at Copenhagen, who might be supposed to be best

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acquainted with the blockade, and whose authority must carry the greatest weight at that place, namely, the British Minister, supposed the blockade to extend to all the Russian ports in the Baltic, and a letter of Sir Charles Napier of the 27th May, 1854, seems to show that he was under the same impression.

On the 27th May, the Admiral addressed, from Hango Bay, the following letter to Mr. Buchanan :—

> Sir,—Many Danish and Swedish vessels have been warned off the coast of Courland, attempting to enter the blockaded ports, pretending that no blockade has been notified. My letter, notifying the blockade, was addressed to her Majesty's Ministers at Copenhagen, Berlin, Hamburg, and Chargé d'Affaires at Stockholm. [It does not appear that any such notification had been made by the Admiral, except by his letter of the 11th of April.] I have, therefore, to request that you will take steps to make it known that all vessels, in future, will be seized attempting to break blockade.

On receipt of this letter, Mr. Buchanan, on the 3rd of June, addressed the following note to the Danish Minister for Foreign Affairs :—

> Copenhagen, June 3, 1854.
>
> M. le Ministre,
>
> I have the honour to acquaint you with respect to my note to your Excellency of the 12th April last, that Sir C. Napier, the Commander-in-Chief of her Majesty's naval forces in the Baltic, having established a blockade of all the ports of Russia in that sea and the gulfs of Finland and Bothnia, has reported to me that he has already had occasion to warn off Danish vessels attempting to proceed to some of these ports, and that his Excellency has notified to me, for the information of the subjects of his Majesty the King of Denmark, that vessels attempting in future to violate the blockade which he has established will be seized by her Majesty's cruisers.

Yet, from the Gazette of the 14th of August, it appears that the blockade of the coast of Courland commenced on the 17th of April, that of Helsingfors and some other ports on the 26th of April, that of Revel and other ports on the 20th of May, and that of Cronstadt and others in the Gulf of Finland on the

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26th of June, above three weeks after the date of Mr. Buchanan's letter.

It is clear, therefore, that the real state of the blockade could not have been known at Copenhagen on the 14th of May, and that the only notice which the master could receive at that port at that time would be, that he must not sail for any of the Russian ports; a notice which, if he had received it from a British officer, he could not, on the principles already stated, be punished for disregarding.

If this view had been presented to the judge in the argument in the Court below, it is probable that it would have commanded his assent, since he entirely approves of the principles on which it is founded. But unfortunately the argument before him took a different direction. The contention then appears rather to have been that there had been no blockade of any Russian ports which could have been known at Copenhagen on the 14th of May; and that if any knowledge, however accurate, had been acquired by the master, through the channel of notoriety, it would not have formed a legal ground of condemnation for an attempt to enter a blockaded port. At all events, their Lordships have the satisfaction of believing that the conclusion at which they have arrived upon this point is not opposed to the authority of the eminent judge whose decision they have to review.

But, further, although the Government and commercial classes of Denmark could hardly have been ignorant on the 14th of May that the commerce of neutrals had been subject to interruption, and that captains of British ships of war had interfered with their vessels, on the allegation of a blockade of Russian ports, there were not wanting circumstances which might reasonably excite grave doubts whether any such blockade had been established with sufficient authority, or would ultimately be recognised by the British Government.

In the first place, the intention to blockade had been duly notified to the Danish Government, and they might naturally expect that as the British Government on the one side, and the admiral on the other, had means of easy and rapid communication with Copenhagen, any measure so seriously affecting their trade as the actual blockade of any of the Russian ports would be forth-

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with intimated to them in the same authentic manner. It now appears why this was not done, namely, that the admiral considered the notification of the 11th April as equivalent to notice of actual blockade; but of this, of course, the Danish Government could not have been apprized.

Besides this, they would see that, by the British Order in Council, and the French Ordinances of the 15th of April, issued subsequently to the notification by the admiral of the intended blockade, a certain degree of commerce—which, if the ports were blockaded, would expose neutrals to confiscation—was permitted to Russian ships up to the 15th of May; they would observe that no such permission was given to neutrals; and they would not unreasonably infer that such permission was not granted only because it was not required; that the permission was granted to Russians because they would be liable to capture, whether the ports were blockaded or not; that it was not extended to neutrals, because, there being no blockade, there would on their part be no risk; and this impression would be confirmed by observing that, in the permission to Russian ships in the ports of the allies to proceed on their voyages, no reference is made to blockaded ports as either included in or excluded from such permission.

Again, it might be known at Copenhagen that the rumours of blockade which prevailed were, to a certain extent at all events, so far unfounded that many of the ports which were said to be closed were, in truth, open; that as to the coast of Courland itself there had been for two days no ships of war upon the blockading station, and that on those days and the day following a very large number of ships were reported at least, whether truly or not, to have entered Riga.

Their Lordships cannot but think that these considerations might with great justice affect the credit of any reports in circulation at Copenhagen, and create a not unreasonable doubt whether any blockade of Russian ports had yet been established by a competent authority; and they go far to explain much of the testimony which might otherwise be fairly open to severe animadversion. There has been much confusion and perplexity with respect to this blockade; there are, as usually happens in such cases, some inaccuracies and errors in the evidence on both sides, but their

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Lordships are not inclined to attribute to the statements of the witnesses, or the certificate of the merchants, which has been produced on the further proof, any wilful distortion or concealment of the truth.

The view which their Lordships have taken of this part of the case makes it unnecessary for them to advert to the many other important points which were argued at their Bar. They must advise a restitution of the ship (or rather of the proceeds, for it appears to have been sold) and of the freight, but certainly without any costs or damages to the claimant. There will be simple restitution, without costs or expenses to either party (*l*).

[Spinks, 307; 10 Moore, P. C. 70.]

(*l*) THE JOHANNA MARIA.

The circumstances in this case which led to the capture of the ship, differed from those of the *Franciska*, in this extent: The *Johanna Maria*, a neutral ship, belonging to a subject of Sweden, under Norwegian colours, took on board at Stavanger a cargo of herrings, and sailed therewith on the 5th of May, 1854, bound for Riga, where she arrived on the 20th of that month, and discharged her cargo, and then took on board a return cargo of rye and hemp, and sailed from Riga on the 24th of May, bound for Elsinore for orders, destined for a Norwegian port, and in the prosecution of such voyage was captured on the following day, about eight miles off Lyser Ort, at the entrance of the Gulf of Riga, by her Majesty's ship *Archer*, the respondent, Edmund Heathcote, Esq., commander, and brought to England for adjudication.

On the 19th of July, a claim was entered for the ship by the appellant, the Swedish Consul-General, on the part of the owner, Christian Lindtner, of Stavanger, Norway.

After the admission of further proof by the captors and claimant, the ship and cargo were condemned by sentence of the High Court of Admiralty, dated the 3rd of February, 1855, for a breach of the blockade of Riga, with a full knowledge by the master of the blockade. From that sentence the present appeal was brought.

Dr. Addams and *Dr. Twiss*, for the appellant; and

The *Queen's Advocate* (Sir John Harding), and *Dr. Jenner*, for the respondents.

The arguments and authorities were the same as those advanced in the case of the *Franciska*.

Judgment was delivered at the same time as in the case of the *Franciska*.

The Right Hon. T. PEMBERTON LEIGH: This vessel entered Riga on the 20th of May, after all difficulty arising from the Order in Council of the 15th of April had been removed. She came out again on the 24th of May,

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The following is the judgment of the Court below which was reversed:—

Dr. Lushington.—In the judgment I am about to pronounce upon the question relating to the blockades in the Baltic, it will be my earnest endeavour to found my decision upon the principles laid down by Lord Stowell in the numerous cases which it fell to his lot to determine, and, in adducing reasons for the conclusions to which I may come, I shall be anxious to resort to none which would not be in strict conformity with the principles forming the foundation of those great judgments—judgments which have been the delight and admiration of the world—and I adopt those principles and reasons, not solely on account of their authority or intrinsic merit, nor because the decisions of the Court of Admiralty were, with scarcely an exception, upheld by the Court of Appeal, and, more especially, were sanctioned by that most eminent judge, Sir William Grant, but also because, so far as I know, they were adopted as a part of the law of nations by the most celebrated jurisprudents in the United States. Indeed, I am content

having taken on board a cargo, with a full knowledge of the existence of the blockade at the time of loading, and in the expectation, as it is said, that the worst that could happen would be that she would be sent back by the British ships forming the blockade, to unload her cargo.

The only ground on which she could ask to be relieved from condemnation would be, that the letter of Sir Charles Napier, of the 27th of May, 1854 (*ante*, p. 364), and the subsequent announcement by the British Government in the *London Gazette*, of the 14th of August, would be sufficient to annul all that had previously taken place, and, on the principles laid down by Lord Stowell in the *Rolla* (*m*), to postpone all penalties for breach of blockade till after the 28th of May.

Their Lordships, however, are of opinion that such a judgment would carry the doctrine referred to further than either the decision itself or sound principle would warrant. In that case Lord Stowell observed that the blockade had been very lax; that several vessels had been permitted by the blockading squadron to enter, and the observations relied on must be understood with regard to the circumstances out of which they arose. In this case, from the 5th of May there had been an uninterrupted blockade; no single instance has been produced in which any vessel had been permitted by any of the blockading ships to enter the port; nor had any been permitted to come out after the 15th of May with cargoes subsequently loaded. There is clear proof of a *de facto* blockade; full knowledge of it by the master, and nothing which could mislead him as to its extent or effect. The usual consequences must therefore follow, and the sentence below be affirmed, but without costs of the appeal.

(*m*) Vol. I. p. 573.

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to take the law of blockade in the words of Chancellor Kent (*a*). I do not read these passages, because they are familiar to all, but I repeat that they contain the doctrine by which I intend to be guided.

I purpose, in the first instance, to address myself to the general questions, which may possibly affect all or most of the cases; having disposed of them, I shall then, so far as may be necessary, consider each particular case and what distinctions ought to be made.

Assuming, for the moment only, that certain blockades were established or attempted to be established by Sir Charles Napier in the Baltic, the first question which has been raised is: whether Sir Charles Napier was invested with adequate authority to establish blockades in those seas?

What is the law? Lord Stowell states it in the *Henrick and Maria* (*b*) and in the *Rolla* (*c*), where he says, "a declaration of blockade is a high act of sovereignty." The doctrine is this: that it appertains to the government of a belligerent country to declare a blockade; that no commander, of his own authority, can declare a blockade: he must be directly or indirectly empowered so to do by adequate instructions from his government, according to the circumstances of the case. It is not necessary for a commander on a distant station to have a special authority to impose a particular blockade. He must be supposed to carry with him such a portion of the sovereign authority as may be necessary to provide for the exigencies of the service, many of which cannot be known beforehand. With respect to stations in Europe, however, Lord Stowell said, it may be different.

In all this I fully concur, and it comes to this: that Sir Charles Napier, in order to declare a valid blockade, must have had adequate instructions from his own government. These instructions are not before the Court, and why? Because, when the objection was first taken, and afterwards, when repeated, I offered to cause a letter to be written to the Admiralty, requesting to be informed how far the instructions given to Sir Charles Napier authorized the imposition of blockades (*d*), and this offer was not accepted. I must say that the objection comes with a bad grace from the claimants, who, if doubts there were, had an opportunity of having them cleared up by the most competent authority.

(*a*) 1 Kent's Com. § 7, p. 145.

(*b*) Vol. I. p. 84.

(*c*) Vol. I. p. 573.

(*d*) Dr. Twiss submitted that that would not affect the question, which was whether, by the law of nations, neutrals were bound to conclude, without notice, that Sir Charles Napier had such authority; that such authority, or subsequent confirmation by his own government, might legitimate a commander's acts as between himself and them, but not as respects neutrals.

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But apart from any such information, I am of opinion that the Court has satisfactory proof that the blockades imposed by Sir C. Napier were imposed by competent authority.

In the case of the *Rolla*, Lord Stowell distinctly lays down the doctrine that the adoption by the home government of an enterprise which included blockades, though originally undertaken without appropriate instructions for that particular purpose, would have the effect of legitimating all the acts done by the commander, so far, at least, as the subjects of other countries are concerned; and on that principle he affirmed the blockade of Monte Video.

There appears to me to be conclusive evidence in this case that her Majesty's Government not only adopted all that Sir Charles Napier had done, but that those acts were done by virtue of due authority previously committed to him. The *Gazettes* of June 16th, July 12th, and August 11th all distinctly recognize, adopt, and enforce the measures of blockade instituted by Sir Charles Napier. That is more than enough to dispose of this objection; besides, this Court cannot pronounce itself ignorant of what all the world knows, viz., that one of the primary objects of the great armament organized for the Baltic, and entrusted to Sir Charles Napier, was the institution of blockades against the coasts and towns of Russia. This Court has uniformly acted upon such notoriety, and has never deemed itself under the necessity of asking for strict proof of that which no one reasonably doubted.

I pronounce, therefore, that this objection is wholly untenable.

The questions which I have at present to determine have reference only to the blockade of Riga, Windau, and Libau; and therefore my observations will at present be confined to the blockade of those places, or, perhaps it may be said, of the coast of Courland.

It was objected that the force destined to perform this service was inadequate to maintain the blockade. This is a question distinct from the due maintenance of the blockade; and I intend to consider them as separate matters.

I need not now state with perfect accuracy what is a legal maintenance of a blockade. As a general description, the places asserted to be blockaded must be watched by a force sufficient to render the egress or ingress dangerous; or, in other words, save under peculiar circumstances, as fogs, violent winds, and some necessary absences, the force must be sufficient to render the capture of vessels attempting to go in or come out most probable.

Is it proved, by satisfactory evidence, that, on the present occasion, the force appointed for the duty was competent to the performance of it?

That the testimony of the commander on the station is admissible

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evidence for such purpose, there is an authority to which, even if my own opinion differed therefrom, I am bound to defer: the judgment in the Court of Appeal pronounced by Sir W. Grant in the *Nancy* (*a*). But the authority of that case goes much further; for the opinion of the commander-in-chief on the station, that the force employed was adequate to maintain the blockade, was considered by the Court of Appeal as a sufficient ground on which to form their judgment. Sir W. Grant said: "As it appears the commander on the station considered the force employed completely adequate to the service required to be performed, we feel it necessary to rely on his judgment, and condemn the vessel as prize to the captors."

I must then first examine what the commander-in-chief has deposed on oath upon this point. Sir C. Napier, in his affidavit dated September 9th, 1854, amongst other things, deposes that on the 17th of April he placed the ports of Libau, Windau, and the Gulf of Riga under strict blockade, and the *Conflict*, the *Cruizer*, the *Archer*, and the *Desperate* were stationed off that coast, with orders to maintain the blockade; that on the 9th of May the *Amphion* was added; that he has received from the officers in command their logs, and has been officially informed that the blockade has been strictly maintained, and that he verily believes such information to be true.

It is true that Sir C. Napier does not in so many words assert that the blockading squadron was sufficient for the purpose, but the inference that he considered it so to be is irresistible; for he never could have deposed that he believed that the coast had been strictly blockaded by the force he despatched for such purpose, unless at the same time he believed it was capable of doing what was reported to have been done.

I am of opinion, therefore, that I have the same evidence of the adequacy of the force appointed to maintain the blockade as existed in the case of the *Nancy*, and was deemed by the highest authority sufficient proof of the averment.

I believe that I might safely rest my conclusion upon this authority and this evidence; but for the sake of a clear understanding of the principle, I will make one or two further observations. Although I am bound by the authority of the *Nancy*, and my own opinion entirely concurs with it, still that case must not be pressed too far. I am of opinion that if the declaration of a commander-in-chief on a station, that the blockading force is adequate for the purposes intended, is not met by conflicting evidence, it ought to be received as conclusive; unless, indeed, I could conceive a case in which the commander-in-chief would so certify, yet it should appear, even to a landsman, that

(*a*) *Ante*, p. 106.

such certificate could not meet the exigencies of the law, or, in other words, that the commander was mistaken in his notion of what was, in law, an effectual blockade. Where there was conflicting evidence—though I should pay the attention justly due to the testimony of the commander-in-chief, yet I should not hold myself absolutely bound by it—I should draw my conclusion from a consideration of the whole evidence before me.

I cannot think that the facts of the present case raise any suspicion; I can see no reason to suppose that a force of three or four steam vessels was not perfectly adequate to blockade the coast of Courland, from Libau to Lyser Ort, a distance of less than a hundred miles. Indeed, I am satisfied that evidence to establish the fact according to precedent and the law of this Court has been adduced to justify the conclusion that the force appointed to blockade that coast was adequate to an efficient discharge of that duty.

I shall now consider the question whether the port of Riga, and, I may say, all the Russian ports within the Gulf of Riga, Pernau, and others, could be legally blockaded by a force stationed off Lyser Ort. As this question, though not very prominently put forward, has been incidentally raised in the course of these proceedings, I deem it expedient to deliver my opinion upon it. Let me first consider the facts, and then see how the law will bear upon them.

Captain Key, in his affidavit, after having stated that he was appointed to command four ships, and that he stationed two between Memel and Libau, goes on to say, "that the two other ships were ordered to remain off the entrance of the Gulf of Riga and near Lyser Ort, where is the only passage for ships passing in and out of the Gulf of Riga; that the said passage is limited by shoals to a breadth of three miles; that the said position is the best and most efficient which can be taken by a ship or ships blockading the Gulf of Riga and the ports which are within the Gulf of Riga, the only approach to which it entirely commands, as the northern passage is impracticable for sailing ships, and is, in fact, never used by vessels of any description except fishing and other small boats, and that ships so stationed off Lyser Ort are also within sight of the port of Windau."

It follows, then, that it is perfectly practicable for a vessel of war, especially a steamer, stationed near Lyser Ort, at the entrance of the gulf, to prevent the ingress and egress of vessels into and from the gulf, and, consequently, to and from all places within it. Indeed, the distance of three miles is so short that the practicability of so closing the entrance is self-evident.

It is true that, in this mode of blockade, there are no ships regularly stationed immediately close to the towns of Riga or Pernau, or any other town in that vicinity; and it is also true that from Lyser Ort to

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Riga itself, and also to Pernau, the distance is very considerable—very many miles—but it is also true that all the coast within the gulf forms a part of the Russian dominions.

As such a blockade is, beyond all question, a justifiable measure of warfare against Russia, the question is, whether neutral nations have a right to complain thereof? In what respects are they aggrieved more by a blockade of this kind than by one where the blockading force is stationed more immediately off the coast or town blockaded?

It is not a question of efficiency, for it is obvious that such a blockade as this of the Gulf of Riga, may be more completely maintained than that of many other towns or coasts, because the distance to be guarded is limited to a breadth of three miles. Then, what is the distinction? Why, that the blockading force, though performing its office with equal efficacy, is stationed at a greater distance from the place blockaded. I confess that I do not perceive how any ingenuity of reasoning can conjure up a grievance to neutrals from a blockade of this description. Can the grievance depend upon the comparative distance which, in different cases, the blockading force may be stationed from the place blockaded? If so, at what distance would the blockade be valid, and at what not? Where is the arbitrary limit, and why should an arbitrary limit be fixed at all? To me it is abundantly manifest that the true criterion whereby the legality of a blockade shall be established is, not the place where the blockading force is stationed, nor its distance from the place blockaded, but the capability of the force, wherever stationed, adequately to maintain the blockade.

I will now examine whether there is any authority on this question, remembering always the terms of the proposition, that the whole of the coast purported to be blockaded is part of the dominions of the enemy. What are the words of Chancellor Kent?—"The squadron allotted for the execution of the blockade must be competent to cut off all communication with the interdicted place or ports" (*a*). This, I agree, is the true test, and not the distance of the blockading squadron.

All Lord Stowell's definitions are the same in substance. He tells us that a blockade, to be legal, must be efficient; and if efficient, it is enough.

No authority to the contrary has been or can be cited.

This, too, is the doctrine to be collected from the case of the *Nancy* (*b*), already cited. The inquiry of the Lords of Appeal was, not whether the place blockaded was an island, or a port, or a gulf, nor at

(*a*) 1 Kent's Com. 146.
(*b*) *Ante*, p. 106.

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what distance the ships were stationed, but whether the force employed was completely adequate to the services to be performed.

There is another case which came under the consideration of Lord Tenterden, when Lord Chief Justice of the King's Bench. It was the case of *Naylor and others* v. *Taylor* (*a*), and related to the blockade of Buenos Ayres. It was contended by the present Lord Campbell, then counsel in the cause, that no breach was proved. "It does not appear," he said, "that there was any port to which the notified blockade applied nearer than Buenos Ayres itself, which was 100 miles distant and more from the place of capture. A blockade cannot properly exist at such a distance; or, at least, vessels cannot understand that it does so, and are not guilty of a breach of blockade."

Lord Tenterden, in delivering judgment, said: "The distance of the blockading fleet from the ports declared in blockade is certainly considerable; but I know no precise limit of distance which can be fixed. I should say, as at present advised, that the blockading fleet may be at any distance convenient for shutting up the port blockaded, not obstructing any other"—that is, a neutral port—"and that was the case here; for Monte Video was open, and we do not learn that there were any ports not in a state of blockade higher up the river. I think, therefore, that the blockading fleet might lawfully be stationed off Monte Video." Therefore, compare the distance between Buenos Ayres and the point where the capture was effected in that case with the distance between the blockaded port and the blockading squadron in the present case, and compare the River Plate, the breadth of that river, with the passage off Lyser Ort of not more than three miles, and see whether the case to which I have now adverted is not an authority of the strongest kind.

In the course of the argument reference was very properly made, as I think, to the blockade imposed by Great Britain on the coasts of Holland in 1799. That blockade was deemed just and legitimate, though many of the squadron maintaining the blockade were necessarily stationed at great distances from the ports intended to be affected by the blockade, and large spaces of sea intervened between them.

I am satisfied, both on principle and authority, that the requisites to a blockade are only two: 1st, that the ports to be blockaded shall be hostile territory (*b*); 2nd, that the blockading force could so act as

(*a*) 1 Moo. & M. 207.

(*b*) Since this judgment was delivered, many vessels which had been captured off the Sulina mouth of the Danube, for breach of the blockade of that river, have been condemned; but the Court has in each case expressly stated the ground of condemnation to be, that no claim had been given in on their behalf.

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efficiently to maintain it. Both these requisites existed in the present case, and therefore I say that the blockade of Riga was legitimate.

I next proceed to consider what was done to constitute the blockade, and whether the blockade was maintained with that strictness which is necessary for its legal maintenance. For this purpose I shall consider the evidence, both affirmative and negative; premising, however, that I reserve for subsequent investigation the whole question of notice.

I will first observe that, assuming the force deputed to perform the duty was competent, a point already disposed of, some presumption fairly follows that the officers did discharge the duty entrusted to them, unless indeed it should appear that they either misconceived their duty or neglected it.

Sir Charles Napier deposes that on the 17th of April he placed the coast of Courland under blockade, and he mentions the four ships appointed to that duty. On the 9th of May the *Amphion* was added to the squadron. The *Desperate* may have been withdrawn.

As none of the ships now brought before me for adjudication were captured before the 21st of May, it does not appear to me necessary at this moment to endeavour to fix the precise day before that time when the blockade might actually have commenced; but I will examine the evidence as to the actual maintenance of the blockade.

Captain Douglas, one of the first who joined the blockading squadron, deposes that he is the commander of the *Cruizer*, and joined the squadron then blockading the coast of Courland on the 15th of April. He remained on that station till the 25th of August, but with very considerable absences—no less than about thirty-eight days. Where the *Cruizer* was during that interval I have no means of knowing. Captain Douglas then deposes that during all the time he was on the station he rigorously maintained the blockade, and he subjoins a list of sixty-nine vessels which he boarded.

Captain Heathcote, commander of the *Archer*, joined the squadron on the 9th of May, and he deposes to have assisted in maintaining the blockade from that period till the 12th of September, also with certain intermissions, amounting only to fourteen days or thereabouts; during that period he examined forty-one vessels.

Captain Cumming, who succeeded Captain Foote in the command of the *Conflict*, performed a similar duty from the 11th of May to the 14th of September. He was absent during thirty-three days. He examined forty-two ships.

Captain Key, in the *Amphion*, had the command of this squadron, which he assumed on the 9th of May. He states that two of the squadron were stationed off Lyser Ort, two between Windau and

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Memel, and that they so remained until the 11th of July "with such intermissions only as were necessary for coaling, watering, or other exigencies of the service."

What were the positions of the blockading ships after the 11th of July does not so distinctly appear from this affidavit; but Captain Key swears that the blockade was maintained up to the 19th of September, the date of the affidavit.

To this affidavit is attached a list, not of all the vessels boarded by the *Amphion*, but of those bound to Russian ports, nearly all to Riga, being eighteen in number.

Without attempting with any accuracy to ascertain the whole number of vessels so searched, it appears from this statement that they greatly exceeded 150 searched—some proof that the squadron were not wholly negligent of their duty.

But there is a much more competent judge than I can pretend to be, who has had under his consideration all the logs and all the official despatches of the officers employed in this service. Sir Charles Napier deposes on his oath, "that he has from time to time, in the course of their public duty, received from the officers in command of the said ships the logs of the proceedings of such ships, and has been officially informed by the said officers, and fully believes, that from the said 17th of April up to the present time, to wit, the 9th day of September, 1854, the said blockade has been strictly maintained."

If Sir Charles Napier, with this evidence before him, with his means of forming a correct judgment, has come to the conclusion that the blockade was duly maintained, I think that a judge sitting in this chair would, in the absence of conflicting testimony upon such evidence, feel himself compelled to come to a similar conclusion; and I think so also, more especially because if Sir W. Grant deemed the opinion of a commander-in-chief adequate evidence of the competency of a squadron to execute a blockade, *à fortiori, multum à fortiori,* such opinion would be of force when the question was of its actual maintenance, and when the evidence from which the conclusion was to be drawn consisted of logs and other statements, upon which none but a nautical person can form a very satisfactory judgment.

I am of opinion, therefore, judging only from the evidence at present referred to, and the opinion of Sir Charles Napier, that I must, *primâ facie,* consider the blockade to have been adequately maintained.

But this is a *primâ facie* opinion only. I must now examine the opposing evidence in these cases, to see whether any facts or circumstances are proved which ought to lead to the conclusion that those officers are mistaken in their notions of the maintenance of a blockade, or that in truth the blockade was not adequately enforced.

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Many objections of this kind have been raised. I will notice them in order. First, it has been said that many ships were allowed to go in and some to come out of the port of Riga, with the consent of the blockading squadron, or one of them.

What is the law, and what is the proof of the fact? I apprehend the law to be that when a blockade has been established by notification or *de facto*, for so long a space of time that all neutral nations must be taken to be cognizant thereof, it is not legally competent to the blockading squadron to allow ingress or egress at their pleasure; and that if they do so—though the blockade is not wholly invalidated, as I will presently show from authority—yet, if it be carried to too great an extent, then the blockade cannot in justice be enforced against other neutral vessels. But when a blockade, *de facto*, has been recently constituted, then it is the privilege of the neutral trader to come out of the port blockaded with a cargo laden before the blockade was imposed, and the duty of the blockading ships to allow such vessel to pass. The officers of the blockading vessels must, from a consideration of time or other circumstances, form the best judgment they can as to whether the cargo was taken in before the blockade commenced or not. They have no very satisfactory means of investigating such questions, because all they can do when they examine a vessel coming out of a blockaded port is to make inquiry of the master, who is clearly a person greatly interested in making a representation to his own advantage. Should the commander of any such blockading ship occasionally miscarry in his judgment, it could not be seriously contended that the blockade was thereby invalidated.

Of course, neutral vessels in ballast might leave the port.

Then as to ingress. To allow any vessel to enter would clearly be a breach of duty and an illegal relaxation of the blockade; but it by no means follows, that because a cruiser may not allow a vessel to enter, that he is therefore bound to detain her. On the contrary, it is his duty, if he has reasonable ground to believe that the master had no knowledge of the blockade, to warn her off, and not detain her. Very true it may happen, and frequently does happen, that a vessel is warned off, and that, upon being so warned off, the master of such vessel, instead of pursuing the line of conduct most consistent with a just regard to the interests of the belligerent, avails himself of the very first opportunity to slip into the port by night.

Such, then, being the law, what are the facts? Is there the slightest proof that the vessels composing the blockading squadrons at any time voluntarily relaxed the blockade by permitting egress or ingress contrary to the law regulating such questions? That no such neglect of duty or omission to perform it took place the affidavits of all the officers commanding all the cruisers fully prove. They state, one and

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all, that no vessel was allowed to come out except in ballast, or because they had adequate reason to believe that the cargo was taken on board before the blockade took place; that no ingress was allowed to any vessel whatever; but that they did as they were bound to do—warn off every vessel intending to enter which they conceived might be approaching the blockaded ports in possible ignorance of the blockade, detaining only those which from circumstances they deemed knowingly and wilfully to be attempting to violate the blockade.

The Court listened with the attention justly due to the many able arguments which were advanced on the part of the claimants, but I confess I marvelled much that so little notice was taken of the evidence I have just referred to—most important evidence on the part of the Crown—most important because, if neither discredited nor contradicted, it established the great leading fact of all, viz., that there was maintained a blockade *de facto*.

But what evidence is there to the contrary? Direct evidence of neglect of duty, or of inefficiency to perform it, there is none. There is no evidence of any ships being allowed to go in or to come out with the permission of the squadron—mark the words *with the permission of the squadron*—contrary to law. There is, however, evidence brought in on the part of the claimants, showing that a certain number of ships did enter the port of Riga notwithstanding the blockade. Assuming the fact to be so, such fact furnishes no evidence against the affidavits of the captors that they permitted no violation of the blockade; it is not even said or contended in any part of the evidence that a single one of those ships which entered Riga did so with the consent or by the connivance of the captors.

Then to what point can this evidence tend? To one only; it is legitimate evidence, not to prove but to tend to prove, that the blockading force was not adequate to the full discharge of the duty entrusted to it; and this brings me to the consideration of the question whether, seeing what was done and what was not, the Court ought to hold that the blockade was adequately maintained or that the port of Riga was so insufficiently invested that ingress might take place without evident danger.

This is a mixed question of law and fact. To decide it properly, the whole evidence on both sides must be weighed and contrasted, and not only the evidence as to facts showing the number of vessels which entered the port, and the number prevented, warned off, or captured, but all the peculiar circumstances of the blockaded port must be borne in mind.

What, then, is an efficient blockade, and how has it been defined, if, indeed, the term "definition" can be applied to such a subject? The one definition mentioned is, that ingress or egress shall be attended

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with evident danger; another, that of Chancellor Kent (*a*), is that it shall be apparently dangerous (*b*).

All these definitions are and must be, from the nature of blockades, loose and uncertain; the maintenance of a blockade must always be a question of degree—of the degree of danger attending ships going into or leaving a blockaded port. Nothing is further from my intention, nor, indeed, more opposed to my notions of the law of nations, than any relaxation of the rule that a blockade must be efficiently maintained; but it is perfectly obvious that no force could to absolute certainty bar the entrance; that vessels may get in and get out during the night, or fogs, or the prevalence of violent winds, and those fogs or those winds may occur more or less according to the latitude and longitude of the place where the blockade is maintained. It is most difficult to judge from numbers alone. Hence, I believe—and I have made search to ascertain the fact—that in every case the inquiry has been whether the force was competent and present, and if so, the performance of the duty was presumed; and I think I may safely assert that in no case was a blockade held to be void when the blockading force was on the spot or near thereto, on the ground of vessels entering into or escaping from the port, where such ingress or egress did not take place with the consent of the blockading squadron. I asked if there was such a case; none has been produced.

A very elaborate argument was addressed to the Court to prove that the blockading force was not, at certain periods, upon the station, or, rather, was not off Lyser Ort; and most certainly, if the fact could be established, that from incompetency or neglect of duty that force was not present in its proper place at times and seasons when there was no legal excuse to justify its absence, the validity of this blockade could not be sustained. But what was the evidence resorted to for the purpose of establishing so important a position? Reference was made in some detail to entries in the logs of the cruisers; for many reasons I consider myself incompetent to form any such sweeping conclusion from the entries in the logs. First, the logs at times contain expressions wholly unintelligible to me, and, I apprehend, to all who are not possessed of nautical experience. Secondly, I do not know at what particular part of the coast, how far off Lyser Ort, or how close to Filsund, would be the best station to maintain the blockade. Thirdly, I apprehend that, according to circumstances,

(*a*) 1 Kent's Com. 146.

(*b*) In the convention between Great Britain and Russia, on the 17th of June, 1801, a blockaded port was declared to be "that where there is, by the disposition of the power which attacks it with ships stationary or sufficiently near, an evident danger in entering."

places at a considerable distance from each other may be selected, and that winds and currents may have much to do with the selection. Fourthly, there must be winds which prevent at one time ingress, at another egress, to sailing-vessels, and the position of the blockading force will be altered accordingly.

These are circumstances upon which I am incompetent to form any conclusive judgment. I fully admit, however, that the fact of vessels entering the blockaded port is evidence always to be considered; but that question I have already examined.

For these reasons, I think that any judgment I could form from such data would not be warranted by former practice, and would be most liable to error. To this I may add that I should act against authority in entirely overthrowing the evidence of those persons who were on the spot and are possessed of nautical knowledge; and I will also observe that the opinion given by Sir Charles Napier has been also adopted and notified through the act of the Admiralty, thereby showing that, in their judgment, the force was competent for the purpose.

Again, take the list which is found on the one side and on the other. Assuming the list produced by the claimants to be a correct list, I find that according to that, from May 22nd to June 13th seventeen vessels entered Riga; from May 22nd to July 26th nine vessels went out of Riga, of which several were captured. Now take the other list; from April 15th to May 31st not less than 103 vessels were examined, that is, during a period of about six weeks—a fact I shall hereafter advert to again.

Now, it does appear to me to be very difficult to say, even from these statements, that egress from and ingress to this port, was not a matter of evident danger.

But allowing for a reasonable number of these vessels escaping by night or during fogs, which would not in the slightest degree affect the validity of the blockade, how many came out in broad daylight and were not exposed to examination? There is not one iota of proof that a single vessel did so come out, and perhaps when I come to another part of the case I may be able to show that it was very improbable that any would make such an attempt; but assuming that a third of the number did so come out, can it reasonably be contended, looking at the number boarded, that there was no danger to such vessels in effecting their egress? Is a mere violation of a blockade, against the consent of the blockading force, to invalidate it? Is there any case or authority for such a position? In the case of the blockade of the coasts of Holland in 1799, can it be supposed that many, very many, vessels did not evade that blockade? When we see the cases which came before the Court of Admiralty in that

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day, does it not almost follow as a matter of certainty that there were numerous cases in which that blockade was broken?

If such a doctrine as this could be maintained, the right of a belligerent to establish a blockade would become a nonentity. No port could be hermetically sealed.

I am then of opinion that I have ample evidence that the blockading force was adequate to the duty to be performed; satisfactory proof that all the officers of the squadron did their duty; and nothing to oppose it but the escape of some ships, all of which might be accidental, and none of which unquestionably did take place with the consent or by permission of the blockading squadron.

I cannot think that this blockade is invalidated by reason of any of the circumstances I have just investigated.

I will now consider the argument that the blockade could not have a legal existence until after stated periods, and I wish, so far as may be, not to mix up this part of the case with another most important division of the subject, viz., whether and when it became, to use a short expression, a matter of notoriety.

It has been contended that this blockade could not, by reason of the dates of the publication in the *Gazette*, be in existence before a particular time.

[The learned judge then stated the contents of the three *Gazettes*.]

What are the inferences to be drawn from these facts? First, it is clear that any blockade constituted by Sir C. Napier would acquire no legal validity in addition to what it originally possessed, or by way of confirmation and approbation of the exercise of the authority given to him, before the actual publication in the *Gazette;* or, in other words, the *Gazette* cannot convert a blockade *de facto* into a blockade by notification from the State itself before such notification be published. Up to the date of such notification, a blockade *de facto* must depend on its own legality, and be subject to all the rules attending a blockade *de facto* as distinguished from a blockade by notification; but I am at a loss to comprehend on what reasoning it can be maintained that a blockade *de facto* is, either as to the time it commenced or its validity, dependent upon the period of its notification by the government.

If a commander-in-chief imposes a legal blockade *de facto*, and maintains it, does the law require that it should be affirmed or confirmed or notified by his government at all, at any time whatsoever?

I am not aware that any such proposition was ever advanced before the hearing of this case, or that any authority can be found for it. No doubt it is much more convenient that every blockade *de facto* should be communicated as soon as possible to the home government, and by the government be duly notified; and for obvious reasons. Such blockade immediately becomes a blockade by notification, and obtains

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also the advantage of such a blockade over a blockade *de facto*. But suppose a blockade *de facto* is not notified at all, is it less a legal blockade? Is there any authority for contending that a blockade *de facto*, of however long continuance, must of necessity, and to maintain its vitality, be notified by the home government at all? And have there not been many blockades *de facto* never notified by the home government, and that *ex confesso*, from all the authorities?

Lord Stowell said, in the *Vrow Judith* (*a*), that though a formal public notification would always be most desirable, yet it is sometimes omitted in practice; and he added, that it might commence *de facto*, and went on to state some of the requisites of such a blockade.

If, then, it be not necessary to have any such notification from the home government at all, how can a late notification have any retrospective effect to invalidate a blockade with respect to neutrals? If a blockade *de facto*, with all its provisions for the protection of neutrals, be valid, how can they be injured by the delay or absence of notification?

I really doubt if it has been intended to argue that such delay of notification is a proof that there was not a blockade *de facto* actually imposed before; but if such was the drift of the argument the answer is the fact itself proved by the affidavits of Sir Charles Napier and the other evidence to which I have referred.

Even supposing that Sir C. Napier omitted to make due communication, or that the home government thought fit to delay the publication of the notification, or, if you please, neglected it—I cannot rationally put the proposition stronger—what right has a neutral subject to complain of this? Has he a right to say, Why did you not sooner convert a blockade *de facto* into a blockade by notification? Is not a blockade *de facto* fenced, for the protection of neutrals, by stringent and more rigid rules, to prevent injustice being done? and can it be averred that he is more sorely pressed by a blockade *de facto* than by one by notification from home? In how many cases can there be no such notification, such as in the China Seas, the Pacific, and even on the coast of the Brazils? In how many cases nearer home may the communication be delayed from a variety of circumstances?—from misapprehension, as supposing Sir C. Napier thought that the communication of his intention immediately to blockade was sufficient, or delayed to do so till his other measures were more advanced, or for any other reason? Suppose all this or any other similar reason, would not a blockade *de facto* be valid from the commencement, and would it be rendered null because the commander did not communicate the fact, and cause it thereby to be notified? If this were so, a blockade *de facto* would not depend on the authority to

(*a*) Vol. I. p. 86.

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institute or its maintenance, but on the fact of communication—a proposition hitherto unknown and totally without foundation in law or justice, for it proceeds on the erroneous supposition that a blockade *de facto* is not just as lawful as a blockade by notification, or is more onerous to neutrals; whereas it is a fact that in a blockade *de facto*, a severe operation upon neutrals is guarded against by regulations so stringent that it cannot affect them even to the same extent as a blockade by notification.

The same reasoning applies supposing that the home government, for causes by it deemed sufficient, or if you please by accident, should for a time delay notification, or omit it altogether.

Let me, however, not be misunderstood. I consider that it is, for the sake of greater certainty and the observance of strict regularity, advisable that the home government should, at a due season, make a notification; but that it is not incumbent upon it to do so at any particular time, and that such notification is not essential to the validity of a blockade *de facto*, in all other respects duly established.

I proceed to an argument which has been urged with great force, and which presents considerations of serious importance.

By the Order in Council of the 15th of April, any Russian merchant-vessel which, prior to the 15th of May, 1854, shall have sailed from any port of Russia in the Baltic or White Sea, bound for any port in her Majesty's dominions, shall be permitted to enter, discharge her cargo, and go to any port not blockaded.

It is then argued that the true construction of this Order is to permit any Russian vessel to leave, until the 15th of May, any blockaded Russian port, and consequently the port of Riga, and therefore to allow the trade to be carried on from a port prohibited to the neutral.

If this be so, the alleged inference in law is said to be that the blockade is invalidated, because it is contended to be contrary to the law of nations for one belligerent to permit to another a trade from which neutrals are excluded.

Three questions arise hereupon. First, the construction of the Order of April 15th. Secondly, what is the law? Thirdly, will the validity of the blockade be affected, and if so, how and when?

On the part of the Crown, the construction put on this Order is denied.

I will first observe that this Order of April 15th is an extension of the Order of March 29th, with certain alterations. By the Order of March 29th, all Russian merchant-vessels which had sailed from any foreign port prior to the date of that Order bound for any port in her Majesty's dominions were protected. The Order of the 15th of April made great alterations; it limited the place, from which Russian vessels might sail, to the Baltic and White Seas, and

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extended the time from the 29th of March to the 15th of May. The reason of the extension was manifestly to give time to leave the Russian ports after they were free from the ice.

It is apparent that at the date of issuing the Order of March 29th, there could not possibly be any reference to blockade, or egress from a blockaded port, for that Order is cotemporary with the declaration of hostilities. Although her Majesty, by another Order, specially reserves the right of blockade, yet it is in no degree adverted to in the Order to which I am referring, and which applies to a period when there could have been no blockade; but with respect to the return voyage, there was no exception of blockaded ports.

When the Order of April 15th was issued, the Government could not have known of any blockade, for none could have been imposed and made known to them at that period; but they did know what instructions had been given to Sir C. Napier, and they might have conjectured that some of the Russian ports would be blockaded before the 15th of May. Then the question is this, whether the original Order not having purported or probably intended to allow Russian vessels to sail from blockaded ports, such permission is conferred by the Order of April 15th. Now that Order makes no exception whatever; in form it applies to all Russian ports in the White Sea and the Baltic. Am I at liberty to engraft an exception upon it? It was urged that the British Government never could have intended to cripple its right over the power of blockade; to have granted an indulgence to the enemy, though also for its own advantage, which might possibly invalidate a blockade as to neutrals.

It appears to me that this is a strong argument to prove that the British Government never intended to allow Russian ships to come out of a blockaded port, but I think that that is not the true question; the Order in Council of the 15th of April gives in certain words a privilege to Russian ships, and the question is, not what the government intended, but what is expressed by the words which they have used. In cases of great doubt and difficulty it is true that surrounding circumstances may be resorted to, to ascertain the meaning of given words; but if the words themselves contain a clear and definite meaning, it is exceedingly dangerous to resort to circumstances *dehors* the instrument; and not only is this so, but it must be recollected that in a concession given by one belligerent to another, relaxing the strict rights of war, it is a principle sanctioned by high authority, and in my judgment to be sacredly maintained, that the most liberal interpretation should be given to the terms in which such relaxation is declared.

I am, therefore, of opinion that no restriction can be engrafted upon the words giving permission to Russian vessels to quit Russian ports;

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that even if doubt there were, that doubt ought to be decided in favour of the hostile power; and that, consequently, if any question were to arise as to any Russian vessel coming out of Riga prior to the 15th of May, that port being blockaded, such Russian vessel ought not to be subjected to condemnation.

Again, if I am right in this conclusion, the subjects of neutral powers would be justified in contending in this Court, that so far as their interests could be concerned, such was the true construction of the Order in Council of the 15th of April.

For these reasons I am disposed to give to all the claimants in this Court the benefit they can be justly entitled to derive from such a construction; but it remains to be considered to what benefit they could justly make a claim, and to what extent and in what way the consequences of a blockade would be affected. This statement, I am well aware, opens a very wide and all-important theme for discussion, and requires the Court to go back to the first principles by which the rights of belligerents and of neutrals shall be governed.

The argument stands thus: by the law of nations a belligerent shall not concede to another belligerent, or take for himself, the right of carrying on commercial intercourse prohibited to neutral nations, and therefore that no blockade can be legitimate that admits to either belligerent a freedom of commerce denied to the subjects of States not engaged in the war. The foundation of this principle is clear and rooted in justice, for interference with neutral commerce at all is only justified by the right which war confers of molesting the enemy—all relations in the nature of trade being by war itself suspended. To this principle I entirely accede, and I should regret to think if any authority could be cited from the decisions of any British Court administering the law of nations which could be with truth asserted to maintain a contrary doctrine.

One authority was mentioned, the case of the *Fox* (*a*). That case is most essentially distinguished from the present; it refers solely to blockades, if so they may be called, established on the principle of notification only. The observations which have been cited from the judgment in that case were called forth by an argument that even the blockades of those days might be vitiated by a grant of licences. In answer to such arguments, Lord Stowell asserted a fact, but he did not maintain a principle; he said, with great truth, that it had never been considered that the validity of blockades was vitiated by the grant of licences; but to give just weight to his words, we must bear in mind the circumstances of the case that he was then discussing. Lord Stowell was not speaking of blockades according to the ordinary custom of nations; he was discussing another and a very different

(*a*) *Ante*, p. 61.

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question. He had to decide whether Great Britain was justified, in consequence of the celebrated Berlin and Milan decrees, in imposing, by declaration only, blockades against a very large portion of the coasts and towns of Europe—blockades which it was never intended, and which, indeed, it was impossible for the naval forces of Great Britain to maintain according to the ancient laws. These were called paper blockades, and their justification depended wholly and entirely upon reasoning foreign to the present case. With regard to the observation of that learned judge, that the grants of licences had never been held to invalidate a blockade, I must observe, first, that the relaxation contained in the Order of the 15th of April is not merely a grant of licences to individuals, but, though limited to a class, is a permission to the whole of the Russian mercantile navy destined upon voyages to Great Britain to complete such voyages, and I think that this fact alone forms a distinction between the present case and the grant of licences. And secondly, with respect to the grant of licences, I concur with Lord Stowell as to the fact (though I believe the question was never raised) that the grant of licences had never been held to vitiate a blockade; and I am of opinion that where such licences were granted upon peculiar and special occasions, and for such only, the doctrine is true, and for this reason, because special occasions might arise which might call for the grant of such licences, and be productive of no perceptible injury to the subjects of neutral States or their commerce; but I think it my duty to declare that if, in the case of blockades, according to the accustomed law of nations, licences should be granted indiscriminately and with such profusion, with liberty to violate that blockade, as to throw the whole trade into the power of the belligerent State imposing the blockade, and thereby excluding neutral commerce, I am not prepared to say that such a blockade under such circumstances could be justly enforced against neutral States with a due regard to the principles of the law of nations. I think that if the relaxation of a blockade be, as to belligerents, entire, the blockade cannot lawfully subsist; if it be partial, and such as to exceed special occasion, that, to the extent of such partial relaxation, neutrals are entitled to a similar benefit. To a certain extent this also was the course of reasoning adopted by Lord Stowell in the *Fox*, upon the fact that licences had been granted as numerously to neutrals as to British subjects.

With respect to the present question, I therefore have come to the conclusion that, as Russian vessels might have left the ports of Courland up to the 15th of May, the subjects of neutral States ought to be entitled to the same advantage; and if there be any vessel so circumstanced, I should hold her entitled to restitution. I think the remedy should be commensurate with the grievance.

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A question then arises whether any and what further consequences could result with regard to this blockade; upon what principle could it reasonably be maintained that after the 15th of May, when the privilege of Russian vessels had ceased, neutral subjects could claim a right to be emancipated from the ordinary law of blockade. At that period all the reasons which a neutral might justly urge on account of the advantage conferred upon the enemy, or the benefit given to British commerce, had vanished; and how can it be fairly contended that the effect shall continue, when the cause has disappeared? To me it seems that I have conceded to the utmost limit all that can be justly demanded on the part of a neutral nation.

I must now briefly refer to another matter. In the course of the argument the letters which have been written by the officers commanding different ships composing the squadron were adverted to, and it was contended that the legal operation of a blockade could not be maintained at times earlier than those mentioned in the letters. Though I am prepared to admit that, so far as relates to the interest of any individual ship affected by the letters or actions of the commander of one of her Majesty's ships of war, the claimant would be entitled to the full benefit of any results fairly emanating therefrom, yet I think it right to guard myself against the supposition that the acts or conduct of such an officer can be held to alter the character of such a blockade, such officer at the time being under the command of a superior. To elucidate what I mean, I will refer to the case of the *Henrick and Maria* (*a*). There the officer commanding the capturing vessel erroneously stated to the master of the neutral ship that the blockade was of greater extent than in reality it was, and this Court decreed restitution—and most just was such an administration of the law in protecting the party misled—but it would have been a most extravagant conclusion to have administered a remedy wholly beyond the disease, and to have held that the character of the blockade was changed, and its efficiency impaired with respect to other vessels, where there was no misleading and no mistake. This also was precisely the course pursued in the three cases reported in the notes to the *Juffrow Maria Schroeder* (*b*).

In the case of the *Vrow Barbara*, the vessel was taken on her voyage from Havre to Hamburg; she had been stopped and examined in going to Havre, and had been informed, in effect, that she might do so. The master knew of the blockade, and understood that it had been relaxed. Lord Stowell restored the vessel, and very properly, because she was permitted to go in. So in the case of the *Henricus*, the Court held that the permission to go in with a cargo, included the permission

(*a*) Vol. I. p. 84. (*b*) Vol. I. p. 279.

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to that ship to come out with a cargo. So in the *Venseab;* but mark what Lord Stowell said: "I beg it may be understood that I hold that the blockade existed generally, though individual ships in some few instances are entitled to exemption from the penalty in consequence of the irregular indulgence shown to them by the blockading force. It has never been held by the Court that no blockade existed from November, 1798, to September, 1799." And such, in fact, was also the case of the *Juffrow Maria Sehroeder.*

I apply that doctrine to the present case, and it is on that doctrine I undoubtedly shall act. Wherever any neutral vessel, in reliance on the Order in Council of the 15th of April, has gone in, I shall give to every such vessel coming out of Riga at the period so named, *i.e.*, up to the 15th of May, the benefit of restoration. If it can be shown that any vessel has been permitted improperly to enter or come out, I shall confer the same benefit on such vessel; and even if there were any vessel that had been permitted so to do, I should still hold with Lord Stowell, that such an unfortunate relaxation of the blockade by negligence does not at all impair its general validity.

I must now examine the law attending blockades generally, and especially blockades *de facto;* I do not mean to state the authorities; we all know where they are to be found. If these doctrines do not rest upon the decisions of Lord Stowell and the books referred to, they have no firm foundation. We all know that there are blockades by notification, and blockades *de facto;* we must bear in mind the attributes belonging to each, and the distinctions between them.

And first let me observe with respect to the word notification, I am not sure that that word, as applied to this subject, has ever received any clear definition; indeed, I believe that the cases show that even Lord Stowell is reported to have used these expressions in a very lax sense; to have used the expressions notify and notification without its being possible to affix to them their peculiar strict meaning; I refer particularly to the case of the *Rolla* (*a*). Notification in its strict sense was, I think, well defined by Dr. Twiss, when he stated that it was a communication of a blockade by the government of a belligerent to the representatives of foreign Courts in a belligerent country, or by the ministers of the belligerent country resident abroad to the respective governments to which they were accredited. Thus far is clear; but I am inclined to think that a similar effect has been ascribed to similar communications made by commanders-in-chief even to a hostile government. The case of the *Rolla* appears to me to exemplify this proposition. It will not, however, be necessary for me to determine whether any promulgation short of a State communication will carry

(*a*) Vol. I. p. 573.

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with it the consequences belonging to a notification strictly so called. The legal attributes belonging to a blockade by a notification have been so clearly defined, I need not expend time in discussing them.

The questions which I am about to discuss relate principally to a blockade *de facto*. All authorities, as well as common justice, require that the subjects of neutral States should not be injuriously affected by such a blockade without previous intimation of its constitution. Notice, therefore, is indispensably requisite; but it is another and a different question what shall constitute notice. It is, indeed, incapable of accurate definition. Lord Stowell (*a*) thus expresses himself: "All that is necessary to make a notification"—whether we take notice or notification will not signify—"effectual and valid is that it shall be communicated in a credible manner, because, though one mode may be more formal than another, yet any communication which brings it to the knowledge of the party, in a way which could leave no doubt in his mind as to the authenticity of the information, would be that which ought to govern his conduct, and will be binding upon him."

It is clear, therefore, that to answer its end and purposes the notice must be, of whatever it may consist, adequate to convey a knowledge to all concerned of the danger of approaching a blockaded port. Notice to each individual vessel or to each merchant concerned is impossible, but unless the notoriety of the blockade be so great that, according to the ordinary course of human affairs, the knowledge thereof must have reached all engaging in the trade to the ports so blockaded, a warning is indispensably requisite; and we shall presently see what distinctions in this respect necessarily exist with respect to egress and ingress.

I concur with Lord Stowell in thinking that, by lapse of time and other circumstances, a blockade *de facto* may become so notorious that knowledge must be generally presumed. In some cases the notoriety may be so great as to amount to a *presumptio juris et de jure*, in others it may only throw the onus of proving ignorance on the claimant. If there be room for reasonable doubt, the subjects of neutral States are entitled to the benefit of it.

Though the term notoriety may not be precisely the expression of all I wish to convey, yet upon the whole it is the best I can use for the purpose of declaring my views upon this subject. What shall constitute notoriety, I repeat, is incapable of definition, but we may make some approach by giving that term its due effect, by seeing what materials necessarily must exist to form notoriety.

I apprehend that they are the following: first, a state of circumstances arising out of the blockade itself; secondly, communications,

(*a*) The *Rolla*, Vol. I. p. 573.

howsoever made, of the blockade having been established; and thirdly, all the circumstances peculiar to the case.

Under the first head, the continuance for a time more or less long of a blockading squadron off the port blockaded, the prevention of vessels entering and departing, the indorsement upon the papers of vessels turned back and the fact of capture, must necessarily tend to constitute notoriety; for these are facts so deeply affecting the interests of the commercial world, that it would be contrary to all human experience to suppose that they are not circulated at least with the ordinary rapidity with which mercantile communications are made.

Under the second head will be comprised all verbal or written communications made by officers or other persons in authority to persons engaged or likely to be engaged in commercial transactions connected with the blockaded ports. These will have their weight towards establishing the requisite publicity according to the clearness with which, and the times when, they occurred, and the number and condition of persons who were made cognizant thereof.

Thirdly must be taken into consideration the whole circumstances which may be said to be component parts of the history of the transaction; for instance, the locality of the places blockaded, the probability—a probability known to the public—of the blockade being imposed, the facility of communication of the fact of the blockade to all persons accustomed to trade with the port blockaded; and especially due consideration must be given, according to these facts, to the time that has elapsed between the establishment of the blockade and any attempt to trade with that port. Nor must we forget that the residence of the parties who may embark their property in such commercial undertakings may require in justice to be duly considered, for it is obvious to all that intelligence which must become known to countries in the neighbourhood of blockaded ports may be utterly unknown to the inhabitants of distant States, where all communications of facts must occupy a longer space of time, and in some instances be less likely to take place at all. Hence the well-known distinction in favour of the United States of America and of the Brazils.

Let me now, before proceeding to the evidence on the point, say a word as to the consequences of complete notoriety when once proved to exist. In such a case I apprehend that every vessel seeking to trade in whatever way with the blockaded port must be taken to be cognizant of the blockade, and that, generally speaking, under such circumstances, no vessel is permitted to go to the mouth of the blockaded port itself on any pretence whatever; that the sailing with intent to enter such a port is itself a breach of blockade; and that warning off is only necessary when there does not exist a notification or such a notoriety as I have endeavoured to describe. This I appre-

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hend to be the law, and in both cases to be founded upon the same principle, viz., that what is necessary to justify a blockading force in making a capture, is that the captured had, or might have had, a knowledge of the blockade. And whether this knowledge be acquired through the medium of notification or notoriety is one and the same thing; it is the knowledge that affects the party, and not the mode in which that knowledge was conveyed.

Having endeavoured, with as much perspicuity as the nature of the subject admits, and is within my limited power, to notice what constitutes notoriety, I will now examine the evidence in the case.

With regard to the evidence to be produced in the Admiralty Courts with respect to blockades, and indeed I may say all other questions of prize, I believe the practice to have been, not to entertain objections to the admissibility of the evidence offered, but to receive all that might be tendered; and certainly we have in this case the licence of evidence of every kind and description which could well be offered to the consideration of the Court.

I apprehend that this, so far as I know, the universal practice of the Court, was adopted for several reasons. First, because the Prize Court, being not a municipal Court but a Court for the administration of public law, was not restrained, with regard to evidence, by those rules which are applicable to questions of municipal law.

Secondly, it would be most difficult, even if possible, to have laid down any rules of evidence; because this Court, having to concern itself with the transactions of various nations, could never construct a code in conformity with all their various rules, and consequently injustice might be done by excluding, in transactions in which they were interested, proofs recognized by themselves.

Thirdly, because of the extreme difficulty of procuring what we are accustomed to call the best evidence, when such evidence is to be obtained from distant countries.

Fourthly, because, though the Court may receive all, it will form its own judgment according to the circumstances of the case, of the weight to be attributed to each species of evidence, and is not supposed to be liable to the error of giving undue importance to any evidence, merely because it does not exclude it.

Lastly, though not least, because as all its judgments may be exposed to the test of an appeal, the superior Court may, with greater facility, correct any error arising from too great force being attributed to any species of testimony, than it could remedy an evil arising from exclusion.

Now, then, as to the facts of this blockade, it is beyond all doubt true that from the 15th day of April there were four vessels of war stationed on or about the coast of Courland; and at least this may

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be said without the risk of contradiction, that these vessels did, during that period, perform some of the duties, if not all, of a blockading squadron. We have a list of 103 vessels, bound to Russian ports, boarded or spoken to by these vessels during a period of six weeks; and every one or nearly every one of these vessels had her papers indorsed with a notice of the blockade.

Beyond all possibility of doubt these facts must have been known in the blockaded ports and in their vicinity; for can it be imagined that the masters of all these vessels did not make known, wherever they went, the circumstance of their having been boarded and of notice of the blockade having been given to them? It would be contrary to the course of human nature if it were otherwise. The interests of the masters and their employers would induce them to make these facts as public as possible. To suppose publicity was not given would be to raise a conjecture in defiance of all probability.

There were other facts, too, of which the whole world was immediately cognizant; the unfortunate death of Captain Foote in April, then in command of the squadron; the attack and capture of the vessels at Libau; the presence of Sir C. Napier in the Baltic, with the largest fleet that ever had been despatched to those seas, and where for years a British man-of-war had not appeared. All these and many other facts must have given rise to inquiry, and must have produced knowledge. Indeed, it is not too much to say that the eyes of all Europe were fixed upon the proceedings in the Baltic; and least of all is it to be supposed that the eagle sight of commercial men was blinded upon an occasion so deeply affecting their interests.

Leaving, then, the consideration of the facts which tended to render the blockade notorious, let me now advert to the communications, to use as appropriate a term as I can, distinct from the notification of the blockade itself in the strictest sense of that term.

Sir C. Napier deposes that on the 11th of April he requested her Majesty's Ministers at Berlin, Copenhagen, Stockholm and Hamburg, to give notice to the British consuls and vice-consuls that he intended immediately to place the whole of the Russian ports in the Baltic and the Gulf of Finland and Bothnia under blockade.

What was done thereupon? Lord Bloomfield deposes that on the 14th of April he received such communication from Sir C. Napier; that on the 15th he communicated it to the British consuls in the various parts of Prussia—Memel and Stettin—desiring them to give publicity to such information; that he communicated the same intelligence to the Prussian Minister for Foreign Affairs, and he subjoins a copy of that Minister's answer.

That answer is dated the 28th of April, and it encloses a copy of an official declaration to the merchants of Prussia annexed to it,—a

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document of no small importance with respect to the question now under consideration. It bears date the 21st of April. It informs the merchants that Sir C. Napier was about to take measures for establishing the blockade in question, and it apprises them that confiscation is the penalty attending a breach of blockade, and that the Prussian Government will not be able to intercede in consequence of any vessel being captured for attempting a breach of blockade. That is the notice given by the Prussian Government to their own subjects.

Lord Bloomfield concludes his affidavit by deposing that the blockade of Libau, Windau and the Gulf of Riga, was matter of public notoriety, referred to in all the newspapers, and a matter of general conversation in political and commercial circles, in Berlin as early as the 1st of May.

Mr. Buchanan, her Majesty's Minister at the Court of Denmark, deposes that on the 12th of April he received from Sir Charles Napier the following despatch:—

"Duke of Wellington, in Kioge Bay, April 11th, 1854.

"Sir,—I have the honour to acquaint your Excellency, for the information of the foreign ministers, consuls, vice-consuls and consular agents residing in the kingdom of Denmark, that her Britannic Majesty's fleet will sail this day for the Gulf of Finland, to place in a state of blockade the whole of the Russian ports in the Baltic, and in the Gulfs of Finland and Bothnia."

Upon receiving this notice Mr. Buchanan immediately addressed a note to the Minister for Foreign Affairs to the Court to which he was accredited, giving him information thereof, and he received a letter acknowledging the receipt of that communication.

Mr. Buchanan further deposes that, having ascertained that Sir C. Napier had sailed with the fleet on the 12th of April, he made an express communication of that particular circumstance to the Danish Minister for Foreign Affairs by a note, a copy of which is annexed, and to all the foreign ministers, and other foreign diplomatic and consular agents at Copenhagen. On the 14th of April a notice of such information was made in a public journal.

Mr. Hodges swears that on the 14th of April he made similar communications to the governments of Lubeck, Hamburg and Brunswick.

It is true these are not notifications by Sir C. Napier himself of an actual blockade having been established or to be established on a given day, but these communications do make known to foreign governments the intention to constitute this blockade immediately. It is, therefore, a fact, proved beyond all shadow of doubt, that Prussia, Denmark and the Hanse Towns were apprised of what was

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about to take place; and the public notice taken shows their sense of such communications, their conviction that as soon as practicable the intention of Sir C. Napier would be carried into effect, and that their governments—the Prussian more especially—duly apprised their subjects of what would be the consequence of violating the blockade.

Now, of the perfect notoriety, and, I will add, the legal notoriety, of such intention to blockade, no human being can entertain a doubt. The least that can be said is, that the subjects of these neutral States knew what was about instantly to be done.

What, then, is the legal effect of such an authorized communication? I admit that it is not the publication of a notice of an actual blockade, or that it will be imposed on a certain day. Had a day or time been fixed, such a communication would in effect have been a notification. The communication, however, is as nearly as possible an approach to such notification,—was so received by the Prussian Government, and was treated as such by them in the documents which they published to the mercantile classes. What was the consequence? The attention of all mercantile classes was roused to the subject; their most important interests were at stake; and it is inconceivable that they did not from that time use every endeavour in their power to obtain information on the subject, and avail themselves of every channel of knowledge to ascertain when the blockade was actually imposed.

It was not only their interest but their bounden duty to pursue such measures, for it never can be reasonably contended that, having received such information, the subjects of neutral States had a right to shut their eyes and to stop their ears against the reception of that knowledge which such a state of circumstances would naturally generate. They had no right to say, because this is not a notification of a blockade at a particular time or hour, present or to come, we will consider this intimation of what is about to take place of no consequence, and we will contend that we are entitled to be placed in the same situation as if no such knowledge had been conveyed to us; or, in other words, we will contend, when the blockade is imposed on Riga, it is the same as if all had been kept secret from us; and we will assert that, as a matter of right, in justice and common sense we are entitled to the same notice at the ports blockaded as if no communications of Sir Charles Napier's intention had been made, and he had not quitted for the very purpose of carrying it out.

I am, therefore, of opinion that these communications are strong evidence tending to prove the notoriety of this blockade; for if, as I have already said, the blockade was established in fact, these circumstances must have led to inquiry, and inquiry to information.

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I will now make a short reference to the evidence of Lieutenant Hall, Mr. Hertslet, and Mr. Lousada.

Lieutenant Hall was lieutenant on board the *Conflict*. He swears that on April 15th the blockade was established, and on that day the Dutch galliot, the *Joan Geeling*, was boarded and warned off, and her papers indorsed; that the day after she went into the port of Memel, not for the purpose of keeping that circumstance a secret, I apprehend; that on the 17th he, Lieutenant Hall, went to Memel; that he informed Mr. Hertslet, the vice-consul, that the coast of Courland was blockaded; that he remained on shore for three days, conversed with many of the merchants at the principal hotel, and the fact of the blockade was perfectly well known.

Mr. Hertslet deposes that on the 17th of April he received a letter from Lord Bloomfield, stating that Sir Charles Napier would immediately place the whole of the Russian ports under blockade, and that he was desired to give publicity to that intelligence. Accordingly on the same day, April 17th, he gave notice to the following effect, that Admiral Sir Charles Napier has placed the whole of the Russian ports in the East Sea in a state of blockade.

Now it is perfectly true that this notice so given does not strictly correspond with the instructions of Lord Bloomfield; the instructions speak of intention, the notice states the fact; but if the fact were true as relates to Riga, to Libau, and to Windau, how can it be a matter of any possible importance that there was such a difference as I have mentioned between the instructions and the notice?

Did Mr. Hertslet know the fact, or did he not? Mr. Hertslet was apprised by Captain Foote and by Lieutenant Hall on the same day that the blockade had commenced; and the day before, a Dutch vessel had come into the port of Memel, having been warned off. He had ample knowledge of the fact of the blockade; and although a strict compliance with form might have required that he should have given the notice in the terms of Lord Bloomfield's letter, and have added to it that the blockade had actually commenced, yet what difference could this possibly make to the neutral merchant, when the only question that appertained to him was the knowledge of the blockade? The notice to which I have referred was posted by the authority of the corporation of merchants on the Memel Exchange on the 18th, 19th, and 20th days of April. If so, it would be very difficult indeed to say that the merchants of Memel especially were not perfectly cognisant of the fact of the blockade, as well as of the previous intention to impose it.

Mr. Hertslet annexes to his affidavit a letter from Captain Key, dated the 12th May, and in this letter he is desired to inform the consuls at the ports of Libau, Windau, and Riga, that these ports

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were strictly blockaded, and that any vessel leaving them after the 15th of May with a cargo will be detained. This letter was communicated to all the consuls of the neutral States, and they were requested to inform their colleagues at the Russian ports.

Much comment has been made upon this letter. I know not the particular motives which induced Captain Key to write it, or to fix the date of the 15th of May. Whether he did so because he had received information of the Order in Council of the 15th of April, fixing that as the last day Russian vessels should leave the port, or for some other reason, I know not; but whatever view he took of it, I can in no respect concur with some of the arguments which have been attempted to be drawn from it. Such a letter could in no degree whatever impair the validity of the blockade previously established. Captain Key had no authority so to do; the utmost extent to which that letter could go would be, to protect vessels coming out of the blockaded ports prior to the 15th of May—a point which I have already considered.

Mr. Lousada's affidavit is dated December 6th, and if the contents of this affidavit be true, they are of the very greatest importance, for they prove to demonstration that on the 19th of April the most extensive publicity was given at Riga to the fact of the blockade being established.

Mr. Lousada at that time filled the office of her Majesty's consul at Riga, and the measures which he has sworn he did adopt were measures which it was his bounden duty to take.

His character and veracity have been strongly impugned, and I must say, in my judgment, without a shadow of cause, or without any reason being stated which I deem worthy of notice; and I am bound in justice to that gentleman to say that I think the disparagement attempted to be thrown upon him and his evidence is wholly without foundation.

He deposes: That the blockade was well known at Riga on the 17th of April, the very day it was established, to all the consuls, merchants, &c.; that communications were made of the proceedings of the squadron by telegraph, especially from Dome Ness, and that frequently and at all hours of the day, and were posted up on the Bourse and at the club-house; that Mr. Hertslet's notification was known on the 18th of April at Riga, and a copy thereof was posted up at the Bourse and his consular offices; that he made known the Order in Council of April 15th to all the foreign consuls at Riga, and pointed out to them the extent to which he apprehended it caused an exemption from the blockade; and that all the consuls, Danish and Swedish included, acted upon his suggestions, and made declarations before him which necessarily admitted the existence of the blockade, and sought the

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benefit of the exemption which Mr. Lousada thought the Order in Council of April 15th gave.

Assuredly this is evidence which, if credited, is perfectly conclusive that this blockade was known at Riga. I will not dwell further upon it at the present moment.

There is some other evidence to which I will very briefly advert, for it would answer no good purpose for me to travel more deeply into details in this case.

Mr. Plint's letter, annexed to Captain Key's affidavit, establishes the fact that the blockade was known at Lubeck long before the 10th of May.

All the numerous documents annexed to the affidavits prove that formal notification was made about the middle of April of Sir Charles Napier's declaration that he was about immediately to establish the blockade, and also of his having actually sailed on the 12th of April for such purpose.

Accounts relative to the fact of blockade appear in the public papers, more or less distinctly announcing the fact, as would probably be the case in such compilations; and, moreover, in a few instances the accounts from Riga in some respects deny the existence of the blockade, on which species of evidence Lord Stowell, with his accustomed wisdom and acuteness, observes that it must be listened to with great distrust, as the inhabitants of a port blockaded have a great interest in making the commercial world believe the contrary.

Mr. Sloman and Mr. Bischof deposed that this blockade was known at Hamburg as early as the end of April.

Mr. Bird's affidavit affords an instructive specimen how facts of this description circulate. The *Jagerine* was warned on the 18th of April from entering Riga. She went to Memel. Mr. Bird deposes that at Flensburg, to which port this vessel belonged, the fact that the *Jagerine* had been examined and searched by one of the blockading squadron—a fact conclusive of the actual exercise of the blockading power—was known soon after the 18th of April. I apprehend that such information of the search and warning of this vessel, having reached Flensburg, did not remain buried at Flensburg, but in all probability it must have circulated through some part of the Danish dominions.

A similar circulation of the facts must have taken place with respect to all the other vessels warned, and whose papers were indorsed, and there were above one hundred in number. The same facts, the same motives, the same inducements, would produce the same results.

I have now stated, as succinctly as I can, the leading parts of the evidence tending to establish the notoriety of this blockade in the Baltic. Before I attempt to draw any conclusions upon this question,

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it is meet that I should weigh and consider the evidence that has been adduced on the part of the claimants, not so much with reference to any particular instance of ignorance, as to the absence of general notoriety, and the disproof of evidence produced on behalf of the Crown. This will not be a very long task.

It is established by this evidence that on the 19th of May Mr. Andersen, part owner of the *Steen Bille*, inquired of Mr. Larlham, the British vice-consul at Elsinore, if the Russian ports in the Baltic were blockaded, and that he answered that the British vice-consul here had not received any official report to that effect.

Now there can be no doubt as to this fact, and the claimant is entitled to the full benefit of it, whatever that may be. I have, however, already expressed my opinion that in the case of a blockade *de facto*, neutral subjects have no right to break that blockade merely because there has been no official notification. I must observe that if Mr. Larlham, at the time when that inquiry was made of him, had deposed that he had no official account of the blockade, and he did not believe it existed, it would have been strong evidence to disprove notoriety; but it stands on the simple fact, which is not disputed, namely, that there had not been official notification.

In the further proof in the *Nornen* there is an affidavit from Mr. Sharp, annexing a letter of Captain Key's, of which letter I am unable to see the importance. It appears to me to be merely a repetition of what had been written before, stating the consequences of the blockade being broken. Captain Heathcote's letter has no effect upon the question we are considering.

The further proof produced in the case of the *Steen Bille* requires more attention. I will first advert to the certificate from certain persons at Elsinore. After having spoken of an official communication received at Elsinore on June the 6th, the subscribers, who were no doubt persons of great respectability, state that it was not known to them that any persons had received notice of any effectual blockade being established. Without stopping to remark that this certificate is not upon oath, I cannot but observe that it is expressed in language calculated to raise much doubt. It is not a statement of facts, but an expression of opinion very much depending upon the meaning to be attached to the word "effectual." Had these gentlemen deposed that within their knowledge no ships had been stopped and warned off, and all vessels allowed to come out of Riga, their evidence as to these facts, if they could have so deposed, would have been infinitely more to the purpose.

The Minister for Foreign Affairs of Denmark has given an argumentative note upon the present occasion, upon which I do not think it necessary particularly to comment. It bears date, "Copenhagen,

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August 31st." It admits the receipt of Sir Charles Napier's letter, under date of April 12th; but unfortunately it wholly omits to notice the only point in question, viz., whether that Government had a knowledge of the blockade *de facto*. In fact, all the papers annexed to the affidavit of Mr. May base themselves upon the absence of a formal notification, and that only. If they can stand on that foundation, well; if not, there is an end to the discussion. If I am wrong in the law, they may be right in their construction; if they are wrong in their construction, and I am right in the law, all the evidence which has been brought to prove there was no official communication is rather an unnecessary work.

There is one paper which I cannot refrain from noticing. It is a paper emanating from the Merchant Society of Copenhagen, dated the 25th of September, 1854. It has indeed been already strongly commented upon, but I think not more strongly than it richly deserves. Those gentlemen have thought fit to state, not to swear, that having had great interest in observing anything connected with that blockade, they had never heard, even as a loose rumour, that it had been carried into execution until June 3rd. I hardly know how to treat this paper; it certainly requires considerable self-command. Truth requires me openly to declare my opinion that this statement is utterly unworthy of credit. I do not stop to notice their arguments, which in this same paper follow up this representation; for they are about upon a par with the credibility of the statements.

The next set of further proofs to which I will advert relate to the case of the *Annechina Jantina*. These proofs afford very little occasion for comment; they merely allude to a formal notification, and present an accumulation of formal documents to prove what no one denied, and what was not the true issue in the cause.

There is, however, one document which I will shortly notice, and that is a statement of Messrs. Wohkman & Sons, the shippers of the cargo. They certify that, at the time of the shipment of the cargo (that is, about the middle of May), no blockade *de facto* existed. Certainly, if none such existed, the fact could not be notorious, but whether it did exist or not depends upon other evidence besides that of these gentlemen. I should like to have known whether they were aware of the publications made by Mr. Lousada or the proceedings of Captain Key. I should like to know whether, at the time they signed that certificate, they knew anything of these captures, or of the numerous vessels which had been warned off. Looking at the communication between Libau and Riga and Windau and Riga, I should like to know whether these gentlemen could have been in total ignorance of that fact, with which the whole commercial world must have been acquainted.

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In the case of the *Union*, there is a certificate from merchants that, according to their full conviction, it is impossible for the captain of a ship leaving Flensburg on May 14th to have arrived at a certainty whether and when the blockade of the Russian ports had taken place. There is also a certificate from the Custom House to the same effect.

The further proof in the *Vrouw Alida* principally relates to the peculiar circumstances of that case.

It now becomes my duty, from a consideration of this conflicting evidence, to draw such conclusions as I think the law and the facts of the case require.

Can I believe that, after the evidence that I have recapitulated as to the fact of the blockade itself, as to the visiting so many vessels, and indorsing their papers—after all the communications made by the ministers, the consuls, the officers, the publications at Memel and at Riga—considering the facility of communication between all the ports of the Baltic, the earnest desire which self-interest would prompt to acquire the best, the earliest information—can I believe, on a comparison of this evidence, that the fact of this blockade was not known at least at a very early period in the month of May? Lord Bloomfield says it was known prior to the 1st of May. Supposing it was not known before in other places, how long would the news be travelling from Berlin? I will not attempt to fix the day, because it is obvious that knowledge may have reached various ports at different times.

I cannot in my conscience entertain any rational doubt that the fact was so, and I hold myself bound, therefore, to pronounce that this blockade, by the period I have stated, was matter of public notoriety. But I wish to proceed with all the care and all the caution which an earnest desire to protect the subjects of neutral States can possibly dictate: and if there be a rational doubt, however small, I wish to give them the full benefit of it. I shall therefore limit my conclusion by stating that I consider this blockade to have been, at the time mentioned, a matter of notoriety, yet not of such notoriety as to bind the neutral merchant absolutely and without power of redemption, but sufficient to throw upon him—and I am well warranted by authority in taking this position—the onus of proving, if it should be in his power to do so, that he was pursuing his avocation in ignorance of that measure which had generally become so publicly known.

By these conclusions I shall be guided in determining the cases brought before me with respect to a breach of the blockade of the coast of Courland, and, I hope, with a just regard to the circumstances of each particular case.

I am happy to say I have arrived at the last part of this case which requires a separate discussion. The branch of inquiry on which I am now entering involves two questions:

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First, whether the 16th Article of the treaty of Great Britain with Denmark, 1670, be now in force, and, if so, what is the construction to be put upon it?

Similar questions arise with respect to the 11th Article of the treaty of 1661 with Sweden.

It is admitted that these treaties were made at the time they purport to bear date, and consequently were engagements binding upon the contracting powers. To prove, therefore, that the treaties themselves, or any part of them, are not operative at the present time, must be an onus on those who assert such position.

The question of revocation of treaties is, I believe, almost novel in these Courts. I must therefore state what are the principles which I presume ought to govern the Court in so important an inquiry. In one respect, States contracting with each other in forming treaties, dissolving treaties, or altering treaties, stand in a very different position from individuals. Independent Governments are not bound by any particular form, either in making contracts, or changing, or annulling them. Forms are, indeed, in use, but as to contracts affecting only the mutual interests of the contracting parties, they are not, I apprehend, bound to observe them.

Though some arguments were addressed to the Court, the aim of which might be to prove that those articles were obsolete, yet without entering into the question whether treaties can so fall into desuetude, I think the whole history of these treaties, and the discussion respecting them so late as 1793, demonstrate that such a position cannot in this case be maintainable.

The only question which has been substantially raised for my decision is, if I understand it rightly, whether the Danish and Swedish treaties before mentioned have been as to particular articles revoked by the convention of 1801. The terms in which such a proposition is stated admit their existence up to that period.

If one written statement is to be revoked or altered by another, there are only two means by which such effect can be wrought—direct revocation or necessary implication. Direct revocation is not alleged. In order to constitute revocation by implication, the inference must be free from doubt; it must be proved that the provisions contained in the latter instrument are such as to be wholly irreconcileable with those of the former; that the two cannot reasonably co-exist together. The presumption is against such a revocation, because, if the contracting parties intend to alter a subsisting article, they would naturally so express themselves; they would use revocatory terms.

Now the articles to which I must more particularly address my attention are the 16th of the Danish and the 11th of the Swedish

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treaty, which preceded it somewhere about nine or ten years. The 16th Article is in these words—

> "It shall be lawful for either of the confederates, and their subjects or people, to trade with the enemies of the other, and to carry to them or furnish them with any merchandise (prohibited only, which they call contraband, excepted), without any impediment, unless in ports and places besieged by the other; which, nevertheless, if they shall so do, it shall be free to them either to sell their goods to the besiegers, or to betake themselves to any other port or place not besieged" (*a*).

This treaty, I should observe, was originally in Latin.

The convention of June, 1801, is between Great Britain and Russia, but Denmark and Sweden afterwards became parties to it (*b*). It is mentioned that the intention was that all the former treaties should be renewed by this convention, when Denmark and Sweden acceded to it; for they say, "save and except the differences which result from the nature of the treaties and engagements antecedently subsisting between England and Denmark, of which the continuance and renewal are secured by the aforesaid convention."

I take it, therefore, that the convention of 1801 generally confirmed, revived and brought into existence, the same as if there were no war, all the treaties previously subsisting between Denmark and England, and, amongst others, this identical treaty. That confines the consideration to the simple question whether anything is to be found in the convention of 1801 which will annul directly or indirectly the article in question.

I hardly know where to fix my attention in this case. Perhaps it is better to begin by observing, that beyond all doubt there are no revocatory clauses, and that the question is one of necessary implication—whether, in fact, it was the intention of these parties, without stating it, to substitute the provisions in the treaty of 1801 for the 16th Article of the Danish treaty, and the 11th Article of the Swedish treaty.

I am not quite sure whether I am correct, but I understood the argument of her Majesty's Advocate to be founded upon the 3rd Article of this treaty, and especially upon the division of it marked No. 4: "That in order to determine what characterizes a blockaded port, that denomination is given only to a port where there is, by the dispositions of the power which attacks it, with ships stationary or sufficiently near, an evident danger in entering."

I have looked through the whole of this treaty very carefully, and have paid due attention to the argument of her Majesty's Advocate, as I understand it, that because the convention of 1780 has been

(*a*) Hertslet, Vol. I. p. 191. (*b*) *Ibid.* p. 205. (*c*) *Ibid.* p. 215.

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embodied in this, almost word for word—with the single exception of the two articles which were most objectionable to Great Britain, viz. that free ships made free goods, and the article of search, of notice, and of blockaded ports—therefore, by reason of the omission on the occasion in question, this treaty must be considered a substitution for, or rather a revocation of, the 16th Article of the treaty of Denmark of 1670.

On this point I would first observe that, beyond all doubt whatever, there are no revocatory words, and I must say that I cannot discover any terms in this treaty which I am justified in construing to be a revocation by implication, nor any intention to substitute this treaty, or any part of it, for the stipulations contained in the 16th Article; and I must add that I do not perceive the slightest inconsistency in the 16th Article of the Danish treaty and this treaty of 1801 subsisting together. I will add to this, that with regard to the Swedish treaty in 1803, that article which contained a provision as to contraband was altered, and no notice was taken of the remainder. I see no reason for supposing that it has been in any way set aside.

In the documents themselves I see no reason to pronounce a judicial opinion in favour of a revocation. There are circumstances, however, which, if I am correctly informed, tend to show that some conception was entertained that a revocation was intended. I advert to the fact that the reservations as to Sweden and Denmark, inserted in the instructions from the Admiralty in 1793, were not inserted in any instructions issued in the war commencing in 1803; and also, what appears still more extraordinary, I cannot find any trace of the articles in question becoming the subject of discussion in these Courts. But if all I have now stated be correct, I do not perceive how such circumstances ought to influence my present judgment, for the omission to which I have alluded may possibly have been unintentional, or even if intentional, it was the act of one of the contracting parties only. I am at a loss, indeed, to conceive how it happened that, when so many Danish and Swedish vessels were captured, these articles were not brought into controversy; but the omission to seek a remedy cannot alter a contract.

For these reasons I feel myself bound to come to the conclusion that the 16th Article of the treaty with Denmark of 1670, and the 11th Article of the treaty with Sweden of 1661, are unrevoked and in full vigour.

The most difficult task remains, for, admitting these articles to be in force, what is their true meaning, and how are they to be construed?

I apprehend that I must first look to the articles themselves, and if the meaning intended to be expressed is clear, I am not at liberty to go further.

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If there be doubt, I should in an ordinary course seek elucidation by reference to the circumstances under which the treaties were concluded. I have used my best endeavours to obtain information, but I must candidly acknowledge that I am unable to refer to any auxiliary information of this description. I cannot find any information as to the peculiar circumstances attending the country at the time these treaties were made which would throw any light upon the present question. Cotemporary exposition would be the next resource; I have none, and I have not heard that there was any cotemporary exposition. In the very able argument addressed to the Court I was not apprised, and I do not know, whether these articles were carried into execution, and if yea, how, during any war prior to 1793, or if so, to what extent.

Again, with regard to modern exposition, this may be of two kinds.

First, an explanation solemnly agreed between the two States reconcileable with the terms of the articles. An interpretation of this kind, though it might not be quite in unison with my own opinion, I should hold myself bound to accept.

Secondly, an interpretation which the words of the article do not admit. Such an interpretation might be more properly called a substitute for the original meaning, but a substitute agreed to by both the contracting powers. Assuming this to happen, I must have the authority of the Government under which I sit that such an agreed interpretation has taken place. I should then receive it, not as a construction, but as an agreed settlement of a difficulty. I must always remember the limits within which, as a court of justice, I can act.

It is quite right that the Court of Admiralty should decide whether one treaty has been altered or revoked by another; it is equally within its province to construe the meaning of a treaty; but if any change has taken place by diplomatic arrangements only as relates either to the subsistence and continuing effect of the treaty, or as to any alteration in its meaning, such is matter for the Governments, and not fit for a judicial tribunal.

It has been contended that these treaties must have been intended to confer some peculiar privileges on Denmark and Sweden, otherwise why should such articles be framed? or, to express the same idea in other words, that in case of war, Denmark and Sweden should, as neutrals, have some advantage over other neutral countries.

First, I will observe that it may be not altogether unusual for a treaty to be made merely declaratory of the law, not giving any peculiar advantage to either of the contracting powers; and such is the opinion expressed by Mr. Wheaton. With regard to the treaty with America in 1794, he says: "The stipulation in the treaty intended

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to be enforced by this instruction seems to be a correct exposition of the law of nations, and is admitted by the contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it" (*a*).

Without any reference to these particular treaties, I must express my serious doubt whether the principle involved in such proposition can be maintained, whether it was quite consistent with the law of nations to confer on one neutral rights as to blockades which did not belong to others similarly circumstanced. The true principle is that the evils arising to neutral nations from war, and especially the exercise of the right of blockade, are evils which ought to fall on all according to the same rule; that it would be wholly contrary to law and justice to allow one neutral to trade with a blockaded port, and exclude others. So, in a less degree, but still equally in principle, it could not be consistent with justice to relax the precaution or diminish the safeguards against entering a blockaded port in favour of one or two neutral States, to the prejudice of others; because so doing would be giving them facilities and inducements which others did not possess, and so confer upon them a special commercial advantage not warranted by other distinguishing circumstances; and moreover, that such a measure might justly be complained of on another ground, viz., that all restrictions with regard to blockades are only justifiable to the extent that they are necessary to effect their object; and that if a restriction is not necessary to be imposed on one neutral State, it is equally unnecessary to be applied to another.

I will illustrate the foregoing reasoning by reference to the subject of contraband. Now, we all know that there is contraband by the general law, contraband by special treaty, and articles excepted from contraband for special reasons, particularly as being the growth and produce of a country. Suppose France and Russia to be at war, and Belgium and Great Britain to be neutral countries; what would be said of a treaty whereby France agreed to allow the manufactures of Liege, being of the nature of general contraband, to go without let or hindrance to Russia? Would not Great Britain have a right to say: "The whole law of contraband depends upon the right of self-protection; if necessary at all, it is equally necessary against all; and you have no right to keep the burden upon me, and relieve another to my disadvantage?" For these reasons, without saying to what construction I may be compelled to come, I think strong objections in principle lie to the proposition contended for by Dr. Twiss, that the articles must confer some privilege beyond what is allowed to other States.

(*a*) Wheaton's International Law, Vol. II. p. 238.

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To carry this matter a little further. When I am told that by these treaties extraordinary rights were conferred on Sweden and Denmark, I should have liked to know what was the law governing blockades such as the present in those days when the treaties were framed, and in what particulars these treaties differed from that law. It would, perhaps, not be easy to show what the law was. It is within the bounds of possibility, looking at the unsettled state of the law at that period, that the alterations supposed to have been made by those treaties were only an exemplification of the present law: a declaration of what should be taken to be the law.

On the other hand, however, it must be admitted that the circumstances of the exception from the Admiralty Orders of 1793, and Mr. Keene's negotiations about the same period, show that, in the opinion of the British Government at that period, there was some peculiar privilege reserved by these treaties to Sweden and Denmark. That privilege was construed to be a right to warning.

These instructions are very short, and we must recollect that, upon the occasion when they were issued, Great Britain and other European countries conceived that such was the state of warfare with France, that it was lawful to resort to the most extraordinary measures for the purpose of crushing the French nation, even to the attempt of endeavouring to starve them.

The first object of these instructions is contained in Article 1: all neutral vessels laden with corn, &c. bound to any French port or to any port occupied by the French troops were to be detained, and the right of pre-emption exercised; and to the best of my recollection they received ten per cent. in excess. The second article was:—

> "It shall be lawful for the commanders of his Majesty's ships of war, and privateers that have or may have letters of marque against France, to seize all ships, whatever be their cargoes, that shall be found attempting to enter any blockaded port, and to send the same for condemnation, together with their cargoes, *except the ships of Denmark and Sweden, which shall only be prevented from entering on the first attempt*, but on the second shall be sent in for condemnation."

Now, it is perfectly clear to my mind, and no person can deny, that it must have been intended by these instructions to have referred to treaties which were in existence, and that in consequence of these treaties this privilege was given to Denmark and Sweden. When we go to the third article, I must confess, that when one comes to construe the treaty itself, it does leave a court of justice in a great difficulty indeed. The third article, supposing that I understood it rightly, and that pains were taken in framing these articles, relates to blockade by declaration, in which case Danish and Swedish ships are all put on the same footing as others, and there is no exception at all. I must not call that

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a construction of the treaty, because that would be wrong; this was the step taken by his Majesty's Government at that time in consequence of the treaties between Denmark and Sweden.

There are several reasons which render it very doubtful whether I can take these instructions as my guide.

First, I can hardly consider them as a construction of the words of the articles, for I can find no words in the articles to bear them out. They can be made to bear them out only by putting words into the articles which appear neither expressly nor by implication. There is not a word as to warning off the first time to be found in any one of the articles, nor anything approaching to it.

Secondly, as an exposition of the articles, they are loose and unsatisfactory; for the great question of all will still remain unsolved, viz., whether a Danish vessel would be entitled to a warning if she proceeded with a knowledge of the blockade *de facto*, and made an attempt to break it; that is not solved by these instructions nor by anything else.

Thirdly, this exposition, if such it may be called, or agreed construction, was temporary only, and, so far as I know, its duration ended with that war.

Fourthly, Mr. Keene's despatch justifies me in saying that this was not an exposition of the articles, but a substitution for them; and I apprehend that where such a substitute for explanation is agreed upon, I am not at liberty to engraft it into judicial proceedings, except under the authority of the Government under which I sit, and no such authority I have.

Let us see what Mr. Keene says. Addressing the minister of Sweden, he says:—"The minister of Sweden will no doubt observe that the rules prescribed in these orders are more favourable to Sweden than those stipulated in the treaty existing between the two Courts, as in the treaty all transports of provisions to an enemy are declared contraband and subject to confiscation." This may be peculiar to Sweden, because the two articles differ as to contraband, but the next passage cannot. "The exception in favour of Sweden, in the article of these regulations concerning blocked-up ports, is founded upon the same treaty, the principles of which are perfectly consistent with the prescriptions given to the commanders of his Majesty's armed vessels." These are the regulations which the Government, for the time being, chose to enact, founded on the treaty. Then he goes on, "It can certainly not be imagined that the object of this treaty has been to permit to the vessels belonging to neutral powers to renew their attempts of entering into blocked-up ports as many times till they succeed in throwing provisions into them; they

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have only been exempted from the punishment of confiscation upon the first attempt" (*a*).

Now, I repeat my opinion that these instructions are not a construction or interpretation of the treaty.

If, then, I am not authorized to take these instructions as the arrangement made between the two Governments, and as a permanent settlement, I must put upon those articles that interpretation which I think the words in which they are expressed require, and which they were intended to bear at the time of the contract; that is, if we can, with our little means of judging, say what the contracting parties intended in 1661 and 1670.

First, it is, I conceive, perfectly clear that these articles do not give any general right or liberty to go to blockaded ports.

The words of the 16th article are: they shall have freedom, of course, to go anywhere they please without impediment, "unless in ports and places besieged by the other." Therefore, construing, as I believe I must, *obsessum* to be commensurate with the siege or blockade, or both, it was intended that Denmark and Sweden should not convey merchandise to blockaded places.

With regard to what follows, I must enter into some nice disquisitions with respect to the two treaties, because the treaty of Sweden, which perhaps I may call the mother treaty of the two, is in these words, "*quod si acciderit*," which is construed to mean, "if they happen to go to blockaded ports." The words are, "*quod si acciderit*," the meaning may be, "unintentionally approaching them"; the words in the Danish treaty are, "*quod si fecerint*"; these words are equally left without auxiliary explanation. They must, I grant, looking at the whole context, necessarily mean this: if they should in some way or other, but how nobody can tell, approach blockaded ports.

My opinion is, therefore, that there was no general right to go to blockaded ports, and that such a stipulation would not only have militated against the right of blockade, but would have been repugnant to the just rights of other neutral nations.

In what cases, then, were these articles to apply? There are insuperable difficulties to any literal interpretation of the words of the articles, arising most probably from our ignorance of the circumstances for which they were intended to provide.

It is my belief, though a belief I cannot act upon, that there was some particular commercial intercourse, a regard to which dictated these compacts, such as a supply of provisions or some similar commodity; for it is almost an absurdity to suppose that these articles

(*a*) Annual Register, 1793; State Papers, p. 174.

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applied to cargoes of every description. Observe the alternative—you may take it, according to one construction, to a blockaded port; the blockading squadron must buy it, or you must take it to another port. Now, could it be supposed that a Danish or Swedish vessel could carry a cargo of silks and satins or pig iron to the blockading fleet, and say, "Buy my cargo, or send me to an enemy's port not blockaded"? It must have been intended that the commodity offered to the squadron must have been a commodity possible to be bought; there can be no other meaning to that part of the treaty.

I incline to think that the only mode of arriving at a safe conclusion is to determine what is not the meaning, or what is sometimes called the process of exhaustion.

It is agreed, then, first, that this article does not destroy the right of blockade generally. Does it mean that a Swedish or Danish vessel may, with a perfect knowledge of the blockade, sail with a cargo for that blockaded port, get in if she can without being stopped by the cruisers, and if stopped say, "True, I was going to the blockaded port, but you have caught me; buy my cargo, or send me to another port not blockaded"?

Would that be a rational exposition? What would be the consequence? All Swedish and Danish vessels might sail for any of the blockaded ports for Riga; get in if they could; if turned back, sail along the blockaded coast, slip into Windau or Libau; or, if stopped by another cruiser, say, "I have been warned; I am in my course to some port not blockaded."

If this be the sort of warning claimed for a ship intending to violate the blockade, I say that such a construction is not only not to be found within the four corners of the treaty, but is repugnant to the spirit of it; destructive of all just rights belonging both to belligerents and other neutral States.

But there is another possible interpretation which I will put to the test. A Danish vessel, cognisant of the blockade, but without any intention to violate it, sails straight for the blockading squadron, and says, "Buy my cargo, or let me go to an unblockaded port." I think this might be one of the meanings, and, if such a case should occur, I would restore the vessel.

Take another state of things. A Danish vessel proceeding for a blockaded port in ignorance of the blockade. By the ordinary law of blockade she will not be condemned unless the blockade has been notified to Denmark, or unless the blockade has become so notorious that knowledge must be presumed. Does the treaty make any difference in such a case?

In the case first supposed, of notification to Denmark, it could not be argued that ignorance could be any excuse, when that ignorance

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arose from the fault of the Danish Government in not informing her subjects, as Lord Stowell held it was the duty of every Government so receiving a notification to do.

Then consider the case of ignorance of a blockade *de facto*. There might be a case of general notoriety, and yet of particular ignorance; a case where, unless there was some stipulation by treaty, the presumption of knowledge ought to prevail against the fact of ignorance. Does this treaty provide for such a contingency? Possibly it might have been intended so to do. It is possible that, as this treaty is universal in its terms and not confined to the Baltic, and as Denmark and Sweden were in those times difficult of access, this might have been the intention of the contracting parties.

Be it so, then, though circumstances have wholly changed; yet if such a case occur, Danish ships and property shall be protected.

Is there any other possible state of things in which Denmark or Sweden (I speak of them indiscriminately) could reasonably claim a benefit under this treaty? I will exercise my ingenuity to find a case. Say a case of doubt as to the continuance of a blockade; of justifiable doubt. What is the extent of any reasonable demand on the part of the merchant vessels in such a case? Liberty to approach the blockading squadron and make inquiries. Produce the case of reasonable doubt and of directing the course of the vessel to the blockading squadron for such purpose; I will release her.

Now, what cause of complaint has Denmark or Sweden? I have provided for every case that I can even imagine for the protection of their merchant vessels, if their commerce be conducted with integrity and due regard to the rights of the belligerent. If there be any other state of things which could require a similar remedy, I would provide for that also; but do not tell me that I have given to Denmark and Sweden no more than other nations could justly claim until you have proved to me what the state of the law was prior to 1661—until you have shown me that, either this treaty was not declaratory of that law, or, if it were not, that the law of nations, since 1661, has not grown up to the same proportions. Show me, in short, that my construction is not consistent with justice, or with the fair import of the words of the treaty, and I will abandon it; but if no complaint can fairly be raised, and no grievance pointed out, I will adhere to my own interpretation, and not adopt that which the convenience of the moment or the *incuria* of statesmen might have induced them to resort to, for the sake of temporary acquiescence.

Having now stated the various conclusions to which I have come with regard to this blockade and the treaties, I proceed to adjudicate upon this case of the *Franciska*, in conformity with those conclusions, and, I hope, also with the true result of the evidence.

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The present consideration is confined to the ship only (*a*). The vessel is a Danish vessel, and, in the month of April, left Spain with a mixed cargo, destined for the Baltic, and bound to Elsinore for orders. Mr. Arboe, the owner of the vessel, was resident at Copenhagen. What were the precise orders the master received I have no means of knowing with accuracy. She left Elsinore on the 14th of May, and I must seek for his destination in the evidence of the master, the papers in general terms describing the voyage to be to the Baltic.

The master's account on the 18th interrogatory is, that his owner's orders were to proceed to Memel, but, he says, "If there was no blockade, and if the English ships of war would permit, I was ordered to proceed to Riga, and I was sailing to ascertain this from the English when captured. The voyage was to have ended at Riga if not blockaded, and if permitted to go in and out."

It is of the last importance in this case to try the credit of the master; to examine whether his evidence be consistent and true, or whether, having placed himself in a difficulty, he has adopted such a statement as he believed might rescue him from the consequences without regard to the real truth of the case, and it may be without having very definitely determined upon the line he should adopt in his evidence.

First, then, he has sworn that his orders were to go to Memel, a neutral port, to which he was entitled to go, and so far well; he does not say he was to go to Memel to make inquiries there as to the blockade, but omitting all mention of what was to be done at Memel, he goes on to state that he was ordered to proceed to Riga if not blockaded.

On the 13th interrogatory he states the consignees of the cargo in Memel were Frederick Schœller: the Riga consignees he does not know. His evidence on the 3rd interrogatory is: "The place of capture was ten miles to the west of Lyser Ort; the day was the 22nd of May; the distance from the place of capture to Memel would be about 130 miles to the north of Memel, and beyond it."

I cannot easily reconcile this statement with his assertion that his orders were to proceed to Memel; but on the 30th interrogatory there is a further statement that the *Franciska* was steering her course towards Memel before the capture. Here, then, is a vessel with a fair wind said to be proceeding to Memel, when she has already proceeded 130 miles beyond it towards the Gulf of Riga, and is sailing in a direction, according to the log, E.N.E. and N. by E.; that, I confess, is a nautical question which I cannot solve with any advantage to the present claimant.

(*a*) On a subsequent day the cargo was also condemned.

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But is there a word of truth in this statement? Was this vessel sailing towards Memel at the time of capture, or shortly before? Let us look at the log: on the 21st of May, at 3 a.m., Libau was in sight E. by N.; the course during the whole of that day was E.N.E. and N. by E. On the 22nd she had advanced so as to get Windau in sight, and she steered N.N.E. and E. by N., therefore she was never steering towards Memel at all, and this part of the statement is utterly false; it is not true that her course was altered to approach the cruiser when she descried her. In answer to this same interrogatory this master equivocates, and plunges still deeper into difficulty. He says her course was at all times, when the weather would permit, directed to the place for which she appears destined by the ship's papers. This is mere equivocation, because he knew that the clearance was for the Baltic generally, and it is utterly false to say that she was going to Memel at any time whatever.

The real truth is that the master was going to Riga; that he was aware that the so doing might subject him to detention by a British cruiser; that he was embarrassed by the place of capture, that he could not determine what was the best course to take; so that at one time he swears he was going to Memel, which was not true, and at another that he was seeking a British cruiser for the purpose of making inquiries, which was equally false. I entertain no doubt whatever that this master was cognizant of the blockade, was seeking to violate it, and has invented a tissue of inconsistent falsehoods for the chance of escape.

There is nothing more to comment upon. The papers afford no information, nor does the further proof. It was strongly urged by her Majesty's Advocate that Mr. Arboe, the owner, had not made an affidavit deposing to his ignorance of the fact of the blockade. Perhaps that may be some confirmatory proof of the inferences I must draw from the evidence of the master and the log; but I respect Mr. Arboe for his abstinence, for sure I am from this evidence, as well as from the whole testimony regarding the blockade, that he could not have asserted his ignorance without sacrificing his conscience to his interest.

I condemn this ship, first, because I hold that the blockade was notorious at Elsinore on the 14th of May, the day this vessel sailed.

Secondly, because the master has deposed falsely, and was proceeding to violate the blockade with a full knowledge thereof. Under such circumstances he can derive no benefit from the treaty with Denmark.

With respect to the other cases, I must postpone my judgment till I have had time to examine the peculiar circumstances belonging to each.

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I am afraid it may be said with some truth that this judgment in parts may be diffuse, in others I may have been guilty of repetition; but when it is considered that I have had, in the space of one week, to make some inquiries, as far as my means extended, into the history of the treaties, to weigh and digest all this evidence, and to come to my conclusion, I think it would not be expected that I should be as concise or as accurate in my expressions as I otherwise might have wished to be. But I felt, from the great interest taken in these cases, and knowing what mischief must accrue by delay, that it was better to pronounce my judgment, the substance of which I believe right, than, by taking further time, to prejudice the parties interested.

[10 Moore, P. C. 73.]

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Restitution—Sale—Rights of Claimants—Gross Proceeds—Proper Deductions—Expenses of Sale—Of Custody of the Ship—Of Pilotage, &c.

A ship and cargo taken as prize having been condemned by the Admiralty Court, was sold under a decree of that Court, pursuant to the Prize Act, 17 & 18 Vict. c. 18, s. 26. The decree was reversed on appeal, and simple restitution decreed. *Held*, that as the captors were *bonâ fide* in possession during litigation, they were entitled to the rights, allowances and incidents attaching to such possession, and that the claimants were only, upon simple restitution, entitled to the nett proceeds of the sale, after deducting from the gross proceeds the marshal's charges, consisting of (1) expenses of sale, (2) reasonable expenses for the care and custody of the property pending adjudication, and (3) for pilotage, lights and other dues, incurred in bringing the ship to England.

The practice in former wars in such cases considered.

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A FURTHER question arose in the cases of the *Franciska*, and the ship *Union*, which had been also seized by the *Cruiser* for a breach of the blockade of Riga, and condemned; but in accordance with the decision in the *Franciska*, the sentence of condemnation had been reversed; whether the claimants upon the reversal of such sentences were entitled to the gross proceeds of the sale, or only to the nett proceeds, after deducting the marshal's charges.

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It appeared that after their condemnation as prizes by the Admiralty Court, the ships were, upon the petition of the Queen's Proctor, in pursuance of the Act 17 & 18 Vict. c. 18, s. 26, decreed to be appraised and sold. The sales were accordingly effected by the marshal as directed by that section, and the gross proceeds were paid by him, to the account of the Paymaster-General, into the Bank of England. Subsequently, the marshal brought in his account of charges in each case, which being taxed, an order was made under the provisions of the 28th section of that Act, for the payment out of the proceeds then in the hands of the Paymaster-General. The marshal's charges were of three descriptions: First, those which related exclusively to the charge for advertising, sale, for printing and distributing inventories, for use of Lloyd's room, appraising, commission of sale, &c.; secondly, those which related to the care and custody of the ships and cargoes, pending adjudication, the charges for possession, dock dues, warehouse room, &c.; and, thirdly, those which were incurred in bringing the ships and cargoes to this country, for pilotage, Trinity lights, Ramsgate dues, &c. The registrar received from the Paymaster-General the proceeds realised by the sale, on account of the prizes and their cargoes less the marshal's claim for fees and disbursements; which the claimants refused to accept, insisting on their right to the gross proceeds of the sales.

The claimants now moved for payment to them of the amount of such gross proceeds.

Dr. Addams, for the claimants.

The *Queen's Advocate* (Sir John Harding), for the captors, opposed,

submitting that the question was one rather between the officers of the Court and the claimants, than between the claimants and the captors.

At the conclusion of the argument their Lordships reserved judgment, the question being, in their opinion, one of considerable importance, and as such, they deemed it requisite to see whether

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there were any authorities upon the point. They referred the matter, therefore, to the registrar of the Court, in ecclesiastical and maritime causes, to examine into and report upon the practice in such cases prevailing during the last war in this respect, upon the question, whether any and what deductions were allowed from the gross proceeds of property sold in cases of simple restitution. The registrar having made his report (*n*)—

(*n*) As the report of the Registrar (Mr. H. C. Rothery) contains a very full and valuable account of the practice in former wars upon this point, the reporter, thinking that it would be acceptable to the profession, has obtained permission of the Registrar to print it. The report, after setting forth the above facts, proceeded as follows:—"The fact which I am directed to ascertain is, whether in former wars, any, and, if so, which of these charges were allowed as deductions from the gross proceeds in cases of simple restitution on appeal.

"It will not be unimportant briefly to examine, in the first place, what was the practice in former wars, in regard to the care, custody, and sale of prizes, and in what respect that practice was altered in the late war, by the provisions of the Prize Act (17 & 18 Vict. c. 18). In all previous wars, prizes, when captured by commissioned vessels during hostilities, were left, pending adjudication, in the custody of the captors; the prize master and crew, who had brought the vessel to port, frequently remaining on board and taking care of her until she was either condemned or restored. On the breaking out, however, of the late war with Russia, it was thought better that the practice prevailing in the United States of America, in this respect, should be adopted, and that the prizes should, immediately upon their arrival in port, be placed for safe custody in the charge of some public officer. Accordingly, the 15th section of the Prize Act directed that all prizes which shall be brought within the jurisdiction of the Court of Admiralty, shall be forthwith delivered up to, and remain in the custody and care of, the marshal, his substitute, or other officer to be appointed by the Court; or if there be no such officer, then shall be delivered up to the collector or comptroller, or other principal officer of the Customs, or of Navigation Laws, at such port, and shall remain in such custody and care, subject to the decree of the Court.

"This transfer of the prize, pending adjudication, from the custody of the captors to that of an officer of the Court of Admiralty, necessarily led to another very important alteration. In former wars, upon the condemnation of any prize, it was the captor, or, rather, his agent, who sold it. But under the present Prize Act, it is the marshal who is directed in all cases to effect the sale. The 26th section of the Act provides that, whenever any ship, vessel, goods or merchandise, has been condemned as prize, in the Court of Admiralty, the judge of the Court shall forthwith direct the same to be appraised and sold by the officers of the Court, or by persons authorized by the Court for that purpose, and the proceeds thereof to be paid to the account of her Majesty's Paymaster-General on account of naval prize.

Judgment was delivered by the Right Hon. Sir JOHN PATTESON: —In these cases, the ships and cargoes having been condemned by

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"Some prizes, indeed, there were even during former wars, in which the sales were effected by the marshal, as when the property was condemned as *droits* of Admiralty, or when it was sold *pendente lite*, in consequence of its being in a perishable condition; but such cases were, comparatively speaking, rare. When a prize was sold, it was generally through the instrumentality of the prize agent. It is important to bear this distinction in mind, as it will explain why it has not been possible to find any case exactly similar to those of the *Franciska* and the *Union;* that is to say, any case in which the prize, after having been condemned, has been sold by the marshal, and where the proceeds have been ordered to be restored on appeal; for if the prize had been condemned, the captors' agent, and not the officers of the Court, would have effected the sale thereof. I shall, however, bring before your Lordships cases as nearly similar as the altered practice of the Court will allow. I shall bring before you cases in which the sale has been effected by the marshal, and shall show you the deductions which have in such cases been usually made by him from the proceeds. And I shall also bring before you cases in which the prize has been first condemned, and then restored upon appeal, where the sales have been effected by the captors, and where they have been called upon to bring in account sales on oath, and where the deductions which they have claimed to make from the proceeds have been objected to by the claimants.

"First, then, as to sales effected by the marshal under an order of the Court.

"In the middle of the last century, a curious practice existed in regard to sales effected under an order and by the marshal of the Court—the practice of making, not only the expenses of the sale, but all incidental charges, and even the costs of the proceedings, form part of the price. That this was the practice, at least in some cases, appears clearly from Marriott's Admiralty Reports, for the period from Michaelmas Term, 1776, to Hilary Term, 1779, at page 142 of which we find the case of the *Vrow Antoinette*, in which the Court ordered that certain goods 'should be sold for his Majesty's use, to persons to be authorized, on a fair valuation by merchants; the carrier to be paid his freightage and all incidental charges by the buyer; and the money to be paid to the claimant or captor, whosoever should finally have the property.' Again, in the case of the *Concordia Affinitatis*, Vol. I. p. 25, the Court directed a portion of the cargo 'to be sold for his Majesty's use at a fair valuation by merchants; the freight and expenses of proceedings to make a part of the price, and the money to be brought into the registry, for the use of the parties who should finally obtain the property upon a further hearing.' In the case of *Le Perlan*, Marriott, p. 235, the Court ordered the cargo to be sold for the use of his Majesty's Navy, upon a valuation by merchants named on each side, for the profit of the claimants, all expenses on both sides to be charged to the buyer.' And again, at p. 287, in regard to the cargoes of certain Dutch store ships, it is stated that 'all freight and expenses were to be charged to the buyers, and

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the Court of Admiralty, appeals were entered and prosecuted, and their Lordships reported to her Majesty, that the sentences of the money to be brought into Court for the benefit of all parties who should be proved to have right.'

"Now, I need hardly observe that the effect of such a practice must have been to throw the whole of the expenses upon the proceeds, so that they would be payable by the captor in the event of a condemnation; by the owners in the event of a decree of restitution ensuing. No constat of these expenses would appear amongst the records of this office, as they would naturally be settled out of Court by the purchaser.

"The inconvenience, however, attending such a mode of sale must have been very great, and must necessarily have had the effect of narrowing the circle of purchasers to those only who could form a pretty accurate estimate of what the expenses would amount to. Whether or not this course was adopted, in regard to all sales effected at that period, under a decree of the Court, or when in fact the practice was altered, I have not thought it necessary to inquire. Suffice it to say, that from the early part of this century it was the invariable practice of the marshal, in all sales effected by him under an order of the Court, to deduct the expenses of the sale and all charges which he might have against the property from the gross proceeds, and to pay the net proceeds only into the registry.

"And if the deductions thus made by him were improper, or his charges extravagant, a monition could be taken out against him on the part of any person interested in the proceeds, calling upon him to bring into the registry the amount improperly deducted by him. In the Appendix to this report will be found the account sales in a number of cases, in which the sales were effected by the marshal under orders of the Court, between the years 1804 and 1816; and in every one of these cases the amount paid in by the marshal, as appears by our books, was the net and not the gross proceeds.

"The practice of permitting the marshal to repay himself all his charges and disbursements out of the gross proceeds, and of bringing in only the net amount of proceeds, prevailed in the Court of Admiralty from the time to which I have referred down to about the end of the year 1853, when it was thought better that the marshal should, in the first place, pay in the whole of the gross proceeds, and that the amount of his charges and disbursements should, after taxation, be paid out to him. It was thought that the marshal ought not to be the judge, even in the first instance, of what charges were and what were not proper to be retained by him out of the proceeds, and accordingly the practice was, with the sanction of the judge, altered in this respect. Hence, in all the sales effected by him under the present Prize Act, it has been his practice to pay to the account of the Paymaster-General at the Bank of England the amount of the gross proceeds, and to receive thereout, under an order of the Court, the amount of his charges, after they have been taxed and allowed by myself, in accordance with the provisions of the 28th section of the Prize Act. This is the course that was adopted, not only in regard to the cases of the *Franciska* and the *Union*, but

the Court of Admiralty ought to be reversed, and that the ships and cargoes in question ought to be restored, or the proceeds in regard to all the prizes which have been sold during the late war by order of the Court.

"It should, however, not be forgotten, that the amount remaining in the Paymaster-General's hands, after payment of the marshal's charges, is, in fact, the sum which the marshal would originally have brought in, before he was precluded from deducting his charges from the proceeds. Your Lordships will perceive, by an examination of the account sales, printed in the Appendix hereto, what was the general character of the charges which the marshal was in the habit of deducting from the proceeds, and how far they resemble the charges in the cases of the *Franciska* and the *Union*.

"I now proceed to call your Lordships' attention to the sales effected by the captors or their agent, upon condemnation of the property to them. And, first, let me observe, that the practice of selling a prize after condemnation, even though an appeal had been entered from the decree of the Court below, was almost invariably adopted in former wars. It was considered to be more for the interests of all parties concerned, that the property should be sold, than that it should remain under arrest, necessarily at a heavy expense, to become, as Lord Stowell expressed it, 'food for the worms.' The minute usually entered on the occasion of an appeal being entered, *apud acta*, from a decree of condemnation, was as follows:— . . . . with all due reverence protested of a grievance and of appealing. The judge assigned the captors to bring in account of sales on oath, and directed the sentence not to be suspended on bail being given to answer the appeal. The assignation books of the Admiralty Court for past wars are filled with similar minutes.

"First, then, I would observe that there is a clause to be found in all the Prize Acts passed during the wars, from 1793 to 1815, but which, from some cause or other, was not inserted in the late Prize Act, that of 1854. It is in the following terms:—'Provided always, and be it further enacted, that in case the sentence or interlocutory decree, having the force of a definite sentence of such Court of Admiralty or Vice-Admiralty, shall be finally reversed after sale of any ship or goods, pursuant to the directions in this Act contained, the nett proceeds of such sale (after payment of all expenses attending the same) shall be deemed and taken to be the full value of such ship and goods, and that the party or parties appellate and their securities shall not be answerable for the value beyond the amount of such nett proceeds, unless it shall appear that such sale was made fraudulently or without due care.'

"This section will be found in all the Prize Acts passed from 1793 to 1815; the references to it are as follows:—33 Geo. 3, c. 66, s. 32 (1793); 43 Geo. 3, c. 160, s. 29 (1803); 45 Geo. 3, c. 72, s. 44 (1805); 55 Geo. 3, c. 160, s. 41 (1815).

"In the present Prize Act, however, no such clause is to be found. How this came to pass I am unable to say. It may have been omitted *per incuriam*, or, more probably, it may have been thought better to leave the Court of Appeal wholly unfettered in its discretion as to the degree of

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arising from the sale thereof paid to the claimants for the use of the owners and proprietors thereof. These reports were duly confirmed by her Majesty in Council.

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restitution which it might think proper to grant, and as to the deductions which it might or might not think proper to allow from the value of the property in such cases.

"To return, however, to the practice in previous wars: the words of the section, quoted above, 'the nett proceeds of such sale (after payment of all expenses attending the same),' would certainly seem to imply that the expenses of the sale only, and not those relating even to the care and custody of the property, were properly chargeable against the proceeds in cases of this description; and I think that I shall be able to show that up to about the year 1805 this was the admitted practice of the Court in cases of this description; but that the question then, and subsequently, underwent very full consideration from the Lords of Appeal, and that very important alterations were made in regard thereto.

"It is, indeed, much to be regretted that questions of this description, which are of the greatest importance to the parties interested in the proceeds, were not, in former times, thought worthy of being reported; so that, throughout the volumes of Admiralty Reports, no one case is to be found bearing directly upon the question at issue, namely, as to what charges are or are not proper to be deducted from the gross proceeds in cases of simple restitution on appeal (although it can hardly be supposed that the subject was not frequently brought under the consideration of the Lords of Appeal). Allusions are indeed made to the subject in several places; as in the first volume of C. Robinson's Reports, p. 187, where there is an Order of the Court dated the 3rd of July, 1799, one clause of which is in the following terms:—'That the commissioners and marshal bring in the proceeds which have been collected, at the same time with their returns; and that if the whole proceeds have not been collected, they retain only such sums as may be required to answer accruing expenses.' There is also the case of the *Narcissus*, Moulton, reported in the fourth volume of the same reports, p. 17, where the expenses of sending a cargo from Bermuda to Europe were decided to be not chargeable to the claimant on restitution. There is also the case of the *Industrie*, reported in the fifth volume of the same reports, p. 90, where the expenses of the unlivery and appraisement of a cargo were held to be a charge on the property. And in a note to that case, at the same page, it is said, 'In the case of the *Peggy*, March the 8th, 1804, a similar decree was made, that the captor should be liable to the marshal for the expenses of appraisement and unlivery, but that he should be considered to have a demand against the goods for such expenses, to be charged rateably on all the property restored.' And there is also the case of the *Frau Maria*, reported in the second volume of the same reports. (Vol. I. p. 235.)

"I must also not omit to mention the case of the *Rendsberg*, reported in the sixth volume of the same reports, p. 142, where the marshal's fees were very fully considered by Lord Stowell.

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Questions now arise and have been discussed before their Lordships. First, whether the gross proceeds of the sale ought to be

"I do not, however, cite these cases as being in point, for they are not so. The utmost that they prove is, that the marshal has a claim against the proceeds for the amount of his charges, or, if the proceeds be insufficient, then against the captors. But neither of these cases are cases of simple restitution on appeal, like the *Franciska* and the *Union*.

"It is, however, amongst the old records of this office that cases of this description are to be found; and by good fortune I have discovered three leading cases, which, although unreported, appear to have undergone the very fullest consideration from the Lords of Appeal, and which I shall have the honour to lay before you. The disadvantage, however, of referring to an unreported case is this, that we have no means of knowing what fell from the Court on the occasion of its finally disposing of the case, further than what appears from the formal words of the decree; nor can we say what general principles the Court may have laid down, or how far it may have been induced to deviate from those principles by the special circumstances of the case. Such as they are, however, they are submitted to your Lordships' consideration.

"First, then, I would observe that upon a decree of condemnation being reversed upon appeal and restitution decreed to the claimant, it was the practice to call on the captors, by whom the property had been sold, to bring in the proceeds, together with the account sales, on oath. If the owners were satisfied with the accounts as furnished by the captors, they received out the proceeds in satisfaction of their claim; but if, as frequently happened, the owners were not satisfied with the deductions claimed to be made by the captors from the proceeds, the accounts were referred in the usual way to the registrar and merchants to report the amount due. The report of the registrar and merchants when brought in could be objected to by either party, and the question would then be decided by their Lordships. The cases to which I am about to refer you are cases of this description.

"The first case to which I will call your Lordships' attention is that of the *Catherina Maria*, captured by the private ship of war *General O'Hara*, on the ground of her having enemies' goods on board. The vessel was accordingly taken to Gibraltar, and proceedings having been instituted against the cargo in the Vice-Admiralty Court there established, the same was, on the 27th of July, 1797, condemned as prize, and was thereupon sold by the agent for the captors! An appeal was, however, prosecuted against the decree to the Lords Commissioners of Appeal in Prize Causes, and on the 17th December, 1802, their Lordships reversed the judgment of the Court below, pronounced the cargo to have belonged as claimed, decreed the same to be restored, or the value thereof paid to the claimant for the use of the owners and proprietors thereof. The captors were then monished to bring in the account sales on oath, which they did, showing deductions from the proceeds, not only of the expenses of unlading the cargo, selling and measuring it, &c., but also of the Court fees and proctor's charges, and of a commission to the agent himself of five per cent. on the gross proceeds, and making the nett pro-

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paid to the claimants, or whether the nett proceeds only should be repaid, after deducting the marshal's charges; and, secondly, if

ceeds to amount only to the sum of seven hundred and nine pounds nine shillings and five pence (709*l.* 9*s.* 5*d.*). These accounts were, of course, objected to by the owners, and were accordingly referred to the registrar, assisted by merchants, who on the 22nd of July, 1803, reported the sum of one thousand and thirty pounds one shilling (1,030*l.* 1*s.*) to be due to the claimant. In the Appendix hereto will be found a copy of the account sales brought in by the captors, as also the registrar's report with schedule annexed, and by a comparison of these two documents it will be seen that the only deductions allowed by the registrar and merchants were the expenses of the sale and the freight, which was necessarily a charge on the cargo. By the subsequent proceedings in the cause, it appears that a monition issued against the master of the privateer, the two owners, and the bail given on their behalf, to bring in the said sum of one thousand and thirty pounds one shilling (1,030*l.* 1*s.*), and that this amount was subsequently brought into the registry by the privateer's agent, and was then paid out to the claimant.

"The next case is a very important one, and occurred a few years afterwards: it is that of the *Falck*, a vessel which was captured by H.M.S. *Brunswick*, on the ground of her having enemies' goods on board, and was carried to Jamaica for adjudication. The ship was restored and freight was ordered to be paid to the neutral master, but the cargo was condemned by the Vice-Admiralty Court of Jamaica, and the sale thereof was effected as usual by the captor's agent there. Subsequently an appeal was prosecuted, and on the 14th of July, 1803, the Lords of Appeal reversed the sentence of the Court below, decreed the cargo to be restored, or the value thereof to be paid to the claimant for the use of the owners and proprietors thereof. The captor then brought in the account sales, showing the gross proceeds to have amounted to the sum of nine thousand and sixty-seven pounds one shilling and tenpence halfpenny (9,067*l.* 1*s.* 10½*d.*), and the deductions therefrom, including a large item for freight, to four thousand seven hundred and sixty-seven pounds four shillings (4,767*l.* 4*s.*). To these deductions an objection was taken by the claimant, and the accounts were accordingly referred to the registrar and merchants in the usual way. On the 18th February, 1804, the registrar made his report, disallowing the charges for pilotage, prize master's allowance, and expenses of landing and warehousing the cargo, and allowing only the freight, the expenses of advertising the sale, cooperage of cargo, and the duty paid on the wine. On this report being brought in, an objection was taken to it by the King's Proctor, on the ground that the charges which had been disallowed were necessary expenses attending the sale of the cargo, and as such ought to have been allowed. An Act on petition was gone into on the subject, the case was argued, and ultimately, on the 22nd June, 1805, their Lordships, after having taken time to deliberate, overruled the King's Proctor's objections in respect of the allowance to the prize master, and a charge of 5 per cent. commission on the gross proceeds of the sale by the captors' agent, and two other small items, but directed the report to be reformed by allowing to the captors the expenses

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the nett proceeds only ought to be paid, what deductions from the gross proceeds ought to be allowed.

of landing the cargo, including the permit for that purpose, and wharfage and warehouse rent for a reasonable time, and the article of appraiser's fee on perishable goods, 37*l.* 9*s.* 3*d.*, if it should appear to have been incurred by order of the Court. I should add that the lords who delivered this judgment were Sir William Grant, Sir William Wynne, and Sir William Scott.

"The next case is that of the *Triton*, a case very similar in many respects to that of the *Fulck*. This vessel, the *Triton*, was captured on the 7th of October, 1799, by the private ship of war *Caroline*, on the ground of her having enemies' goods on board, and was carried to Jamaica for adjudication; proceedings were thereupon commenced against the cargo in the Vice-Admiralty Court there established, and it was ultimately pronounced to be Dutch property. It appeared, however, that the *Caroline*, although commissioned against the French, was not commissioned against the Dutch, although we were at war with Holland at the time; and accordingly the goods were condemned as *droits* and perquisites of his Majesty in his office of Admiralty, and were thereupon sold by the Receiver of Admiralty *droits* in that island. From this decree an appeal was entered, and on the 7th of May, 1803, their Lordships reversed the sentence appealed from, decreed the cargo to be restored, or the value thereof paid to the claimant for the use of the owners and proprietors thereof. Subsequently the Admiralty Proctor brought in the account sales, showing very large deductions to have been made from the gross proceeds on account of the expenses, including wharfage and warehouse rent, labour and duties, also the captors' costs in the Court below, and the agent's charge of 5 per cent. on the gross proceeds of sale. These account sales, being objected to by the claimants, were referred in the usual way to the registrar and merchants, and on the 7th of October, 1803 (the judgment of their Lordships in the *Fulck* not having been then pronounced), the registrar made his report, allowing only the charges for advertising and the duties paid. The report was objected to by the Admiralty Proctor, on the ground that his parties had been put into possession of the cargo by the decree of a competent Court for the use of his Majesty in his office of Admiralty, that they were bound to sell and dispose thereof to prevent its being wasted and altogether lost, but which they could not have done without incurring various and heavy disbursements, and he submitted and humbly insisted that all the said charges were necessarily incurred in the course of the proceedings in law in the said Vice-Admiralty Court in supporting the interest of his Majesty in his office of Admiralty and in the sale of the said cargo, &c. The question was argued before Sir William Wynne, Sir William Scott and Sir John Nicholl, and on the 19th July, 1810, their Lordships referred back the registrar's report to have the allowances made to the captors according to the decree of their Lordships in the case of the *Fulck*, and also to reconsider the rate of exchange. What was the exact amount of the charges ultimately allowed does not appear from the records of the Court; probably the case was compromised out of Court; but there is

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These questions must have arisen during former wars; but as no direct decisions upon them were to be found in the printed reports, sufficient in their Lordships' decree to show the principles upon which deductions from the gross proceeds were to be allowed.

"Lastly, there is the case of the *Madoc*, which was finally decided in 1817, after the conclusion of the war. The ship was captured on the 15th day of June, 1813, by his Majesty's brig *Bobuff*, and having been sent to Gibraltar for adjudication, was, together with the cargo, condemned as prize by the Vice-Admiralty Court there established, and subsequently sold by the captors' agent. An appeal was, however, entered against the said decree, and on the 16th day of February, 1815, the Lords of Appeal reversed the sentence of the Court below, decreed the ship and cargo to be restored, or the value thereof paid to the claimants for the use of the owners and proprietors thereof.

"The captors thereupon brought in the account sales of the ship and cargo, in which they claimed very large deductions from the proceeds on account of labour, pumping the ship, coopering casks, fees of appraisement, wharfage, unloading cargo, watchmen, shipkeepers, lighterage, Court charges, auction dues, brokerage, commission, and a variety of other charges. To these deductions the claimants objected, and accordingly the accounts were referred to the registrar and merchants as usual. On the 5th of July, 1815, the registrar made his report, allowing a portion of the charges for labour, wharfage, warehouse rent, lighterage, auction dues, and brokerage; but disallowing altogether the charge for shipkeepers, and of course the law expenses and agent's commission. This report was objected to by the captors, and an act on petition having been entered into, their Lordships, on the 20th March, 1817, referred back the report to the registrar and merchants to reconsider it, which they did, and the amended report was brought in on the 21st of May, following. This case is extremely important, as it occurred nearly two years after the final termination of the war, and it enters very fully into the whole question of the allowances proper to be made in cases of simple restitution. In the Appendix hereto will be found the account sales, the registrar's first report, the Act on petition in objection thereto, the registrar's amended report, and the decrees of their Lordships relative thereto. A comparison of the first and second reports with the account sales will show the general character of the deductions which were allowed from the proceeds by the registrar's amended report. At the second inquiry before the registrar and merchants, it transpired from the evidence produced, that the greatest frauds had been attempted to be perpetrated by the captors' agents, and, amongst other things, that a large sum, which had been charged by them for auction dues, and had been allowed by the registrar in his first report, had in fact never been paid by them; so that this is not a case in which any great indulgence was likely to have been shown to the captors, or that other than the most legitimate charges would have been allowed them as deductions from the proceeds. And yet we find that the registrar in his amended report allowed them not only the expenses attending the sale, the brokerage, the auction dues as far as paid, the labour, lighterage, wharfage and ware-

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their Lordships ordered that search should be made by the registrar into the books of the Admiralty Court, in order to ascertain what house rent, but also (and which is most important) a certain amount for shipkeepers—not indeed the full amount charged as for four shipkeepers during the whole time, but about a third of that amount. From the further proceedings in this case it would seem that no objection was taken to the registrar's amended report, and that the amount reported due from the captors was paid by them into the registry.

"The conclusions, then, which may fairly be drawn from these cases as to the practice prevailing in former wars in regard to cases of simple restitution on appeal are as follows:—

"First. It may, I think, be safely affirmed that the expenses of sale were always allowed as proper deductions from the gross proceeds. The clause in the former Prize Acts appears to be conclusive upon this point; but, independently of this, in all the cases cited above, the *Catherina Maria*, the *Falck*, the *Triton*, and the *Madoc*, the expenses of the sale were allowed from the first by the registrar and merchants; nor, indeed, do they appear to have been objected to by the claimants.

Second. As regards the expenses attending the care and custody of the property, the cases of the *Falck* and *Triton* (where the property in question was cargo) appear to sanction the principle that warehouse, wharfage, and other such charges are proper to be allowed as deductions from the gross proceeds; and the case of the *Madoc*, in which both ship and cargo had been sold, that possession fees likewise are proper deductions from the proceeds.

"It should, however, be observed in regard to the item of possession fees, that in former times prizes generally remained in charge of the prize master and prize crew pending adjudication, and that consequently no charge in the nature of possession fees would ordinarily be found in the account sales. Whereas, in the late war, all prizes were handed over to the marshal or his substitute, who was obliged to provide and pay persons to take charge of them, the prize master and crew at once rejoining their respective ships; so that one of the expenses for the care and custody of prizes in the late war would not ordinarily have been incurred in previous wars.

"Third. As regards the expenses of bringing the prizes to this country. These relate exclusively to the ship; and in the case of the *Franciska* are (here he enumerated the items).

"The only important items in the accounts are those for pilotage, the others are but trifling in amount. Now in the case of the *Falck* a sum of 3*l.* was allowed for pilotage out of the proceeds, and in that of the *Madoc* a sum of forty-eight dollars, or about 8*l.*, for mooring and pilotage. Whether your Lordships will consider these two instances as sufficient authorities for allowing these charges in the cases of the *Franciska* and the *Union* is a matter entirely for your Lordships' consideration.

"There is yet another case to which I would wish to call your Lordships' attention, as bearing upon the questions at issue in these causes; it is not, strictly speaking, a prize case, but is in the nature of prize, and occurred so late as the year 1840. I refer to the case of *Barton* v. *The Queen*, reported

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had been the practice in such cases in former wars, and that the registrar should report thereon.

in the 2nd Moore's P. C. Cases, page 19. It was the case of a ship called the *Winwick*, which was seized in the Port of Gibraltar on the ground that she was engaged in the slave trade. Proceedings were commenced against her in the Vice-Admiralty Court there established, and on the 20th of July, 1838, the judge of that Court adjudged her to be forfeited to the Queen. From this decree an appeal was prosecuted to this Court, the result of which was, that their Lordships ordered the vessel to be restored to the claimant for the use of the owners and proprietors thereof, or the proceeds thereof (transmitted to the registry of this Court) paid to them, but without costs and damages, &c. In the meantime, however, and pending the proceedings in the Court of Appeal, the vessel had been sold by the Vice-Admiralty Court of Gibraltar, and the sum of 1,591*l.* had been paid into the registry of that Court as the nett proceeds of the sale, the marshal having first deducted his fees and expenses, and then paid the balance in. Subsequently, however, the bill of costs of the proctor for the captors, amounting to no less than 955*l.* 10*s.* 10*d.*, was paid out of the proceeds; and when a monition issued from this Court to transmit the proceeds, the sum of 635*l.* 9*s.* 2*d.* only, being the balance after payment of the captor's bill of costs, was transmitted. Upon this a further monition was issued against the judge, registrar, and marshal of the Court below, ordering them to transmit the above sum of 955*l.* 10*s.* 10*d.* into the registry of this Court, the said sum being the balance of the nett proceeds of the said ship or vessel *Winwick*, &c. Before, however, the attachment actually issued, Captain Sheriff, the captor, brought in the said sum of 955*l.* 10*s.* 10*d.* I have carefully examined the papers in the cause to ascertain whether the 1,591*l.* brought in by the marshal was really the gross or the nett proceeds of the sale, and have assured myself that it was the nett proceeds only, after payment of all the expenses attending the sale; the affidavits both on the one side and on the other agree in this.

"The case, therefore, of the *Winwick* establishes the fact that the proctor's bill of costs is not a proper deduction from the gross proceeds in cases of simple restitution on appeal; but it does not prove, as would at first sight appear on a hasty perusal of the reported case, that no deductions whatever are to be allowed from the proceeds in such cases. On the contrary, the expenses of the sale were in that case deducted from the proceeds by the marshal, and there was never any question as to his refunding the amount. I regret to say that I have not discovered amongst the papers in the cause any detail of the marshal's charges, but only the fact that they related to the sale, and that they amounted to about 65*l.* sterling; no question as to the propriety of their being deducted appears ever to have been raised.

"Such are the facts which I have been able to collect as bearing upon the question of whether any and what deductions can be properly made from the gross proceeds of sale in case of simple restitution on appeal; and the only question that now remains to be considered is, in what manner the claimants

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Mr. Rothery, the registrar, has accordingly made diligent search, and has furnished their Lordships with an elaborate and highly valuable report.

are to be reimbursed in the event of your Lordships being of opinion that all or any of the charges in question ought not to fall upon the proceeds.

"The proctors for the claimants, in their printed cases, state that I have claimed to make certain deductions from the proceeds, and pray that your Lordships will be pleased to order me to pay to them the gross proceeds, and not the nett proceeds. I would, however, beg to observe, first, that as Registrar of the Court of Admiralty, no part whatever of the proceeds came into my possession or under my control; the gross proceeds were paid by the marshal directly to the account of the Paymaster-General at the Bank of England in accordance with the provisions of the Prize Act; I then taxed the marshal's account of charges, and certified their correctness, upon which an order of the Court was made for the payment thereof to the marshal, and the amount was accordingly paid by the Paymaster-General out of the funds remaining in his hands. And, secondly, as Registrar of the Court of Appeal, I have never received from the Paymaster-General more than the nett proceeds after the payment of the marshal's charges. I have not, therefore, made or claimed to make any deduction from the proceeds, and I would humbly submit, that I cannot be ordered to pay that which has never come into my possession or been under my control.

"The question, then, remains to be considered, by whom the deficiency, if any, should be made good; whether the marshal should be ordered to pay into the registry the amount of such charges as may appear to be not properly chargeable against the proceeds, or whether a monition should be issued against the captor to bring in the amount.

"In former wars, when the sale and everything relating thereto was conducted by the captors or their agents, and the proceeds passed directly into their possession, it was natural that the monition should issue against them to make good any deficiency which might be found in the proceeds in cases of restitution on appeal. Under the present Prize Act, however, the captors have not the whole conduct of the sale, nor, in fact, are the proceeds paid as formerly directly into their possession. On the other hand, however, both these vessels and their cargoes were sold at the petition of the Queen's Proctor, acting therein as the captor's agent, the decrees or instruments for effecting the sales were taken out by him, and by him entrusted to the marshal with directions to carry them into execution. Again, when the vessels and their cargoes had been sold, and the marshal brought in his accounts of expenses relating thereto, they were sent by me to the Queen's Proctor to ascertain if he had any objections to offer to them on behalf of the captors, or to an order being made upon the Paymaster-General for the payment thereof out of the gross proceeds. No objections were made by him to the accounts, and they were accordingly paid in the manner stated above. Every step relating to the sale of these vessels and cargoes was done with the full knowledge and sanction of the Queen's Proctor; and in his bill of

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It must always be borne in mind that these cases are cases of reversal on appeal, decreeing simple restitution of the property or its proceeds. The captors are, therefore, treated as being *bonâ fide* in possession of the property, during the time of litigation, and are entitled to all rights, allowances and incidents attaching to such *bonâ fide* possession, though the legal right to such possession may ultimately be determined against them. The distinction between *bonâ fide* possession, and legal right to possession, as regards prize cases, is in itself sufficiently obvious, and it is fully and clearly explained by Lord Stowell in the cases of the *Betsey* (*a*) and the *John* (*b*). The captors in such cases of *bonâ fide* possession are not answerable for incidents not arising from any misconduct on their part, and are to be protected in doing whatever may be necessary for the preservation of the property, and for converting it into money, if a sale takes place in the ordinary course of judicial proceeding.

The registrar has furnished their Lordships with four cases not reported, during the former wars, in which simple restitution was decreed by the Lords of Appeal, after condemnation in the Admiralty Court, and in all which the question arose as to what deductions ought to be made from the gross proceeds of the sale. These cases are the *Catherina Maria*, in 1802, the *Falck*, in 1805, the *Triton*, in 1810, and the *Madoc*, in 1817, after the conclusion of the then war. In all these cases, and indeed in all similar cases, the expenses of sale were uniformly allowed, as proper deductions from the gross proceeds.

It is true that in the Prize Acts in those times, passed from 1793 to 1815, an express clause was inserted, that in cases of reversal on appeal, the nett proceeds of the sale (after payment of all expenses attending the same) should be decreed and taken to be the full value of such ship and goods, and that in the present Prize Act

costs in those cases, which have been since taxed by me, will be found charges for taking out the decrees of sale, for instructing the marshal to execute them, and for examining the marshal's accounts of charges, &c. So that, in case the marshal were ordered to repay any portion of the sums which he had received out of these proceeds, he would be entitled to recover the amount from the Queen's Proctor, by whose directions and under whose instructions he has acted throughout."

(*a*) Vol. 1. p. 63. (*b*) *Ante*, p. 232.

that clause is omitted; but their Lordships are clearly of opinion, that such omission, if intentional, could at most only operate to leave the matter in the discretion of the Court, and that the Court, whether that of Admiralty or Appeal, ought to continue and act upon the practice which has hitherto prevailed.

Their Lordships, therefore, have no hesitation in saying that the expenses of sale must be deducted from the gross proceeds, before any money is paid over to the claimants.

But there are two other heads of deduction which require a distinct consideration. The one is composed of charges which relate to the care and custody of the property, pending adjudication, and before sale. Now in former wars that care and custody remained with the captors, excepting the few cases in which the property was condemned as *droits* of the Admiralty, or, being perishable, was sold at once. The present Prize Act directs that the property shall be forthwith delivered up to, and remain in, the custody and care of the marshal, or other officer (as the case may be). It necessarily follows that persons must be employed and paid to keep possession of the property; whilst in former wars those persons would have been the servants of the captors themselves.

Their Lordships are of opinion that this alteration made by the present Prize Act, being intended for the benefit of all persons concerned, the reasonable expenses attending the possession, care and custody of the property, must be treated as a charge upon the property itself; and must be deducted from the gross proceeds of the sale, whether the property be condemned or restored; and indeed this appears to have been the practice in former wars, whenever, from circumstances, the possession, care and custody did not remain with the captors themselves.

Another head of charges is composed of "Pilotage," "Trinity Lights," "Ramsgate Dues," &c. These charges relate to the ships only. The charge of pilotage appears to have been allowed in the cases of the *Fidek* and the *Madoc*. The amount indeed in those cases was much smaller than in the present instances; but the principle applies equally to all. They are charges necessarily incurred, in order to bring the ships into the proper port for adjudication, whilst the captors were *bonâ fide* in possession of the

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ships, and which they were compelled to pay by the Acts of Parliament relating to "Pilotage," "Trinity Lights," &c.

Their Lordships are of opinion that these charges fairly and properly attach to the property, and ought, therefore, to be deducted from the gross proceeds of the sales. Their Lordships, therefore, determine that the sums which have been received by the registrar from the Paymaster-General, and those only, are the amounts which the claimants in these cases are entitled to receive.

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[9 Moore, P. C. 150; Spinks, 174.]

Capture — Wrongful Act — Honest Mistake of Captor — Restitution — Damages and Costs.

If captors improperly and without reasonable cause, but through an honest mistake, seize a vessel, such vessel not being, by any act of her own, voluntary or involuntary, open to any fair ground of suspicion, the captors are liable in damages and costs.

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THE question raised by this appeal was whether the owners of the *Ostsee* and her cargo which had been captured by her Majesty's ship *Alban* for a supposed breach of the blockade of Cronstadt, were entitled, upon the decree of the High Court of Admiralty for restitution of the ship and cargo captured as a prize, to costs and damages from the captors. The seizure and detention being admitted to be without sufficient grounds for condemnation, the captor consented to the restitution of the ship and cargo. The sentence of the Admiralty Court was founded upon that consent.

The facts of the case were these :—

The *Ostsee*, under Mecklenburg colours, took on board at Cronstadt, in the month of May, 1854, a cargo of wheat, and sailed therefrom on the 28th of the same month, bound to Elsinore for orders, and in the prosecution of such voyage was captured on the 1st of June in the Gulf of Finland, about twenty-four miles from Dagerort, by her Majesty's ship *Alban*, Henry Charles Otter, commander, as for a breach of the blockade of Cronstadt, and sent to England for adjudication as a prize.

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Proceedings were instituted in July, 1854, against the ship and cargo in the High Court of Admiralty, when a claim was put in by the appellant on behalf of the owners of the ship and cargo. It appeared, however, that the blockade was not imposed upon Cronstadt until after the capture, and consequently the Queen's Proctor, on the 2nd of August, offered to consent to the restitution of the ship and cargo on payment of the captor's expenses. No answer was given to this offer until the 10th of August, when the claimant rejected it.

The cause came on for hearing in the Admiralty Court on the 19th of August, when the claimant prayed the restitution of the ship and cargo, and that the captors might be condemned in costs and damages. The captors consented to restitution of the ship and cargo, but submitted that it ought to be without costs and damages. The judge of the Admiralty Court (the Right Hon. Dr. Lushington) admitted the claim for the ship and cargo, and decreed the same to be restored to the claimant for the use of the owners, but without costs and damages. In giving judgment the learned judge observed that: "During the seventeen years that Lord Stowell presided in this Court, and administered the law of nations with regard to war, I believe that out of the many thousand ships and cargoes brought before him, he condemned the captors in costs and damages in only about ten or a dozen cases—not one in a thousand; and Lord Stowell also, as I right well remember, laid it down that he would not condemn the captors in costs and damages upon evidence given before him, without giving them the opportunity of justifying their conduct, and stating, if they thought fit, the grounds on which they made the capture. In my own recollection there are only three cases of restitution with costs and damages. I am well aware that where a seizure has been made without ostensible cause or reason, justice requires that the persons making the seizure should make good to the party the loss that may have been occasioned by the capture; at the same time, I am of opinion that this is the extremity of the law of nations, which ought not to be adopted except in cases which imperatively require the Court so to do. Without venturing any opinion as to what may be the duty of the Court in cases that may come before it, looking at the confusion that has arisen respecting this blockade,

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and the difficulty commanders of her Majesty's vessels have in forming their own opinion, and seeing that consent has been given for the restitution of this ship and her cargo, I think I should be going too far in condemning the captors in costs and damages, and I decline so to do" (*o*).

From so much of this sentence as refused costs and damages to the claimant the present appeal was brought, and the appellant prayed that that portion of the sentence appealed from might be reversed, the principal cause retained, and that the damages and costs sustained by the owners of the *Ostsee*, and her cargo, by reason of her capture and detention, be pronounced for, and that the respondent, Otter, the captor of the ship and cargo, might be condemned in the damages and costs, and also in the costs incurred by the appellant, as well in the Appellate Court as in the Court below, by reason that the seizure and detention of the *Ostsee*, for the presumed breach of a blockade, which was not imposed until nearly a month after, were unjustifiable; and that the same were not occasioned by, and was not imputable to, any misconduct of any description on the part of the *Ostsee*.

The appeal was argued by *Dr. Addams* and *Dr. Twiss* for the appellant, and

The *Queen's Advocate* (Sir John Harding) and *Dr. Bayford* for the respondents.

For the appellant, it was contended that the general principle recognized in Prize Courts was to grant compensation to claimants upon restoration of the ship and cargo when wrong had been done; whether the original seizure was justifiable or not, if the captors were guilty of malfeasance or non-feasance; and they submitted, that as the seizure in this case was without probable cause, as it was not in dispute that the *Ostsee* was captured for a breach of a blockade which had no existence until nearly a month after the seizure, the appellant was entitled, *ex debito justitiæ*, not only to simple restitution, but to restitution with costs and damages. The following authorities were referred to by them, as instances where costs and damages had been allowed on

[(*o*) This was the whole judgment as reported in Spinks, p. 174.—ED.]

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restitution: Story on Prize Courts, pp. 35, 39, 112 (*p*), the *Washington* (*q*), the *Acteon* (*r*), the *Hendrick and Jacob* (*s*), the *Wilhelmsberg* (*t*), the *Corier Maritimo* (*u*), the *Anna* (*x*), the *Neustra Senora de Los Dolores* (*y*), the *Saint Juan Baptista* (*z*), the *Elise* (*a*), *Lindo* v. *Rodney* (*b*), *Le Caux* v. *Eden* (*c*); and they further submitted that even if the captors had acted *bonâ fide* and been guilty of no misconduct, and the neutral had been wronged, he was still to be compensated by the captors, the payment of which was a question resting between the government and the captors: the *Zacheman* (*d*); and that the fact of the captain, Otter, having acted under orders of his superior in command, did not exonerate him from responsibility: the *Mentor* (*e*), the *Eleanor* (*f*).

The respondent's counsel distinguished the cases cited by the appellant, where costs and damages had been allowed, from the *Ostsee*, submitting that they were either cases of capture by privateers, or of improper conduct on the part of King's ships, and they referred to the *Betsey* (*g*), the *Felicity* (*h*), the *Lively* (*l*), the *Marianna Flora* (*m*), the *Two Susannahs* (*n*), as authorities that restitution had been decreed without costs and damages. They further contended that the seizure of the *Ostsee* by the *Alban* was upon probable grounds, as there was an absence of necessary ship papers; that by international law it was the absolute duty of neutrals in time of war not to sail the seas without a complete set of ship papers (Bynkershoek, *Quæst. Juris Publici*, lib. i. c. xiv.; Story on Prize Courts, pp. 4, 36 (*o*); 1 Kent's Comm. p. 161; Chitty's Law of Nations, p. 196 (edit. 1812); Abbott on Shipping, 288 (*p*); Hubner, *De la Saisie des Bâtiments neutres*, c. 3, sec. 2); that the sea register was wanting, and they submitted that it was

(*p*) Pratt's edition.
(*q*) Vol. I. p. 555.
(*r*) *Ante*, p. 209.
(*s*) Cited in the *Betsey*, Vol. I. at p. 67.
(*t*) Vol. I. p. 437.
(*u*) Vol. I. p. 137.
(*x*) Vol. I. p. 499.
(*y*) *Ante*, p. 20.
(*z*) Vol. I. p. 417.
(*a*) *Ante*, p. 327.
(*b*) Note to *Le Caux* v. *Eden*, 1 Doug. 612.
(*c*) 1 Doug. 594.
(*d*) Vol. I. p. 439.
(*e*) Vol. I. p. 96.
(*f*) 2 Wheat. Amr. Rep. 346.
(*g*) Vol. I. p. 63.
(*h*) *Ante*, p. 233.
(*l*) 1 Gallis. Amr. Rep. 315.
(*m*) 11 Wheat. Amr. Rep. 1.
(*n*) Vol. I. p. 208.
(*o*) Pratt's edition.
(*p*) 9th edit., by Shee.

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not too late to urge such objection, as it was the privilege of the captor to rely upon any point at the hearing, as he might capture on one ground, and obtain a condemnation on another: Story on Prize Courts, p. 49; the *Adeline* (*q*).

Dr. Twiss, in reply.

The consideration of the appeal was reserved.

Judgment was now delivered by the Right Hon. T. PEMBERTON LEIGH:—

On the 1st of June, 1854, the ship *Ostsee*, sailing under the Mecklenburg flag, on her voyage from Cronstadt to Elsinore, was seized by her Majesty's ship *Alban*, under the command of Captain Otter, and sent to London for adjudication as prize.

Upon the ship's papers and the examination of the master, the mate, and another of the crew, on the usual interrogatories, there appeared to be no ground for condemnation; and with the consent of the captors, on the 19th of August, 1854, an interlocutory decree was pronounced, by which the ship and cargo were restored to the claimants, but without costs and damages.

From so much of the decree as refuses costs and damages to the claimants the present appeal is brought.

It is agreed on all hands that the restitution of a ship and cargo may be attended, according to the circumstances of the case, with any one of the following consequences:—

First. The claimants may be ordered to pay to the captors their costs and expenses; or,

Second. The restitution may be, as in this case, simple restitution, without costs or expenses, or damages to either party; or,

Third. The captors may be ordered to pay costs and damages to the claimants.

These provisions seem well adapted to meet the various circumstances, not ultimately affording ground of condemnation, under which captures may take place.

A ship may, by her own misconduct, have occasioned her capture, and in such a case it is very reasonable that she should indemnify the captors against the expenses which her misconduct has occasioned.

Or she may be involved, with little or no fault on her part, in

(*q*) 9 Cranch, 244.

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such suspicion as to make it the right, or even the duty, of a belligerent to seize her. There may be no fault either in the captor or the captured, or both may be in fault, and in such cases there may be *damnum absque injuriâ*, and no ground for anything but simple restitution.

Or there may be a third case where not only the ship is in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion. In such a case a belligerent may seize at his peril, and take the chance of something appearing on investigation to justify the capture; but, if he fails in such a case, it seems very fit that he should pay the costs and damages which he has occasioned.

The appellants insist that the circumstances of this case bring it within the last of these rules.

The general principles applicable to this point are stated with great clearness in a document of the very highest authority, the Report made to King George II., in 1753, by the then judge of the Admiralty Court (*r*), and the law officers of the Crown, one of whom was Mr. Murray (afterwards Lord Mansfield), and they are laid down in these terms (Pratt's Story, p. 4):—"The law of nations allows, according to the different degrees of misbehaviour or suspicion arising from the fault of the ship taken, and other circumstances of the case, costs to be paid, or not to be received by the claimant, in case of acquittal and restitution. On the other hand, if a seizure is made without probable cause, the captor is adjudged to pay costs and damages."

This passage (with others) is cited by Lord Stowell (then Sir William Scott), and Sir John Nicholl, in their letter to the American Minister, in 1794, as containing an accurate statement of the law of maritime capture.

These rules have been recognized and acted upon by all the chief maritime powers.

In France, a very early *Ordonnance* provides that when a seizure is made "sans cause raisonable, nostre dit Amiral sera deuement restituer le dommage." (Pratt's Story, 35.)

The same rule is laid down by M. Pourtalis, in two cases which came before the French *Conseil des Prises*, in 1799. In one, the *Pigou*, where a neutral ship (an American) had been captured by

(*r*) Sir J. Lee.

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two French frigates, the rule was stated and applied, it may be thought with some severity to the particular case.

An English translation of a rather imperfect report of the judgment is to be found in the notes in the case of the *Charming Betsey* (*s*); but the judgment is set out at length in a French work published during the present year, with which Mr. Rothery (the registrar) has been good enough to furnish us, entitled, *Traité des Prises Maritimes*, vol. ii. p. 54.

After stating that in general a man is bound, as well by natural as by civil law, to make good the damage which he has occasioned, and that error on his part cannot relieve him from this reparation, the judge (*t*) proceeds in these terms:—"En matière de prises, l'imprudence des capturés, leur négligence dans l'observation de certaines formes, des procédés équivoques peuvent souvent compromettre leur sûreté et faire suspecter leur bonne foi. Il peut arriver alors qu'en examinant l'ensemble des faits on reconnaisse qu'une prise est invalide. Mais on peut reconnaître aussi que les capturés, par leur conduite, ont donné lieu à la méprise des capteurs. Dans ce cas, il serait injuste de rendre ceux-ci responsables d'une erreur que l'on ne peut raisonnablement regarder comme leur ouvrage.

"Mais quand l'injustice des capteurs ne peut être excusée, les capturés ont incontestablement droit à une adjudication de dommages-interêts."

In that case there would appear to have been some colour for the capture, for the Tribunal of the First Instance had decreed restitution; that Order had been reversed by a superior Court at Morbihan, which decreed condemnation of the ship and cargo, and this sentence was again reversed by the *Conseil des Prises*, which decreed restitution with costs and damages.

The same doctrine is laid down by the same eminent authority, about the same period, in the case of the *Statira* (*u*).

The cases in the American Courts fully bear out the statement of the law by Mr. Justice Story, in the treatise already referred to

(*s*) 2 Cranch, 98.

(*t*) It appears that this was not strictly a judgment of the *Conseil des Prises*, as Monsieur Pourtalis, although afterwards President of the *Cour de Cassation*, was at that time only *Commissaire du Gouvernement*, or public prosecutor, and the passage is taken from the "conclusions," or arguments, delivered in by him to the Court. They are, however, important as being the deliberate opinion of so eminent a lawyer.

(*u*) 2 Cranch, 99.

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(p. 35), which is in these terms:—"Every capture, whether made by commissioned or non-commissioned ships, is at the peril of the captors. If they capture property without reasonable or justifiable cause, they are liable to a suit for restitution, and may also be mulcted in costs and damages. If the vessel and cargo, or any part thereof, be good prize, they are completely justified, and although the whole property may, upon a hearing, be restored, yet, if there was probable cause of capture, they are not responsible in damages."

It may be observed that there is a misprint in this passage in Pratt's edition of Story, p. 35, where the words "possible cause" are substituted for "probable cause." On referring to the Appendix to 2 Wheat. Rep. 8, from which this part of the treatise is copied, the mistake appears, and, indeed, it is obvious from the context.

Mr. Justice Story then proceeds to enumerate a great variety of circumstances which have been held to constitute probable cause, but all of a character to throw suspicion on the ship or cargo, and all attributable, in a greater or less degree, to some act or omission on the part of the owners. At p. 39, he lays it down generally:—"If the capture is made without probable cause, the captors are liable for damages, costs, and expenses to the claimants."

In the case of the *Juffrow Maria Schroeder* (*v*), in 1800, Lord Stowell says, "It is not necessary that the captor should have assigned any cause at the time of the capture; he takes at his own peril and on his own responsibility to answer in costs and damages for any wrongful exercise of the rights of capture."

In the case of the *Triton* (*x*), in 1801, the same learned judge expresses himself thus: "It being the case of a voyage from Saint Thomas to Altona, both neutral ports, without any doubt on the destination and without any sufficient ground of seizure, I think the claimants are entitled to costs and damages."

In the case of the *William* (*y*) the same learned judge states:

(*v*) Vol. I. p. 279.

(*x*) Vol. I. p. 352.

(*y*) The words quoted are from the following charge to the Trinity Masters, the vessel having, as was alleged by the claimant, been lost at sea through want of proper nautical care on the part of the captors:—"Gentlemen, I will in this stage of the case take the liberty of stating to you the principles of law which govern cases of this description. When a capture is not justifiable, the captor is answerable for every damage. But in this case the original seizure has been justified by the condemnation of part of the [6 C. Rob. 316.]

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"When a capture is not justifiable the captor is answerable for every damage." The same law is laid down in the *Actæon* (*z*), which we shall presently state more fully. In the case of the *Elizabeth* (*a*), in 1809, Sir William Grant, an authority upon such subjects second only, if second, to Lord Stowell, said: "We order the vessel to be restored, and, as we are of opinion there appears scarcely any ground for justifying the detention of the vessel, condemn the captors in costs."

There appears in that case to have been, in the opinion of the Court, some, though but little, ground for the seizure, and the decree is for restitution without damages; but the captor, who had obtained a decree in the Court below, is condemned in the costs of the appeal. We have referred to the original Order in the Minute Book, the case being loosely stated in the report.

The result of these authorities is, that in order to exempt a captor from costs and damages in case of restitution, there must have been some circumstances connected with the ship or cargo affording reasonable ground for belief that one or both, or some part of the cargo, may prove upon further inquiry to be lawful prize.

What shall amount to probable cause so as to justify a capture cannot be defined by any exact terms. The question was discussed before Mr. Justice Story, in the case of the *George* (*b*), when it was

cargo. It is therefore to be considered as a justifiable seizure, in which all that the law requires of the captor is that he should be held responsible for due diligence. But on questions of this kind there is one position sometimes advanced, which does not meet with my entire assent, namely, that captors are answerable only for such care as they would take of their own property. This, I think, is not a just criterion in such case, for a man may with respect to his own property encounter risks from views of particular advantage, or from a natural disposition of rashness, which would be entirely unjustifiable in respect to the custody of the goods of another person which have come to his hands by an act of force. In cases of capture there is no confidence reposed nor any voluntary election of the person in whose care the property is left. It is a compulsory act of justifiable force, but still of such force as removes from the owner any responsibility for the imprudent or incautious conduct of the prize-master. It is not enough, therefore, that a person in that situation uses as much caution as he would use about his own affairs. The law requires that there should be no deficiency of due diligence; and this is the point which you will have to determine on the evidence laid before you."

(*z*) *Ante*, p. 209.

(*a*) 1 Acton, 10. [Not republished. The quotation comprises the entire judgment on appeal.]

(*b*) 1 Mason, 24.

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contended that, in order to exempt captors from costs and damages, the case against the ship at the time of seizure must be such as *primâ facie* to warrant condemnation, or, at all events, that a restoration by a Court of Prize without further proof is conclusive evidence of a defect of probable cause. Mr. Justice Story expresses his dissent from these propositions, in which we agree with him; and he then expresses himself in these terms (p. 26): "If, therefore, there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to the proprietary interest, the national character, or the legality of the conduct of the parties, it is proper to submit the cause for adjudication before the proper Prize Tribunal; and the captors will be justified, although the Court should acquit without the formality of ordering further proof." In this case there was abundant ground of suspicion, and the demand of damages was rejected.

Neither in the texts, nor in the decided cases to which we have thus referred, do we find it stated that, in order to subject captors to condemnation in costs and damages, vexatious conduct on their part must be proved (except as some degree of vexation is necessarily implied in the detention of a vessel without reasonable cause, after she has been searched), or that honest mistake, though occasioned by the act of the government of which they are subjects, can relieve them from their liability to make good to a foreigner and neutral (and with this case alone we are dealing) the damage which, by their conduct, he has sustained.

Nor is it easy to perceive upon what grounds of reason or justice such excuses could rest.

If costs and damages were inflicted as a punishment on captors, honest intention would be a consideration of the greatest weight; but the principle on which they are awarded is that of affording compensation to a party who has been injured. Vexatious conduct on the part of the captors has, in some cases, been alluded to as removing all reluctance on the part of the judge to award costs and damages, as in the *Nemesis* (*c*), or as forming a ground for

(*c*) Edwards' Rep. 50. [Not republished. The decision was based on the special facts of the case, costs and damages being awarded for the capture of a British ship on unjustifiable grounds. "It is impossible to conceive the least shadow of an excuse for such conduct."—Per Sir W. Scott.]

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what are termed vindictive damages, or for subjecting the captors to costs and damages or depriving them of their expenses, when, but for such conduct, they might have been entitled to their expenses against the claimants, as in the cases of the *Speculation* (*d*), the *Washington* (*e*), and several others; but no case was cited to us at the Bar, nor have we been able to find any, in which wilful misconduct on the part of the captors has been stated to be a necessary ingredient in an ordinary condemnation in costs and damages.

So as to error occasioned by the proceedings of their own government. The captors act as the agents of the State of which they are citizens, and which must ultimately be responsible for their acts. Prize Courts afford the remedy as between the individuals, which otherwise must be sought by the government of the claimants against the government of the captors; but the mode of proceeding cannot affect the right to redress, and if the State could not urge its own mistakes as a justification of its own wrong, neither, it should seem, should individual citizens be permitted to do so.

The law of nations upon these points appears to us to be settled by decisions both in the American and European Courts. In the case of the *Charming Betsey* (*f*), in 1804, the captain of an American ship of war had seized in America a vessel which was held upon the evidence to have become Danish property. The Court was of opinion that the orders issued by the American Government were such as might well have misled the captor; but it was decided (the judgment being delivered by a most eminent lawyer, Chief Justice Marshall) that the claimants were entitled to costs and damages against the captors (though not vindictive damages which had been awarded in the Court below), and that the officer, if he had acted in obedience to orders or had been misled by his government, must be indemnified by the State. Precisely the same doctrine, though without reference to this decision, was laid down some years afterwards by Lord Stowell in the case of the *Actæon* (*g*).

There an American ship sailing under a British licence had been captured by one of his Majesty's frigates, under the command of

(*d*) Vol. I. p. 237.
(*e*) Vol. I. p. 555.
(*f*) 2 Cranch, 64.
(*g*) *Ante*, p. 209.

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Captain Capel, who, being unable to spare men to take charge of her, had destroyed the vessel and cargo. It was a case, therefore, in which all possible suspicion of selfish or improper motives for the capture was out of the question, yet Lord Stowell decreed restitution, with costs and damages, and laid down the principles of his decision in these terms:—"This question arises on the act of destruction of a valuable ship and cargo by one of his Majesty's cruisers. On the part of the claimants, restitution has been demanded, and there can be no doubt they are entitled to receive it; indeed, I understand that it is not now opposed by the captor himself; but it remains to be settled what is to be the measure of restitution—how far it is to be carried. The natural rule is, that if a party be unjustly deprived of his property, he ought to be put as nearly as possible in the same state as he was before the deprivation took place; technically speaking, he is entitled to restitution with costs and damages. This is the general rule upon the subject, but like all other general rules it must be subject to modification. If, for instance, any circumstances appear which show that the suffering party has himself furnished occasion for the capture; if he has by his own conduct in some degree contributed to the loss; then he is entitled to a somewhat less degree of compensation to what is technically called simple restitution.

"This is the general rule of law applicable to cases of this description and the modification to which it is subject. Neither does it make any difference whether the party inflicting the injury has acted from improper motives or otherwise. If the captor has been guilty of no wilful misconduct, but has acted from error and mistake only, the suffering party is still entitled to full compensation, provided, as I before observed, he has not by any conduct of his own contributed to the loss."

His Lordship, then, after observing that the act of Captain Capel in destroying the vessel might have been a very meritorious act as regarded his own government, and that he was not chargeable with any corrupt or malicious motives, but acted, in all probability in obedience to orders, concludes his judgment in these words:—"But this will not affect the right of the American claimant, whom I must pronounce to be entitled to restitution, with costs and damages; and I beg it may be understood that I

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do so without meaning in the slightest degree to throw any imputation on the conduct and character of Captain Capel, but merely for the purpose of giving a due measure of restitution to the claimant."

This judgment was pronounced by Sir William Scott in the month of May, 1815, almost at the very close of the war, and it is in perfect conformity with the rules laid down at its commencement in the paper already referred to in the year 1794.

The same decision on the same grounds was pronounced by the same learned judge immediately afterwards in the case of the *Rufus* (*h*).

It is needless to refer to all the other cases which were cited at the Bar, but there is one large class which so strongly illustrates the principle that it may be proper to advert to it. We allude to what are called the Cape Nicola Mole cases.

In the early part of the last war a number of French and Dutch vessels and cargoes were captured by British ships, and sent in for adjudication to the Court of Admiralty of St. Domingo. Several of the ships and cargoes were condemned, and the proceeds of the captures distributed in the years 1797 and 1798.

It was afterwards discovered, that although the Court of St. Domingo was properly constituted as a civil Court of Admiralty, and his Majesty's instructions had been addressed to it as a Prize Court, yet, by mistake, no warrant had been issued to give it a prize jurisdiction against France or Holland, although there had been a prize warrant against Spain.

Some time afterwards some of the owners of the captured property having discovered this error, the effect of which was that the Court had no jurisdiction, instituted proceedings in the High Court of Admiralty, calling upon the captors to proceed to adjudication. These proceedings were instituted nearly two years after the sentence, when the property had been distributed, the crews dispersed, the papers probably lost or destroyed, and when it was scarcely possible that the truth of the cases could be made to appear on the part of the captors. In one of these cases, the *Huldah* (*i*), Lord Stowell, in 1801, overruled the protest of the

(*h*) *Ante*, p. 213, note. (*i*) Vol. I. p. 303.

captors against the proceedings; and, in 1804, in determining a question upon the registrar's report (the *Driver*) (*k*), he speaks of it as "one of that unfortunate class of cases in which this Court has felt itself under the necessity of decreeing restitution, with costs and damages."

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In all these cases where restitution was ordered, we believe that, on reference to the registrar's books, it will be found that the captors were condemned in the costs of the proceedings in the Court at Cape Nicola Mole.

Surely, if the absence of misconduct on the part of the captors, if honest error, occasioned by the blunders of the government, or the consideration of hardship upon individual officers, acting in discharge of their duties, could in any case afford a protection against the claims of a neutral, such protection would have been afforded by the circumstances of these cases. Yet the captors were held liable by the Court of Admiralty, and were afterwards, we understand, indemnified at the expense of the public.

To apply, then, these rules to the facts of this case.

It appears that the ship was captured on the ground of some supposed breach of blockade. The mate, on his examination, says:—"I did not hear of any port or place being blockaded until the 1st of June, 1854, when we were taken. When they came on board they told us there was a blockade, and asked us if we did not know it."

The master says:—"I did not know of any blockade whatever; I did not hear of any blockade. It is true I heard from Sir Charles Napier, after the capture, that I had broken the blockade; but I did not knowingly enter or leave any blockaded port, place, river, or coast. I did not hear of it except from Sir C. Napier on the morning following the day of capture. He sent a boat for me, and I was taken on board the admiral's ship, and he told me of it."

This is all that appears upon the evidence with respect to the grounds of seizure, but the papers on board the ship distinctly showed the port from which she had sailed and that to which she was addressed; and it may not be immaterial to observe that,

(*k*) 5 Rob. 145. [Not republished.]

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although some of these documents were in languages of which English seamen might well be supposed ignorant, yet the material facts are stated in an English certificate, signed by the British vice-consul at Rostock. From these papers it appeared that she had sailed from Cronstadt, and was bound for Elsinore for orders. We take it for granted, therefore, that it was for a supposed breach of blockade in sailing from Cronstadt that she was seized; and this is the only ground upon which the case was rested on the argument before us. Now, in order to justify a condemnation for breach of blockade, three things must be proved:—1st, the existence of an actual blockade; 2ndly, the knowledge of the party; 3rdly, some act of violation, either by going in or coming out with a cargo laden after the commencement of the blockade. (The *Betsey* (*l*).)

The instructions to her Majesty's commanders upon this subject for the present war are, that if any vessel shall be found coming out of any blockaded port, which she shall have previously entered in breach of such blockade, or if she shall have any goods on board laden after knowledge of the blockade, such ship and goods shall be seized, and sent in for adjudication. (Article X.)

Now, when this ship was seized, was there any reasonable ground for suspicion that she was liable to seizure under these instructions?

It appeared distinctly upon her papers, as the facts upon inquiry turn out to be, that on the 25th of March, 1854, before the declaration of war against Russia, this ship was on her voyage from Leith to Cronstadt; that she was on that day chartered for a voyage with a cargo of wheat from Cronstadt to England, or countries in alliance or amity with England, according to orders which she might receive at Elsinore; that on the 10th of May the shipment of her cargo had been completed; and that by the 16th she had complied with all the formalities required to enable her to leave Cronstadt; and that when she was taken she was on her direct course from that port to Elsinore.

Cronstadt was not blockaded at the time when she entered that port, nor at the time when she took her cargo on board, nor at the

(*l*) Vol. I. p. 63.

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time when she left Cronstadt, nor even at the time when she was captured, nor for more than three weeks afterwards; and no blockade of Cronstadt had been proclaimed either by the British Government or by the admiral.

It is said that the admiral had, on the 16th of April, in Kioge Bay, proclaimed an intention of blockading all Russian ports, and that certain ports in the Gulf of Finland were actually blockaded on the 28th of May, and perhaps at an earlier period; but there was not the slightest ground for suspecting that this ship had left any other port than Cronstadt, or had any intention of entering any other Russian port.

What colour of reason, then, could there be for seizing under such circumstances this vessel, which did not fall under any one of the conditions which are required by the instructions to concur in order to justify sending in the ship for adjudication?

It is said that there was a confusion with respect to the blockades in the Baltic, and the several gulfs of Finland, Riga and Bothnia. But, in the first place, with respect to the port of Cronstadt, we find no trace in the evidence of any confusion or doubt as to the period when the blockade commenced, and if there had been, it was a confusion created only by the acts and in the minds of her Majesty's officers, and could not, therefore, according to the principles which we have collected from the authorities, have afforded any answer to a neutral perfectly innocent of all fault, and not by any act or neglect of his, voluntary or involuntary, exposed to any suspicion.

But it is said that although there might be no ground for suspecting this ship of breach of blockade, yet a captor is not confined to the case upon which the seizure was made, and that a vessel sent in for adjudication upon one ground may, if the facts warrant it, be subjected to condemnation on another.

Of this rule there is no doubt. Whether, when a ship is sent in for adjudication as a neutral, and there appears to be no reasonable cause for having sent her in as such, a captor can excuse himself from costs and damages by alleging irregularities in her papers, which might have led, but did not in fact lead, him to doubt her neutrality, is a question which it will be time enough to consider when it arises. This question, as regards non-commis-

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sioned captors, is discussed, and in our opinion most properly decided, by the learned judge of the Admiralty, in the case of the sloop *Elize, otherwise Wilhelmine* (*m*).

In this case it is not open to doubt upon the evidence that the *Ostsee* was in truth a neutral ship, and nothing suspicious is found on board her. But it is said that she ought to have had on board a sea pass from the Mecklenburg Government, describing and identifying her, and that no such pass is amongst the documents produced. It is very true that no such document is found there, but unfortunately, in this as well as in other respects, there has been some irregularity on the part of the captors. By the Act 17 & 18 Vict. c. 18, it is enacted, and by her Majesty's instructions, in conformity with the Act, it is ordered (Art. II.), that the captor shall bring into Court all books, papers, passes, sea briefs, and other documents and writings whatsoever, as shall be delivered up or found on board any captured vessels, and the captor, or one of his chief officers, or some other person who was present at the capture, and saw the said papers and writings delivered up or otherwise on board at the time of the capture, shall make oath that the said papers and writings are brought in as they were received and taken, without any fraud, addition, subduction, alteration, or embezzlement whatsoever, or otherwise shall account for the same upon oath to the satisfaction of the Court.

It is obvious that unless the papers are verified in the manner pointed out by these instructions, that is, by the oath of some person who saw them taken, there can be no security that the papers brought in are all the papers on board the ship.

Now, in this case, neither the captor, nor any person present at the capture, nor any person who can have any personal knowledge whatever on the subject, has made the affidavit. It appears that a gentleman named Huxham, one of the officers on board of the *Duke of Wellington*, the flag ship, was sent home in charge of this vessel, and he brings in certain papers, which he swears were all that were delivered to him by Captain Otter, with certain exceptions, which he specifies and accounts for.

On the other hand, the master, Voss, in his answer to the

(*m*) *Ante*, p. 327.

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7th interrogatory, states that the ship had a sea pass on board from the Mecklenburg Government, and in his answer to the 28th interrogatory he says it was on board when he took the command of the ship and previously thereto. Now, when it is remembered that, from the nature of the case, Mr. Huxham's affidavit offers no contradiction to this statement, and that the supposed absence of this paper appears to have excited no remark at the time of the capture, and to have occasioned no doubt as to the ship's neutrality, it is impossible to attribute any weight to this circumstance.

We will now advert to the principal cases cited for the respondents, by which it was argued that the rules which we have above stated were modified, or exceptions engrafted upon them, which are sufficient to protect the captors; but in doing so we must premise that, unless the rule itself be qualified, its stringency is not affected by the circumstance that it may not always have been applied by the judge who lays it down, to cases in which those who are bound by its authority may consider that it was applicable. The application, of course, must depend upon the opinion of the judge in each particular case.

The first case relied on was the *Betsey* (*n*).

There an American ship was found in the harbour of Guadaloupe, at the time when the island was captured by the British forces; there were circumstances which, in the opinion of Lord Stowell, threw great doubt upon the point whether she was neutral or enemies' property, and made a seizure justifiable, for the purpose of further inquiry. The learned judge, it is true, remarks that the question whether there was or not a blockade in existence when the ship entered the port was one of nicety, which had only been recently decided by the Lords of Appeal, and required more legal discrimination than could be required from military persons; but he does not appear to have rested his judgment upon that ground.

The next case relied on was the *Luna* (*o*), which is, no doubt, a strong decision, for in the case of a capture made from a neutral, under a mistaken construction by the captors of a British Order in

(*n*) Vol. I. p. 63.

(*o*) The *Luna*. [Not republished; the facts and decision are set out next page in this judgment.]

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Council, the learned judge not only relieved the captors from costs and damages, but gave them their expenses out of the captured property.

It must be admitted that the mistake of the captors was not an unnatural one; they thought that an Order in Council of April 26, 1809, which declared a strict blockade "of all ports and places under the Government of France, together with the colonies, plantations, and settlements in the possession of that government," extended to St. Sebastian in Spain, which was then, and had been for two years, in the possession of the French.

The facts of the case are not stated in the report so fully as to enable us to form an accurate judgment of the degree of suspicion which might really attach to the ship. The question of expenses does not seem to have been argued, and Lord Stowell probably felt that he was going to the very verge of the law, for he says: "I cannot in this instance refuse the captors their expenses, but in no future case arising on the same state of facts will the Court grant this indulgence."

This judgment was pronounced in the year 1810, during the conflict between the French, Berlin, and Milan Decrees on the one hand, and the retaliatory British Orders in Council on the other. Whatever may be thought of the particular decision, the general rule with its modifications is laid down five years afterwards, in the case of the *Actæon*, by the same learned judge in the terms which we have stated.

If, however, these cases be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the respondents here, where no questions of law of any kind appear to have existed.

The other authorities mainly relied on by the respondents do not relate to disputes between belligerents and neutrals. They are either cases in which the rights of belligerents only were involved, as where captures had been made by one belligerent from another in ignorance that peace had been restored, or where no belligerent rights at all were involved, as in the capture of ships engaged in the slave trade.

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The rules laid down in these cases may have an indirect, but only an indirect, application to questions between belligerents and neutrals.

The case of the *John* (*p*) was one of the former class.

There a capture of an American vessel had been made by a British cruiser in ignorance that war between Great Britain and America had ceased, and the prize having been lost by unavoidable accident, the captor was called upon for restitution.

The case was one which, as the learned judge intimates, might be provided for by the treaty of peace between the two nations, and on which, as between them, there might or might not be a claim against the British Government according to its terms, and according as the British Government had or had not taken due means for giving notice of the peace to its officer; and he lays it down that the officer being under invincible ignorance, and being in possession *bonâ fide*, was not responsible for the loss which had occurred.

In another case of the same kind, the *Mentor* (*q*), Lord Stowell seems to have thought that when an act of mischief was done by the King's officers, though through ignorance, it would not necessarily follow that they would be protected from civil responsibility, but that the party injured might resort to a Court of Prize, and that the officer must look to his own government for reimbursement. Whether all the doctrines laid down in these two cases are quite consistent with each other may perhaps admit of some doubt; but they belong, as we have already observed, to a different class of cases from that which we have to decide; and if all the doctrines found in the *John* were applied to a case between neutrals and belligerents, they would afford no protection to the captors here, where there was no invincible ignorance, where everything depended on the admiral's own acts, whether he had or had not established a blockade of Cronstadt.

It was then urged that the captors, having acted *bonâ fide*, ought to be indemnified by her Majesty's Government, and that there are cases in which the Court of Admiralty has either made an order against the government, or has refused to make an order against

(*p*) See *ante*, p. 232. (*q*) Vol. I. p. 96.

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the captor unless the government would undertake to indemnify him.

The cases relied on for this purpose are the *Zacheman* (*r*) and the *San Juan Nepomuceno* (*s*).

In the former the Crown, having by treaty the right of pre-emption of certain goods seized as contraband, had improperly delayed to exercise such right. In the latter the slaves, the value of which was sought to be recovered, had been liberated by the Crown.

In both these cases the Crown either had taken, or had the right to take, the property, the value of which was demanded from the captors. In neither was any order made against the government, nor is it easy to see how any could have been made.

But it is sufficient to say, that in the case before us no blame of any kind appears to be imputable to the government. They had contributed by no act or default of theirs to the capture. They had not, at the time when it took place, proclaimed any blockade of Cronstadt, nor done anything to mislead the naval officers in that respect.

Whether in any case where her Majesty's naval officers may have acted wrongfully as regards neutrals, but are liable to no imputation of wilful misconduct, it may or may not be expedient, with a view to the efficiency of the navy and the interest of the public service, to indemnify such officers at the public expense, against the legal consequences of their acts, must be left to the consideration of those who are entrusted with the executive authority of the Crown. Sitting here judicially, we can only administer the law as we find it between the claimants and the captors.

It is then said that in this case the sending in the ship must be treated as the act of the admiral, and not of Captain Otter. When a subordinate officer does an act under the immediate order of his superior, it may well be that the superior officer should be responsible for it. The principles applicable to this subject are discussed and explained in the *Mentor*, already referred to, and the *Eleanor* (*t*), before the American Courts in 1817. But here we are dealing with the actual captor, who demands adjudication of the

(*r*) Vol. I. p. 439.
(*s*) 1 Hagg. 265. [Appeal under the Slave Trade Abolition Acts.]
(*t*) 2 Wheat. 357.

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ship and cargo, and who, for all purposes of this suit, must be treated as the party responsible to the claimant. With any rights or liabilities as between Captain Otter and Sir Charles Napier we have here nothing to do.

It is then said, that if the captors had been admitted to prove the circumstances of the capture the case might have worn a different aspect. But the principle of the Prize Court is that the case is, in the first instance, to be tried on evidence coming from the captured; and if upon such evidence no doubt arises, the property is to be restored instantly—to use the expression of Lord Mansfield, in *Lindo* v. *Rodney* (*u*), "*velis levatis.*" The liberty to enter into proof on the part of the captors is rarely granted, and is attended with great inconvenience, as is well explained by Lord Stowell in the case of the *Haabet* (*v*). No doubt the circumstance that the case is decided exclusively upon evidence proceeding from the claimants is deserving of great attention, when it is sought to condemn captors in costs and damages, and makes it fit that the Court should look with great jealousy at the evidence, with a view to see whether there might not be reasonable ground of seizure, before it pronounces such a decree. But we can see, in the case before us, nothing to excite any suspicion or to induce us to think that if an application for liberty to give evidence on the part of the captors had been made in proper time, it ought to have been complied with, or, if complied with, would have altered the complexion of the case. However that may be, we do not mean, in any degree, to affect the rules of law upon this point as they now exist. In the present case the captor was aware, before the cause came on, of the question which alone was to be discussed; if he thought his case could be bettered by further proof, and that he was entitled to give it, he should have applied for such liberty before the case was heard, and he cannot reasonably make such an application after the hearing.

It is then said that there is a distinction to be made in these cases between officers of her Majesty's navy and privateers; that the Court has a large discretion in such subjects, and ought not to press with severity upon men who are acting in the discharge of a difficult and important duty.

(*u*) 2 Doug. 614. (*v*) Vol. I. p. 524.

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That, for many purposes, there is a clear distinction to be made between public and private ships of war, and that there are the strongest reasons for making such distinction, can admit of no doubt; but, as regards the particular rule in question, that a capture without probable or reasonable cause exposes the captors to condemnation in costs and damages, we find it laid down in the text books and the decided cases, both foreign and domestic, as applicable to captors generally, to public and private ships indifferently.

In the case of the *Lively* (*w*), Mr. Justice Story states distinctly: "Public and private ships must be governed by the same principle."

Again, as to the discretion to be exercised by the Court. When the application of a rule depends on the absence or existence of misconduct in both or either of the litigants, the greater or less degree of that misconduct, the existence or absence of suspicion attaching to a particular ship or cargo, the greater or less degree of it, and the causes to which it is, in whole or in part, to be attributed, it is obvious that there must necessarily be a very large discretion left to the judge, for scarcely any two cases can in all such respects be precisely the same. But when once, in the opinion of the judge with whom the decision rests, a particular case is brought clearly within a particular rule, it should seem that his discretion is at an end. It is not a question merely of costs of suit, but of reparation for a wrong which, when an accidental loss has afterwards occurred, may extend to the whole value of the ship and cargo.

Nor, if we were at liberty to relax settled rules upon our own notions of justice and policy, are we quite prepared to say that we should do so in this instance. The law which we are to lay down cannot be confined to the British navy; the rule must be applied to captors of all nations. No country can be permitted to establish an exceptional rule in its own favour, or in favour of particular classes of its own subjects. On the law of nations, foreign decisions are entitled to the same weight as those of the country in which the tribunal sits. America has adopted almost all of her principles of prize law from the decisions of English Courts, and whatever may have been the case in former times, no authorities

(*w*) 1 Gallis. 327.

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are now cited in English Courts, in cases to which they are applicable, with greater respect than those of the distinguished jurists of France and America. Whatever is held in England to justify or excuse an officer of the British navy will be held by the tribunals of every country, both on this and the other side of the Atlantic, to justify or excuse the captors of their own nation.

By the usage of all countries, captors have a great interest in increasing the number of prizes. The temptation to send in ships for adjudication is sufficiently strong. Is it too much to say that where no ground of suspicion can be shown, and all that the captor can allege is that he did wrong under a mistake, he should make good in temperate damages the injury which he has occasioned? Ought a captor to be permitted to say to the captured, "True, nothing suspicious appeared in your case at the time of seizure, but upon further inquiry something might have been discovered. I had a right to take my chance; you have nothing to complain of. I subjected you to no unnecessary inconvenience. Go about your business, and be thankful for your escape"?

We cannot think that this would be deemed a satisfactory answer to a British neutral seized by a foreign belligerent.

Upon the whole, therefore, after the most anxious consideration, having sought in vain for any circumstances which could afford in this case a probable cause for capture, we cannot hold the captors exempted from all responsibility, though the damage will, in all probability, prove to be but small. The amount must be referred to the registrar in the usual way; but we shall advert to some circumstances which ought to be attended to in making the computation.

No complaint is made of any vexatious conduct on the part of the captors, or of any undue delay in sending home the vessel. London appears to have been one of the ports to which the charter-party provided that she might be sent. For any delay which may be attributable to the claimants themselves, the captors of course cannot be held responsible.

The exact time of the ship's arrival in London does not appear. It was stated at the Bar to have been on the 26th of June.

On the 3rd of July a monition was taken out and the ship's papers were brought in; on the 6th the monition was posted up at

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the Royal Exchange; and on the 7th of July the examination of the witnesses *in præparatorio* was completed.

It seems probable that as the ship had previously traded with this country, and one of her contemplated destinations was the east coast of England, the owner, or at all events Brockelman, the part-owner of the ship and sole owner of the cargo, had agents in this country.

On the 10th of July, at all events, the present claimant came forward and gave bail, but his claim was not consistent with the fact, for he alleged Brockelman to be the sole owner both of the ship and cargo, omitting the other part-owners of the ship, and no affidavit accompanied the claim; an amended claim and affidavit were afterwards brought in, but not till the 31st of July.

On the 2nd of August an offer was made by the captors to restore on payment of their expenses, and no answer was returned to this till the 10th, when the claimants rejected it, expressing their hope of obtaining £2,000 for damages.

On the 19th of August the case was heard and restitution took place.

We think that three weeks, at least, of the delay in this case must be imputed to the claimants, and that in respect of this period no damage or demurrage must be allowed to the ship or cargo.

We shall recommend that the claimants have their costs in the Court below, but that no costs should be given of this appeal.

We have thought it fit to enter so fully into the grounds of our decision, not only on account of the great importance of the general principles which have been brought into discussion, but out of the deference which we must always feel for any opinion of the learned judge from whom we are compelled to differ, and to whose deliberate judgment, if it were consistent with our duty to do so, we should willingly surrender our own. But this case seems to have passed without much discussion in the Court below, certainly without that full examination of the principles and the authorities, both in this and foreign countries, for which we are indebted to the able arguments addressed to us from the Bar. The cases in which during the late war restitution was attended with costs and damages turn out on inquiry to be more numerous than was supposed.

We have been guided to the conclusion at which we have arrived by what we consider to be established principles. They appear to us to be founded both in justice and convenience, reconciling as far as possible (what it is very difficult to reconcile) the conflicting rights of belligerents and neutrals. We have adopted them, however, not upon any views of our own, but because we consider them to have been recognised and acted upon by the general consent of nations (*x*).

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[Spinks, 167.]

Blockade—Neutral—Cargo Owner—Liability for Act of Agent—Egress.

The rules as to blockade may be relaxed in the case of a cargo owner, ignorant of a blockade, who has purchased cargo in a blockaded port before the declaration of war, which cargo is brought out of a blockaded port without knowledge on his part of the blockade.

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THIS was a Dutch ship, which left Amsterdam in ballast on the 18th of April, and proceeded to Elsinore for orders. She cleared out from Elsinore on the 5th of May, entered Riga on the 16th, put a cargo on board in that port, cleared out on the 27th, and was captured by her Majesty's sloop of war *Archer* on the 30th, about fifty miles from Riga.

DR. LUSHINGTON.—This is a Dutch ship which left Amsterdam in ballast on the 18th of April, proceeded to Elsinore for orders, cleared out from that port on the 5th of May, entered Riga on the 16th day of May, put on board a cargo in that port, cleared on the 27th, and was captured on the 30th.

As to the ship and freight there is no question, they must be condemned for breach of blockade; and I must add that all the evidence in this case, and all the conduct of Mr. Schroeder satisfies

(*x*) The claimants laid their damages at £1,961 15*s.* 6*d.*, which, upon a reference to the registrar and merchants, was reduced to £1,223 19*s.* 6*d.*, with interest at 4 per cent. per annum from the 19th August, 1854, until paid. The amount was subsequently paid by her Majesty's Government.

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me—if, indeed, I had not been otherwise satisfied—of the perfect knowledge which all the parties at Riga had of the blockade *de facto*, and of the fallacies they indulged in with respect to the absence of formal notification, and of a blockading squadron immediately off Riga. It is much to be lamented that persons filling such responsible situations should not exercise more caution.

The cargo, however, may stand in a different position; it does not belong to the owner of the ship, but to different persons, being Dutch subjects.

The master's account is as follows: He says that the cargo consisted of sixty lasts of hemp and twenty-nine lasts of hemp-seed; that the laders are Messrs. Krüger & Company, of Riga; and the owner, Mr. Schrœder, of Amsterdam, for whom the cargo had been purchased in 1853.

The charter-party was signed in Amsterdam on the 14th of April; the master received it in a letter at Elsinore. He says it was a condition of the charter-party—and so it appears—to go to Riga to load seed for Amsterdam, and that it should be void if the vessel should be prevented by blockade. At Elsinore the master, according to his own account, applied to the Netherlands consul for advice and information, and, acting upon his own judgment thereon, proceeded to Riga.

This is, as relates to the cargo, the substance of the master's evidence, and it appears to me to be substantiated by the further proofs. Then here is a Dutch merchant, with property in a Russian port, bought in December, 1853, and January, 1854, three months before hostilities; he charters a vessel to bring it away as soon as practicable after the ice breaks up. Such charter is entered into, and the vessel sails before any knowledge of the blockade could be supposed to have reached Amsterdam. A blockade was expected, and that contingency was provided against by the charter-party being void if it took place.

The master of the vessel was not the agent of the owner of the cargo. Assuming him to have left Elsinore with a knowledge of the blockade, it does not appear to me that such act can be ascribed to the owner of the cargo. I think, therefore, that if any breach of the blockade by ingress has been committed, the owner of the cargo is innocent.

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As to egress, the case stands in a different position. The shippers of the cargo were certainly the agents of the owners of the cargo, and they ordered the goods to be laden on board this ship, in breach of blockade. Of this the owners were most probably not cognizant.

The question is whether they ought to be held responsible for the acts of their agents. We all know that, as a general rule of law, principals must be bound by the acts of their agents; but this Court, as appears by many judgments, is not disposed to carry this rule to the full extent to which it might properly be applied in ordinary transactions. It looks with indulgence, and I think with a just indulgence, to those cases where neutrals, without any fault of their own, have had their property placed in jeopardy by the breaking out of hostilities, and the acts of agents over whom they could not at the time exercise control, and who might have an interest in the very act which endangered the property of their principals.

I will refer to two or three cases in order to see whether the present case fairly falls within the principle. The *Neptunus* was a case arising out of the blockade of Amsterdam; part of the cargo, belonging to Hamburg merchants, was condemned under the general rule respecting shipments in a blockaded port; but with respect to other parts belonging to residents in Portugal, the Court was prayed to allow them to show that the shipments were made under orders given previous to the blockade; and Lord Stowell said: "It might be attended with great hardship to neutral merchants if a responsibility for the acts of agents in the enemy's country was to be bound down without any consideration on them with the same strictness with which the law imputes the acts of agents in ordinary cases to their employers; it is obvious that such agents may have private interests in shipping off the merchandise of their ports whilst under blockade, without attending sufficiently to the risk of their principals" (*y*). Accordingly, he permitted the orders to be produced, that it might be seen whether there had been time for counter-ordering the shipments after the notification of the blockade, and whether due diligence had been used for that

(*y*) Vol. I. p. 292.

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purpose on the part of the several claimants. Upon the production of the order and the subsequent hearing of the claim, he said: "The claimant stands, therefore, fully justified as far as his own personal act can be considered. But then it comes to this general question, which I am not aware that the Court has yet fully decided: whether the owners are in all cases bound merely by the acts of their agents. The abstract rule is undoubtedly just that persons are bound by their agents; but two or three considerations weigh much to induce me to limit the extent and application of this principle in these particular cases. In the first place, I cannot but recollect that the law of blockade is a thing rather out of the common course of mercantile experience; it is new to merchants, and not very familiar to lawyers themselves. It might, therefore, be a little too rigorous to expect in the very first instance an exact compliance with the strict rule of law. A second consideration is, that the agents of foreign merchants in the enemy's country, that country being under blockade, do not stand in the same situation as other agents; they have not only a distinct, but even an opposite interest from that of their principals to fulfil the commission, at all risks, as rapidly as possible, for their own private advantage and for the public interest of their country, at that time under particular pressure as to the exportation of its produce. This may fairly be allowed to impose a strong obligation on the candour of the Court not to hold an employer too strictly bound, on mere general principles, by an agent who may be actuated by interests different from those of his principal."

Lord Stowell again enunciates the same principle in the *Adelaide* (*z*), where he also says, with reference to the shipment of a cargo by an agent, "There must be time to give the principal an opportunity of countermanding;" and he held in that case that there was not sufficient to affect the American merchant with culpable negligence, and that he was not to be held strictly bound by the act of his agent.

I will also mention the case of the *Juffrow Maria Schroeder*, reported in a note to the *Potsdam* (*a*). The note is to this effect: "A quantity of goods sent into Havre in 1797, before the blockade, for the purpose of being sent on to Paris and sold for the account

(*z*) Vol. I. p. 306. (*a*) Vol. I. p. 356, note.

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of the consignor, but re-shipped (as found unsaleable) by order of the neutral proprietor, during the blockade, was restored; the Court saying: 'As the truth of this representation is not impeached, these goods are, I think, entitled to restitution. The same rule which permits neutral merchants to withdraw their ships from a blockaded port, extends also with equal justice to merchandise sent in before the blockade, and withdrawn *bonâ fide* by the neutral proprietor.'"

The principle, then, is shortly this: that the goods of neutrals in a port before a blockade may be withdrawn. That case very nearly resembled the present; almost went upon all-fours with it. Here the property belonged to the claimant, not only prior to the blockade, but prior to the war. These cases, however, admit of nice distinctions, and I must observe that neither this case which I have cited, nor any other that I know of, justifies, even where there was neutral property bought before the war in the enemy's ports, the sending in a neutral vessel in ballast to bring it out of this blockaded port. The *Comet* (*b*) shows what Lord Stowell held to be the law upon this point.

Under all the circumstances of the present case, I shall restore this cargo on the conviction that this property was bought before the war; that the owners of the cargo were ignorant of the blockade when the ship sailed; that the breach of blockade by ingress was not committed with their knowledge, and that the breach by egress, though committed by the shippers at Riga, who were their agents, ought not to work a condemnation under the circumstances, and especially, as I think, there was no fair opportunity of obtaining a knowledge of the blockade and countermanding the shipment. I shall therefore restore this cargo, first, for the reasons stated in the *Juffrow Maria Schroeder*, and secondly, for the reasons stated in the other cases to which I have referred; but I must direct the expenses of the captors to be paid. The ship and freight must be condemned (*c*).

(*b*) *Ante*, p. 10.

(*c*) On the 3rd of February, in the cases of the *Vrouw Alida* and *Annechina Jantina*, the Court condemned the ship and freight, but restored the cargoes, on the same principle as this case. They were not appealed, the net proceeds of the *Vrouw Alida* being only about 220*l*., and of the *Annechina Jantina* under 400*l*. The *Jeanne Marie*, of which the net proceeds were about 500*l*., was appealed.

[Spinks, 208.]

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Seizure—Release—Second Seizure—Validity—Order in Council—Protection to Enemy Vessel—Reasonable Time.

A ship under neutral colours sailed from a foreign port bound with a cargo to Hull within the time granted to Russian vessels to sail, was seized on her arrival at Hull on suspicion of being Russian, was immediately released as protected by the Order in Council, remained at Hull six months after the discharge of her cargo, and was then again seized. *Held*, 1st, the first seizure not having been judicially recorded, was no bar to the second; 2nd, an enemy entering a British port, and claiming the protection of the Order in Council, must enter under enemy, not neutral, colours; 3rd, the protection of the Order in Council does not extend to enemy vessels beyond a reasonable time for the discharge of their cargoes and for their departure.

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This vessel, laden with linseed, sailed from Odessa under the Tuscan flag, on the 28th February, 1854, bound to Hull, where she arrived on the 18th of June, and was immediately seized by the officers of the Customs on suspicion of being Russian property. Proceedings were commenced before the Standing Commission at that place, but on its having been ascertained that the vessel had sailed from Odessa before the 29th March, bound for Hull, and upon the case being referred to the Proctor for the Admiralty, he gave directions for her release, on the ground that she was, if Russian property, protected by the Order in Council of the 29th March, and he reported accordingly to the Admiralty.

No return had been made to the Court of the proceedings commenced at Hull, and no monition had issued.

The cargo was discharged on the 6th of July, but the ship instead of "departing forthwith," as permitted by the Order in Council, still remained at Hull. This circumstance having been reported to the Admiralty by the officers of the Customs, the Admiralty Proctor was instructed in the month of December to take proceedings against her. The vessel was then again seized, and the examination in preparatory taken.

On the 29th of January a claim was given in by S. W. Bowden, of Hull, merchant, on behalf of Andrea Wicklund and others, of

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Gamla Carleby, in Finland, subjects of the Emperor of Russia, as the owners. In the affidavit accompanying the claim, Mr. Bowden deposed that the vessel sailed from Odessa on the 28th of February, 1854, laden with a cargo of linseed the property of British owners, bound to the port of Hull, and arrived there on the 18th of June; that by virtue of a certain Order in Council of her Majesty, made on the 29th of March, 1854, Russian vessels which shall have sailed prior to the date of the said order from any foreign port, bound for any port or place in her Majesty's dominions, are exempt from capture or detention on entering such port or place; that prior to sailing from the port of Odessa, and with a view to protect the said vessel and cargo from capture by the forces of the Ottoman Porte, then at war with the Emperor of Russia, a bill of sale of the said ship *Odessa* to Pietro Augusto Adami, of Leghorn, merchant, a subject of the Grand Duke of Tuscany, was executed by Henric Wicklund, the then master of the said vessel; that the said vessel passed through the Turkish waters and the Dardanelles on her said voyage to Hull under the Tuscan flag; that on her entering the said port under the Tuscan flag the said vessel was seized by the collector of her Britannic Majesty's Customs, but on a representation of the circumstances being made to her Majesty's authorities after inspecting the said ship's papers, was released as being Russian property and protected by the said Order in Council.

The case now came on for hearing on the admission of the claim.

The *Queen's Advocate* and the *Admiralty Advocate* appeared for the Crown, *Dr. Bayford* for the claimant.

DR. LUSHINGTON.—The Court has been called upon to condemn this vessel upon two grounds: first, that the claim is contrary to the depositions and to the ship's papers, and therefore cannot be entertained; secondly, that supposing the Court to enter into the facts of the case, it cannot be proved to its satisfaction that this vessel was protected by the Order in Council of the 29th of March; that, in fact, she does not fall within the terms of that order, that

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she has violated that order, and on that ground also ought to be condemned.

On the other hand, on behalf of the claimants, it is urged, first, that this is a second seizure, and though it is not pressed as an absolute bar to the proceedings of the Court, yet it is alleged that in equity the Court ought to look with great suspicion upon the case, if not to reject it altogether; secondly, that if the Court goes into the merits of the case it will appear that this vessel, although entering a British port under Tuscan colours, is entitled to be restored as a Russian vessel under the Order in Council.

I will first dispose of that part of this defence which relates to the second seizure. So far as I am acquainted with the facts of the first seizure, I think they are these: that some suspicion arose whether the vessel was not entitled to protection under the Order in Council. She was seized by one of the Custom House officers at Hull, the depositions were taken in part, then by an order of the Lords of the Admiralty the vessel was released; she remained at Hull till the month of January, and then she was again seized by the officers of the Customs.

Now, in order to make a bar to the proceedings under the second seizure, two things are requisite: first, it is necessary that there should have been a restitution by consent or otherwise in this Court, judicially recorded; and, secondly, it must be shown that there were no circumstances, no *noviter pervenia* of importance, which would call on the Court to adjudicate on the merits of the case. There is no such restitution here, there has been no decree of restitution of the Court, and therefore I apprehend it was competent to the seizors to make a second seizure; but wherever a second seizure is made, it is always at the peril of costs and damages.

Again, it was pressed upon the Court that though there was no regular restitution, yet it was done by order of the Lords of the Admiralty, that it emanated from high authority and ought to operate in favour of the claimants. But if I am not wholly mistaken, the present proceeding has been conducted with the approbation of the Lords of the Admiralty, otherwise the proceeding could not take place at all; therefore, the Lords of the Admiralty, on a reconsideration of the circumstances of the case, having deter-

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mined to sanction the investigation, it is clearly not for the Court to refuse to entertain the case. I am also of opinion that the circumstances which occurred after the first restitution are such as fully justify the proceedings being commenced. I refer to the fact of the vessel remaining in port, and to the fact of the attempted sale of the vessel.

I will now proceed with the history of this case, and consider the facts.

This ship is claimed, on behalf of an asserted Russian owner, as a Russian vessel protected by the Order in Council of the 29th of March, 1854. By the admission of the claimant, therefore, she is subject to condemnation unless protected by that Order in Council.

The facts of the case are these:—She was and is a Russian vessel; she left Gloucester in 1853, bound to Odessa, to bring from thence a cargo to England; she quitted Odessa at the end of February, 1854; reached this country about the 18th of June, was seized on the 20th, but released again on the 27th of that month; the cargo was discharged in the course of the month of July, but she remained in the port of Hull until the month of January in the present year, when she was again seized.

It further appears that a fictitious sale took place at Odessa from the Russian owner to an Italian merchant at Leghorn. I call it a fictitious sale, because the present claim is founded on the fact of its being a fictitious sale, and because, from an examination of all the papers, there is no reason to suppose that any interest vests in any one but the Russian owner. Whether or not the whole of the proceedings have been conducted with fairness and integrity, whether there has not been an attempt to deceive through the medium of the papers, is quite a different consideration, to which I shall presently direct my attention. The fact is, she assumed Tuscan colours at Odessa, and obtained more formal papers at Leghorn, where she touched on her voyage to England; and that under the same Tuscan colours she sailed from Leghorn and entered the British port as a Tuscan vessel.

I must observe, that when the vessel quitted Odessa, on the 28th of February, she could by no possible means have had in contemplation the Order in Council dated the 29th of March; indeed, I am not satisfied that this vessel ever had the benefit of

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the Order in Council in view at all. She left Leghorn some day in April, but I have no reliable evidence to show either the precise date of her departure, or whether she was then apprised of the Order in Council. If she was apprised of the Order in Council, it is somewhat surprising that at Leghorn, where there was an opportunity of abandoning the Tuscan and resuming the Russian character, she did not avail herself of it.

Let us now see what is the reason assigned for this fictitious sale. The reason, and the only reason, according to the affidavit of claim and the evidence of the master, is stated to have been to enable this ship to prosecute her voyage with safety, notwithstanding the war between Russia and Turkey.

I will here advert to the distinction which prevails between this case and the *Soglasie* (*d*). In that case the master claimed the ship as a Danish vessel on behalf of himself, the owner, as a Danish subject; when it appeared that this claim could not be sustained, an attempt was made to ask for restitution on behalf of the real owner, a Russian subject, which the Court rejected. In the present case the Italian title is *ab initio* abandoned, and the claim is preferred on the part of the Russian owner as protected by the order. There is no attempt therefore by the claimant to deceive the Court, and he is free from all culpability on that ground.

I now consider the alleged cause for assuming Tuscan colours, bearing in mind that it is sworn that there was no other object in view.

It is true that Great Britain did not become an ally in the war between Turkey and Russia till the end of March, 1854; and though the excuse of escaping from the power of the Turks at that time cannot be viewed in a very favourable light, yet I will not venture to say, whatever I may think, as to the fact of assuming Tuscan colours, that the alleged reason for so doing imported any legal culpability. I do not think it did. I think that, in the absence of war between Great Britain and Russia, the fictitious assumption of neutral colours, for the purpose of avoiding capture by the Turks and passing the Bosphorus, is not an offence of which the law of nations can take cognizance.

(*d*) [Not republished. See note, p. 238.]

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It appears, however, in this case, that the disguise continued long after the reason for its assumption was at an end, because as soon as this vessel had escaped the Dardanelles, there was then no reason to be afraid of Turkish intervention and Turkish capture. It so happens that this simulation——

Dr. Bayford.—I may mention she had no Russian papers at that time.

THE COURT.—I am perfectly aware she had no Russian papers, but she had a Russian flag on board; the Russian papers were left at Odessa, that is one of the facts of the case; but I must consider a little the necessity, not only of continuing the flag at Leghorn, but the necessity of sailing and entering here under that flag.

I say the necessity for the assumption or continuance of the Tuscan flag, so far as relates to the reason assigned, entirely ceased when this vessel came out of those waters; but she enters here, as I have stated, under the Tuscan flag, without giving, so far as I know, or as appears from the papers or from the depositions, the least intimation that she was not *bonâ fide* entitled to that flag.

Now with regard to vessels entering a British port, there is a very wide difference between one which *bonâ fide* belongs to a neutral and enters under a neutral flag and one which, being an enemy's vessel, has no title to enter that port except under peculiar protection; and how far it is justifiable in an enemy intending to claim protection from the Order in Council to assume a neutral status, entirely at variance with her evidence and her real character, must be the subject of the present investigation.

I will look at once to the Order in Council, upon the construction of which the Court's final determination must depend.

The words are: "Any Russian merchant vessel which prior to the date of this order shall have sailed." Now is this vessel entitled to be considered in any sense of the word a Russian merchant vessel? What was the intention—the fair intention—of those who framed the Order in Council at the time is to be collected from the terms of the order itself, because out of the order itself, of course, I cannot presume to go.

It has been said, and said with great truth, repeating, indeed,

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only the sentiment to which the Court gave utterance on a former occasion, that wherever there is any relaxation of the rights of war extended to any belligerent, the document which confers such privileges ought to receive a liberal construction; but though that be true, a rational and natural construction must be put on the instrument. Now can this order mean anything else than a Russian vessel under Russian colours, coming in avowedly for the purpose of claiming the protection of the Order in Council? Let us see what the consequence would be if I were to yield to the construction which has been put upon the order by the counsel for the claimants. It would be this: any number of vessels coming under any flags whatever, being Russian owned, would be entitled to the protection of this order; and not only entitled to the protection of this order, but, having once come to a British port, and having been received as neutrals, would remain and trade—for who could prevent it?—in whatever way seemed most conducive to the interests of those concerned. She might take a cargo, and she would be protected under the assumed character; and not only take a cargo, but she might become the subject of sale and transfer, and to all intents and purposes would be treated as a neutral vessel. It is clearly my opinion that the only construction to be put on the Order in Council is that it extends protection, as in the case of the *Success* (*e*), only to those who come within the fair meaning of the terms; that is, vessels under the Russian flag, exclusively owned by Russian merchants.

The case of the *Success*, which was cited by the Advocate for the Admiralty, I well remember, for I argued it myself. That case laid down two propositions: the one was a repetition of what the Court had said in another case, namely, that the flag and pass bind the parties. It went further: it stated at length the opinion of the Court, that if any inconvenience arose from the assumption of such flag and pass, it must fall on those who thought fit to assume that character. That was one of the points decided in that case. The other was that, though the vessel was Swedish to all appearance, though she carried the Swedish flag and would have been protected if Swedish property, yet part, and part only, not being

(*e*) *Ante*, p. 140.

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Swedish property, the Court held she was not protected by the words of that proclamation, a proclamation which was intended to protect vessels which were *bonâ fide* Swedish vessels. I think this is a very strong authority, and has been properly cited by Dr. Phillimore to satisfy the Court what ought to be the fair construction put on this Order in Council.

But I must take care not to be misunderstood. I do not say there might not occur a case of that peculiar description, where, for instance, a belligerent avails himself of a British licence authorizing a ship under any flag, and for the purpose of carrying out that licence, and acting *bonâ fide* in the matter, assumes a flag in order to escape the enemy; and I do not say that such an assumption would be a simulation that would be visited with punishment; on the contrary, there were such cases in the last war, arising from various causes, especially from the manner in which licences were granted, when it was deemed desirable on the part of this country to extend the system of licences; and, instead of licensing a neutral by name, to give authority to bring a cargo in a vessel under any colour, by whomsoever owned. There the terms of the commission granted permitted the assumption of the colours of the enemy, without regard to the real national character of the vessel.

Now let me follow this up a little. This vessel comes here, and what does the vessel do then? Does she comply with the terms of the Order in Council, either as to the time or as to anything else? The words are, "shall forthwith depart without molestation; and that any such vessel, if met at sea by any of her Majesty's ships, shall be permitted to continue her voyage to any port not blockaded."

I am of opinion that the words "any port not blockaded" include every port whatsoever, and that the words "not blockaded" are especially added for the purpose of giving a liberty to go as well to a neutral port as to the enemy's port; and I think the word "forthwith" ought not to be pressed with too much severity against a vessel so circumstanced. I think so for this reason: circumstances might intervene which would render it difficult, perhaps impossible, to discharge the cargo with great expedition, or to leave the port. She might have had to make repairs, or something of the kind. But the argument is that the vessel might

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remain here for any length of time whatever, because the argument on the other side is founded on the assumption that all Russian ports are blockaded, or will be blockaded, as soon as the ice allows the navigation to be opened. If that were so, not only might she be allowed to remain during the late blockade, but even during the present blockade; and there would be no end. It is difficult to satisfy my mind that that is the proper construction of this order. It is true that ports in the Baltic are blockaded; it is not true that all Russian ports are blockaded. I apprehend, when the instrument was framed, those who framed it must have considered the probability of a blockade in the Baltic; but still there would be Russian ports open for a considerable time to which a vessel might resort. It is obvious that the vessel might have gone to Memel, in the immediate neighbourhood of Russian ports, had she been minded so to do.

I am of opinion, therefore, she was not protected by the Order in Council from that period when she might fairly have quitted this country.

But there is another matter which strikes me with still greater force: this vessel is advertised for sale. Has it been contended to-day, or could it be contended for a single instant, that it was intended by this Order in Council to allow a Russian vessel to come to a British port and discharge her cargo forthwith, and then to remain to be the subject of barter and sale? I was astonished to hear that that could be within the view of British policy at all. What are the views of British policy? To place the whole of the enemy's navy in that position in which they can be of no value whatever to the owners. But if you allow them to remain under the Order in Council, and permanently to remain, you are defeating your own intentions, and conferring upon them that which is the greatest benefit to a commercial nation—namely, the opportunity of competing with yourselves in the best market to which their wares can possibly be brought.

Upon that ground alone I should hold this vessel liable to condemnation as not being protected by the Order in Council in so lying here. I am not speaking of the gentleman who makes the claim, Mr. Bowden. I am not saying whether he was right or wrong in signing this document which advertises the ship for sale.

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I do not attribute any blame to him as a merchant carrying on his business. The vessel was under Tuscan colours, he may have consulted the Custom House authorities; but if the Custom House officers, with the knowledge they possessed in Hull, knowing she was a Russian vessel, sanctioned the sale as a Tuscan vessel, they were guilty of a double fault: first, for countenancing a fraud; and secondly, for countenancing a sale contrary to the laws of the country. But their ignorance or disregard of the law cannot protect from condemnation the property of those who are enemies to Great Britain, and have no protection from the authorities of this country.

It appears to me, therefore, that I really am under the necessity of condemning this ship for many reasons. There is still another reason besides those I have mentioned: I think there has been an attempt, and a very clear attempt, to deceive the authorities of this country.

I refer to the evidence given on the 10th interrogatory by all the three witnesses. Henric Wicklund, the master, swears boldly and straightforward, that Mr. Adami is the owner of this vessel. It is not till he is pressed on the 31st interrogatory that his conscience a little pricks him, and he endeavours to show that he was the owner in law, but that, in reality, the gentleman who resides in the Russian dominions is the true owner. This is the real fact.

Let us see what the papers say. They go to a late period, subsequent even to the first arrest. There was a letter from Mr. P. Augustius Adami to the master, enclosing important documents proving Mr. Adami's ownership of the *Odessa*, previous to the declaration of war, namely: "A declaration from the Tuscan mariners, which will be very useful." I should like to know for what? "Copy of a deed of his ownership of the ship *Odessa*;" and finally, "A copy of a passport from the Tuscan Consulate at Odessa." These papers are to be used when and where necessary. There is a latitude given for the use of these papers within the British dominions; a fraudulent use, of course, if they knew the sale to be fictitious. The letter further states that another vessel of his, the *Orio*, has been seized by a French steamer, and not yet released; and that both ships, the *Odessa* and *Orio*, were purchased

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by him prior to the declaration of war. Nevertheless, he says, "You will be cautious to consider well before leaving the port where you now are. Tell me whether the documents I transmit you are sufficient." Dated, "Leghorn, 22nd July, 1854." So that there is a perseverance in that which is now admitted to be a false and fictitious character from the beginning to the end, and false and fictitious with the very view of deceiving those in this country who might make an investigation.

But it is not these documents alone; there are others, and several of them, too, in which the same thing appears. Nos. 211 and 212, for instance; they are documents in the form of an agreement: the first between Captain Wicklund and the supercargo, and the second an agreement of Captain Wicklund with Captain Patron, all for the purpose of withholding all the testimony that could be withheld—if it was known that there was the Order in Council—in defiance of that order, because it cannot be said that they could rationally intend to send the vessel under Tuscan colours to avail themselves of that Order in Council. It appears to me, on all these grounds, that I am bound to condemn this vessel, though I do not attribute the slightest blame to the gentleman who appears on behalf of the Russian merchant, for he acted, as he was bound to do, for the interests of those whom he represented. He has stated the truth, yet I think it falls short. I am bound to condemn this vessel.

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[Spinks, 217.]

Blockade—Seizure—Reasonable Cause—Restitution—Costs and Damages.

The status of the Ionian States relatively to Great Britain being of so doubtful a character, and depending upon the nice construction of public documents, a commissioned captor, seizing an Ionian vessel on the ground of illegal trade with Russia, though that trade was, in fact, legal, and that vessel was a neutral ship, *Held* not liable to condemnation in costs and damages, as having captured her without probable cause.

The *Ostsee* (*ante*, p. 432) considered.

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This vessel, under Ionian colours, sailed from Santa Maura with a cargo of olive oil, bound for Taganrog, in the sea of Azoff; and having put in by reason of stress of weather, first at Syra and then at Mitylene, reached Constantinople, where, in consequence of the war, she was refused her clearance for Taganrog. The master, therefore, changed her destination for Trebizond, for which place nominally she sailed on the 1st of May, 1854, still having on board her bill of lading for the cargo, stated to be "shipped by Messrs. Pietro and Alexandro Stamatopulo Brothers, Ionian subjects, for their own account; consigned to Taganrog, to order, on payment of freight as therein mentioned."

After her departure, her Majesty's Acting Consul-General at Constantinople sent a letter to Viscount Stratford de Redcliffe, informing him of the circumstances, and intimating a suspicion of the master's intention still to sail for the Sea of Azoff. This letter his Excellency officially transmitted to Vice-Admiral Dundas, who immediately dispatched from off Sebastopol her Majesty's steam-frigate *Firebrand* in the suspected track of the said vessel.

On the 14th of May the *Firebrand* fell in with her about forty-eight miles from the Straits of Kertch, steering to the E.N.E., with the wind from the S.S.E., in the proper course for the Sea of Azoff, and, as it was stated, not for Trebizond. On being boarded, it seems, her master persisted that he was bound to Trebizond, and that he was in the direct course for that port; but a person on board, who called himself the owner, contended that the Ionian flag, under which she was navigated, being a neutral one, she was

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at full liberty to enter a Russian port. She was captured, and brought in for adjudication.

A claim was given in by Alexandro Stamatopulo for the ship and cargo, as the property of himself and Pietro Stamatopulo, both of Santa Maura, and Ionian subjects. The Court having decided that trade with Russia was not prohibited to Ionian subjects, the question whether the claimants were entitled to restitution, with costs and damages, now came on for hearing.

The *Queen's Advocate* and the *Admiralty Advocate* appeared for the captor; *Dr. Addams* and *Dr. Twiss* for the claimant.

DR. LUSHINGTON.—In this case, on behalf of the claimants, the Court has been prayed to decree restitution, with costs and damages; on the part of the captors that prayer is opposed; and they have asked, if the Court is not satisfied, that it would allow them the benefit of giving explanatory evidence.

Questions of very great difficulty have been mooted in the case, of which some are likely to occur frequently; it is, therefore, for the interest of all concerned, or who may be so in future, that the Court should, to the best of its ability, fully consider the points which have been discussed, and declare what, according to its conception, the doctrine and practice of this Court has been, and the course which on similar questions, where there are no distinguishing circumstances, it will pursue.

The questions which so present themselves are, first, the question of costs and damages, when they ought to be decreed to the claimants; secondly, the question of allowing captors to give explanatory evidence, whether it ought to be allowed at all, and under what circumstances. Before I enter on this discussion I will state the principles and rules by which I have been, and am anxious to be, governed in all my judgments, and which I deem to be binding on the Court, whatever its own individual opinion may be in any particular case.

This Court is, I conceive, bound to adhere without deviation to a course of precedents adopted by its predecessors, though not to a single decision; where that course has also been sanctioned by the Court of Appeal, this Court has no discretion at all: its sole

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duty is to obey. If I am able to discover what that course has been, to it I must adhere, until either it be shown that I have mistaken it or that the Judicial Committee have made any change therein. Until this has happened, I should not, from any notions of my own, or by reference to general principles or strong *dicta* in particular cases where there was no doubt as to the application of the general principles or from the judgments of foreign authorities, consider myself at liberty to depart from the established practice of the Court. Indeed, it would appear to me that such practice would but show to what extent and within what limits, according to the judgments of my predecessors and the Court of Appeal, the general principles should be carried out, and would prove under what modifications they ought to be enforced.

Such is my notion of the duty of a Court, subject to a Court of Appeal. The Privy Council stands in a very different situation; they have infinitely larger powers, are at liberty to exercise a much wider discretion, the limits whereof it is not for me to attempt to define.

Whenever that Court may have given a clear explanation of the principles which ought to be adopted, or of the manner in which they ought to be brought to bear in practice, or of the extent to which they ought to be carried, whether such explanation be consistent with former practice or not, it becomes the duty of this Court, without any regard to its own opinion or any notion of its own, to regulate all its proceedings by the judgment of that superior tribunal; and, to the best of its ability, without regard to any other consideration, to give the fullest force and effect to the expressed directions of the superior authority. If I fail in so doing in this or any other case, such failure will arise from inability on my part and not from want of inclination, for no duty can be more imperative than strictly to follow out the decrees of the superior Court. If this were not done, all would be uncertainty and confusion.

In this great inquiry, therefore, as in all other matters, my first guide will be the principles adopted by Lord Stowell, as modified by him, in constant usage and every-day practice, and I shall not depart from them, save as I may be admonished to do by the Court of Appeal.

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I now approach the question of costs and damages. That is an expression very familiar to our ears, but still it requires some explanation, and my apology for entering into some detail is, that as there have been no prize proceedings for nearly forty years, it is impossible for the present advocates and proctors to be intimately acquainted with the practice of the Prize Court. Valuable as our Reports are, admirably calculated to give a knowledge of general principles, they were not intended and are not calculated to give full information as to matters of every-day practice, matters seldom made the subject of any reports.

Costs alone, independently of damages—I mean law costs, in the common acceptation of the term—were very seldom, if ever, given in the Prize Court of the Admiralty to either the captors or the claimants; I hardly remember a single instance. I did in this war in one case (*f*), under very peculiar circumstances, condemn a British merchant in costs where the claim was abandoned; but I doubt if I could have found a precedent for such a decree where the claim was given by or on behalf of a neutral merchant. In this, as in many other respects, the practice of the Prize Court wholly differs from the practice in Courts of Equity and Common Law.

Costs, however, in the Court of Appeal, were sometimes given, but not very frequently, and still more seldom was it that such decree extended to the costs in the Court below, and, as I believe, such rare cases were confined to the decrees of Vice-Admiralty Courts.

Captors' expenses include law costs and all other expenses fairly incurred in bringing the case before the Court; but as this matter is not immediately connected with the question I am now to decide, and as this judgment will, I regret to say, be of some length, I need not now enter upon it, save to observe that if the absence of what is termed probable cause appearing on the ship's papers and depositions is alone a ground for condemnation in costs and damages, a question which I dare not attempt to solve must arise, and it is this: if upon the depositions and ship's papers there is probable cause for detention and bringing to adjudication, is not

(*f*) The *Atlantic*, *ante*, p. 345.

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such a case a case for captor's expenses? How, under such circumstances, the intermediate line is to be drawn I have not the slightest conception, if that should be the established principle.

Costs and damages may be best expressed by the term *restitutio in integrum*—complete indemnity for the capture.

It is now my object to show what was the course of proceeding in these matters during Lord Stowell's time; but it will tend to make this inquiry clearer if I first state generally the different circumstances under which costs and damages may be decreed.

We must bear in mind the wide difference between the detention of a vessel under the colours of the enemy or under neutral flags.

The destruction of a vessel under hostile colours is a matter of duty; the Court may condemn on proof which would be inadmissible or wholly irregular in the instance of a neutral vessel. It may be justifiable or even praiseworthy in the captors to destroy an enemy's vessel. Indeed, the bringing to adjudication at all of an enemy's vessel is not called for by any respect to the right of the enemy proprietor where there is no neutral property on board. But for totally different considerations, which I need not now enter upon, where a vessel under neutral colours is detained, she has the right to be brought to adjudication according to the regular course of proceeding in the Prize Court; and it is the very first duty of the captor to bring it in, if it be practicable.

From the performance of this duty the captor can be exonerated only by showing that he was a *bonâ fide* possessor, and that it was impossible for him to discharge it. No excuse for him as to inconvenience or difficulty can be admitted as between captors and claimants. If the ship be lost, that fact alone is no answer; the captor must show a valid cause for the detention as well as the loss. If the ship be destroyed for reasons of policy alone, as to maintain a blockade or otherwise, the claimant is entitled to costs and damages. The general rule, therefore, is that if a ship under neutral colours be not brought to a competent Court for adjudication, the claimants are, as against the captor, entitled to costs and damages. Indeed, if the captor doubt his power to bring a neutral vessel to adjudication, it is his duty, under ordinary circumstances, to release her. These observations will be found hereafter to have

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a bearing on some of the decided cases which have been referred to in the case of the *Ostsee* (*g*).

Again, costs and damages were given where neutral vessels were brought to adjudication duly, but the detention was deemed to be unwarrantable. This will be the chief matter for investigation at present.

The materials for inquiry into the practice of the Prize Court of Admiralty of England are not of very great extent. The Reports of Sir Christopher Robinson, of Dr. Edwards, of Sir John Dodson, and Mr. Acton, are our principal sources of information. The Appeal Cases will furnish some further means of knowledge, and so will the records of the Court itself; but to examine them requires much time and the expenditure of great labour. After all, as I have already observed, the usage of the Court, the every-day practice, can only be known thoroughly by those who have had opportunity of observing it daily. I am sorry to say very few survive who can speak from their own personal experience.

Then what proof of the course of proceeding adopted is to be extracted from these materials, namely, the Reports I have referred to? The cases are very few in number.

First, the *Cape Nicola Mole* cases, and the *Actæon*, and others falling under the same category, must be considered. It may be well to state the mode of proceeding in these cases. The captors were called upon by monition to proceed to adjudication. They were unable to do so in most of the cases, the ships and crews being gone; and in the case of the *Actæon* (*h*) the ship was destroyed and the papers were destroyed also. The captors appeared under protest, the object of the protest being to show that the capture and destruction of the ship was warranted, and that the not proceeding to adjudication was justified by circumstances, as in the case of a captured vessel justly detained, but accidentally destroyed by a storm. The *onus probandi* lay entirely on the captor, and, of course, captor's evidence was admitted, for there could be no other.

The Court then pronounced for or against the protest. If for the protest, there was an end of the case; if against it, the captors appeared absolutely, and, according to the circumstances of the

(*g*) *Ante*, p. 432. (*h*) *Ante*, p. 209.

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case, were condemned in costs and damages for not proceeding to adjudication, or to restitution in value.

It is not always in the Reports that these proceedings are reported distinctly, but in one of the *Cape Nicola Mole* cases it will appear what was done; that is in the case of the *Huldah* (*i*). I need not enter into the particulars of that case, because my only object is to show what was done, and the conclusion of it. The protest was overruled, an absolute appearance given for the captors, and the cause heard on the merits; when the Court decreed restitution of the principal part of the cargo belonging to the owner of the ship. I point this out because there was a distinction taken in the *Cape Nicola Mole* cases; in some there was restitution with costs and damages, in some restitution of the cargo only. This distinction does not seem to be adverted to.

Now these cases were distinguished from others in many important respects. The principal question was, though mixed up with others, whether the not proceeding to adjudication was justifiable, not whether the original detention was justifiable, though that was thrown in in the case of the *Actæon*.

That case I perfectly well remember having argued, and I have had recourse to the original papers to see whether my memory failed me or not. That was a case under a licence where Captain Capel acted under the express order of the Commander-in-Chief on the station; for I find, on looking to the proceedings, that was the state of the case. There was no doubt as to his being indemnified by government; but it should be known that the invariable rule of the government was not to pay or undertake to pay on behalf of the captors one single sixpence till the case had been heard and decided by the Court of Admiralty; and for this purpose, and this purpose only, the action was brought before the Court, and all the circumstances stated, though I must say with very considerable irregularity, with a view to save the government, not Captain Capel, who would have been broken if he had disobeyed the orders of his superior.

It is clear that the destruction of this vessel, and consequent thereon the not proceeding to adjudication, was the ground of that decree. Lord Stowell (*k*) says: "Why, it is said in the first place

(*i*) Vol. I. p. 303. (*k*) *Ante*, p. 209.

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that Captain Capel found that the transfer of these licences from one vessel to another rendered such cases suspicious, and made it necessary for him to use great vigilance in detecting them; but that does not at all impose upon him a necessity of destroying the vessels which were furnished with them."

I do not dwell further on these cases, because they are cases in which the captor was condemned in costs and damages, not on account of there being no probable cause of seizure, which is the case I have particularly under my consideration, but for not bringing the captured vessel to a proper Court for adjudication, and for destroying the vessel. This explanation is necessary in order to give due weight to such cases. I should also observe that there was a right secured in many instances by treaty, and always given at the commencement of every war, namely, a right of appeal to the superior tribunal, and that in the *Cape Nicola Mole* cases the captors had taken the ship to a Court having no jurisdiction, and consequently the claimants had no power to appeal from the condemnation which took place; whether such condemnation was well-founded or not had nothing to do with the question; in fact, the condemnation was erroneous; the condemnation took place for a breach of blockade which did not exist. That was the real ground of condemnation in the *Cape Nicola Mole* cases, and that is perfectly evident from what was said.

Under circumstances like these, when captors could not perform their first duty to bring the prize before a competent Court for adjudication, and that for want of the ship herself, the papers and witnesses being gone, a condemnation for omitting so to do was called for by the evident demands of justice, as well as by the rules which govern prize proceedings.

The next class of precedents are those which may bear on the principal questions before me: seizure without probable cause.

It is manifest that this class must be subdivided. First, cases where it appears that the captors were guilty of misconduct or vexation. They are to be found upon the records and in our books. I believe there were some fourteen to eighteen cases. Secondly, cases of a totally different kind—cases where, upon the production of the depositions and ship's papers alone, no probable cause was disclosed. I believe that all the precedents which have

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been produced are cases which fall under the first of these divisions. I have dedicated a considerable portion of all the time I could spare to search on this question. All the cases which have been cited in the *Ostsee* were cases of this description—for I have examined them—all cases of improper conduct on behalf of the captors.

I say, then, that I verily believe that not one case will be found where Lord Stowell condemned the captors in costs and damages upon the production of the ship's papers and depositions upon the ground that they did not disclose a probable cause of capture.

I will state the ground of this belief. There were hundreds of cases—not scores—but hundreds—in which costs and damages must have been decreed had such been the rule. There is not a single one in which they were decreed, though restitution had been constantly passing every day, and sometimes many in a day. There are cases where captors' expenses had been refused on the ground that the seizure was not justifiable, but costs and damages were not given, and they are some of them to be found in Sir C. Robinson's Reports.

My own notes—for I have gone through them all—furnish but very meagre information, and for the best of all possible reasons, that such questions were not discussed—the practice was known to all who practised here. I will state, however, what I have found. I am now about to read, word for word, the whole of my notes in two cases: "On the 4th of December, 1809, in the case of the *Hannah Holmes*, an American ship, the question was whether she was going to France; professed to be bound to Tonningen; all the papers so purport; positively sworn to; aided in this case by general probability; it is not likely that an American ship should be going to France; the Court is not inclined to believe that the ship was going to Calais: very improbable; great numbers of British cruisers watching at Calais; inconsistencies of the log are explained; better a few ships should escape than the principles of justice be relaxed in so dangerous a way. N.B.—Captors wanted to introduce affidavits. Ship and cargo restored. Adams asked for expenses for claimants on the ground of the loss they had suffered by losing their voyage to Tonningen. The Court refused expenses."

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The *Frau Aletta*, on the 27th of November: "Vessel lying in Pappenburg; a licence for this vessel by name, from Ems to London, to take colonial produce. First difficulty to obtain leave from Dutch Government; partly between two fires; ship lay at Embden; then comes an embargo; he slips from Embden in the night and comes to Cape Bury, to take protection of British cruisers; was stopped for want of his papers; papers delivered up to commissioners; papers support his account; taken in the western passage; licence permits him to do it; this permission took off the blockade. The passage in the licence does not keep on the restriction on the western passage; perhaps inserted unintentionally, being a common clause. Not a capture that ought to have been made. Vessel restored without costs and damages."

Now, having adverted to the precedents, it may be well to look at the principle and see some of the reasons which governed Lord Stowell's mind, though of course it is not in my power to state all. We shall thereby see with how many serious difficulties this subject is environed, and it may perhaps enable us the better to overcome them in future.

Lord Stowell administered the Prize Law on great and comprehensive principles; his object was that on the whole equal justice should be done to the rights of the belligerent and the just claims of neutral nations, but he did not seek in each particular case to do the most perfect justice. Many passages in his judgments might be cited to show this, whereby he declared that, though there might be hardships in particular cases, both to captors and especially to neutrals, yet on the whole the balance was in favour of the neutral rather than against him. Lord Stowell used to say, though blockade was a hardship on a neutral, and the right of search was a hardship on a neutral, yet it was to be recollected that the whole trade was always open to them—the carrying-trade in time of war. He used always to say, and rely greatly on that rule of law, that in the first instance the case should be heard on the evidence of the claimants themselves, namely, the ship papers and depositions; and on the other hand, in the case of the *Diligentia* (*l*), where the captors complained of what Lord Stowell was about to

(*l*) *Ante*, p. 197.

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do, Lord Stowell made the same answer. He told them that though they might complain in particular instances, yet he must adhere to the general principle, even if the consequences might press hard upon them. Now, no person more readily acknowledged the truth of the principle that a claimant should be indemnified for a capture made without probable cause than Lord Stowell; but he held it to be equally contrary to common justice that a captor should be mulcted in costs and damages where he has faithfully performed his duty, and had in truth adequate cause for the seizure. Yet this cause of seizure might not appear on the face of the depositions and ship's papers. So it might be in blockade cases, and in numerous others which might be stated.

Then the question arises, how is the truth to be got at? By what evidence are the facts whether probable cause existed or did not exist to be ascertained? Justice will say by evidence from both of the litigant parties, that no one ought to be condemned upon *ex parte* evidence. But for reasons which I need not enter into, the great rule—the established rule of the Prize Court of Great Britain and of most others, save France for some time—was to hear the case in the first instance, on the depositions of the master and crew of the captured ship, excluding all evidence from the captors. If such evidence was satisfactory, restitution always followed as a matter of course, whatever might be the truth of the transaction.

If, then, on such *ex parte* evidence, a prayer for condemnation with costs and damages was founded, what was to be done in that case?

In the case of the *Elize* (*m*), I stated that when such a state of things once occurred—and once only in my knowledge—Lord Stowell observed that though restitution followed, no probable cause appearing on the face of the depositions, or in the ship's papers, whatever might be the true merits of the case, no further inquiry would be allowed; but that if costs and damages were demanded, they could not be decreed without receiving evidence from the captors.

I have not, I regret to say, been able to find the name of that

(*m*) *Ante*, p. 327.

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case, but I have a perfect recollection of the case within my own knowledge—I was present at the time. Nothing further was done in that case, and it is most remarkable, but I believe it to be true, that no case could be found, though I do not say so positively, in which such explanatory evidence was actually received, with respect to costs and damages.

How is this to be accounted for? In this way, first, that the claimants, knowing that the captors' evidence might possibly be received, in many cases would not press their demand. Secondly, that the production of captors' evidence was attended with many difficulties, and surrounded with embarrassment. Captures were made on the high seas in all parts of the world. Captors, from the nature of their occupation, were constantly moving from place to place. Generally it would be a matter of great difficulty to procure the evidence of any one present at the capture; but if, after much delay, such evidence was procured—if it disclosed new facts, as it must almost necessarily have done—then the claimants must have had an opportunity to reply, and such evidence must also have been procured from abroad, and frequently from distant countries.

Now, when we consider what were the limited means of communication in those days, some notion may be formed of the delay and expense which would have been attendant on such proceedings in allowing captors to give explanatory evidence to excuse themselves from costs and damages. Suppose, however, the evidence was produced, there would not be an end of the difficulty. Though it may be true that no such case has occurred, yet in a case nearly analogous to it, Lord Stowell pointed out the embarrassments which would necessarily present themselves. I allude to the case of the *Haabet* (*n*), in which captors' evidence was produced for a different purpose—with a view to the decree of condemnation.

In endeavouring to account for the prevalence of this usage, if so I may call it, reference may be had to the nature of prize itself, and the incidents which necessarily attach to it. Ships and cargoes are not only perishable commodities, but the care necessary to preserve them, even for a short time, is attended with much

(*n*) Vol. I. p. 524.

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expense. Hence all claimants were desirous of obtaining restitution as speedily as possible; and, looking at the consequences of asking for more, simple restitution by consent took place in hundreds of cases, frequently on the payment of captors' expenses. Lord Stowell commenced with an arrear of nearly 800 cases; fresh captures were coming in daily. To have investigated one-twentieth part of the cases of restitution with one-tenth part of the time and pains bestowed on the *Ostsee* would, I think, have been deemed by all more than a Herculean task. The records of the Court of Appeal, so far as they extend, show that that high tribunal did not repudiate the course followed by Lord Stowell; indeed, it is most remarkable that scarcely one of his judgments on any question of great importance was ever reversed—not one in a thousand. In one case only of moment, an appeal from a Vice-Admiralty Court, was there a serious difference between Lord Stowell and Sir William Grant; and in that case, I am rather ashamed to say, no final judgment was ever pronounced. After remaining five years for judgment, it finally was compromised. That was a class of cases involving property to an enormous amount. I may add that the sanction of Lord Stowell's proceedings was not confined to the very high authority of Sir William Grant. I agree with an expression in the *Ostsee*, that it is scarcely possible to call in a higher authority. Sir William Wynne was a constant attendant at the sittings of the Privy Council; he had been King's Advocate; he had had the experience of the two wars before the war of 1793. No man had a greater knowledge of his profession, no one was more dedicated to the performance of its duties, and no man was more conscientious, or more independent in his opinions. To Sir William Wynne I must add the name of Sir John Nicholl, also King's Advocate, whose knowledge, experience, and accuracy are known to us all. A board more distinguished for talent, ability, and knowledge was never constituted. Constant opportunities occurred where, had they differed from Lord Stowell on the question I have been discussing, they must and would have expressed that opinion.

Much more might be said; but I abstain from further observation, because my object is only to prove the course of practice

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prevailing in this Court on the subject of costs and damages, and in some degree to account for it. It is no part of my duty now to maintain and defend it.

In the case of the *Ostsee*, I had not the advantage of hearing the very elaborate argument which appears to have been addressed to the Lords of Appeal on the part of the claimants. There was very little discussion before me, and I expressed my opinion upon the question briefly and assigned no reasons in detail, and I did so because what had occurred in former days on this subject was fresh in my memory and present to my mind. But I avow that, had I had an opportunity of hearing all that has since been urged on the subject, I should have given the same judgment, and for this simple reason: that I should have considered myself not at liberty to exercise any discretion upon the subject, that as a subordinate judge I should have deemed myself absolutely bound to follow the rule as to costs and damages as carried into execution according to the uniform practice of this Court, sanctioned by those whose names I have mentioned. I should have asked, as I have in this case, for any one precedent to justify my acceding to the motion; failing the production of such precedent—and none I believe has or can be produced—I should have refused the prayer. I do not find that Sir John Dodson, who had much experience during the late war and who formed one of the Judicial Committee, referred to any such precedent; yet if such a precedent was known to him, he must undoubtedly have given their Lordships the benefit of it. Failing the production of all precedent to the contrary, I should have thought it presumption on my part to have questioned the propriety or justice of a course so long pursued. My duty was to obey.

The Judicial Committee stands in a very different position from me. It is their privilege not merely to ascertain what has been done in past times, but if in their judgment such a course of practice is not consistent with justice, they have power to alter and reform it. That Court is at liberty to take into consideration any alteration which may have occurred in the relative situation of the belligerent and neutral States, and to act upon much wider views than I should dare to do.

It remains, then, to examine the judgment of their Lordships to

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ascertain what are the principles and rules they intend to prescribe, what alteration there ought to be in the course hitherto followed, and it is my duty to discover how far that judgment affects the case of the *Leucade* and other similar cases; for I hope and trust that this examination will not only assist me in pronouncing a just judgment in the case of the *Leucade*, but afford light to guide us in future. It is a fearful state of the law when the administration of justice in each particular case depends, not on the application of some general principles, but upon the dissection of minute particulars.

The first rule which I extract from their Lordships' decision is founded upon the following passage: "The result of these authorities is, that in order to exempt a captor from costs and damages, in case of restitution, there must have been some circumstances connected with the ship and cargo affording reasonable ground for belief that one, or both, or some part of the cargo might prove upon future inquiry to be lawful prize" (*o*).

This rule I apprehend to be that, in the case of all ships and cargoes brought in for adjudication, if it should appear from the depositions and ship-papers that the seizure was made without probable cause, a condemnation in costs and damages will follow; or in other words, such decree shall be passed when the depositions and ship-papers do not show probable cause. That must be the meaning of the expression, for I agree with the argument of counsel. I do not think it is the most fortunate expression that could be made use of; it is not the expression of their Lordships, but the authority they cited. It may be that probable cause existed, though no such probable cause existed on the face of the papers.

Now their Lordships most truly stated that probable cause is incapable of definition; that probable cause must be probable in the opinion of the judge, not probable cause in the opinion of the captor, who, unfortunately, in the discharge of his duty, has to determine whether to detain or not, with little time for deliberation, and very often from a bundle of papers in a foreign language and in the midst of a crew speaking the same. In each individual case, then, such task must now fall upon the judge.

(*o*) *Ante*, at p. 440.

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But perhaps some light may be thrown upon this important inquiry, though we cannot define what probable cause is by considering what is not probable cause within the meaning which the Court of Appeal has affixed to the term in the passage I have cited. I apprehend that slight irregularity in the ship-papers, or petty variations in the depositions, would not be deemed probable cause; for were it otherwise, in what case could it be said with truth that there was no probable cause? In almost every case there is some little irregularity or omission. So to construe their Lordships' declaration would be little less than a mockery and a snare. I apprehend that the ground on which a seizure could now be justified must be real and substantial.

The judgment has, however, touched upon another question which I must not pass unnoticed, it is this: whether the probable cause must have arisen from the fault or defect of the captured vessel, or whether a captor will be relieved from the liability to costs and damages for other reasons. I do not apprehend that their Lordships intended to express any decided opinion whatever upon those points at all. I will only observe that there is a very wide distinction between the cases which have occurred and may possibly occur again.

I must again refer to the *Actæon*. The act of destruction of the ship by Captain Capel was in itself illegal, even if the vessel was liable to condemnation; it could only be justified on the grounds of public policy, and for illegal acts done for such a reason responsibility must attach. The same in the *Cape Nicola Mole* cases.

Very different is the case where the government gives a lawful order, and the captor from circumstances has difficulty in applying it. In the case of an absolute order to seize a particular ship, Lord Stowell expressed his opinion that the captor would be indemnified; that is the case of the *Diligentia* (*p*). That is the expression used by Lord Stowell. Perhaps it may be somewhat ambiguous, but, looking at the context, I think that in that case it meant he would not be liable to condemnation in costs and damages in a Prize Court. Except so far as the necessity of the case now under consideration may compel me, I shall certainly

(*p*) *Ante*, p. 197.

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abstain from considering this branch of the subject, finding the law in the state I have mentioned.

There is another matter intimately connected with the question, to which I must advert. I refer to the production of captors' evidence on which I have already touched for another purpose. We must bear in mind certain distinctions, if we desire to comprehend this head of evidence. First, the production of evidence as to the facts of actual capture as contra-distinguished from other evidence, which the case may call for to clear up difficulties which may arise—and this for the purpose of procuring condemnation, or of showing that costs and damages ought not to be decreed.

If I may use the expression, there are three classes: captors' evidence as to the facts to procure condemnation; captors' evidence as to the facts of seizure to escape condemnation in costs; and there is captors' evidence as to the facts not relating to the act of capture. That is the distinction I am desirous of expressing. Captors' evidence as to matters not immediately connected with the facts of capture.

Now, to the best of my knowledge and belief, the practice of this Court was as follows: I speak of general rules to which there may be few and very few exceptions, as in the case of the *Haabet*. Captors' evidence as to the fact attending the actual capture, for the purpose of procuring condemnation, was almost universally excluded. I might say, with few exceptions, such as the case of the *Haabet* and the other case cited. Those are the only two cases on record; and Lord Stowell shows in his judgment, and it also appears in a note to the *Haabet*, that he was determined not to admit that practice in future.

Now, evidence from the captors for incidental questions, if I may so call them, was constantly admitted, as to prove a blockade *de facto*, and numerous other circumstances not necessary to advert to. That was every day's practice.

As to that point which most materially concerns us now, the admission of captors' evidence to show probable cause of capture where vexation and misconduct were not imputed, there was no course of practice at all; and for the best of all reasons, because there was no case in which it was necessary to determine the point, or to introduce such evidence; the Court refusing to condemn

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without asking for captors' evidence. I therefore know no precedent for its introduction, and I know of no authority for its introduction, except what I have already stated that I heard Lord Stowell declare, and which I have mentioned in the case of the *Elize* (*q*).

Upon this very important question their Lordships have expressed no opinion, and I shall abstain from doing so until it becomes absolutely necessary; for this question is beset still with the most serious difficulties. Great mischief must arise from the admission of captors' evidence, and gross injustice from its universal exclusion.

Now, the admission would occasion delay, expense, and doubt—doubt as to what may be the decision which justice requires. There is always difficulty in deciding between conflicting affidavits. How enormously would that difficulty be enhanced when the affidavits came from persons all interested in the result; and for the most part, as relates to the claimant, prepared abroad, and from translations also. Those who remember the last war know full well to what extent the manufacture of papers and evidence was carried.

Then take the other alternative, the refusal to admit captors' evidence. The captors then, whatever may be the truth of the case, will be left wholly at the mercy of the claimants. Our experience, even in this war, shows in some degree what would then be the state of the case. Look at the case that came before me, the *Odessa* (*r*). What an array of papers to prove a national character, which, by the claimants, was disclaimed! What a mass of evidence to support such papers!

Take the case of blockade. Those who command our cruisers are bound by their orders to detain vessels bound to blockaded ports attempting to break a blockade. The place of capture is, perhaps, the most essential question; the depositions may be contrary to the truth, and often have been; the place of capture may be much nearer to the blockaded port. The captors are shut out of all proof. Precisely the same, it may be, as to the course which the vessel pursued. So as to an attempt to escape. It appears to me, therefore, that to subject the captors to costs and

(*q*) *Ante*, p. 327. (*r*) *Ante*, p. 462.

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damages, without giving them the opportunity of explanation, would at least savour of injustice. Remember, too, how severely Lord Stowell blames the cruisers in the case of the Havre blockade for not enforcing it; how severe he is upon officers in command of her Majesty's cruisers for not doing what it was their duty to do. In vain it is, he said, for the government of this country to impose a blockade, if those to whom it is entrusted will not fulfil the duty they undertake to perform. That is the case of the *Juffrow Maria Schroeder* (*s*).

In fact, the captors are placed between two fires; and at the same time their lips, even for self-defence, would be closed. It may be for reasons like those that Lord Stowell said he might, perhaps, at times have been too favourable to them.

Again, however, we are bound to look, in this Court at least, to the preservation of the just rights of the belligerent. None is more essential to the interests of Great Britain than the right of blockade. The right of seizing enemy's property on board neutral vessels has been parted with—so far there is a change of circumstances; but I am at a loss to conceive that such concession on the part of Great Britain ought, in the slightest degree, to relax the exercise of the right of blockade.

But if, upon claimants' evidence alone, a cruiser would be condemned in costs and damages, will any man rationally expect a blockade would be adequately enforced? Even in this war occasions are not wanting in which our cruisers have been accused of not uniformly and efficiently performing their arduous duties.

So much, then, upon the question of refusing captors' evidence altogether. I have addressed myself, it will be recollected, to the difficulties and dangers of captors, and to the injustice of excluding them.

Suppose, however, a middle term was adopted, that captors' evidence in exoneration of themselves might, in certain cases, be received against the depositions and ship's papers, how would it be possible within the bounds of any human power to draw the line? Would it not be a question of dispute and discussion in every case? And then, again, come delay and expense.

(*s*) Vol. I. p. 279.

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It may be for these and many other reasons which presented themselves to the wisdom and sagacity of Lord Stowell, that with scarcely an exception—and then only when particular circumstances warranted it—he adhered most pertinaciously to the great rule that the case should be heard on the claimants' evidence, and restitution should pass without admitting captors' evidence; that with equal fixity of purpose he did not decree costs and damages, save in most special cases.

Having now fully explained my general views on this question of costs and damages, and having endeavoured to ascertain to what purport and effect the Lords of Appeal have expressed their opinion in the case of the *Ostsee*, I now proceed to the facts of the case before me in the *Leucade;* and here I greatly regret to say I must proceed on the assumption that I am right in the conclusion to which I came that the subjects of the Ionian States were at liberty to trade with Russian ports not under blockade. I must, I say, assume I am right in my solution of a question of great novelty, doubt, and difficulty.

There are three modes of disposing of this case. First, simple restitution; secondly, costs and damages; thirdly, to allow the captors to give explanatory evidence. Assuming for the moment that this ship was seized only on the ground of her being an Ionian vessel trading with Russia—and which trading I have held to be lawful—ought costs and damages to be decreed under such circumstances? I put the proposition simply.

If that is the decree I must pronounce, assuredly I must found my judgment on the case of the *Ostsee* exclusively, and not on any authority or practice with which I was before acquainted. Under these circumstances, it behoves me to bestow the greatest pains, and to exercise the greatest caution, in my endeavour to ascertain the true intent and purport of that judgment, and to apply its principles to this case as their Lordships would wish them to be applied if they were adjudicating on this case in the first instance.

Now, if I fail in any particular, I may on the one hand impose a liability on the captors which that decision did not intend to impose; on the other, I may relieve the captors, and in so doing incur the blame of not giving full effect to the judgment of their Lordships—an error I am most anxious to avoid.

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I proceed then on this principle: what the decision of the *Ostsee* has clearly decided, that I do; as to what may be left in doubt, I shall be guided, as I have said, in my judgment by all the principles and practice carried into operation by Lord Stowell. As in the one case I shall rigidly carry out all the directions I receive from the superior Court, so in the other, I shall not, till commanded, depart one iota from what I believe was the practice established under the authority of Lord Stowell.

I must now again advert to that most important passage in the case of the *Ostsee*, already cited: "The result of all these authorities" (*t*)—I need not read it over again.

I presume that this passage is meant to be not only a statement of their Lordships' opinion as to what was the result of the authorities, but to be also a declaration of their adoption of it, as the rule which they intend to establish.

The first question then, is, as to the meaning of this passage. Then, confining my observations to the ship alone, there must be circumstances connected with it affording a reasonable ground for the belief that upon further inquiry she would prove to be lawful prize. If this paragraph admit of no qualification, I am of opinion that I am not called upon to condemn the captors in costs and damages, because it appears to me that the peculiar condition of the Ionian flag was such as to afford a reasonable ground for the belief that the ship would prove lawful prize. I allude to the connection of the Ionian Islands with Great Britain, to the fact of the Ionian flag being joined to some extent with the British, and to all those notorious facts and circumstances which have lately been the subjects of much discussion.

But if the paragraph I have read is intended to have another construction: to mean circumstances importing some fault or defect, or some apparent fault or defect, in or about the ship, and that such a state of things only can excuse a captor from costs and damages; then I think that the mere fact of bearing Ionian colours, and being an Ionian vessel, cannot possibly be deemed a fault or apparent fault; and in that view of the case, I should be bound to decree costs and damages.

(*t*) *Ante*, at p. 440.

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Looking at the whole of this judgment, I entertain a most serious doubt as to what construction I ought to put on their Lordships' expressions.

There follows a passage from Mr. Justice Story to the effect that the captors will be excused, if there be a reasonable suspicion of illegal traffic, or a reasonable doubt as to national character, or as to the legality of the conduct of the parties. I am of opinion that there was a reasonable suspicion of illegal traffic in this case; but whether their Lordships adopted the passage I have quoted in this meaning, I really do not know.

I must, however, notice other parts of this judgment. Their Lordships cite the case of the *Betsy* (*u*), and of the *Luna* (*v*), and then observe: "If, however, these cases be held to establish the principle that there may be questions of so much nicety in the construction of public documents, or the determination of unsettled points of law, as to exonerate captors from what would ordinarily be the consequence of their mistake, they will not much assist the argument of the respondents here, where no questions of law of any kind appear to have existed" (*x*).

I am of opinion that the present case did involve a question of much nicety in the construction of a public document, and the determination of unsettled points of law. But whether their Lordships intended to adopt this principle of justification or not, I am wholly at a loss to determine, because the passage is put hypothetically, and I really do not know, and cannot conceive, whether it was intended to affirm or to controvert the doctrine.

As the claimants have founded their claim for costs and damages on the case of the *Ostsee*, I have for that, as well as other reasons, examined it with as much care as I could bestow. The result is, that in my opinion, the question which I have now to decide is not governed by the judgment in the case of the *Ostsee;* but that the utmost that can be urged in this respect on behalf of the claimants is, that the question is left altogether open.

Then, if the question be left doubtful, and consequently, I am entitled to pronounce my own opinion unrestrained by superior authority, I have not the slightest hesitation as to the decision to

(*u*) Vol. I. p. 63. (*v*) See note *ante*, p. 449. (*x*) *Ante*, p. 450.

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which I should come. I have no hesitation in adhering to the course pursued in former wars, and in pronouncing that judgment which I am certain Lord Stowell would have pronounced, and therefore in refusing to condemn the captors in costs and damages on the ground relied on by the claimants. It is my confident belief that if this question had been raised before Lord Stowell, he would not have allowed it to occupy five minutes of his most valuable time.

I should have thought, under ordinary circumstances, that I should now have discharged my duty, and that it would not be necessary for me to travel further into the facts of this case; but as probably this case may be appealed, and my judgment upon the point I have just discussed may be deemed unsound—and there are not wanting passages in the judgment in the case of the *Ostsee* which create in my mind great distrust as to the conclusion to which I have come, I deem it but just to the captors to mention—I deem it right to mention other grounds on which they have founded their right to be exempted from costs and damages.

For this purpose I must consider the *Leucade* as a neutral vessel, and in that character entitled to sail either to Taganrog or Trebizond. Counsel argued, and I think with great truth, that the foundation of the seizure of this vessel was that she was an Ionian vessel going to a Russian port; but it does not appear to me to follow necessarily that, if that ground fails to justify the captors, there may not be other circumstances to excuse the captors from a condemnation in costs and damages.

The question, then, is one of fact. Are there other circumstances to justify the detention or to show probable cause for the seizure? This is not very easy of solution, for if this vessel ought to have been deemed by the cruisers which captured her entitled to a neutral character, then all that related to her destination, there not being any blockade in the neighbourhood, could be of no importance, and the case comes very much to this: if the captor institutes an investigation which, turn out which way it will, will not afford probable cause for seizure, can he avail himself of the fact that the neutral vessel endeavoured to evade his inquiry, and that by means which would not be justifiable if the object of inquiry was well founded? In former wars, no doubt the captors

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would be held justified, but their suspicion attaching to the conduct of the ship might attach to the cargo, and if not proved to be neutral property such cargo would be liable to condemnation. No such reason exists in the present war, as "free ships make free goods." There cannot in such a case be inquiry as to the property in the cargo.

It is said that this vessel was sailing wide of her asserted destination; that she had no log; that there were other defects in her papers; that she had deceived the British authorities; that her ostensible destination was Trebizond, but her real destination was a Russian port.

Now, assuming all these facts to be true, neither any single one nor all put together would furnish a legal ground for the condemnation of a neutral vessel. I incline to think, upon the best consideration I can give to the judgment in the *Ostsee*, that according to that decision these circumstances would not be held to furnish probable cause for seizure; but as I have declared my opinion on the leading question that the captors are not liable to be condemned in costs and damages, I do not think that I am called on to say more. Should this case travel to the Privy Council, their Lordships will put their own construction on the judgment in the *Ostsee*, and its applicability to the circumstances I have been discussing. I leave this part of the case.

The conclusion to which I have come disposes of the question of evidence from the captors, and I will conclude this judgment by observing that it is most probable that this case and many others will be appealed, and I shall then have the benefit of the opinions of their Lordships upon some of the many difficulties which may beset my course; and I entertain a confident hope that, by the new light which the superior wisdom and knowledge of their Lordships will shed on these embarrassing questions, I may be able to effect that which is the great desideratum of a Court of Prize: preserve, undiminished, the rights of the subjects of neutral States without derogating from rights equally sanctioned by the law of nations, the rights of belligerent powers; and so reconcile the abstract principles of justice with practicability.

THE CARL (No. 2). [Spinks, 238.]

Capture—Right of Ship of War to Share in Capture made by her Tender—Constant Employment as Tender—Compliance with Municipal Law by Captured Ship.

A ship of war is entitled to share in all captures made by a tender attached to her, however distant she may have been from the tender at the time of capture.

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This Russian vessel had been captured by her Majesty's steam-vessel *Avon*, and condemned as prize in August last. A claim was now made on behalf of her Majesty's ship of war *Impregnable* to share in the proceeds, on the ground that the *Avon* was attached to the *Impregnable* as a tender, and could therefore make no independent capture of which the benefit would not accrue to the *Impregnable* equally with the tender.

The *Queen's Advocate* and the *Admiralty Advocate* appeared for the tender *Avon*; *Dr. Addams* and *Dr. Twiss* for the *Impregnable*.

Dr. Lushington.—This Russian vessel was captured off the Start Point by her Majesty's steam vessel the *Avon*, and was on the 6th of August last year condemned to her as good and lawful prize.

Since that decree was made an appearance has been given on behalf of her Majesty's ship *Impregnable*, and a claim asserted that distribution should be made not to the *Avon* alone, but to the *Impregnable* and *Avon* together, on the ground that the *Avon* was attached to the *Impregnable* as a tender.

That the *Avon* was so attached is sufficiently proved by the letter from the Admiralty.

The question which I have to determine is whether on this state of facts the claim of the *Impregnable* can be supported.

I propose to consider what was the rule during the last war, and then whether there is any cause to induce the Court to depart therefrom.

In the case of the *Charlotte* (*y*), Lord Stowell said, "the claim

(*y*) Vol. I. p. 478.

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for the King's ship is given in virtue of a seizure said to be made by this vessel as a tender; and in order to support that averment, it must be shown either that there has been some express designation of her in that character by the orders of the Admiralty, or that there has been a constant employment and occupation in a manner peculiar to tenders equivalent to an express designation, and sufficient to impress that character upon her. The former species of proof would undoubtedly be most desirable."

It must be necessarily inferred from these observations that if the conditions mentioned by Lord Stowell were complied with, the result would be that the ship to which the tender was so attached would be entitled to be considered as captor, and the capture effected by a duly commissioned vessel.

It is quite clear that the *Aron* had all the requisites mentioned in this judgment. There is an express designation of her as tender, and there is constant employment of her in that capacity. Under such circumstances, I apprehend that the tender becomes, as has been contended in law, a part of the ship to which she has been attached, and that any capture made by her enures to the benefit of the ship to which the tender is an adjunct. This was the old rule and practice, and must prevail unless any distinction can now be shown.

First as to the place of capture. It was off the Start about 50 miles from Plymouth where the *Impregnable* lay; but I do not think that on the ground of distance only any exception has hitherto been engrafted, nor is there any clear reason for so doing. Tenders are, I apprehend, used for the very purpose of performing service which it may be inconvenient for the large ship to attempt, and may consequently be compelled to proceed to a considerable distance.

I think that no line has or could well be drawn, though I do not say that there might not be a combination of circumstances which would form an exception.

Then is there anything to be found in the existing proclamation on naval prize which ought to militate against the long established usage of the navy?

It has been said, and truly, that in a former proclamation mention is made of tenders, and that in the present proclamation

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nothing respecting them can be found. Since the hearing of this case, I have had an opportunity of seeing some of the proclamations which have been issued under the authority of the Crown for the distribution of prizes or other seizures.

The proclamation of 1780 relates to prize, and in that proclamation there is no mention of tenders; proclamation of 1793 same; so also in those of 1803 and 1805.

The proclamation of 1816 was issued during the time of peace, and no mention is made of prize at all. The subject-matter is seizure under the revenue and navigation laws, and in this document is to be found an express provision that the ships to which tenders are attached shall share, and also persons absent from the ship or tender on ship's duty or revenue business.

There was a proclamation of King William the Fourth, dated the 3rd of February, 1836, which I have not had the opportunity of seeing, but which is partly recited in a proclamation of the 19th of May, 1846.

It appears that that proclamation of William the Fourth did relate to prize, revenue seizures, and so forth. How it came to include prize I do not know, probably by reference to some of the statutes which formed the subject of discussion on a former occasion, respecting which there is some confusion.

This proclamation is silent as to tenders. The existing proclamation of March, 1855, relates only to prize captured in the present war.

The result is that up to the present moment, so far as I know, ships to which tenders were duly attached were considered as the captors of all captures actually made by tenders, and that, too, under a series of proclamations in which no express mention was made of tenders; that in a proclamation—that of 1816—reference is made to tenders, the subject being seizures and not prize; that subsequently there was a reference to prize as well as seizure, and no mention made of tenders.

Upon this I will observe, that if in a proclamation for such purpose there be found anything of a novel character creating a right which did not exist before, and in a subsequent proclamation all mention of such right is omitted, it would be a fair inference

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that it was so done intentionally, and with the view of not renewing a grant previously made; but, if the right or usage had existed long prior to the first proclamation, and before mention was made of it in any proclamation, then I think the mention of it must be considered only as declaratory of the usage, not as creating the right, and that the omission in a subsequent proclamation remits the case to its former state, namely, a right founded on usage—but I am putting the case stronger than it really ought to be put, for the express mention of tenders is to be found in the proclamation of 1816 only, and that does not include prize.

It would not, I think, with respect to proclamations, be necessary to put on them the same degree of legal strictness which might be applied to Acts of Parliament. With respect to the Naval Pay and Prize Act, 1854, and especially the seventh division of the third section, I do not perceive that the present question is affected thereby.

This tender is not commissioned; if the prize were considered as having been captured by her only, she must be condemned as a *droit* of Admiralty.

It appears to me, however, that according to established usage the capture must be considered as made by the *Impregnable* through her tender, and distribution made accordingly. The orders that were given by the admiral on the station were given through the *Impregnable*, and the tender had on board of her a part of the crew of the ship. Were I to come to any other conclusion, I think it would be that the *Carl* was taken by a vessel not commissioned, and that consequently she was a *droit* of Admiralty.

THE CAROLINE. [Spinks, 252.]

Seizure—Probable Cause—Further Proof.

A Prussian vessel, during the war between Denmark and Prussia, was fictitiously sold to a Russian and assumed Russian colours, which she continued to carry until the war between Great Britain and Russia was imminent.

The vessel, with her cargo, was decreed to be restored, but *held*, that her seizure, on suspicion of her being Russian, was not without probable cause, and did not subject the seizor to costs and damages.

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This vessel was seized in London, on the 29th of March, 1855, under the Prussian flag. She was claimed by the Prussian owner, and the Court was prayed to condemn the seizor in costs and damages.

It appeared from the ship-papers and depositions that she was Prussian built, and sailed under Prussian colours until the war between Denmark and Prussia, when it was thought advisable to assume Russian colours, which she did while in St. Petersburg in the year 1849 or 1850. At this time there was a fictitious sale of the vessel to a Russian. It seems she continued to carry the Russian flag long after the war between Denmark and Prussia was terminated and until February, 1854, when she resumed her Prussian flag.

The *Queen's Advocate* and *Admiralty Advocate*, for the seizor, contended that it was a case of such suspicion that the Court could not restore without requiring further proof.

Dr. Addams and *Dr. Twiss*, for the claimant, contended that there was no ground whatever for the seizure, and that they were entitled to a decree not only of restitution but of costs and damages.

Dr. Lushington.—During the last war it was a matter of every-day's experience that when vessels were brought in and the case came on to be heard before the Court, the counsel for the captors, according to the peculiar circumstances of each case, either prayed for condemnation or asked for further proof. If they prayed for condemnation, of course it was open to the counsel for

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the claimants either to pray immediate restitution or that they might be permitted to give further proof, and the Court decided according to its own opinion of what was justice on a consideration of the whole facts of the case.

But there was frequently a whole class of cases in which it was perfectly known by the practitioners that they were cases for further proof without further discussion. They were a class of cases in which the master not being able to speak to the property, or the bills of lading not having been produced in terms sufficiently clear, these circumstances were matters for further proof, which was granted in the ordinary course. Such was the practice.

With respect to persons making seizures of vessels not upon the high seas and not entitled by their commission so to do, I adhere entirely to the observations I made in the case of the *Elise Wilhelmine* (*z*); at the same time, what I then observed must not be carried to an extent which I think the words did not convey, and which the Court did not certainly intend. It is one thing for an officer of the customs or a revenue officer to make a seizure of a vessel in a port and come and claim condemnation on the ground of a violation of the law of nations, either by a breach of blockade or in any other way, as in the case of the *Elise Wilhelmine*, it is another thing where a Custom House officer seizes a vessel believed to be an enemy's, carrying on any trade in the port of Great Britain. I apprehend it to be a part of the duty of a Custom House officer to take due care and exercise due diligence that vessels are not admitted as neutral vessels to carry on a trade, if in reality they are the property of an enemy disguised under a neutral flag; then it is for the officer to make the seizure, and afterwards, if the Lords of the Admiralty give their sanction, to follow that up by a suit. I apprehend without that sanction this Court would not entertain the suit.

Now what are the facts of this case? It appears that this was a vessel under Prussian colours, and, as I collect from the whole of the proceedings, she had been accustomed, if not always, yet frequently, to trade from ports in the Baltic to British ports and, being under Prussian colours, she reached this country at the close

(*z*) *Ante*, p. 327.

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of last year or the beginning of the present. The cargo then brought was unladen and a fresh cargo laden, and on the 29th of March in the present year she was seized by the Custom House officers and these proceedings were instituted. She has been claimed on behalf of the present owners, and it appears that the master is greatly interested, so much so, that he has about twenty-seven parts out of sixty.

It is alleged by the counsel for the captors that there is such a deficiency of proof that the Court ought not to be satisfied without directing further proof of the facts alleged in the claim.

Many observations have been made by her Majesty's Advocate as to the defect of the papers, but with regard to some of these observations I must confess I cannot at all concur; for instance, much has been said about the log; I now hold it in my hand; it is said to be a mutilated instrument, but I am at a loss to know where. In the year 1855, when a vessel has been performing voyages almost without number, is it to be expected that you would find a perfect log of the years 1849 and 1850? I am at a loss to conceive how the tearing out of this leaf or that leaf, or as many as you please in that log, can have framed a just cause of suspicion. I am still more at a loss to conceive why, looking at the transaction, the transfer to the Russian flag should ever appear in the log, provided the vessel was intending to carry on a trade under a colourable character. I dismiss that from my consideration, and I dismiss also the muster-roll, for I do not apprehend that under circumstances like these the Court is in the habit of requiring that nice investigation of instruments of that character, if there be others more important to be considered.

Now the statement of the master is that the ship was built in 1846 in a Prussian port. At one time, and indeed for a great many years, she carried on her trade under the Prussian flag, but when the war broke out between Denmark and Prussia, it being no longer safe to sail under that flag because she might be intercepted in her passage through the Sound, she assumed Russian colours. It is stated, and stated fairly, that the colours were assumed at St. Petersburg or Cronstadt—it matters nothing at which port they were assumed—and she continued under these assumed colours to carry on her trade till the month of February, 1854. It is per-

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fectly apparent that the avowed object for which the Russian colours were assumed—namely, in consequence of the war between Prussia and Denmark—had for nearly three years entirely ceased, and therefore that the continuance to have Russian colours is not accounted for by the statement which the master has made, inasmuch as the reason has entirely failed. I must say that when I see the change from Russian colours to Prussian, just when the war was imminent, it is a circumstance of very considerable suspicion, and not of less suspicion because it is a matter of perfect notoriety that every possible attempt has been made in the present war to cover Russian property by transfer to neutral merchants.

I must therefore look to the other documents and see whether, notwithstanding this, the Court is satisfied as to the property in this vessel. I may observe by the way that it is quite true that this Court does not take cognizance of frauds practised upon other nations; for instance, this Court never takes cognizance of any attempt which may have been made by the disguise of colours, or in other ways, to avoid navigation or other laws of foreign countries. It is no offence in the eye of the Prize Court when such an attempt is made; it is only an offence where it is made in violation of British law.

Let us look how the facts stand here. The first instrument of great importance referred to in the argument is what is called the grand bill of sale. It appears that the vessel had, when originally built, an instrument on board, call it by what name you will—a *bielbrief*, or a grand bill of sale. Now the usual appellation which is bestowed upon the document which a ship possesses when she is built is a *bielbrief*, but I am by no means disposed to say that a similar meaning may not attach when the instrument which emanates from the shipbuilder, or from those who employ him, is called a grand bill of sale; and I apprehend that either the one or the other—whether *bielbrief* or grand bill of sale—is meant to be the foundation of the title of those to whom it is granted. This document, on careful examination, appears to me to be a substitution for a former document of the same description which was lost, and which appears from the correspondence to have been what I should have been more inclined to designate a *bielbrief*. It has been lost, and this was a substitution thereof; but I cannot in

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justice to the claimants say that this is a document to which, because it bears a different name from that which would be given to the original instrument, the Court ought not to pay attention. I think I am bound to consider this instrument as a proof of the title of the claimants to the same extent as I should the original *bielbrief* if it had been produced; there is therefore one document of very great importance produced on the present occasion. There are other documents certainly wanting, one of which I certainly confess I did look for and do not find, namely, a sea-pass.

Now, according to the doctrine which I believe has been maintained by my predecessors in this chair, it has always been considered, I will not say a matter of absolute and indispensable necessity, but of the greatest moment, that a neutral vessel sailing the seas in time of war should be provided with an instrument called a sea-pass, or something tantamount thereto. There is no such document to be found here. The master accounts for its absence by saying he believes it was left behind at Elsinore. It must be remembered this is a document of first-rate importance, for this is the document which entitles him to sail under the flag and pass of the nation to which he belongs, and I hope and trust, whatever may be the result of this case, that in future it will be understood that this is one of the documents which the Court will require to be produced; it will require it to be produced, or a satisfactory reason assigned for its non-production.

Now, how stands the result of the evidence in this case? The master is unsupported by the testimony of the mate, and though I do not expect from the mate many particulars relating to the transactions of the ship, because it is not usual and customary for persons of that description to give the Court such detail, yet it is certainly somewhat surprising that he has not stated in his evidence a fact which must have been well known to him, namely, that his vessel carried Russian colours till February, 1854, he having come on board in the month of October, 1853.

With respect to the correspondence, it appears to me to be greatly corroborative of the evidence of the master. The whole of the correspondence tends to show that a gentleman of the name of Gradener, with whom he was in the habit of corresponding, had

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property in the ship. I see nothing in the documents or any part of the evidence that points to Russian interest.

The first question, therefore, is whether I am to order further proof or direct immediate restitution? I am, I must say, satisfied that the ship is Prussian property; and I am of opinion that I ought on this evidence to direct her to be restored, not that there is no irregularity in the proceeding, but because, upon the whole, I am clearly convinced in my own mind that the property is proved to be Prussian.

The only question that remains is that of costs and damages; and to them I am equally clear that the claimants are not entitled. It is utterly impossible to hold that this was a seizure without probable cause; or, to use an expression employed by Mr. Justice Story, where there is no reasonable doubt. I think that where a vessel was carrying Russian colours up to the commencement of the war, and where she was divested of them only at the breaking out of the war, that one ground is a justification for seizing the vessel. When I look further at the circumstances of the case, that the master is not corroborated, that the grand bill of sale was procured under circumstances which, though they now are explained, were *primâ facie* not clear, and when I see no sea-pass on board, I am satisfied that the justice of the case does not require me to condemn the seizor in costs. I shall therefore simply restore.

The *Admiralty Advocate*.—Upon the payment of the captors' costs and expenses, or without?

THE COURT.—No, simple restitution.

Dr. Addams applied, on behalf of the owners of the cargo in this case, for restitution with costs and damages, and submitted that, whatever cause there might have been for detaining the ship, there could be no pretence whatever for seizing the cargo.

THE COURT said: That when a ship was seized, it was quite impossible to do otherwise than arrest the cargo. That was an universal rule. He would simply restore the cargo and make no order as to costs.

THE OTTO AND OLAF. [Spinks, 257.]

Blockade — Egress — Laden Vessel — Capture — Probable Cause — Restitution — Practice — Variance of Claim and Preparatory Evidence — Further Proof.

Every ship leaving a blockaded port with a cargo is liable to detention without subjecting the captor to payment of costs and damages.

Where the claim and preparatory evidence is at variance with the documentary, the Court is bound to require further proof.

The Court will not enter upon an inquiry whether a captured neutral vessel has complied with the requirements of the municipal law of her own country.

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This ship under Danish colours sailed from Copenhagen with a cargo of coals for Riga, after the blockade of the year 1854 had been raised. Having arrived there and discharged her cargo, she took on board a cargo of wheat, &c. and attempted to prosecute her return voyage, but in consequence of the ice she was compelled to put into Bolderaa, and remain there for some time. On leaving that port in the month of April she was found to be too deeply laden to cross the bar, and was compelled to unload a part of her cargo into lighters, from which she again reshipped it after having passed the bar.

In the meantime (on the 19th of April) the blockade had been again imposed upon the Gulf of Riga. On the 8th of May she was captured by her Majesty's ships *Archer* and *Geyser*, was released on the 15th, and upon the same day was again seized by them, and sent here for adjudication on the ground of breach of the blockade. The cargo having been restored, a claim was made for costs and damages. A claim was also given in on behalf of four Danish subjects, as the owners, for restitution of the ship with costs and damages.

The *Queen's Advocate* and *Dr. Deane* appeared for the captors; *Dr. Addams* and *Dr. Twiss* for the claimants.

Dr. Lushington.—There are two questions to be disposed of in this case: the one relating to the claim for the cargo, the other to the claim for the ship. With respect to the circumstances of the case, some of them are common to both questions which the Court will have to decide; and some will be more applicable to the cargo, and some to the ship.

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The general nature of the adventure was this: Assuming for a moment that the ship was duly transferred to Danish subjects, that they were the owners at the time of the capture, she being a Danish vessel lying at Copenhagen, and it being perfectly notorious when the Baltic was covered with ice that the British fleet would withdraw, and the ports which were blockaded would of necessity be left open, it was determined by the owners of the vessel to embark in an adventure for the purpose of carrying a cargo of coals from Copenhagen to Riga, and of bringing back another cargo to some other port, which was to be named when the vessel arrived at Kiel. No doubt it was in the contemplation of the parties, that if they were unable to get the cargo on board at the time, and before the ice set in, so as to render it impossible to get out, they would be detained until the approaching spring; that, if they stayed, the British Government would reimpose the blockade, and that they would be shut up there; and then they well knew and relied upon the rule of law, that a vessel taking on board a cargo antecedent to the blockade was entitled to come out.

I am of opinion that this was a perfectly lawful undertaking; that the owners had a right to enter as they did into the charter party with Messrs. Suse & Co., namely, to take a cargo out in the first instance, and then to bring back another, if they chose to run the risk of being detained by the ice, knowing that a blockade would be imposed, and then to assert their rights to carry out the cargo by reason of its having been laden antecedent to the blockade. I know of no illegality in this, and no blame is to be attributed to them, provided they carry out their intentions *bonâ fide*.

It appears then that the vessel reaches Riga, discharges her cargo of coals, and takes on board a cargo of wheat and other articles of that description. It appears that such cargo was taken on board before the end of the month of January, but that the vessel was unable to quit the port in consequence of the ice—one of those contingencies which was anticipated. She remained there; the cargo was too heavy, and the ship was too deep to get over the bar. In the month of April part of the cargo was transferred to a lighter to enable the vessel to get over the bar, and was subsequently put on board again. The blockade was imposed on the

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19th of April, and I think the 8th of May was the day of capture; and I am of opinion that the unshipping of the cargo into the lighter was not an illegal act, provided that the Court was satisfied that the identical cargo, which had been originally shipped in the January preceding and no other, was again put on board. These are the general facts of the case, and common both to the ship and cargo.

I apprehend that when this vessel came out of the Gulf of Riga, or before she came out of the Gulf of Riga, she was liable to detention by any of her Majesty's cruisers who were maintaining the blockade established on the 19th of April; and it becomes, under circumstances like these, the duty of the claimant to establish his title to restitution. *Primâ facie*, every vessel whatsoever laden with a cargo, quitting a blockaded port, is liable to condemnation on that account, and must satisfactorily establish her exception to the general rule.

I apprehend, further, that when a laden vessel coming out of a blockaded port has been taken by a ship of war, it never could be contended or maintained that such vessel was detained without probable cause. The very fact of coming out of a blockaded port with a cargo is probable cause for detention (*a*).

It is clear that the cargo could not have been restored without the ship. If it had been contended on the part of the cargo that the cargo was not to blame, that it ought to have been restored immediately, then the answer is this: the cargo must participate in the lot and fate of the ship. If there was good ground to bring the ship to this country, then also there was good ground to bring the cargo. That follows as a matter of necessity; consequently it is utterly vain to contend for costs and damages in cases of that description. The cargo has been already restored, and

(*a*) On the 3rd of August, the Mecklenburg and four other ships, seized under similar circumstances to the present, were restored upon payment of captors' expenses; the Court observing that the principle applied by Lord Stowell to such cases was, that it was the duty of captors to bring such vessels to the Court for adjudication, unless they were satisfied that they formed exceptions to the rule that a vessel leaving a blockaded port with a cargo was liable to condemnation. At first, appeals were entered on behalf of the claimants against these judgments, but they were afterwards abandoned.

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I am very clearly of opinion that the claim for costs and damages has no shadow of foundation whatever. This will appear more clearly when I discuss the case of the ship; but, as far as I have gone, I am clearly of opinion that there is no pretence for such a claim, and the question now is whether I ought to decree payment of the captors' expenses. I am of opinion that I ought to do so. First, I ought to do it on the general ground that this was a vessel coming out of a blockaded port, and that, availing herself of an exception to general principles, she was bound to prove that she came within it. It will never do to argue that you have no right to seize a vessel, and no right to detain her. It is impossible for the capturing vessel to ascertain what the case really is; she has no opportunity of examining the documents, and no opportunity to enable her to pronounce a decided opinion on the subject. But I think the captors are entitled to their expenses on another ground, viz., that the cargo was partly unladen, and was, after the establishment of the blockade, again taken on board. This is another feature in the case, and I am perfectly satisfied that these captors were justified in bringing the cargo in for adjudication, though the officers of the Crown did right in releasing it, and they are therefore entitled to their costs and expenses.

With regard to the ship, independent of the cargo, very many objections have been raised to the restitution of the vessel, some of which I do not think it will be necessary to dwell upon at any length. She is sailing under Danish colours, and it is my duty to see that she is the property, strictly the property, of those who claim her, for I know nothing more important in the discharge of the duties of a Prize Court than to take care it does not restore the property brought in by cruisers except to those who are the rightful and legal owners.

But other arguments have been addressed to the Court with regard to the Danish character in another sense of the term. A vessel may have, and in one sense be entitled to, a Danish character, because she is the property of Danish subjects, and because she sails under the Danish flag; and yet she may violate all the municipal laws of Denmark. Now, in a simple case depending upon the law of nations, and not depending upon the peculiar construction of any treaty between Denmark and

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England, I am of opinion that it is no part of my duty to examine minutely into the municipal law of Denmark. I have no right to look and see whether Denmark has been fraudulently treated by the parties who procured these instruments. The only purpose for which I can look into that question is to see whether the property *bonâ fide* belongs to Danish subjects. I have no right to penetrate into the mysteries of their institutions, or to see whether their directions have been substantially or at all complied with. I wish this distinctly to be understood, because a contrary doctrine would be most serious. In the case of the capture of any neutral vessel, which was bearing the neutral flag throughout the civilized world, I should have to examine into the pass, perhaps, of the kingdom of Hanover, of Mecklenburg, of the United States of America, or of the South American States, in order to ascertain whether the vessel that carried the flag of that particular State had complied with its particular municipal institutions. I never will enter on such a discussion, except for the purpose of considering whether the property is *bonâ fide* the property of the claimant.

But the most serious objection on the present occasion is that which I am about to state. The claim is made on behalf of four persons, viz., of Jensen, Salomonsen, Hansen, and Dirck Carlsen Jans, who are all respectively subjects of Denmark; and certainly the evidence of the master does support the claim, for he says the owners are Carl Jensen, H. S. Hansen, Mr. Salomen, and Captain Jans; therefore his evidence is in conformity with the claim. But I am bound to look at the documentary evidence, and see whether that supports the statements made in the claim, and supports the evidence of the master; for I take it to be quite clear, that if the claim and the evidence in preparatory differ from the evidence to be found in the documents, that is just the case in which the Court is bound, as common and ordinary practice, to require further proof.

Of course, the first document to which I look is the bill of sale, and that differs from the evidence given by the master, and also differs from the claim; for the bill of sale, which bears date the 30th day of May, 1854, states the vessel to have been sold to Mr. P. Brown, in connection with these other gentlemen. There is, therefore, a difference from the claim; and if I were to restore

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on this evidence, I should restore on the affidavit of the claimant, and upon the evidence of the master, and not admit the title conferred on another individual by the bill of sale. But not merely the bill of sale, but all the other documents in this case, are equally in discordance with the claim and the master's evidence; for instance, the admeasurement bill states her to belong to Messrs. Brown & Co., the owners, resident in Copenhagen; in fact, setting them forth as having the greatest interest, if not the exclusive interest, certainly as the continuing owners, and as entitled to be considered in that light. That is one document; there is another document of exactly the same kind and character, I allude to what is called the certificate of the Captain Surveyor. He certifies the ship to belong to Carl Jensen, of Copenhagen, as if it had been the exclusive property of that individual. There is also a fourth document, in which the same person's name is given as being the owner.

Upon this state of facts, then, I should have no hesitation in ordering further proof; but there is additional reason for so doing, namely, that this sale, alleged to have taken place in June, 1854, was a sale from Russian owners to Danish owners very shortly after the commencement of the war, and the Court, according to its ordinary rules, looks with great jealousy upon the sale of a vessel to a neutral subject at the commencement of war; that would be an additional ground for further proof.

But I am told, on the present occasion, that all this might be reconciled by bringing in the transfer, alleged to have taken place, from Brown to Salomonsen; that the bill of sale has been shown to the Queen's Proctor, and, therefore, that the Court must take it into consideration. Now I neither can, nor will, do any such thing. It is utterly irregular to attempt to introduce into the case evidence not properly before the Court; the evidence before the Court is that by which I must be guided. If there be such a bill of sale as that mentioned, it will be necessary to produce it if further proof is required. I agree that the very circumstance of handing over the bill of sale to the Queen's Proctor might induce him to restore, on the payment of captors' expenses, with which the Court has nothing to do; but if it is brought under the cognizance of the Court, it is the strongest reason for doing that which

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I should have done without, namely, for directing further proof in this case.

I do not think it necessary to travel into the circumstances as to the pass; whether the pass be, as has been argued on behalf of the claimant, a pass delivered in blank, and afterwards on a certificate being obtained filled up with an earlier date, and, consequently, with a date anterior to that of the transfer itself, is a matter with which I do not think it necessary to trouble myself in this case nor in any other, except for the purpose of ascertaining whether it is a *bonâ fide* document where there is a doubt of the validity of the transfer. I restore the cargo on payment of captor's expenses, and I decree further proof as to the ship.

It is quite in the power of the Court to direct further proof generally, or in any shape it thinks fit. On the present occasion it will direct further proof generally, and will require to be satisfied with respect to both the original and the second transfer.

There is one observation I omitted to make, and it may be convenient to make it at once. On several occasions my judgment in the *Soglasie* has been quoted with respect to what I consider to be requisite and necessary after a purchase by a neutral of an enemy's ship, namely, the correspondence which preceded, the correspondence which attended, and the correspondence which succeeded the transfer. Now I in no degree whatsoever depart from what I said on that occasion, but it must be taken with an understanding of what were the facts of that case. In the case of the *Soglasie*, where I made those observations, the vessel was on a voyage immediately after the transfer; but where it turns out that many voyages have taken place and much time has elapsed, the Court will not expect in such case that there will be that correspondence attending the original transfer which might fairly be looked for when the vessel has only been lately purchased.

The *Queen's Advocate*.—That would be the correspondence on board; that would not depend on further proof.

THE COURT.—That would depend on circumstances. Where a vessel has been purchased by a neutral and continued in a lawful

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trade for a considerable length of time, the presumption arises in favour of the neutral, which would not exist provided it had been the first voyage (*c*).

[Spinks, 276.] [On appeal, Spinks, 317.]

THE NINA.

Capture—Ship—National Character of Merchant—Ownership—Further Proof —Suppression of Papers.

The Court cannot restore to a person who claims as sole owner when others appear to have an interest in the property; and it cannot allow further proof when it is satisfied that no trustworthy proof could alter the complexion of the case.

The suppression of papers and the prevarication of the master also afford grounds for refusing further proof.

1855 *August* 11; affirmed *February* 7, 1856 (*d*).

THIS vessel arrived at Ipswich on the 14th of May, 1855, under Austrian colours, and upon the 4th of June, after her cargo had been discharged, was seized by the officers of the Customs on suspicion of being Russian property.

A claim was made on behalf of "Martino Gherdacovich, of Costrena, near Fiumé, in Austria, shipowner, a subject of the Emperor of Austria, as the sole owner thereof."

The master, mate, and two seamen having been examined on the standing interrogatories, the case now came on for hearing on the admission of the claim.

The *Queen's Advocate* and the *Admiralty Advocate*, for the seizor, contended to the effect of the judgment of the Court; *Dr. Addams* and *Dr. Bayford*, for the claimant, submitted that it was a case for further proof; that the documents before the Court might be explained, and the seeming discrepancies in the evidence reconciled by further proof; and that no injury could result to the seizor by the delay.

DR. LUSHINGTON.—It is admitted on behalf of the claimant

(*c*) Further proof having been brought in, the Court on the 27th of November restored the ship upon payment of captors' expenses.

(*d*) The judgment was affirmed on appeal without reasons given. "Their Lordships entirely concur in opinion with the learned judge both as to the facts and law of the case."

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that he cannot ask for anything more than further proof, in order to clear away the difficulties which it is asserted, and indeed not denied on the part of any one, exist in this case.

Having read all the papers before I came into Court, and having attended to all the observations of counsel on both sides, I think it wholly unnecessary to delay my decision, being perfectly satisfied that I should never alter my view of this case, though, perhaps, if I occupied further time before I delivered my judgment, I might make it a little clearer or carry it to greater length.

The claim is made on behalf of a person of the name of Gherdacovich, of Costrena, in Austria, and it was stated that originally it was the intention of Baron Rothschild to have made the claim as Consul-General for Austria, and so it appears upon the face of this claim. Now, really, that has nothing to do with the question which I am about to decide, for whether the claim is preferred by one individual or by another, the Court abides by its general rules and principles, without any regard to persons or individuals. No doubt it was exceedingly proper in this vessel's master to take the advice of the Consul-General of the State to which he claimed to be a subject, and, for aught I know, he might have applied also to the ambassador; but even if that were the fact, it would not make on the mind of the Court even the very slightest impression, for I am neither to be influenced nor in the slightest degree governed by the opinion of any person, nor by anything except what I deem to be the law of nations as administered in this Court.

If the master did make application to the Consul-General in due time, it was unfortunate that from some cause or other he did not receive that advice which would have enabled him, I trust, to have conducted himself with greater propriety than he has done towards the officers of the Customs. Instead of affording every facility for bringing in the papers, and for the examination of himself and his crew, he folded his arms, and if not actively engaged in preventing the inspection of those papers, rendered no aid, and certainly prevented the examination of himself and of those on board; but I do not attribute that to the advice of his consul; I should be exceedingly sorry so to do, because, undoubtedly, if that was so, whether it emanated from consular or any other

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authority, it would tend to indispose the Court from giving due consideration to persons filling those high offices.

Now what are the facts of this case? The ship was originally a British, then a Russian vessel, but, as represented, became Austrian in the year 1853, at what particular time is uncertain from these papers, in which, although the vessel was represented to be an Austrian vessel in the month of July, 1853, yet she did not become so till the month of November in the same year.

Now at that period, I have no hesitation in saying, that if a Russian owner was desirous of changing her character by sale, it was competent for him so to do, and equally competent to the Austrian subject to buy it, provided only the transaction was fair and the Russian interest was divested and the Austrian flag properly assumed under the authority of that country, that country not being deceived by any false representation, and the owner being entitled to a national Austrian character.

Such being the facts in the case, the vessel has been claimed by Mr. Gherdacovich as the sole owner of the property, and the Court can decree restitution to this claimant on no other ground than that he himself is the person solely entitled to it. Even if the case should be made out by further proof, which appeared to me to be a little inadvertently suggested to the Court, namely, that he had the legal title in this property, but in reality other persons in conjunction with him were interested in the ship, be they who they may, unquestionably I could never restore on this claim. The Court will never restore on any claim, unless it is satisfied that the property is *bonâ fide* the property of the individual who claims it; and if it finds any other interest lurking out in any shape, it is quite sufficient for me to pronounce against that claim.

There are two points, then, which arise for the consideration of the Court in this case, independently of the many questions and the many doctrines which have been ably discussed at the Bar.

The first question is one that might be a matter for further proof, viz.: whether Mr. Gherdacovich was of Costrena or not? What do I find in the evidence? I find the master swearing in no very credible or satisfactory manner, first, that he had been resident at Costrena sixteen or seventeen years, and then that he was resident at Odessa, but when and where he knew not, though

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it appears, beyond all doubt and question, that this Mr. Gherdacovich put him in possession of the ship in 1851, at Odessa. He might have had, I think, the means of giving us a little more satisfactory information of the residence of Mr. Gherdacovich at Odessa. But what do I find besides? Without entering minutely into the particulars of this case, I find Mr. Gherdacovich, in 1854, resident at Odessa, both in the month of April and also of November. Now these circumstances excite very great suspicion as to whether Mr. Gherdacovich is really entitled to be considered an Austrian subject, according to the sense in which the words must be understood in this Court. It does not follow, as seems to be imagined, that because this gentleman might have been born of Austrian parents, might have been resident at Costrena, and might have gone there occasionally or frequently (if he was carrying on trade and business at Odessa), therefore he would be entitled to come before the Court and claim restitution in an Austrian character. He must be bound by the character of that place where he was resident, and carrying on his trade, and to which the transaction properly belongs. I mention this because at the commencement of the transaction, when Austrian colours were assumed, matters appear throughout the papers which are explained in a very unsatisfactory manner to the Court. It seems to have been thought by the parties that they were at liberty to change the national character of the vessel without the slightest regard to the reality of the transaction on the mere representation that they wished to obtain, first, Austrian colours, and then any other that might suit the purposes of trade. If that be so—I do not say it is in the case of Austria, as I regret to say it has been in other cases—the grant of the national flag has been made without a just regard to the rights of the belligerent.

Supposing I got over that, what is the next point? I have already said I can restore to nobody but Mr. Gherdacovich, as sole owner. What then is the state of the papers? I am told—very cautiously, certainly, for counsel abstained from stating the mode and manner in which they would effect their object—that, if I will but shut my eyes and open my ears they will find the means of proving Mr. Gherdacovich to be the sole owner. Notwithstanding the documents under my eyes, they will find the means,

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whereby in reading them, I shall be enabled to put on them a construction totally and wholly incompatible with that sense which they bear upon the face of them.

How, I ask, is this to be done? I again refer to those words which I read before in the course of the argument, "I know you would be pleased to proceed on your voyage to the Adriatic, I would consent to it, but you know well that I am not the sole owner, and must execute the orders of my partners" (*d*).

Now, if it were to be proved by any evidence produced in the case that this gentleman was sole owner, it would, as the learned Queen's Advocate has said, be in direct contradiction to the construction which any man of common sense must put on the words to which I have referred. But does the case rest here? Not only would it be in direct defiance of that meaning, but in direct contradiction of the whole of the correspondence, because there are letters upon letters in which Signor Cossio is represented as having an interest in this vessel, in which Anatra, living at Odessa, is represented as having an interest in the vessel; and when I see that the construction I put on these words—and no man living can put another—is in direct accordance with all the other documentary evidence, can I, under these circumstances, allow further proof, the very object of which would be to falsify the whole of the papers? I am of opinion that upon this ground alone, I must not allow further proof; but there are in this case a variety of other reasons which fortify my opinion, and which seem to demand from the Court that determination which I have now expressed.

I will make every possible excuse for this man being a foreigner, every possible excuse for his not understanding what is meant by a suppression of papers; but it is clear that he, through an agent, was concealing papers from the seizors, and preventing them obtaining possession of the papers which by the law of nations this Court is entitled to require. Nor is this all, more unsatisfactory evidence the Court never had occasion to read. Can I believe that this person, who was appointed by the owners in 1851, and had been master ever since that time, was so ignorant of the ownership

(*d*) Cited from a letter of the claimant to the master, dated "Trieste, 6th June, 1855."

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of this vessel that if the claim were such as it is represented to be, viz., a sale or transfer in November, 1853, to the present claimant, he could not have given the Court some rational exposition of the subject? The paper marked No. 101 (*e*) shows that in 1851 Cossio & Co. were the owners, and the master must have known, what was obvious to every man of common sense, that there was a transfer—I do not say a culpable transfer—for the purpose of getting rid of the Russian national character and taking the Austrian national character. He must have known who the Russian owners were who executed the conveyance, and he must have known something of the consideration which passed, if it was an honest and just transaction.

I condemn this vessel, and I regret that in the first case of a vessel coming before this Court under the Austrian flag, it is my duty to pronounce that sentence. I shall always be ready to give that flag as indulgent a consideration as the law of nations will permit; but, at the same time, I trust that the Austrian Government will take care not to allow its flag to be prostituted for the purpose of protecting the property of an enemy from the just rights of a belligerent (*f*).

(*e*) The description in the abstract is as follows: "An inventory of the barque *Nina*, under the Russian flag, the property of Messrs. Bartolomeo Cossio & Co., commanded by Captain Martino Stipanovich. Dated Gavano di Odessa, 7/19 September, 1851. Signed, Martino Gherdacovich."

(*f*) Affirmed *post*, p. 570.

[Spinks, 281.]

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Capture—Consent by Captor to Restitution—Illegality of Trade—Costs.

A Russian ship, coming into a British port under the protection of the Orders in Council and discharging her cargo, instead of departing forthwith was sold to a British subject and remained in a British port. She was seized, and proceedings taken against her; but before hearing, on the admission of claim, the Admiralty Proctor, by direction of the Lords of the Admiralty, declared "that he proceeded no further, but reserved the question of costs and damages." *Held*, 1st, the declaration does not necessarily entitle the claimant to costs, it being always in the power of the Crown to stay the proceedings for condemnation. 2nd. The purchase of the ship by a British subject was a trading with the enemy not specially permitted by the Orders in Council, and therefore illegal. 3rd. For these reasons, and also for illegal opposition to those who seized the ship, under the authority of the Court, the claimant must be condemned in the costs.

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THIS ship arrived at Hull, under the Russian flag, on the 29th May, 1854, with a cargo from Kertch, in the Crimea. Having left that place on the 26th March, she was protected by the Order in Council of the 29th March; but after she had discharged her cargo on the 29th of June, instead of departing forthwith, she was removed the next day to Great Grimsby, where she had ever since remained.

It appeared, from documents and affidavits produced, that in the early part of June, 1854, negotiations were entered into between Mr. Robert Keetley, of Great Grimsby, and Jacob Ljoberg, the Russian master, who had a power of attorney authorising him to sell her, for her purchase. An application was then made by the Russian master to the Customs authorities for information whether he might sell her instead of departing, and whether a British register would be granted to her. A letter was sent by one of the solicitors to her Majesty's Board of Customs in London to the Customs authorities at Grimsby, who thereupon informed the Russian master that if his vessel was sold *bonâ fide* a British register would be granted. It appeared that application had also

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been made on behalf of the alleged purchaser to the Commissioners of Customs in London, and that one of their solicitors had expressed his opinion to the effect that the sale would be legal, and that if proved to be *bonâ fide* the ship might have a British register granted.

Accordingly, Mr. Robert Keetley, in the month of June, 1854, purchased the ship for 2,800*l.* He afterwards had her dismantled and thoroughly repaired. She was still lying at Grimsby in a dismantled state in the summer of 1855.

When the decision of the Court in the case of the *Odessa* (*h*) came to the knowledge of the officers of Customs at Hull, they reported the *Neptune* to the Marshal of the Admiralty. This led to proceedings being taken against her by the directions of the Lords of the Admiralty.

The vessel was seized on the 8th of August, and on the 11th a proctor appeared for Mr. Keetley, whom he alleged to be the sole owner, and obtained a monition against the seizors and the Admiralty Proctor to proceed to adjudication. On the 15th of August the proctor gave in the claim of Mr. Keetley, with an affidavit annexed. When Thomas Keetley, who was named in the monition as the master of the vessel, was summoned in form before the Commissioners at Hull, to attend before them on the prize interrogatories, he did not appear or take any notice of the summons. It also appeared that when the vessel was seized great opposition was offered to the seizors, who were compelled to take the keys of the cabin by force from the claimant.

After the case was ready for hearing on the admission of claim, the Admiralty Proctor received a communication from the Secretary to the Admiralty respecting the case, and upon the 14th of November declared "that by the directions of the Lords Commissioners of the Admiralty he proceeded no further in the cause, reserving the question of costs and damages on either side"; but the claimant's proctor "prayed the judge to order a decree of restitution to issue, and to condemn the seizors in costs and damages." The Court having directed the question to stand over, it now came on for argument, and the Queen's Advocate, on the

(*h*) *Ante*, p. 462.

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part of the Crown, now offered to forego any application for costs provided that the claimant would do the same; but Dr. Addams on behalf of the claimant declined the offer. The argument was therefore proceeded with.

The *Queen's Advocate* and *Admiralty Advocate* for the seizor; *Dr. Addams* and *Dr. Twiss* for the claimant.

DR. LUSHINGTON.—The first question for the determination of the Court is, whether there is anything introduced in the course of these proceedings which ought to stop it from considering the case of costs and damages in its ordinary and usual mode? For this purpose it will not be necessary that I should state the proceedings at any length.

It appears that the vessel was originally seized by two Custom House officers at Hull, and Mr. Clarkson appeared for Mr. Keetley, and prayed the judge to assign Mr. Townsend, her Majesty's Procurator-General in her office of Admiralty, to set forth the names of the seizors, and to decree a monition against the Admiralty Proctor to proceed to adjudication. After an affidavit with papers annexed had been brought in by the Admiralty Proctor, the usual monition had been decreed at his petition and returned, and after affidavits had been brought in by Mr. Clarkson on the 31st of October, and admitted on the 6th November, Mr. Townsend on the 14th of November declared that, by the direction of the Lords Commissioners of the Admiralty, he should not further proceed in this case, reserving the question of costs and damages on either side.

The question is, then, whether that declaration made by Mr. Townsend has the effect of preventing the Court from entering into the merits of the case, or whether the Court must proceed as if there had been a declaration of consent to restitution? reserving the question of costs and damages, because I do not mean to take up time in commenting upon what is the every-day practice of the Court, and always has been, that the captor may consent to the restitution of the property seized, and reserve the question of costs and damages.

Certainly, it is not very usual that a minute should be entered

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to the effect that one of the parties does not intend to proceed further in the case, but reserves the question of costs and damages; it nevertheless appears to me that it is quite impossible to say that the other party should have a right to avail himself of this declaration, that the party proceeding will proceed no further, and at the same time to reject the reservation with respect to costs and damages. He might, if he had thought fit, have objected to this minute altogether; he might, if he had been so advised, have said it was an extraordinary and irregular minute, and the Court would have pronounced its opinion upon it, though I must say I see nothing in it with which the Court can reasonably find fault. There are many cases in which the Crown may not consent to restitution, and at the same time may not think fit to press the case to an ultimate decision, and, under such circumstances, this form appears the best adapted to answer the ends of justice.

Here I must observe, with respect to seizures made by captors commissioned or non-commissioned, that the real party proceeding is always the Crown; in both cases, and clearly in the case of commissioned captors, it is under the control of the Crown properly speaking, and the Crown may, at any time it thinks fit, order the Queen's Proctor to take any measures it may, according to its wisdom, deem right, namely, to proceed no further, and to restore the property or whatever else it may deem proper. So, where the seizure is made by non-commissioned persons, and the proceedings are conducted under the authority of the Lords of the Admiralty, through the medium of the Admiralty Proctor, the Lords of the Admiralty are invested with precisely the same powers if they think fit to exercise them. There ought to be no mistake on these matters; but it is equally true, if it comes to be a question for the judgment of the Court, it may condemn in costs and damages the actual seizor, whether he be a commissioned captor or a non-commissioned captor.

Now, as to the facts of this case, this vessel beyond all doubt was originally a Russian vessel, which reached this country in May and discharged her cargo. She was under the protection of the Order in Council, bearing date the 29th of March, 1854. That Order in Council was purposely framed in order to protect vessels coming to this country, unlading their cargoes, and departing

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forthwith; but it has not been contended, as I conceive it was impossible to contend, that that order sanctions the party in further proceedings by way of sale of the vessel.

On the breaking out of war, the general rule of the law is—and it is really the A B C of prize proceedings—I do not mean to comment upon it or illustrate it for a single moment—that all trading whatsoever between the subjects of the country declaring war and the country against which it is declared is wholly prohibited, and is totally and entirely illegal. The Crown alone can alter or relax that law, and it is not competent to any authority, save that which is by implication derived from the Crown, to relax the general prize law of the land.

If, then, that be the general prize law, it follows, in my opinion beyond all shadow of doubt, that this sale was illegal, because it was a sale by a Russian subject during war to a British subject of property which was protected by the Order in Council to the extent only of being permitted to come to this country to discharge her cargo, and forthwith to depart without molestation for any port not blockaded. If that be so, the only question is whether the authority of the Crown has by virtue of any other Order in Council, or in any other equivalent manner, signified its consent that this ship so circumstanced shall be exempted from the general law, and that a Russian owner shall have power to dispose of, and a British subject shall have authority to buy her.

A reference has been made to another Order in Council which bears date the 15th of April, 1854. It is to this effect—I do not mean to go through it, but the whole Order in Council must be considered together in order to arrive at a safe conclusion as to any part of it—but this part has been referred to:—

> That save and except only as aforesaid all the subjects of her Majesty's and the subjects or citizens of any neutral or friendly state, shall and may during and notwithstanding the present hostilities with Russia, freely trade with all ports and places wheresoever situate which shall not be in a state of blockade, save and except that no British vessel shall under any circumstances whatsoever either under or by virtue of this Order or otherwise, be permitted or empowered to enter or communicate with any port or place which shall belong to or be in the possession or occupation of her Majesty's enemies.

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It is impossible to contend for a single moment that the port of Grimsby comes within the terms or spirit of this Order. The effect of this Order is to allow subjects of her Majesty's and neutral subjects to trade to ports and places not in a state of blockade. I need not say that this very expression—"not in a state of blockade"—could by no possibility apply to any British ports whatever, and this Order in Council never could be extended to justify the subjects of Russia in trading with any port in her Majesty's dominions, which construction, in fact, it is now attempted to put upon it.

For many reasons I will not state what I believe to be the true construction of this Order in Council under the limitations, because I agree with her Majesty's Advocate, that it is better that such important questions should be discussed when they are raised directly, than where they are raised incidentally on such a point as this. But I am compelled to notice them to come to this conclusion, was this sale legal or illegal? I have no doubt whatever that the sale was illegal, nor have I any doubt that if this case had been pressed by the Crown or the Lords of the Admiralty, so as to compel the Court to come to a conclusion, that I should beyond all doubt have condemned the ship on the ground of the illegality of the sale. It is not a British ship under the prize law, but an enemy's vessel. So much for the first question.

The next question that arises is, can the law, as stated, be qualified by anything done by the Commissioners of the Customs? I will assume that the whole facts and circumstances were brought under the cognizance of the Commissioners of the Customs, that their opinion was taken whether the sale was legal or illegal, that they gave their judgment that it would be legal and proper, and that they confirmed it by granting a British register. That would not weigh one single iota in the matter. It would be impossible that a subordinate authority, or any other authority short of the Crown, could change the prize law here or elsewhere. If it was intended to do that, there were means by which it might have been effected by the interposition of the Crown itself.

If I were to travel no further, this would be a perfect justification, an entire justification of the seizure; it would entirely stop

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the claim for costs and damages, and give the seizors a perfect title to costs and expenses.

There have been other circumstances which I have been pressed to consider; but having delivered my judgment, I do not see that I should expend my time in going into circumstances which I consider to be of less importance. I shall not advert to the issuing of the monition, because, from the explanation given by Dr. Twiss, that might be erroneous; and it may be that before the monition was under seal, the claim was given in. But I must say that the proceedings at Grimsby have been such, that I do not hesitate to say, that if they had been brought before the Court, I should not have hesitated one single instant in attaching the party, and I think he would have found the attachment would not have been a matter of form; it would not have been easy to get a release from that attachment, because it is the duty of the Court to enforce at all times a due obedience to the laws of this country which I am bound to administer. With respect to the conduct of the master, it appears to me to be equally reprehensible, and that is also an additional ground for giving the seizors their expenses.

I have now mentioned all the grounds on which I proceed to decree the seizors' expenses; but the first one is so incontrovertible, and it gives them such a right and title to their expenses, that it operates on my mind above all other. I reject the claim for costs and damages on the part of the claimant, and I decree the expenses of the seizors. I think it is to be lamented that the liberal offer of the Crown by its officers to grant restitution of the vessel, and without raising the question of costs and damages on either side, was not accepted, and that the claimant was not wise enough to take the vessel without the risk of having to do, what now he must do, pay the costs and expenses.

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Voluntary and bonâ fide *Transfer—Validity—Domicile—Education—Residence.*

The voluntary transfer of a ship by a father, an enemy, to his son, a neutral, as an advance of a portion of his inheritance, is valid if made *bonâ fide*.

The fact that a man is educated in a foreign country, followed by a continued residence in that country, tends strongly to establish the foreign domicile.

Vessel decreed to be restored, but captors to recover their expenses.

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This ship was originally captured and sent home for adjudication as for breach of the blockade of Riga, but at the hearing on the admission of claim, on the 13th of August, that ground was abandoned and the argument turned on the national character of the vessel. She had been transferred to Hans Friedrich Philipsen (on whose behalf as a Dane and sole owner the claim was made) by his father, a Russian subject; the Court allowed further proof, which was now brought in. The facts are fully stated in the judgment.

The *Queen's Advocate* and *Admiralty Advocate* appeared for the captors; *Dr. Addams* and *Dr. Twiss* for the claimant.

Dr. Lushington.—This vessel, under Danish colours, was captured near Riga, on the 8th of May, in the year 1855. Claims were given for the ship, the freight, and the cargo; parts of the cargo were upon several occasions restored by consent. On the 13th of August the admission of the claim for ship and freight was debated. The claim was admitted, but further proof ordered as to the property in the said ship and freight. Such are the terms of the minute of August 13th. The further proof having been brought in, this case has been lately argued at length, it being contended on the part of the Crown that the vessel is liable to condemnation, not on account of the breach of blockade, which was the original ground of seizure, but on various other grounds which I must presently speak of more in detail.

I think the most convenient course I can pursue will be first to state, as fairly as I can, the case of the claimant, and then, without reference in the first instance to its credibility, inquire whether,

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assuming it to be true, the claimant would under such given circumstances be entitled to restitution. If I should ultimately be of opinion that the facts, if proved, would justify me in restoring the property to him, then I must also consider whether the proof of the facts is satisfactory.

The claim is given on behalf of Hans Friedrich Philipsen, of Altona, and the statement contained in the further proof is to the following effect—not in detail, but in effect: that he was the youngest son of Niss Hansen Philipsen, a merchant carrying on business at Riga; that his father was by birth a Dane, settled for very many years within the Russian dominions; that his two brothers were in partnership with his father; that in 1852 he himself was sent to Denmark for the purpose of learning the art of ship-building, and of acquiring other knowledge to fit him to carry on the business of a shipbuilder and shipowner in Denmark; that he continued to prosecute his studies till the month of August, 1853, when hearing that his father was about to visit Hamburg he went thither to meet him; that upon that occasion his father promised to advance him a part of that share in the property which would devolve to him as his portion, the sum so agreed to be advanced being fixed at the amount of 24,000 roubles; that it was at the same time arranged between the father and son that the ship, the *Benedict*, should be valued at 4,000 roubles, and be transferred from the father to the son in part payment of the 24,000 roubles; that the claimant became of age on the 25th of December in that year, and took up his residence at Altona, towards the end, as it would appear, of the month of February, 1854; that on the 6th of March—I believe the 18th, according to our time—in the same year, the ship, which was then lying at Lubeck, was transferred to him by bill of sale, the whole arrangement as to the advance of the 24,000 roubles and the transference of this ship having been approved of by his mother and brothers and sisters, as appears by an instrument produced in this cause; that the claimant, having taken possession of this vessel in the year 1854, employed her in various voyages; that she brought a cargo of wheat to Scotland, went to Memel, to Malaga, and finally to Riga at the end of 1854, when the blockade was withdrawn.

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Upon this statement of facts, assuming them true, several objections have been raised on the part of the captors. First, it has been contended that this Court cannot recognise a title by donation and voluntary conveyance without a valuable consideration, or, rather, as we should call it, pecuniary consideration, and that there is no precedent for the Court sanctioning such a claim, for that so doing might lead to great abuse.

I certainly am not aware of any precedent, and it is equally true that without great care and caution a voluntary transfer might be resorted to for fraudulent purposes; but if the title be such as this Court ought to recognise, I should not be dismayed from so doing simply by the absence of an example, neither should I be deterred by the probability of abuse, for I think that the Court, provided it exercised due diligence, might protect itself from any reasonable chance of fraud.

I approach at once, then, the question whether a title by donation, if sufficiently proved, ought to be received by this Court or universally rejected. I am well aware how many distinctions are made in the administration of municipal law between voluntary conveyances and titles for a valuable, or, rather, a pecuniary, consideration. But these are distinctions which I should be very reluctant to introduce into the administration of Prize Law, for I think that, sitting as a Court of the Law of Nations, I ought as far as practicable to look at what has really and truly been done—to reject on the one hand any transaction however perfect in form if not sound in its foundations, and on the other hand to admit, notwithstanding technical considerations, whatever has been truly and *bonâ fide* done.

I know not indeed by what authority I should be justified in saying to the subjects of neutral States, that I would stop them during the time of war from acquiring property by a title which would be unassailable in time of peace; in saying, "You may take a vessel by way of legacy, but you shall never acquire a ship from a father or other relation by way of donation"; in saying, moreover, that I will interrupt, or, rather, make void, all the consequences of the natural relation of father and son or other relations. Were I so to do, I think I should sin against a great principle of Prize Law, by prohibiting to neutrals a transference of

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property perfectly lawful in time of peace. I am not disposed to establish so harsh a rule, but before I gave any claimant the benefits of a more lenient principle I should undoubtedly require very satisfactory proof of all the circumstances which had led to the transaction under consideration, and more especially in a case where it might happen that the person so conveying the property was clothed with a hostile character.

If, therefore, the history of this case be correct, I should not refuse restitution to the claimant on the ground that his title was acquired by donation; at the same time, I must observe that I very greatly doubt whether the advance of a portion by persons who live in countries where the property must in great part be divided amongst the children at the time of the death of their parents can with strict propriety be termed a donation. Many cases might be put where, in the exercise of a power, persons advance during their own lifetime money which is not strictly due till after their deaths, and I doubt whether such advances can be truly characterised as pure donations.

I must now address myself to other objections. It has been contended that the claimant, at the period of the arrangement with his father in August, 1853, and of the transfer of this vessel in March, 1854, was to be considered as a subject of Russia. To a certain extent I am disposed to assent to some of the reasons on which this argument is founded. It is quite true that a son under age sent for his education to another country would not thereby acquire the national character of that country; but it is not equally correct to say that the circumstance of such education, accompanied with other facts, would not be of importance in ascertaining the national character, for if the original project of sending for education was coupled with an intention when that education was completed to settle in the same country, it would render great facility to the immediate acquirement of such national character when the residence was continued after majority, and the education was complete. I do not, however, deem it necessary to enter further into this consideration, for the obvious reason that the question is whether, when this ship was captured in 1855, and the claim given in in the month of June in that year, the claimant was then a Dane; for if he was, he would be entitled to the benefit of

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that character. I am of opinion that the continued residence at Altona has, were it necessary to press the matter so far, a retroactive effect upon all that was done at the time of this transfer; and perhaps I might even go further and say that if in March, 1854, the claimant was not justly entitled to be considered a Dane, yet he has certainly acquired that title since; and, moreover, I am not aware that a person whose character was hostile may not change his domicile between the period of the transfer and the time of the claim. Suppose that Mr. Philipsen senior, undoubtedly a Russian in March, 1854, had removed himself and his vessel to Denmark at that period: can anyone contend that if such vessel were captured in May, 1855, and he had been settled in Denmark during the intermediate period, he would not be entitled to restitution?

Another objection has been raised which regards the national character of the master. He was by birth a subject of Mecklenburg; he navigated this ship for several years under Russian colours, Russian owned; therefore no doubt at the time of the transfer he was to be considered a Russian subject. He afterwards assumed the Danish character in the month of April, 1854, according to means which that country affords, with extraordinary facility and expedition. Now what effect is to be attributed to this state of things? I am yet to be informed that the single circumstance of having a master of a hostile character to command a vessel will destroy a claimant's right to restitution, if he be otherwise so entitled; and looking at the rapidity with which national character is allowed to be changed as regards neutrals, I shall be very reluctant to come to such a conclusion. I grant, however, when a case is viewed in a different aspect, the fact that the master's character is that of an enemy may afford a strong ground of suspicion. As to any supposed fraud upon the Danish Government, I lay that wholly out of consideration, for I see nothing on the face of the facts to lead me to suppose that there was any; familiar as the Court is with their mode of transmuting a Russian master into a Danish master, the whole transaction passes in ordinary form, and gives rise to no suspicion whatever. Even if it were otherwise, I disclaim entering into an examination

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of what the law of Denmark does require to enable anyone to command a vessel under Danish colours.

On this occasion it has been said that this vessel is not provided with those Danish papers which are required by law. If by law is meant the treaty with Denmark, I know of no provision in that treaty which authorizes Great Britain to condemn a Danish vessel, because the municipal law of Denmark may not have been strictly complied with. If reference be made to the Law of Nations simply, I am not aware that when a vessel has *de facto* by the authority of a neutral government been incorporated into the marine of that State, this Court has inquired narrowly, if at all, into the law of that State, or how far its municipal regulations have been strictly complied with; and I am of opinion that such an inquiry would be attended with great inconvenience, and could not be prosecuted with reasonable facility or with the probability of doing justice. Every State differs with respect to the regulations of their mercantile marine; the Court is not disposed to enter upon an investigation of systems of jurisprudence in foreign States, which it is not competent thoroughly to understand.

Upon the present occasion an objection is raised as to the pass, that it is dated at one period and issued at another. I know no reason why the Danish Government may not adopt any regulation it pleases upon that subject. It is said that the vessel was not lying in the port where it was represented to be when some of the papers were granted, that a fraud has been practised on the Danish Government. This is an investigation which I will not enter upon. The Danish Government is quite powerful enough to protect itself against fraudulent attempts to obtain for vessels the national character of Denmark; I do not know about its having the will, but I have no doubt about its power. It may be, for aught I know, quite consistent with their practice, or it may be visited with some penalties unknown to me, quite beside the confiscation of the vessel; but I repeat, I will not, for such a purpose as the present, make any attempt to dive into the maritime law of Denmark and their usages, any further than I would present to Denmark a copy of our Merchant Shipping Act for the edification of its judicial tribunals. I doubt indeed, if I were inclined to make such offer, whether I should not be under the necessity of

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sending also some learned expounder of all that is contained in that lengthy document. I, perhaps, might have no difficulty in selecting from the Court one quite capable of so doing, and who would be very acceptable to the Danish Government.

It is sufficient for me to find that by the sanction of Danish authority this vessel has been received into the Danish mercantile marine; and if I am so satisfied, and that she is also the property of a Danish subject, it is my duty to restore her, provided that there has been no fraud on any belligerent rights.

I believe that I have now disposed of all the objections that have been raised in this case on the assumption that the statement of the claimant is founded in truth. Inquiry into this latter question will not occupy the Court long, for I do not think it necessary to enter into great detail. I am of opinion that the statement so made by the claimant is not repugnant to probability, and, though the consideration of impending hostilities might be an ingredient prompting the completion of this transaction, yet that it would not on that account be invalid, because, if I am right in the conclusion I have drawn as to the national character of the claimant, his father would have a right, when war was either imminent or declared, to transfer his vessel to him, and there is nothing in this proposition at all opposed to the decision in the *Baltica* (*i*). The *Baltica* went mainly on the ground of a continuing enemy's interest, though I also adverted to the attempt to sell by wholesale ships the property of the enemy to one individual.

The present transaction commenced in August, 1853, and at that period, beyond all doubt, the parties were fully competent, without being liable to suspicion, to enter into the engagements which are said to have been made. I think also that the arrangement of August, 1853, was carried into execution with as much expedition as could reasonably be expected, considering that the claimant did not come of age till the 25th of December, 1853; and I think, also, it is proved that as soon as that agreement was completed by the execution of the bill of sale, and from that time till the period of capture, the present claimant exercised all the rights

(*i*) Reversed on appeal.

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of owner. There is an abundance of correspondence demonstrating it.

It is true that remittances to complete the sum of 24,000 roubles were continued in 1854; but what possible effect can that have upon the transaction which I have to discuss. It appears quite consistent with probability, and quite consistent also with law, that the father should make such remittances; and, if it should have happened that in addition to them there was a transfer of other property or remittances to the son to be held on his own account or on the account of the father, provided there was no fraud as to this particular ship, it was no more than the ordinary course of trade, and no infringement of any belligerent right. In 1854, Mr. Philipsen, as a merchant, had a right, subject to any chances, to remit any property he thought fit, to be held either on the son's account or on his own; it is nothing more than the ordinary course of trade. I will notice one or two other objections. I think it was stated that it is very improbable that the master should have lost the letter of March, 1854, addressed to him by Niss Hansen Philipsen and directing him to give up the vessel to the present claimant, and one of the counsel for the captors expressed a wish to see that document, on the supposition, I conceive, that it might impeach the genuineness of this transaction. It does not appear to me at all improbable, that in May, 1855, when the son had been in the possession and in the government of this vessel for fourteen months, that such a document should not be forthcoming, especially out of the custody of a ship master; indeed, I think it would have been much more unusual if it had been forthcoming, when the father had, for fourteen months, with the full knowledge of the master, himself treated the vessel as the property of the son, to whom he was directed to give up possession.

But as for the contents of this letter, I apprehend that counsel would find no great difficulty in satisfying their curiosity, for there is a copy annexed to the affidavit of Mr. Philipsen, senior. It is the letter dated March 17th, and gives in correct detail instructions for the delivery of this ship to the present claimant, and in fact it is a copy of that very letter which the master himself has lost. The observations in that letter with respect to the employment of the master are, in my opinion, strong evidence

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of the genuineness of the letter and the truth of the transaction. The father desires the master, if he can, to effect arrangements with the son for the purpose of continuing master; supposing that could not be done, then he says, "if you come here, I will do the best for you, considering you have been in my service."

With regard to the claimant's letter of March 23rd, I do not think that the true construction of it is inconsistent with the other statement. The surprise in that letter is expressed not at the act being done at all, but that the whole promise of his father should be carried into effect so speedily. The surprise is at that expedition, not at the thing done. The whole correspondence with the master is annexed, and I think it would be difficult to find in it anything inconsistent or incongruous.

I think it was said also, that though the agreement, if so it can be called, took place between the father and the son in August, 1853, yet that there was no writing of any kind written in that year to verify that transaction. Now this objection would be entitled to great weight if this transaction had been a contract between two parties intended to be legally binding; but what passed on that occasion between the father and son was of a totally different nature. It was a promise on the part of the father to confer certain benefits on the son, benefits which could not be conferred till after he was of age. I confess I should have been surprised had there been a written agreement to any such effect. There was no obligation on the father to make this promise, or to carry it into effect when made, save his own parental kindness and his own sense of honour. Such obligations are not put in writing. On the whole, I am satisfied that I ought to give credit to the proofs adduced on the behalf of the claimant.

Of course, this is a case, looking to the further proof, where the captor is entitled to his expenses.

[Spinks, 321.]

THE MARIA (No. 1).

Practice—Ship—Absence of Bill of Sale—Further Proof—Procedure by Plea and Proof.

The absence of the bill of sale of a ship, and the ignorance of the master as to the ownership, both necessitate further proof.

If the claimant elects to proceed by plea and proof, the case is open to further proof on the part of the captors.

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This vessel, under Belgian colours, bound from Rio Janeiro to a port of Great Britain, with directions to call at Cork for orders, was captured on the 27th of October, 1855, off Cork, by the revenue cutter *Eliza*, on suspicion of being Russian property.

The claim was given in on behalf of "G. F. E. Huger and J. I. H. Huger, of the city of Antwerp, merchants and ship-owners, trading under the firm of Messrs. Huger & Co., subjects of the King of the Belgians, as sole owners." The examinations on the interrogatories having been taken, the case now came on for hearing on admission of the claim.

The *Queen's Advocate* and *Admiralty Advocate* for the seizor; *Dr. Addams* and *Dr. Twiss* for the claimants, contended that there could be no possible doubt as to the neutrality of the vessel, and that she ought to be restored without further proof. The rule that the absence of the bill of sale was a ground for further proof was not of universal application, but must be qualified by the circumstances of the case.

Dr. Lushington.—The bill of sale not having been produced, this would clearly be a case for further proof on that ground alone. There is, however, another equally strong. The claim is given in on behalf of two persons, the Messrs. Huger; but the master in his evidence describes the ship as belonging to other parties. The explanation which has been given of that circumstance may or may not be true, but that explanation can only be received by the Court on further proof. It is an imperative rule of the Prize Court that the master must be acquainted with the ship-papers, and be able to state without doubt or hesitation who are the owners. Further proof must be given.

The *Queen's Advocate*.—I must ask the Court in this case to

allow the captors to give further proof, as I am instructed that we have proof of the most important character as to the true ownership of this vessel. 1855 *December* 12. THE MARIA.

The Proctor for the claimant thereupon prayed the Court to allow him to bring in a special allegation.

THE COURT.—In that case all difficulty is removed. I should have hesitated to open the case to further proof on the part of the captors; but if the claimant elects to proceed by plea and proof, that, of course, will open the case to both parties.

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[Spinks, 322.] [10 Moore, P. C. 491.]

Practice—Further Proof—Ship's Papers and Depositions—Blockade.

Rule as to the admission of further proof by the captors. By the Law of Prize, the evidence, whether to acquit or condemn the ship, must, in the first instance, come from the ship's papers and the primary depositions of the master and crew; and the captors are not, except under circumstances of suspicion arising from the primary evidence, entitled to adduce any intrinsic evidence in opposition.

In a case where no suspicion of an intention to break a blockade appeared from the ship's papers, or the primary depositions, the Judicial Committee (affirming the interlocutory decree of the Admiralty Court) refused the admission of further proof by the captors to contradict the depositions with respect to the place of capture.

The principle laid down in the *Ostsee* (*ante*, p. 432), that a claimant upon restitution of the ship is entitled to costs and damages from the captors only in circumstances where the ship was in no fault, and was not by any act of her own, voluntarily or involuntarily, open to any fair ground of suspicion, approved.

A neutral vessel was seized for breach of blockade. She was chartered for a voyage from Umea to the neutral port of Haparanda in Sweden, at the head of the Gulf of Bothnia, and had come across the Gulf of Bothnia from the Swedish towards the Finland coast, but not in a straight course from the neutral port she started from to the neutral port she was bound to; and when descried and followed by her Majesty's ships did not slacken sail, but pursued her course till brought to by a shot from the captors. *Held*, to be such an appearance of an intention to commit a breach of the blockade as to warrant the suspicion of the captors, and to entitle the claimants upon restoration to a decree of simple restitution only, without costs and damages.

THIS vessel, under Lubeck colours, sailed from Lubeck with a general cargo of sugar, coffee, tobacco, &c., bound, according to 1856 *January* 18, 20. *July* 9, 10.

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the ship-papers, for Haparanda, in Sweden. On the 14th of November last she was captured by her Majesty's ships *Tartar* and *Dragon* for an alleged attempt to break the blockade of Jacobstadt.

A claim for the ship and cargo was given in by the master on behalf of the respective owners, citizens of Lubeck.

The master in his deposition swore that he was captured between the 63 and 64 degrees north latitude, about twenty miles from the land, and only just within sight of the coast of Finland.

On behalf of the captors a certificate or statement was brought in to the following effect:—

"William Fitzherbert Ruxton, lieutenant, and William Belford Stubbs, lieutenant, have deposed before me that they were on the deck of her Majesty's steam ship of war the *Dragon*, when at anchor inside the Island of Maskar, off the town of Jacobstadt, on the coast of Finland; that on the morning of the 14th day of November, 1855, and at about half-past 8 o'clock a.m., they saw a schooner apparently running for the anchorage off Jacobstadt, about three or four miles off, and that they reported this circumstance to me; also, that on opening the point of the Island of Maskar, which would give a full view of her Majesty's ships of war *Tartar* and *Dragon* at the anchorage, this schooner set her boom mainsail, and hauled out on the port tack, which proceeding they also reported to me; and that this schooner was consequently kept in view until she was detained by her Majesty's ship of war *Tartar*, about seven miles N.N.W. of Jacobstadt.

"I certify that the foregoing reports were made to me, and also that I myself saw the schooner running for the anchorage off Jacobstadt, and afterwards haul out on the port tack.

"Dated on board her Majesty's steam ship of war the *Dragon*, and signed by us in the harbour of Hernösand, in Sweden, this 18th day of November, 1855.

"WILLIAM FITZHERBERT RUXTON, Lieutenant,
"WILLIAM BELFORD STUBBS, Lieutenant,
On board her Majesty's steam ship of war, the *Dragon*.

"WILLIAM W. STEWART,
"Signed in my presence,
"Captain of her Majesty's steam ship of war the *Dragon*."

When the case came on for hearing, the counsel for the claimant

protested against this irregular attempt to introduce captors' evidence, and the Court remarked that the statement certainly could not at that stage of the proceedings be received as evidence; but that, to the best of its recollection, the practice in former times was, when either captor or claimant prayed to be allowed to bring in further proof, for him to state what he proposed to prove. The Court also said that the counsel must argue the case, before it could come to any decision upon it.

The *Queen's Advocate*, for the captors.—The present is a case in which the Court will scarcely refuse to allow the captors to bring in further proof as to the place of capture. Even from the depositions there is so much doubt about the *Aline and Fanny*, that, under the 22nd section of the Prize Act, Russia, 1854, the Court would be justified in admitting further proof. The destination is said to have been Haparanda, lying at the head of the Gulf of Bothnia, so that the vessel was off the enemy's coast the whole of the way, and was under considerable temptation to enter the port of the enemy. Wherever she entered she would have had no difficulty with regard to her bills of lading. It appears from the depositions, that in the course of her voyage she had, without any assignable reason, put into two Swedish ports situated in the narrowest parts of the Gulf of Bothnia, though at the time the wind was favourable for her alleged destination. The inference from such conduct was, that she had put in there to obtain information respecting the blockading squadron, in order to slip into an enemy's port if she had the opportunity of so doing. Though the master swore that he was captured twenty miles from the enemy's coast, yet the captors stated that he was captured about seven miles from Jacobstadt, and they prayed the Court to allow them to bring in further proof to that effect. Authorities are not wanting for such a course: the *Romeo* (*k*), the *Charlotte Christine* (*l*). The reasons for adopting such a course are far stronger now than formerly, inasmuch as captors are now liable to condemnation in costs and damages, unless there appear to be probable cause of seizure. The officers of the navy are in this

(*k*) Vol. I. p. 568. (*l*) See note next page.

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predicament; if they do not seize vessels apparently attempting to break the blockade, they are liable to be tried by a court-martial; if they do seize them, they are liable to be condemned in costs and damages if the ship-papers disclose no ground of suspicion, and the master boldly swears he was captured many miles away from the enemy's coast. Nothing can be easier than to have the ship-papers correct for a legal destination, and to have a story already prepared in case a British man-of-war should happen to fall in with them. The Court can hardly leave her Majesty's officers in such a predicament, and refuse to allow them to give proof of the actual place of capture.

Dr. Deane, on the same side, referred to the Court's remarks on the *Haabet*, in the case of the *Leucade* (*m*), and contended that there must be some mistake, as the decision in the *Charlotte Christine* (*n*), in which Lord Stowell admitted captors' evidence, was subsequent to that of the *Haabet*, in which he expressed his opinion strongly against such evidence. He also cited, from the manuscript notes of the late Dr. Burnaby, the judgment of Lord Stowell in the case of the *Friede* (*o*).

Dr. Addams, for the claimant, contended to the effect of the judgment as to the admission of captors' evidence, and cited the *Haabet* (*p*), *Charlotte Christine* (*n*), and the *Fortuna* (*q*). He also contended that as there was nothing whatever in the ship-papers to raise any suspicion that the vessel was not going to any other port than her alleged destination, she ought to be restored with costs and damages.

The *Queen's Advocate* having replied,

THE COURT reserved its decision.

(*m*) *Ante*, p. 473.

(*n*) 6 C. Rob. 101. Not reprinted. A question of fact as to whether a vessel was breaking a blockade. As to the admission of captors' evidence, it is stated: "Permission was given to the captors to answer the representation [contained in the master's depositions], and affidavits were now exhibited from the commanding officer and other officers and men of the capturing vessel."

(*o*) *Post*, p. 554, n.

(*p*) Vol. I. p. 524.

(*q*) Vol. I. p. 193, note.

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DR. LUSHINGTON.—This is a Lubeck vessel, laden with a general cargo. She sailed from Lubeck, and according to the evidence of the master was bound to Haparanda, in Sweden, a destination admitted to be lawful. She was captured on the 14th of November in the past year, 1855, and the alleged ground of her seizure and detention is, that she was attempting to break the blockade of the coast of Finland. The existence of the blockade and its legality is not disputed; the point at issue, or sought to be put in issue, is, the breach of the blockade.

The Court, according to its ordinary practice—a practice affirmed and sanctioned by all the highest authorities of the law of nations—looks primarily to the ship-papers and the depositions. With regard to the ship-papers, one single observation will suffice. As far as the bills of lading and documents of that description can tend to prove the destination, they all point, as strongly as such documents can do, to a destination to Haparanda.

I then come to the depositions. The master, on the 3rd interrogatory, says, "The ship was seized between 63 and 64 degrees of north latitude, about twenty English miles from land; we could just see the coast of Finland, and I suppose we were seized for being too near the Finland coast—so the captain of the *Tartar* told me." On the 8th interrogatory he says, "that the schooner put into Oregrund, in Sweden, and afterwards into Umea, also in Sweden, and the next day she was taken." On the 30th interrogatory, he deposes, "when I left Umea, the day before the schooner was seized, I had to steer south-east, and when we made the light-house, on the little island of Gadden, we steered east-north-east to get off the Swedish coast, on which we should have been driven, had the wind blown hard. My proper course was never altered, save to keep free from the Swedish coast. When the wind is from the north-east it is very dangerous, and we are obliged to keep well off the land." Again, he says, "we were then twenty miles about from the coast of Finland." On the 35th interrogatory, he denies all attempts to break the blockade.

The evidence of the other two witnesses is not material. It does not contradict, but, so far as it goes, supports the testimony of the master.

It has been argued that there is an inconsistency in the evidence,

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as to the cause of putting into Oregrund and Umea. Now, even if this were so, and I confess I can see very little difference between distress of weather and contrary winds, I do not perceive how such difference could affect the decision of this case. It was perfectly competent for this vessel to go into any Swedish port she pleased, and for any reason she thought fit; and I am really at a loss to understand how entering a Swedish port would affect the question of blockade: how so doing could render a breach of blockade more probable, or tend to prove a breach of blockade.

Reference has been made to the log, and various deductions attempted to be drawn from the entries therein. It has been said that the ship went to Abordso, and not to Umea, Umea being situated much higher up; but it appears to me that this objection is open to a similar answer—what possible criminal motive can with any logical deduction be ascribed to such a misdescription, even if it be one? And is it not most probable, that the misunderstanding arose from the want of knowledge of the locality, and that Abordso may be the entrance to Umea, and is confounded with the town itself? I apprehend that, nautically speaking, it is not unusual to describe the entrance to a place as the place itself; for instance, in calling at Cork for orders, it must frequently happen that the vessel never attempts to enter the harbour at all—merely calls at the mouth of the river. I have no right, nor is it consistent with justice, to assume guilt from a statement that is not clearly intelligible to me, and which does not furnish some rational and probable ground for imputing an unlawful intention.

Then how does this case stand? The captors have not asked for Trinity masters; they have not contended that on the evidence, as it now appears before the Court, condemnation could be decreed: that is to say, upon the ship-papers, the depositions, and log—the primary evidence in the case. I apprehend, therefore, upon the present evidence, it is impossible for me to say that a breach of blockade has been committed—the only ground upon which condemnation is prayed—that I cannot require the claimants to produce further proof when already the papers point to a lawful destination, and when all the evidence in preparatory is to the same effect, and the *onus* is on the captors; and that consequently I must either restore or receive captor's evidence. I consider this

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to be a case in which the depositions, ship-papers, and log, do not afford any ground for suspecting—any reasonable ground for supposing—that this ship was committing a breach of blockade.

At the risk of occupying more time than I would wish, I state these facts in detail, because I think it will presently appear that inconvenience has arisen from some reports furnished at previous times, from an attempt to render those reports too short and too succinct; and they have left the Court, and every person whose duty it is to study such reports, in a considerable state of doubt and difficulty in such cases.

Now, in the present case, certain certificates were brought in on behalf of the captors. They could only be offered as statements of what the captors alleged they were desirous of proving, if they were permitted so to do by the Court. The Court could not regularly receive them as evidence in the first instance, even if they had been presented in the most formal shape, for the Court is bound, as I think, when a case comes before it, to hear it upon the original and proper evidence in the case—the depositions and ship-papers. But though the Court could not in that stage receive the certificates as evidence, yet according to my recollection the practice of the Court has always been to permit both the captors and claimants to state at the hearing any facts they may deem conducive to their interest, and to pray leave to prove them, and for the Court, after hearing the case on the primary evidence, to deal with such application as it may think fit.

I cannot deny that on some occasions the strict rules of practice have in such cases been departed from, and that the Court in former times has been induced, when statements have been made founded upon affidavits or other documents, to look at them even when first offered in an irregular shape; but still only with a view of more formal proof, if such statements should be admitted to proof at all. Such distinctions may not always have been adverted to in the reports. My meaning is that a statement has been offered, in the shape either of a certificate or affidavit from the captors—and the Court has taken into consideration the facts stated in that certificate, or that affidavit, without admitting the further proof at all, but merely, if I may use the expression, *de bene esse*, has discussed the question at the time without determining whether

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the evidence was admissible or inadmissible, and has decided against the captors, saying, "I will give you the benefit of presuming that such evidence has been given in a formal shape." I am afraid that that has occurred more than once in former days, and I will presently set forth the reasons why I think so.

Under these circumstances, the prayer of the captors is that I should receive further proof to the effect that this ship was running for Jacobstadt, a blockaded port; that on seeing two of her Majesty's ships of war she altered her course, was chased, and was captured seven miles to the north-north-west of Jacobstadt. The claimants pray that I should reject that proof and decree restitution with costs and damages.

Before I approach the main question, I will observe that the evidence offered on behalf of the captors is not as to any collateral point, but for the purpose of contradicting and disproving the original evidence in the cause, and that even if it were admitted, and no further proof were offered by the claimants, the Court would be placed in the predicament so forcibly described by Lord Stowell: the predicament of having to determine the case without any satisfactory means of deciding upon the credit due to the respective parties.

But, passing this by, I come to the main question. The case, as it stands, being according to my opinion a case for immediate restitution, ought the Court to receive evidence to contradict the depositions and the ship-papers, and to prove a breach of blockade?

I have already, in other cases, expressed my opinion that the Court ought not to receive such evidence, and I have stated my reasons, and I have no intention to repeat them. I refer especially to the *Leucade* (*t*).

But as some cases have been cited by the counsel for the captors, which have not on former occasions been brought under the consideration of the Court, I deem it to be my duty, in a matter of so much importance, to consider these cases, and to inquire whether they ought to induce the Court to depart from its former opinion. These questions were at all times replete with difficulty; and that difficulty is now greatly augmented when the consequences may be,

(*t*) *Ante*, p. 473.

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not simple restitution to the claimant, but condemnation of the captors in costs and damages, a consequence which formerly would not have followed. It is therefore both my duty and inclination to see if any fresh light can be thrown on this subject.

The question, then, which I propose to myself is this: whether Lord Stowell has or has not expressed his judicial opinion against the admission of captors' evidence in cases similar to the present? That is the question I have to determine, and I pray that these words may be remembered, for there are many distinctions which may arise in cases similar to the present.

It appears to me that the case of the *Haabet* (*u*), decided on the 20th of June, 1805, and the case of the *Glierktigheit* (*x*), decided on the 25th of July, 1805, furnish conclusive evidence of the judicial opinion of Lord Stowell on this question, and that he had supported such opinion by very powerful reasoning.

Of course, I do not mean to go over the case of the *Haabet* again, but I may refer to one single observation there. After having stated certain facts, he says: "The general rule of law, notwithstanding, is that on all points the evidence of the claimants alone shall be received in the first instance; and if no doubt arise upon that view of the case, the Court is bound, by the general law, as well as by the act of the British legislature, to take those points as fully demonstrated." It is upon that exposition of the law that the Court has hitherto acted, and founded all its previous judgments.

Now, it will be desirable to see whether Lord Stowell, subsequently to the case of the *Haabet*, in any degree departed from the opinion so strongly and so forcibly expressed by him; and, I may add, not only forcibly expressed in the very passage I have read, but in the whole reasoning he has set forth in giving judgment in that case.

In the course of the argument reference was made to what fell from the Court in the case of the *Leucade* (*y*). I repeat what I said in that case, and I am not inclined, till further advised, to depart from one single syllable that I uttered there as being my conviction of what is the law and practice of this Court. I believe

(*u*) Vol. I. p. 524. (*x*) Vol. I. p. 527, note. (*y*) *Ante*, p. 473.

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I never did say, and I certainly did not mean to say, that, antecedent to this case, captors' evidence had never been admitted in cases similar to the *Haabet* and the *Glierktigheit*. I could not well have thought so, and if I said so it must have been a mere slip of the tongue, and for obvious and plain reasons, because these two cases themselves furnish proof that the evidence of captors in like cases had been admitted, and the effect of these cases is, that Lord Stowell held the former instance of the admission of such evidence to be *mala praxis*, and expressed his opinion that it would not be expedient to follow it in future. They furnish, in fact, evidence that such practice would not be unusual in these Courts. What I said was this: "Now, to the best of my knowledge and belief, the practice of this Court was as follows; I speak of general rules, to which there may be few, and very few exceptions, as in the case of the *Haabet*. Captors' evidence as to the fact attending the actual capture, for the purpose of procuring condemnation, was almost universally excluded"—almost—"I might say, with few exceptions, such as the case of the *Haabet*, and the other case cited. Those are the only two cases on record"—I mean in the reports, of course—"and Lord Stowell shows in his judgment, and it also appears in a note to the *Haabet*, that he was determined not to admit that practice in future." I really am not sensible that there is any error in the statement of the law on the part of the reporter; but if there be an error, the error is with me and not with the reporter.

Now, examples of what has been done prior to the case of the *Haabet* and the *Glierktigheit* would be, I think, of little or rather no weight, because they are acknowledged by Lord Stowell and are repudiated by him. The true question would be: did Lord Stowell depart from the principles he laid down in the *Haabet* and in the *Glierktigheit?* Now, though this question could not be affected by former practice, still I deem it right to notice the case cited by Dr. Deane from Dr. Burnaby's notes to the case of the *Der Friede* (*z*). I have gone through that case. That case com-

(*z*) In the possession of Dr. Pratt, who has kindly favoured the editor with a copy. "Captors' affidavits admissible in cases of blockade. Friede, Mehrtens, October 6, 1803. Question whether party has been guilty of breach of blockade. I do not feel that indisposition to affidavits

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menced on the 14th of February, 1803. I have that case here, but I really do not know that I should be justified in reading through the whole of it. On the 3rd interrogatory, in that case, the master swears that "the ship was seized in the river Weser, lying close to the Mellen buoy, lying just above the Red Sand, in the month of August, 1803, by reason of his bringing his ship to anchor in the river after having been desired by the captors to proceed to sea." I had better, perhaps, state what the general fact was. The master entered the river Weser, ignorant of the blockade which had taken place, and he was warned by one of his Majesty's ships of war, and was desired to go elsewhere. Instead of going elsewhere, he anchored his vessel in the immediate neighbourhood of his Majesty's ship of war, and the officer commanding that ship, being of opinion that he intended to break the blockade, ordered him away. He refused to proceed unless he could get a pilot, and a pilot he said he could get cheaper in the river than by going to Ider, whither the commanding officer desired him to go. In consequence of this the vessel was seized and detained, and brought here for adjudication.

I must observe that in this case there was the most extraordinary irregularity I ever saw in any case. Two of the captors' witnesses were persons from on board his own ship, not from the ship captured. There was an affidavit bringing in the ship-papers sworn by a person who never saw the ship-papers in his life; in short, there was a mass of irregularity such as I never remember to have occurred in any case during my practice. This was long before I was conversant with these Courts.

Now I have looked at the minutes of this case which I now hold in my hand, and I will state what they were:—On the 6th of October, the claimants' proctor brought in a protest of the master, mate and mariner, and a further attestation of the master,

of captors;—generally true that evidence that Court proceeds on, is that afforded by claimants. But circumstances occurring at moment of capture are open to both—standing on equal footing as to knowledge and nearly so as to interest, objection therefore to evidence from captors not so strong. In other cases there are documents as well as parole evidence; but evidence at moment of seizure in blockade must be parole. Lay down no general rule as to affidavits from captors."

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and prayed the ship to be restored. In the minutes there is nothing said as to any prayer on the part of the captors—nothing at all—to be allowed to give evidence in the case. The Queen's Proctor merely prayed condemnation on the evidence brought in on the part of the captors. Whether it was received or not I cannot say, because the case was appealed, and there the captors' affidavit was exhibited; but whether or not that affidavit was ever received by Lord Stowell the minutes make no mention of.

What, then, was the result of the case? Lord Stowell delivered his judgment, which was read by Dr. Deane from a short note by Dr. Burnaby. Lord Stowell, taking the evidence of the captors into consideration, was of opinion that the seizure was premature, and he restored the vessel. That was the state of the case; but he does not say he admitted the evidence as captors' evidence; but I presume he had admitted all the facts, and even upon the captors' own evidence he restored the vessel. Upon this state of things the case went up on appeal, and the consequence was that the judgment was affirmed with costs. Their Lordships were not much in the habit of giving costs, but they did it on that occasion. So much for this state of the case. I cannot undertake to say exactly what was done, because the minutes do not afford me that satisfactory information which I should have expected; but this is quite clear: among the papers printed there is the affidavit of Captain Rosenhagen and others, namely, the affidavits of the captors, dated September 23rd, 1803, and there is also the affidavit of a seaman as to the capture, dated September 12th, 1803.

Now, if I am to form a conjecture, and it is really no more than a conjecture, from such imperfect materials, I should say that the Court heard the statement of the captors, and came to the conclusion that even if it had been admitted it could not have worked the effect of condemnation. However, I do not lose sight of the observations which Dr. Burnaby reports as coming from the mouth of Lord Stowell. I mean the observations respecting the reception of evidence as to the place of capture, which if correctly reported—which there is no reason to doubt—are very strongly in favour of receiving captors' evidence under the circumstances. I do not lose sight of those observations, but I think the answer to them is the judgment in the *Haabet*, which goes exactly to the

point as to the place of capture itself. If Lord Stowell, in 1803, did express himself in the terms which the note of Dr. Burnaby's states he did, then the answer is, that two years afterwards, in 1805, he changed his opinion on that point—the point of receiving evidence from the captors as to the place of capture.

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There were two other cases cited by her Majesty's Advocate: to both of them I have referred, and it will be well to make an observation upon them. One was the case of the *Romeo* (*a*). I think that the question then under the consideration of the Court—viz., the admission of a document from another ship—depends upon reasons so wholly different from the present, that it cannot be made applicable with any stringency to the case now under consideration. With regard, however, to the general reasoning attributed to Lord Stowell in that case, I am compelled to say, with all my respect for that great judge, I cannot concur in it. Lord Stowell is said to have expressed himself thus (*b*): "The Act of Parliament ordains, that if any doubts arise the Court may direct further proof; but it has not limited the cause of doubt to evidence actually on board, nor could it with propriety have imposed any such restrictions." Now this is the passage from which I am compelled to dissent: "The Court itself might possess information that would completely falsify the claim. Could it be said in such a case that, because the depositions and the formal papers were consistent, there should be no means of extracting the real truth of the facts? Could it be expected that the Court should proceed to judgment on the mere formal evidence, in opposition to its own private conviction that the whole of what was there stated was false? It would be impossible to maintain that proposition to the utmost extent."

I must say I conceive that the Court, as to facts—as to all that relates to the ship, and its destination and employment—ought to know nothing but the evidence before it. As to the law and the fact of blockade, of course the case is wholly and entirely different, and here the Court would avail itself of any information which came within its reach or power. I am, therefore, bound to declare that I wholly discard the notion that the Court may act on any

(*a*) Vol. I. p. 568. (*b*) Vol. I. at p. 569.

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information not judicially brought before it. I do not think it necessary to go further into that case, because the question of admitting evidence from on board another ship really is governed on principles entirely different from this.

I now come to the case of the *Charlotte Christine* (*c*), which was also cited. That case was decided on the 1st of August, 1805, and after the case of the *Haabet*; but it is to be remarked that the captors' evidence was received prior to the decision in the *Haabet*, as appears by the minutes of the proceedings in that case.

This fact alone would prevent the case of the *Charlotte Christine* from being an authority over-ruling the *Haabet*, even if there were no distinguishing circumstances; but it is most remarkable that the judgment throughout is founded upon the claimants' evidence, and not upon the captors'; and if any conclusion is to be drawn from it at all, it would rather appear that Lord Stowell, having admitted the captors' evidence prior to the case of the *Haabet*, was reluctant, after having given his judgment in that case, to make any use of the captors' evidence in the case of the *Charlotte Christine*.

I will not read the whole of that judgment in order to make good my words, because I think that would be wholly unnecessary, but I will read merely the conclusion of it. After having referred to the evidence of the claimants throughout, Lord Stowell says: "On a full consideration of all the circumstances of the case, and on the representation of the party himself, I am bound to pronounce that this ship and cargo were sailing in breach of the blockade."

Now I commend to persons the whole of that judgment, and if any one wishes to understand this subject accurately and minutely, he will there see a specimen of Lord Stowell's skill—he will see how he was enabled to pronounce that judgment, as he did pronounce it, without reference to the captors' evidence (though he had admitted it), and, as it appears to me, clearly avoiding that evidence, in accordance with the opinion which he had expressed in the case of the *Haabet*.

But this gives rise to another observation when one looks into it minutely. In the report of this case, it appears that on the original

(*c*) See *ante*, p. 540, note.

depositions the master had made certain statements. Now what follows in the report? It does not appear that it is the evidence, but it is, in fact, a statement of the learned reporter, and a mixture of what did appear in the original depositions, and in the captors' evidence. Now that should be borne in mind if this case is to be understood; and then there is another fact that must be noted here, viz., that this was a case where there was suspicion on the original evidence—a clear cause of suspicion, the vessel being within a mile and a half of the French coast, of which the greater part was blockaded, in the immediate neighbourhood of Havre. Therefore, in all these points of view, the *Charlotte Christine* would not operate as a precedent.

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There is another case not reported, for the discovery of which I am indebted to the registrar; that is, the *Rapid*. I mention this because my object is to lay before counsel and the public the whole that can be said on the question, whether it makes in favour of my opinion or not. That case no one can well understand until he has taken the trouble of going into the original papers, and seeing what actually did occur. The *Rapid*, as reported in Dr. Edwards' Admiralty Reports (*d*), is merely a case which was decided on the question of carrying despatches. Dr. Edwards states that the question of destination having been abandoned by the captors, the case was argued only on the point of carrying despatches. The case was carried up to the Court of Appeal; and I find—here are the papers now before me—that one of the principal reasons stated, on behalf of the captors' counsel, for carrying up that appeal is, that the vessel was going to a blockaded port.

Now there the captors' evidence was admitted by Lord Stowell, and admitted after the case of the *Haabet*. I think it right to state that. But I am bound to say, after having looked at this case

(*d*) *Ant*, p. 45. Minutes in the case of the *Rapid*. "1810. Feb. 6. The cause came on for hearing, when the judge directed the same to stand over, and reserved the consideration of the effect of carrying the despatches. Feb. 16. The cause again came on for hearing, when the judge took time to deliberate whether he should permit the captors to exhibit affidavits. March 6. The judge, having maturely deliberated, gave permission to the captors to bring in attestations."

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with some care, I cannot venture to pronounce an opinion how, why, or wherefore captors' evidence was admitted on that occasion. There is no report of it that I am aware of anywhere, beyond what I have stated above. The case occurred within my own time, but I have no recollection of it, nor any note of it that I can find. I think, however, there is a circumstance in that case which accounts for the admission of captors' evidence without infringing on the general principle. That circumstance is this: there was an admitted confusion in the log. It was admitted that one of the days on which the log ought to have been entered up had been omitted, and that the entry of the subsequent day applied to the preceding. There was a cause of suspicion on the primary evidence which might or might not, for I do not know, be the reason why captors' evidence was admitted.

I have only to observe that I have mentioned this case, because I am anxious to disclose all that I know upon the question; and if the present case should be carried to the Court of Appeal, I hope this case and others will be made available, and that their Lordships will be in possession of all the information which I at least can throw on the subject.

These are all the cases, so far as I can find—though I will not say what the investigation of the printed volumes might produce—having any application to the *Haabet*, or to the question now before me. It appears to me that they do not in any degree whatsoever impugn the authority of that deliberate judgment, nor leave to me any lawful and just cause for departing from it. Sure I am that the reasoning in the *Haabet* and the *Glierktigheit* cannot in any degree be refuted, and the consequences likely to arise from a contrary doctrine cannot be denied.

It is true, however, as has been forcibly argued by her Majesty's Advocate, that circumstances have been somewhat changed, and that the captors run greater danger of being condemned in costs and damages than they did formerly. But however this may be, and for aught I say to the contrary, it may be a reason for the Judicial Committee to depart from the authority of the *Haabet*, yet I do not think it is competent to me to adopt such a course. Were the admission of captors' evidence an indisputable corollary

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to the case of the *Ostsee* (*f*), it would be both my duty and my inclination to acknowledge it; but I do not think that such a consequence can be fairly predicted to follow from that judgment, and I think so both from the terms of the judgment itself, and from the fearful consequences which, in the opinion of Lord Stowell and of myself, would necessarily follow from the alteration of the practice. If, therefore, the practice is to be altered in this particular, and if captors' evidence is to be received, it must be the act of a higher authority than mine; it must emanate from the Judicial Committee.

For these reasons my decree will be as follows:—In the present case I must reject the prayer of the captors for the admission of the evidence stated. I must restore the ship and cargo, but without costs and damages, because I think that the place of capture, as originally described by the master himself, proves that the seizure and detention were not without justifiable cause.

To prevent mistakes hereafter, I must add one other observation. I do not mean to say, nor, as I apprehend, did Lord Stowell, that there were not cases, even as to the place of capture, where captors' evidence might be received. I can conceive cases in which it might appear from the original evidence and the depositions that there were doubts respecting which it might be just and consistent with principle to admit captors' evidence; but these would be exceptional cases, and not, in my judgment, resembling the present, and would have to be determined upon their special circumstances whenever they might arise.

My decree is founded upon the conviction that no serious doubt arises on the primary evidence in this case—the depositions and ship-papers—that this ship was, according to the evidence, taken twenty miles from the coast of Finland. If that can be constituted into a cause for detention, and to justify the production of captors' evidence, it does appear to me that any vessel navigating the gulf, which is about sixty miles wide, might be detained on a similar presumption. The decree is, therefore, simple restitution.

[The captors and the claimant appealed.]

(*f*) *Ante*, p. 432.

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Against this decree the present appeal was prosecuted by the captors, to which the claimant adhered, insisting that the judge ought to have decreed the ship and cargo to have been restored, with costs and damages.

The *Queen's Advocate* (Sir John Harding) and *Dr. Deane*, for the appellants (the captors).

This case involves an important question in prize law. If the principle laid down in the judgment of the Court below—that where there is no doubt from the depositions of the master and crew the captors' evidence cannot be received, but that in special cases in which there may be doubt it may be proper to admit further proof—be maintained, in future blockade will be but an empty ceremony. What is to be done when a claimant's case may be *primâ facie* quite consistent, but where it is, nevertheless, deliberately and knowingly false? Nothing can be easier than to have the ship's papers correct for a legal destination. Surely, the captors in a case like the present, when they offer to give distinct and material evidence in total contradiction of that of the primary depositions of the master and crew as to the place of the capture, namely, that the seizure was twenty miles from the enemy's coast, ought not to have been excluded from giving such evidence. The relevancy of such evidence cannot be doubted, for the ship, according to the claimant's own evidence, was nearer the coast of Finland than was necessary, if in the honest prosecution of her voyage to Haparanda. There is no inflexible rule to exclude such evidence. Story on Prize Courts (edit. by Pratt), pp. 23, 26, is an illustration that the captors' evidence may be admitted, as in the cases of the *Maria* (*g*), the *Sarah* (*h*), the *Der Friede* (*i*), the *Haabet* (*k*), the *Glierktigheit* (*l*), the *Charlotte Christine* (*m*), the *Rapid* (*n*), the *Sally* (*o*), the *Bothnia and Jahnstoff* (*p*). The

(*g*) Vol. I. p. 152.
(*h*) Vol. I. p. 318.
(*i*) Not reported. Cited in Court below from Dr. Burnaby's MS.
(*k*) Vol. I. p. 524.
(*l*) Vol. I. p. 527, note.
(*m*) See note *ante*, p. 540.
(*n*) In 1810; not reported in any reports. See *ante*, p. 551.
(*o*) 1 Gall. Amr. Rep. 401.
(*p*) 2 Wheaton, 169.

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learned judge of the Court below relied upon the case of the *Haabet*, but that case is qualified by the *Romeo* (*q*). Although the admission of further proof might not lead to the condemnation of the vessel, yet it would justify the captors in her seizure. The case of the *Ostsee* (*r*) has introduced a new and material alteration in respect to costs and damages. If the Court below thought there was no suspicion, why did it not condemn the captors in costs and damages? The claimant, however, has adhered to the appeal, and prays for costs and damages, which ought never to be given without allowing the captors to show that the whole of the depositions of the master and crew were false.

Dr. Addams, for the respondent.

This ship was seized whilst in the prosecution of her voyage between two neutral ports, without any ground to justify her capture. The bills of lading and documents found on board proved that the destination of the ship was Haparanda, in Sweden, as the master deposed. The case is one removed from all possible doubt or suspicion which alone could necessitate further proof. The *Maria* (*s*). The authorities relied upon by the appellants have no direct bearing upon this case, for there is no reason to doubt that the master has not deposed to the truth. He was in ignorance of any technical rule excluding the captors' evidence. If, then, the judgment of the Court below was correct in restoring the ship and cargo, the restoration ought to have been with costs and damages, as in the case of the *Fortuna* (*t*), which decision was founded upon the *Ostsee* (*u*); the rule there laid down being that if no probable cause appears from the ship's papers and depositions, the claimant is entitled to restitution with costs and damages, and not to a decree for simple restitution only. So far I submit the judgment of the Court below is erroneous.

Judgment was reserved, and now delivered by

The Right Hon. T. PEMBERTON LEIGH.—In this case, an inter-

(*q*) Vol. I. p. 568.
(*r*) *Ante*, p. 432.
(*s*) *Ante*, p. 536.
(*t*) Not republished. See *ante*, p. 238, note.
(*u*) *Ante*, p. 432.

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locutory decree was pronounced by the judge of the Court of Admiralty on the 30th of January, 1856, refusing to allow the captors to bring in further proof, as prayed on their behalf, and decreeing the simple restitution of the vessel and cargo, without costs and damages. Against this sentence the captors have appealed, on the ground that the Court ought to have admitted evidence on their part. The claimant has presented a separate petition of appeal, on the ground that costs and damages ought to have been awarded to him.

With respect to the admission of evidence on the part of the captors, the rule of the Prize Courts in this country appears to us to be accurately stated by Story on Prize Courts (Pratt's edit.), referred to in the argument. At page 18 he says: "By the law of prize, the evidence to acquit or condemn must, in the first instance, come from the papers and crew of the captured vessel. The captors are not, unless under peculiar circumstances, entitled to adduce any extrinsic testimony." At page 24 he observes: "The Court is in no case concluded by the original evidence, but may order further proof on a doubt arising from any source or quarter; and it will sometimes direct it where suspicion is produced by extrinsic evidence. But this is rarely done unless there be something in the original evidence which lays a suggestion for prosecuting the inquiry farther; and when the case is perfectly clear, and not liable to any just suspicion, the disposition of the Court leans strongly against the introduction of extraneous matter, and against permitting the captors to enter upon further inquiry."

The first question is, whether the circumstances of this case were such as to require or to justify a departure from the general rule of acquitting or condemning the ship and cargo on evidence furnished by the ship's papers and the depositions of the crew?

Now, in the depositions of the master and the two other witnesses who were examined, it is stated that the ship belonged to owners at the neutral port of Lubeck; that she was chartered for a voyage to the neutral port of Haparanda, in Sweden (at the head of the Gulf of Bothnia); that she sailed from Lubeck on the 24th of October, 1855, with a general cargo, consigned by various merchants at Lubeck to their several correspondents at Haparanda; and that in the regular course of her voyage up the Gulf of Bothnia,

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she was captured on the 14th of November, 1855, by her Majesty's ships *Tartar* and *Dragon*, for an alleged breach of the blockade of the coast of Finland. It is positively denied that there had been any attempt or any intention to break blockade or to enter any Russian port.

As far as regards the ownership of the ship and cargo, the port from which she had sailed, and the port to which she was destined, and the parties to whom the cargo was consigned, the statement of the master and the other witnesses was entirely confirmed by the ship's papers, which were all perfectly regular.

There was nothing in the story told by the master in itself improbable or inconsistent with any facts of public notoriety; but with respect to the ship's course, and the fact of her having been captured in the regular prosecution of her voyage to Haparanda, it was urged by the captors that the place in which she was captured showed that the account given could not be true; for that, according to the claimant's own statement, she was nearer to the coast of Finland, at the time when she was captured, than she ought to have been in the honest prosecution of her voyage; and they proposed to prove that while they were at anchor off the town of Jacobstadt, on the coast of Finland, on the morning of the 14th of November, 1855, and at about half-past 8 o'clock a.m., they saw the schooner apparently running for the anchorage of Jacobstadt, about three or four miles off, and that on coming within view of her Majesty's ships *Tartar* and *Dragon* she set her boom-sail, and hauled out on the port tack; and that she was detained by her Majesty's ship *Tartar*, about seven miles N.N.W. of Jacobstadt.

Now, with respect to the approach to the coast of Finland, the account given by the master is, that the ship had gone into the port of Umea, which is a port on the Swedish coast, nearly opposite to the port of Jacobstadt, on the coast of Finland; that she left Umea on the 13th of November, and was captured on the 14th, about twenty miles from land (which clearly means the land of the coast of Finland). He says he first saw the *Tartar* about half-past 8 o'clock in the morning, at the distance of about sixteen miles; that he did not change his course, but was pursued, and at 11 o'clock was brought-to by a shot fired by the *Tartar*. It does

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not distinctly appear how near the ship had approached to the coast of Finland; but the state of the wind and of the currents, and the nature of the channels, might make it necessary or advisable for this ship, without any evil intention, to keep to the Russian side of the Gulf of Bothnia, or, at all events, in tacking to approach nearer to the coast of Finland than would appear to be necessary by a mere reference to a direct course from Umea to Haparanda as appearing upon a chart. There was no such suspicion, therefore, arising from her being found so near the blockaded coast as could throw reasonable doubt upon the truth of the statement contained in the depositions, and confirmed by the ship's papers. We think that the learned judge exercised a perfectly sound discretion in restoring the ship upon the evidence before him, and rejecting any evidence of the captors.

We may observe that the evidence tendered by the captors would not have materially altered the case. The ship might have appeared to them to be steering for the anchorage of Jacobstadt, and might have appeared to them to have changed her course, in consequence of seeing her Majesty's ships of war; but the impressions produced upon their minds by these appearances cannot prevail against the positive statements of the master and crew, and the strong evidence from the ship's papers. As to the precise distance from the coast of the place of capture, no great certainty, from the nature of the case, is possible; and whether the actual capture took place twenty miles or seven miles from the shore, or, as is probable, at some intermediate distance, is not very important.

But then it is said by the claimant that the ship being restored, costs or damages ought to have been awarded to the claimants, on the authority of the decision of the Judicial Committee in the case of the *Ostsee* (*x*). This must depend upon the question whether this ship has brought herself within the class within which the *Ostsee*, in the opinion of the judges who decided that case, was clearly brought—that is to say, in the language there used, of a capture, "where not only the ship was in no fault, but she is not by any act of her own, voluntary or involuntary, open to any fair ground of suspicion."

It has been suggested at the Bar that a decision which proceeded

(*x*) *Ante*, p. 432.

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expressly on this ground has in some measure altered the practice of the Admiralty Court. If that be so, it should seem that such alteration can only have occurred because the practice itself had insensibly deviated from the principles by which it professed to be governed.

But however that may be, this case does not fall within the principles of that decision. Here there were appearances created by the act of the ship herself which might justly excite suspicion. She had come across the Gulf of Bothnia, at a point where, as we understand, the gulf is between fifty and sixty miles broad from the Swedish towards the Finland coast; she was not in the straight course from Umea to Haparanda. When she was descried and followed by her Majesty's ships then lying off the port of Jacobstadt, she did not slacken sail, but pursued her course, till she was brought-to by a shot from the *Tartar*, after what seems to have been a chase of above two hours. Surely these circumstances were abundantly sufficient to excite the just suspicion of the captors as to the character and purpose of this vessel, and to afford probable cause for capture, though those suspicions have been removed by the investigation which has taken place in the Admiralty Court.

We are therefore of opinion that the learned judge was perfectly right upon both points, and we shall humbly report to her Majesty our opinion that both appeals ought to be dismissed with costs.

With reference to an observation which we find in the judgment, it may be proper to remark that there does not appear to us to be anything in the decision of the *Ostsee* which ought at all to affect the exercise of the discretion of the Court in directing, or refusing to direct, further proof. Whatever the law upon that subject was before that decision was pronounced, such, in our opinion, it still remains.

[Spinks, 337.]

THE PANAJA DRAPANIOTISA (*y*).

Practice—Affidavit of Claimant—Residence—No Enemy Interest—Exception—Order in Council—Licence—Further Proof.

The affidavit accompanying the claim must state the residence of the claimant, and must negative all enemy's interest except where an enemy claims under an Order in Council or a licence.

A prayer for further proof must be founded on a statement of what is intended to be proved.

The omission of such statement renders a claimant liable to costs.

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This vessel sailed out of Odessa in ballast, under Greek colours, on the 30th of May, 1855. On sailing out of the harbour her master sent to her Majesty's ship *Niger*, which was then blockading Odessa, to inquire whether he might pass out for the Danube, and was informed that, if unladen, he might do so, but must first come alongside the *Niger* to have his papers examined.

The examination of the ship-papers and other suspicious circumstances led to her being seized as prize and sent to Malta, where the examinations in preparatory were taken.

An affidavit and claim were given in by Michael Zarifi, of Leadenhall Street, on behalf of "Paul Iraclidi, merchant and shipowner, a subject of his Majesty, Otho, King of Greece, the true, lawful, and sole owner and proprietor of the said ship."

When the case came on for hearing, the Queen's Advocate (with whom was Dr. Deane), for the captors, took a preliminary objection to the claim and affidavit accompanying it, that the place of residence of the person in whose behalf the claim was made, and also the usual denial that any interest in the property remained in any one "inhabiting within the country, territories, or dominions" of the enemy were omitted, and that consequently it did not appear that the claimant had any *locus standi* in the Court.

The Court said it would give no decision upon the point until it had heard the counsel for the claimant.

Dr. Addams, for the claimant, stated that this and other vessels had entered Odessa under Servian colours, and had been detained

(*y*) The case of the *Hariklia*, heard on the same day, was precisely similar, and the judgment of the Court applied to both cases.

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by the Russian Government, but subsequently released; that certain expenses had been incurred, which the owners were unable to defray, and that this vessel had been sold to Mr. Iraclidi, a Greek merchant, then residing at Odessa, but a subject of the King of Greece, and that he intended to dispatch her, and, in fact, did dispatch her to Odessa. He said, that if Mr. Iraclidi had continued to trade with the ship from Odessa, she would, though under Greek colours, certainly be liable to condemnation, but that it might appear that Mr. Iraclidi had a house in Greece as well as in Russia, and that the vessel was intended to trade exclusively for that Greek house as a Greek vessel; and that it might also appear that Mr. Iraclidi was at Odessa for a temporary purpose, and that he was about to quit it.

He therefore prayed the Court, under the circumstances, to admit further proof in explanation of the real facts of the case, and cited the *Jonge Klassina* (*z*), and the *Herman* (*a*).

The *Queen's Advocate* opposed the prayer, and contended for immediate condemnation, on the ground that there was no claim before the Court, as it clearly appeared that Mr. Iraclidi was a merchant resident at Odessa, and therefore totally *exlex*, and had no *persona standi in judicio:* the *Hoop* (*b*). He said that the claimant's counsel did not appear instructed to state what could be proved, if further proof were allowed, that the Court refused, in the *Nina* (*c*), to open a case to further proof, without information as to what could be proved, and when further proof could only lead to false evidence, and that no proof could possibly get rid of the master's evidence that Mr. Iraclidi was a merchant resident at Odessa (*d*).

(*z*) Vol. I. p. 485.
(*a*) Vol. I. p. 270, note.
(*b*) Vol. I. p. 104.
(*c*) *Ante*, p. 514.
(*d*) In answer to the 4th interrogatory, the master deposed: "I was appointed to the command of the vessel by Mr. Paolos Iraclidi, the owner, of Odessa, whereat he personally delivered up to me the possession, on or about the 22nd day of the month of May last. I left him at Odessa, where I believe him still to be, for he is established as a merchant thereat, and I believe it is his fixed place of abode, though I am not quite certain on this point. I know not how long he has resided at Odessa, nor where he was born, but I know him to be a subject, like myself, of the King of Greece." And in answer to the 8th interrogatory:

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Dr. Deane followed on the same side.

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DR. LUSHINGTON.—I reserved my judgment in these two cases, not because I entertained the slightest doubt what must be my decision, but for the purpose of considering: first, what was the practice with respect to claims and the affidavits in support thereof, and the prayers both of the captors and claimants; and secondly, what must be the description of the statement upon which the Court would decree further proof.

Now, speaking to the best of my recollection, and so far as I have been able to refresh my conviction by search as to matters with which I have not been directly conversant for so many years, and which involve only questions of practice and not principle, and consequently take less hold of the memory: with respect to the claim offered in this case, and the affidavit in support thereof, I have caused a search to be made as to the practice both in the former and present war, and I am glad to find that the principle and the practice, with a few unimportant exceptions, entirely concur.

The principle is this: that to support a claim in the Prize Court the individual asserting his claim must first show that he is entitled to a *locus standi*. No person to whom the character of enemy attaches can have such claim, save by the express authority of the Crown; therefore, to prevent deception, which might arise from the use of ambiguous terms, and to stop claims which might be preferred in one sense by the subjects of friendly or neutral states resident in the enemy's country and carrying on a trade there, it has always been deemed necessary that the claimant should describe, both affirmatively and negatively, the character in which he claims.

He must describe the place to which he belongs, and he must negative all enemy's interest in a form specially framed for that purpose, and intended to apply, to all intents, to any person resi-

"Whilst at Odessa, she was under the direction and management, in respect to her employment or trade, of the owner on the spot. Mr. Paolos Iraclidi, the party I have already named, with whom I should have had to correspond when away from Odessa."

dent within the territories of the enemy, to whatever country he may happen to owe allegiance (*e*).

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(*e*) The following is the usual form of claim and affidavit:—

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Master.)

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Appeared personally of , in the kingdom of Sweden, master mariner, and made oath that he is a subject of his Majesty the King of Sweden and Norway, and is duly authorized to make the claim hereunto annexed as agent, and on behalf of and , all of , in the kingdom of Sweden, merchants and shipowners, and subjects of his Majesty the King of Sweden and Norway, the true, lawful, and only owners and proprietors of the above-named ship or vessel , and of the freight due for the transportation of the cargo now or lately laden therein, and which ship or vessel was seized, to wit, by the officers of her Majesty's Customs for the port of , on the day of . And the appearer further made oath, that he verily believes that neither the Emperor of all the Russias, nor any of his subjects or others inhabiting within any of his countries, territories, or dominions, their factors or agents, nor any others enemies of the Crown of Great Britain and Ireland, had at the time of the seizure thereof, as aforesaid, or now have, directly or indirectly, any right, title, or interest in or to the said ship or freight, but that the same were at the time of the seizure thereof, and still are, and when restored will still be, the property of the said only, neutral subjects; and lastly, that the claim hereto annexed is (as he verily believes) a true and just claim, and that he shall be able to make due proof and specification thereof.

On the day of the said)
was duly sworn to the truth of this affidavit.)

Before me .

Admiralty Prize Court.

The Ship)
Master.)

The claim of of , in the kingdom of Sweden, master mariner, a subject of his Majesty the King of Sweden and Norway, on behalf of and , all of , in the kingdom of Sweden, merchants and shipowners, and subjects of his Majesty the King of Sweden and Norway, the true, lawful, and only owners and proprietors of the above-named ship or vessel , and of the freight due for the transportation of the cargo now or lately laden therein, and which ship or vessel was seized, to wit, by the officers of her Majesty's Customs for the port of , on the day of , for the said ship or vessel and freight, as the true, lawful, and sole property of the said and , neutral subjects, and for all such losses, costs, charges, damages, demurrages, and expenses as have arisen, or which shall or may arise, from or by reason of the said seizure.

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The excepted cases are where an enemy merchant claims under an Order in Council, or licence, and then, of necessity, the form is altered and the ground of the special claim inserted. The form of the affidavit has been altered from time to time, according to the States with which Great Britain was at war. Originally it excluded only persons resident in France; as the war became extended, it was altered to affect the subjects of other countries declared to be at war with Great Britain.

Now, it appears from the search that has been made, that in the war previous to this—that of 1798—the address of the persons for whom the claim is given has always been inserted. In the long list which I now hold in my hand, there is not a single exception, the address of the persons always being inserted—by the address I mean the particular place to which he is described as belonging. Then, with regard to the clause in the affidavit beginning thus: "inhabiting within any of the countries, territories, or dominions of so and so," there are certain exceptions. Out of thirty or forty there are three or four cases in which this clause is omitted; but these are special instances, and are entirely accounted for by the circumstances of each individual case. Such, for instance, is the case of the *Le Spanck*—it was necessary that the claim or affidavit should be special, because there were very special circumstances attending that case. The claim, for instance, was of this kind: the island from which the property had been shipped had at one time been in possession of the Crown of Great Britain, afterwards had been restored to France, and again re-conquered by Great Britain; the property had been shipped during the time when it was under French dominion, but, before the capture, the country had again become subject to Great Britain; the affidavit of claim was therefore subject to the alteration which was necessarily called for by such peculiar circumstances. Such was the case of the *Le Spanck*.

It is not necessary to mention the other cases; but wherever the exception has been inserted, it is fully warranted, and indeed required, by the facts of the case. It may, therefore, now be taken with regard to the practice in the prior war, that it was what I have stated. With respect to this war, it appears, with regard to the address, that in every case except one or two—I am

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not prepared to say whether this did not happen from inadvertence —the address has uniformly been inserted till the case under consideration.

There have been some cases in which the clause "inhabiting within any of his territories" has been omitted, because the claims have been made by Russians alleging themselves to be protected by an express Order in Council. There are two or three other cases in which, in consequence, I presume, of no notice having been taken, and the objections not having been brought before the Court, the clause has been omitted.

I conceive this examination shows what the practice is, and as it is conformable to principle we must adhere to it in future. Having said so much with respect to the claim and affidavit which would clearly prove the claim and affidavit in these cases to be entirely defective, it is not necessary for me to enter into that question, because my judgment will be founded on other circumstances.

I now proceed to consider the case in the other alternative, that is, the effect of further proof.

It was customary when the ships were brought in, for the proctor for the captors to file what some may have called a prize libel. This libel or allegation contained no special facts—it was a matter of mere form, and, in my opinion, of unnecessary form. It concluded with a prayer for condemnation—that was the only prayer given in. With respect to the claimants, a claim in the form now in use was brought in, and they claimed originally for restitution with costs and damages, and I am not aware that before the hearing any other prayer was ever made—either brought into the registry or offered to the Court.

When the cause came on for hearing, the counsel for the captors opened his case and prayed for condemnation, or argued that it was a case for further proof, according to his own judgment; but he had not, as a matter of right, any power to call on the claimant's counsel to state what would be his particular prayer.

The claimant's counsel then argued for simple restitution, restitution with costs and damages, or further proof, as he deemed most advisable. Of course, if the captor's counsel asked only for further proof, and the claimant's counsel knew that further proof was the utmost he could obtain, he at once acquiesced, and then there was

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no argument. In practice, cases for further proof were for the most part very quickly disposed of; the great majority of such cases arose from the proof of the property, belonging as claimed, not being sufficient, as, for instance, where the master could not speak to it in his deposition, or where the ship-papers did not describe to whom the property belonged.

The rules of the Court applying to such questions were so well known that little or no dispute arose. Both parties knew what must be a case for further proof, and it was ordered by the Court without any discussion.

Such was the general practice in cases of that description; but, of course, there were many cases where the sole question was condemnation or restitution, and some where the captors contended that no further proof ought to be allowed, and others where the claimants contended that no further proof was necessary.

The result of the whole was that each party was entitled to take his own course, and neither would be compelled at the opening to make any specific prayer. The counsel for the captors could not ask the claimants whether they asked for restitution or further proof, neither could the counsel for the claimants ask the captors whether they prayed condemnation or would consent to further proof—I mean as a matter of right—*de facto* it was done almost every day, or I may say almost every hour. The Court was not fettered by any restriction, but at any time it might ask either party what was his prayer. This power, however, could avail but little, for the captors might answer, as in fact they often did, in the alternative—condemnation, or, if that be refused, further proof; and so the claimants might answer restitution or further proof.

Now I deemed it might be convenient to those who practise in prize proceedings that I should state what, to the best of my recollection, was the practice of the Court. I will only add the reason why, in the case of the *Chrissys*, I asked Dr. Addams what was his prayer. I did so, not with the slightest intention of fettering his discretion in offering any prayer in the alternative or otherwise as he might think fit, but because it had been mentioned by him in argument that on account of the small value it might not be expedient to ask for further proof, or to take it if the Court were disposed to grant it. Had I not put the question, I might—

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I do not say I should—have been under the necessity of ordering further proof when such order would have been nugatory, when the owners would not accept it, and when the only consequence would have been delay and the deterioration of the property to no possible advantage whatever to any party.

With respect to the present cases I mean to make a few observations. It is admitted that these are not cases in which restitution could be claimed upon the evidence before the Court; indeed, I think the true description is that *primâ facie* these are cases for immediate condemnation.

The masters state that these vessels are the property of a Greek subject carrying on trade at Odessa. If that be the true description, then, beyond all doubt, the ships are subject to condemnation as enemy's property.

Dr. Addams very properly declined to argue for restitution, but begged that the Court might admit further proof; but he had no instructions which enabled him to state the facts that further proof would establish, nor upon what ground further proof could found a claim to restitution.

Now the Court has never bound itself to require that further proof should be asked for in any particular form; frequently it might happen that want of time and opportunity to advise with the owners might prevent such prayer from being accompanied by any affidavits or documents.

But what the Court always requires is, that whether the request of further proof be founded on the statements of counsel or affidavits or other documents, such a case should be presented as might, if it were proved, entitle the claimant to restitution. Then, according to the circumstances, the Court would allow further time to substantiate the statements made by counsel, or it would decree further proof at once.

In the present instance the counsel are not instructed even to say what the description of case might be, which they propose to establish by further proof. They, and of course their proctors, are in total ignorance.

I must say that the prayer for further proof, under such circumstances, is not only unprecedented, but I think without any

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justification, and I trust that such a prayer as this will not be repeated, lest I should be under the necessity, if such a prayer were repeated, of condemning the claimant in costs.

I condemn these two ships.

[Spinks, 343.]

THE CHRISSYS.

Capture—Vessel near Blockaded Port—Further Proof—Condemnation.

A vessel captured sixty or seventy miles out of its course, and in the neighbourhood of a blockaded port, cannot be restored without further proof of its destination.

If the claimant declines further proof, the Court is bound to condemn the property.

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This vessel, under Greek colours, took on board at Foki, in the Gulf of Smyrna, a cargo of salt, and sailed therewith, bound, according to the master's statement, for Tultsha, on the Danube. On the 22nd of May, 1855, she was captured by her Majesty's ship *Niger*, about twenty-five miles to the southward of Cape Fontana, whereon the Odessa light stands, and was sent in for adjudication on the ground of an intention to break the blockade of Odessa.

A claim was given in on behalf of Mr. Constantine John Bolanachi, of the island of Syra, a subject of the King of Greece.

The master stated in his evidence that he was proceeding to Tultsha, and that on reaching Constantinople he deemed it necessary, in consequence of information he received as to the depth of water at the Sulina mouth of the Danube, to lighten the vessel, by disposing of a portion of the cargo, and that on the 19th of May he sailed with the remainder for Tultsha, where he expected to meet his owner. He also stated that he was the shipper of the cargo, and would have been the consignee if she had arrived at her destination. He accounted for the fact of his being far out of his course by saying that he did not know where he was.

The *Queen's Advocate* and *Admiralty Advocate*, for the captors.

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As there is nothing on the ship-papers to corroborate the master as to the destination of the vessel, the document on board resembling a cargo-paper for the salt, and no log, and as the vessel was captured seventy miles out of her course, for which the only excuse given is that the master did not know where he was, the inference is that she intended to break the blockade. The absence of the log leads to the inference that it has been destroyed.

If the Court thinks it cannot condemn, it is clearly a case in which it can allow the captors to give evidence as to the place of capture.

Dr. Addams, for the claimant.

The value of the ship and cargo is considerably below 500*l.*, and the master is the shipper, and would have been the consignee of the cargo if the vessel had reached her destination. This accounts for there being no cargo-paper. As to the log, these small foreign vessels frequently have none, and no inference of criminal intention can fairly be drawn from its absence. What are the probabilities of the case? If the master intended to go to Odessa, what necessity existed for his unloading any portion of the cargo at Constantinople? He would only have done that for the reason which he assigns, viz., that he could not otherwise have entered the Danube. Besides, the master must have known that Odessa was blockaded, and that it was 100 chances to 1 against his getting in there, and 1,000 to 1 against his getting out again. Whatever may have been the reason of this vessel being out of her course, there is nothing to discredit the master's assertion that he was going to Tultsha.

The learned counsel expressed a hope that the Court would restore the vessel, but that if it would not do that, it would condemn it, inasmuch as the value of the property was so small, that if further proof were ordered the whole proceeds would be absorbed in costs.

The counsel for the captors having replied, the Court reserved its decision, and directed the parties to furnish it with their respective prayers.

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DR. LUSHINGTON.—I shall dispose of this case in a very few words. This is a case in which, if further proof had been asked on behalf of the claimants, I should not have hesitated in allowing them to bring it in. But, as the case stands, I have only to decide between restitution and condemnation.

It appears, according to the evidence of the master himself and the circumstances set forth, that he was sixty or seventy miles out of his course away from his proper destination. The port, into the neighbourhood of which she had got, was an enemy's port. I apprehend it to be quite clear, under such circumstances, that according to law, there must be further proof to entitle the claimant to restitution. I desired that a prayer might be made with reference to the decision of the Court, that the case might be disposed of according to what the claimants thought most for their advantage. The prayer is for restitution, not further proof. I am under the necessity, as no further proof is asked for, of condemning the ship.

Dr. Addams.—The Court is aware of the reason.

THE COURT.—The smallness of the property. I have given the best consideration to the case. If I could, I would have restored, on payment of captor's expenses. It is a case for proof—I am bound by the law to say so—and if the parties will not accept further proof, I must condemn the property.

[Spinks, 345.]

THE NINA.

Further Proof—Condemnation.

1856 *February* 7, 11.

THIS was an appeal from a judgment of the Admiralty Prize Court condemning this ship, and refusing to allow the claimant to bring in further proof.

The facts of the case have been already reported at p. 514.

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Dr. Addams and *Dr. Twiss* appeared for the appellant; the *Queen's Advocate* and the *Admiralty Advocate* for the respondent (*f*).

The Court consisted of the Right Honourables Sir Edward Ryan, Thomas Pemberton Leigh, Sir John Patteson, Sir John Dodson, Sir William Henry Maule.

The Right Hon. THOMAS PEMBERTON LEIGH delivered the judgment of their Lordships:—

The learned judge in the Court below appears to their Lordships to have fallen into a little inaccuracy with respect to the period at which the claimant quitted Odessa. He appears to have considered that he remained till November, 1854; the result of the evidence, in the opinion of their Lordships, is that he quitted Odessa soon after midsummer in that year, but it makes no difference in the conclusion at which the learned judge has arrived. With that single exception, their Lordships entirely concur in opinion with the learned judge, both as to the facts and the law of the case: they think that he has exercised a perfectly sound discretion in refusing further proof, and they must recommend to her Majesty to affirm the sentence, with costs.

(*f*) One document, No. 13, was strongly relied upon, as showing that Mr. Gherdacovich, the claimant, was not the sole owner. It was the copy of a letter from the master to his principal at Odessa, in which he expressed a hope that, after having served him for the long period of four years, he would be allowed the 5 per cent. upon the remittances; and stated that the *Nina* had not been so profitable, but reminded the principal that he did not remit for the expenses as in past times, as the former captains had not only received this 5 per cent., but also presents in addition. He hoped his demand would be complied with. This letter was dated "Glubok, 15th December, 1854," and in a postscript the master begged an answer to his demand to be addressed to Constantinople, for which place he was bound. It concluded with these words: "Communicate this to Mr. Martino Gherdacovich," thereby showing that the principal to whom the letter was addressed was not the claimant.

[11 Moore, P. C. 79.]

THE ASPASIA (*g*).

Practice—Leave to Appeal—Ignorance of Decree of Prize Court—Limit of Time to Appeal—Prize Act.

By 17 & 18 Vict. c. 18, s. 37 (*h*), the right of appeal from the High Court of Admiralty in England is limited to three months from the date of the sentence, liberty being reserved to the Judicial Committee to allow, upon sufficient cause being shown, the appeal to be prosecuted after the expiration of that period.

Motion by a claimant, the owner of the cargo, upon notice to the captor, for leave to appeal from a sentence of the Admiralty Court in England, pronounced *in pœnam contumaciæ*, fifteen months after the capture. The proceedings in England were unknown to the owner of the cargo, and the sentence of condemnation not having been communicated by the captors to the owner, he had no knowledge thereof until long after the time for appealing had expired. On the motion coming on, it appeared that no petition for leave to appeal had been lodged or referred to the Judicial Committee. Their Lordships refused to entertain the motion, except upon an undertaking to lodge a petition of leave to appeal.

Appeal allowed, subject to the presentment of such petition of appeal, on payment of costs, upon terms of extracting the inhibition, and prosecuting the appeal within three months, bail being given for payment of the captor's costs.

Practice where an appeal is allowed after notice and the respondent applies to rescind the leave given.

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This vessel under Moldavian colours, laden with a cargo of Moldavian soft wheat, the property of one Cimara, of Constantinople, and a subject of the Ionian Islands, whilst in the prosecution of a voyage from Galatz to Constantinople, Leghorn, or Marseilles, as the owner of the cargo might direct, was, on the 27th day of June, 1854, captured as prize by her Majesty's steam

(*g*) Three ships, the *Aspasia*, the *Achilles*, and the *Gerasimo*, were seized for breach of the blockade of the Black Sea, and condemned by the High Court of Admiralty of England as prize. Appeals were interposed from each of these sentences, and separately argued before the Judicial Committee. As these appeals related to the same subject-matter, their Lordships gave but one judgment, which embodied the principal facts common to each, and which are contained in the case of the *Gerasimo*, *post*, p. 577.

(*h*) The practice is now governed by 27 & 28 Vict. c. 25, s. 8. The time limit is still three months.

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ship of war *Firebrand*, and sent to Constantinople. Some months after the arrival of the brig and cargo at Constantinople, M. La Fontaine, as the agent of the British fleet at Constantinople, consented to the release of the ship and cargo, on a bond being given to pay over to him the value of the ship and cargo, in the event of their being condemned as prize. Such bond was accordingly given, and the vessel and cargo were released. No proceedings whatsoever to adjudicate upon the vessel and her cargo were taken on behalf of the captors until the 28th of September, 1855, when a monition was issued at the instance of the captors from the Admiralty Prize Court of England, which monition was served on the Royal Exchange, in the city of London, and was returned into Court on the 6th of November, 1855, on which day the vessel and her cargo were condemned as lawful prize, by reason of no claim having been given in for either of them. The owner of the cargo had not any notice, as it appeared, and knew nothing whatever of the proceedings in the High Court of Admiralty in England, and from the great lapse of time from the capture, believed that no proceedings would be taken for obtaining condemnation either of the ship or her cargo. The first intimation which he had of the proceedings was on the occasion of the party who had given bail for the cargo being called upon, about the end of May, 1856, to pay the sum of 1,002*l.* 7*s.* 10*d.* sterling, the nett proceeds of the sale of cargo. These facts were deposed to in the affidavit of the claimant, Cremidi, the agent in London of the owner of the cargo, who was authorized, so far as the cargo was concerned, to appeal from the sentence of the Prize Court of Admiralty of England, condemning the cargo as prize.

A motion was now made for leave to appeal from the sentence of the Admiralty Prize Court of England, pronounced on the 6th of November, 1855, so far as it condemned the cargo of the *Aspasia* as prize. Notice of this application was given to the captors' proctor, but no petition of appeal had been lodged by the claimant so as to bring the motion within the general Order referring appeals and petitions to the Judicial Committee of the Privy Council.

Upon the motion coming on, it was opposed, on behalf of the

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captors, by the *Queen's Advocate* (Sir John Harding) and the *Admiralty Advocate* (Dr. Phillimore), who submitted that the Court had no jurisdiction to entertain the application, as the matter had not been referred to the Judicial Committee, and relied upon *Cutto* v. *Gilbert* (*i*).

The Right Hon. T. PEMBERTON LEIGH.—Their Lordships are disposed to allow the motion to be heard if the claimant will undertake to present a proper petition for leave to appeal (*k*).

Upon the claimant so undertaking, the motion proceeded.

Dr. Addams and *Dr. Twiss*, in support of the application.

The claimant is a foreigner and entitled to every indulgence, especially as the sentence was pronounced *in pœnam contumaciæ* (2 Wynne's Life of Sir Leoline Jenkins, p. 743), to enable him to purge himself by way of appeal. This Court, in *Harrison* v. *Harrison* (*l*), admitted an appeal from a sentence pronounced *in pœnam contumaciæ*. It is not usual to condemn goods for want of a claim till a year and a day has elapsed after service of process: Rob. Coll. Mar. pp. 88, 89; the *Harrison* (*m*); the *Avery and Cargo* (*n*); the *Aquila* (*o*). Here no steps were taken by the captors to proceed to adjudication for more than fifteen months after the capture, and such laches entitle the claimant to restitution (the *Huldah* (*p*)); the owner of the cargo was induced to suppose that the proceedings were abandoned. Moreover, the captors did not send out the sentence of condemnation until three months had expired from the sentence, and thus deprived the claimant of his right of appeal, given by the Prize Act, 17 & 18 Vict. c. 18, s. 37. An appeal in a prize case was limited by the statute 43 Geo. 3, c. 160, s. 27, to twelve months after the sentence, but the Lords of Appeal admitted appeals beyond that

(*i*) 9 Moore's P. C. Cases, 131. See also *How* v. *Kirchner*, 11 Moore's P. C. Cases, 21.

(*k*) For the practice upon this point, see *In re Minchin*, 6 Moore's P. C. Cases, 43: *Morgan* v. *Leech*, 3 Moore's P. C. Cases, 368.

(*l*) 4 Moore's P. C. Cases, 96.

(*m*) 1 Wheaton, Amer. Rep. 298.

(*n*) 2 Gallison, Amer. Rep. 387.

(*o*) 1 C. Rob. 41 (civil salvage).

(*p*) Vol. I. p. 303.

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time: the *Jacob* (*q*). The claimant in this case was ignorant of the proceedings taken by the captors, and it is therefore a case for the exercise of the discretion vested in the Judicial Committee by the Prize Act, 17 & 18 Vict. c. 18, s. 37, to admit an appeal.

The *Queen's Advocate* and the *Admiralty Advocate*, *contra*.

The Prize Act, 17 & 18 Vict. c. 18, s. 37, limits the time for appealing to three months. The cases referred to relating to appeals against sentences pronounced *in pœnam contumaciæ*, and extending the time in such cases beyond a year and a day, do not apply, the Prize Act, 17 & 18 Vict. c. 18, s. 37, having concluded such rule of the civil law. No merits are disclosed to entitle the applicant to such an indulgence.

The Right Hon. T. PEMBERTON LEIGH.—This is an application for leave to appeal, so far as relates to the cargo of the *Aspasia*, against a sentence of the Court of Admiralty in England, which condemned *in pœnam contumaciæ* the vessel and cargo as lawful prize. By the Prize Act, 17 & 18 Vict. c. 18, s. 37, the old rule of allowing twelve months to appeal, as provided by the statute 43 Geo. 3, c. 160, s. 27, is cut down to three months, if the appeal is from the sentence of the High Court of Admiralty of England; power, however, is reserved in that section for this Court to admit, upon sufficient cause being shown, an inhibition to be extracted and the appeal to be prosecuted notwithstanding. The affidavit of the claimant here states that the omission arose from the captors not taking the proper steps to obtain the condemnation of the vessel, and from the claimant's ignorance of the proper course to pursue. Now, it is clearly the duty of the owner to employ a proper agent to watch the proceedings, but at the same time it is impossible to believe that he negligently and wantonly abstained from prosecuting this claim; therefore it must be attributed to his ignorance and not to an abandonment of his claim. We are, therefore, of opinion that we ought not, in such circumstances, to exclude a party who shows merits from bringing his appeal; but

(*q*) 1759, cited from Lord Hardwick's MS.

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such permission must be subject to stringent conditions. Leave will be given to Cremidi, on the usual claim being filed, to extract the inhibition and to prosecute an appeal from the sentence of the Admiralty Court, provided that within three months from this day the usual bail be given to answer the costs of the appeal, and also to pay the costs of this application.

These conditions having been complied with, the appeal was set down for hearing, when the *Queen's Advocate*, and the *Admiralty Advocate*, for the captors, moved to rescind the order allowing leave to appeal. They relied upon the *Aquilla* (*r*) in support of this course.

Dr. Addams and *Dr. Twiss*, for the appellant, opposed, citing the *Avery and Cargo* (*s*).

The Right Hon. T. PEMBERTON LEIGH.—This application is to discharge an order of their Lordships, giving leave to prosecute an appeal from the High Court of Admiralty of England in a prize case, notwithstanding three months had elapsed from the date of the sentence complained of. Applications for leave to appeal are generally made *ex parte*, and if it subsequently appears that there has been any *mala fides*, upon a counter petition by the respondent to dismiss, the order allowing leave to appeal is discharged. That is the practice of this Court (*t*); but that was not the course adopted here, for the claimant gave notice to the captors, who had every opportunity of resisting the application, which they did. The facts of the case were then very fully gone into, and nothing now appears to justify us rescinding the order granting leave to appeal.

The appeal was then proceeded with. The authorities cited are referred to in the case of the *Gerasimo* (*u*), where the principal facts of the case relating to the national character of the owners of the cargo, and the seizure and condemnation, are fully set forth.

Judgment was reserved and delivered after the argument in the case of the *Gerasimo* (*x*).

(*r*) 6 Moore P. C. 102 (civil salvage).
(*s*) 2 Gallison, Amer. Rep. 387.
(*t*) See *In re Ames*, 3 Moore's P. C. Cases, 413; *Sibnarain Ghose* v. *Hulodhur Doss*, 9 Moore's P. C. Cases, 354.
(*u*) *Post*, p. 577.
(*x*) *Post*, p. 577.

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[11 Moore, P. C. 88.]

National Character of Trader—Foreign Merchant in Belligerent Country—Moldavia and Wallachia—Conversion of Neutral Territory into Enemy's Country—Blockade—Capture—Duty of Captor.

The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of trade, as a subject of the Power under whose dominion he carries it on, and as an enemy of those with whom that Power is at war.

Nature of the possession which the Russians held of the Principalities of Wallachia and Moldavia in the years 1853-4.

Inquiry into and illustration of the political position of those principalities.

Circumstances which convert a friendly or neutral territory into an enemy's country, considered.

A temporary occupation of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

A ship under Wallachian colours, with a cargo of corn belonging to owners residing at Galatz in Moldavia, was seized for breach of the Black Sea blockade, when coming out of the Sulina mouth of the Danube, then in a state of blockade. At the time of the shipment of the cargo the Russians held possession of Moldavia and Wallachia, but such holding was with the expressed intention of not changing the national character, or incorporating that country with Russia. Upon appeal, *held* (reversing the sentence of the Admiralty Court of England), that the national character of the owner was not changed by the fact of the Russians so occupying the principalities, and restitution decreed, with costs and damages.

The purpose of the blockade was declared to be for preventing the import of provisions to the enemy in possession of a neutral's country. *Semble*, the fact of a neutral ship bringing out a cargo of corn is not a breach of such blockade.

It is the duty of the captor, as soon as possible, to send a prize to some convenient port in her Majesty's dominions for adjudication, and to procure the examination in preparatory of the principal officers of the captured vessel, and to deposit in the Admiralty Court all papers found on board the prize. Restitution of ship and cargo with costs and damages.

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This was the case of a Wallachian ship, laden with a cargo of Indian corn, the property of Messrs. Epaminonda Pana & Co.,

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merchants at Galatz, subjects of the Ionian Islands. The ship left Galatz in the month of July, 1854, bound to Trieste, in Austria, and on the 19th day of July was captured by her Majesty's steamship of war *Vesurius*, coming out of the Sulina mouth of the Danube, for a breach of the blockade of that river, and sent to Constantinople. The ship was released upon security being given, but the cargo was sold at Constantinople. No tidings having been heard of the proceeds, and the captors not having taken any proceedings against the proceeds, or to condemn the ship as prize, proceedings were commenced in the High Court of Admiralty of England by the claimant, on behalf of the owners of the cargo, to compel the captors to proceed to adjudication.

The present claim for the restoration of the cargo was made on the 21st June, 1855. On the 23rd of June the claimant's proctor took out a monition against the captors to proceed to adjudication. The captors brought in an affidavit of Mr. Young, from which it appeared that Mr. Nicholson (a commissioner sent out by the Court of Admiralty to Constantinople) had proceeded thither on this case, and also on the cases of the *Aspasia* and the *Achilles*, for the purpose of examining witnesses, and a return from him, with papers annexed, was brought into Court.

The ship was condemned on the 2nd of November, 1855, no claim having been made in respect of her.

On the 14th of November, 1855, the claim for the cargo came on for hearing, when it appeared by the claim that the real owners were Epaminonda Pana & Co., described as subjects of the Ionian Islands, the place of their actual residence not being set forth. The claimant, Cremidi, appeared to be their agent in London. The claimant prayed for a decree of restitution, with costs and damages. The Crown prayed for a decree of condemnation. The Court admitted the claim for the cargo, and directed further proof to be given by the claimant as to the cargo being the property of his principals, and allowed both parties to bring in further proof as to the non-examination of witnesses by the captors in preparatory, and also whether there was any agreement for the sale of the cargo. The captors' proctor filed an affidavit of the respondent, Powell, and of La Fontaine, explaining the reason of the omission to examine the master and crew in preparatory, as they had quitted

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the vessel and also as to the sale of the cargo. The claimant, in further proof, brought in a bill of lading of the cargo, and a *pro formâ* account of the sales of the cargo at the port of destination.

On the 15th of July and 1st of August, 1856, the cause was fully argued upon further proof. The judge of the Admiralty Court (the Right Hon. Dr. Lushington), by his interlocutory decree, dated the 8th of August, 1856, pronounced the cargo to have belonged, at the time of the capture thereof, to enemies of the Crown of Great Britain, and as such, liable to confiscation, and condemned the same as prize. The present appeal was interposed on behalf of the owners of the cargo against this decree.

Dr. Addams and *Dr. Twiss*, for the appellant; and

The *Queen's Advocate* (Sir John Harding) and *Dr. Deane*, for the respondents.

The principal question argued was whether the owners of the cargo, with regard to this claim, were to be considered as alien enemies; and that question turned upon the nature of the possession which the Russians held of Moldavia and Wallachia at the time of the shipment of the cargo: and a further question was raised whether Galatz could be treated as an enemy's port, or had been blockaded at all as against neutrals. The arguments are fully stated and considered in the judgment of their Lordships. The authorities referred to were, upon the national character of the owners of the cargo, the *Indian Chief* (*y*), the *President* (*z*), the *Anna* (*a*), the *Boedes Lust* (*b*), the *Magnus* (*c*); 1 Kent's Comms. p. 82 (8th edit.); Story on Prize Courts (Pratt's edit.), p. 3:

Whether the notification of blockade was sufficiently extensive to include blockade by egress as well as ingress (Wheaton, Elements of International Law, p. 575 (6th edit.)):

(*y*) Vol. I. p. 251. The judgment was concerned chiefly with the facts of the case, except in the following passage: "No position is more established than this: that if a person goes into another country, and engages in trade, and resides there, he is by the law of nations to be considered as a merchant of the country."

(*z*) Vol. I. p. 475.

(*a*) Vol. I. p. 499.

(*b*) Vol. I. p. 459.

(*c*) *Ante*, p. 267, note.

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As to the duty of the captors to have brought the chief officers of the captured ship to the nearest British port and examined them in preparatory, and to have proceeded at once to adjudication: the *Bothnea and Janstoff* (*d*), the *Arabella and the Madeira* (*e*), the *Huldah* (*f*), the *Washington* (*g*), the *Madonna del Burso* (*h*), the *Peacock* (*i*).

Judgment was reserved in this as well as the previous appeals of the *Aspasia* and the *Achilles*, which involved the same question, and was now delivered by

The Right Hon. T. PEMBERTON LEIGH.—This was an appeal from a decree of the High Court of Admiralty, dated the 8th of August, 1856, condemning the cargo of the ship *Gerasimo* as lawful prize.

At the time of her capture this ship was bound to Trieste with a cargo of Indian corn which she had taken on board at Galatz. She was sailing under Wallachian colours, and on the 19th of July, 1854, during the prosecution of her voyage, was captured as she was coming out of the Sulina mouth of the Danube by her Majesty's ship *Vesuvius*, under the command of Captain Powell.

It was the duty of the captors, as soon as possible, to send their prize to some convenient port in her Majesty's dominions for adjudication, to procure the examination in preparatory of the principal officers of the vessel, and to deposit in the Admiralty Court, upon oath, all papers found on board the vessel, in order that speedy justice might be done, and that the property, if illegally seized, might be restored, with as little delay as possible, to the owners.

None of these steps were taken; the vessel and her cargo were sent to Constantinople, and detained there, together with the crew, till (after a delay, as to the cargo of nearly three months, and as to the ship of nearly eight months) the vessel was released upon security, and the cargo sold at Constantinople.

The captors appear after this to have taken no steps whatever in the matter until they were stimulated to action by the owners of the cargo.

(*d*) 2 Gallison, Amer. Rep. 78.
(*e*) 2 Gallison, Amer. Rep. 367.
(*f*) Vol. I. p. 303.
(*g*) Vol. I. p. 555.
(*h*) Vol. I. p. 370.
(*i*) Vol. I. p. 381.

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On the 21st of June, 1855, a claim was brought into the Admiralty Court by Cremidi, in which he claimed the cargo on behalf of Epaminonda Pana & Co., who are merchants at Galatz, and on their behalf demanded restitution, with costs and damages, and at the same time he sued out a monition requiring the captors to proceed to adjudication.

The captors proceeded accordingly, and on the 14th of November, 1855, the case was heard upon the claim.

There was an absence of the usual evidence in such cases: there was no examination of the witnesses in preparatory; no affidavit verifying the ship's papers made *recente facto*; but an affidavit sworn by Captain Powell, on the 30th of August, 1855, more than twelve months after the seizure, verifying certain papers as being all the papers which were found on board the vessel, and none of which related to the cargo. The captors, however, produced an affidavit by a gentleman of the name of Young, who stated that he was the agent in England of the captors, and that he had received a letter from Captain Powell, dated in the month of May, 1855, informing him that the cargoes of this and other ships sent to Constantinople had been sold at that place, with the consent of the owners thereof, and the proceeds deposited in the hands of an agent. There was also a certificate by Mr. Nicholson, who had been sent out (under what circumstances it does not appear) as a commissioner appointed by the Court of Admiralty to take evidence on the subject at Constantinople, and Nicholson thereby certified that he had been informed that the master and the whole of the crew of the *Gerasimo* had long since quitted her, and could not anywhere be found.

The only evidence of property on the part of the claimant was the affidavit of Cremidi, who stated his belief that Epaminonda Pana & Co, subjects of the Ionian Islands, were the owners, and that no enemy had any interest in it. Neither the affidavit nor the claim stated anything as to the place of residence of Epaminonda Pana & Co.

The learned judge, therefore, made an order, dated the 14th of November, 1855, by which he admitted the claim of Cremidi for the cargo, but directed further proof to be given by the claimant as to the property thereof, and also allowed both parties to bring in further proof as to the non-examination of witnesses in prepara-

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tory, and as to whether there was any agreement as to the sale of the cargo, such further proof to be given without prejudice to the question of costs and damages.

The cause was heard on further proof in July and August, 1856, when the learned judge was of opinion that the owners were to be considered as enemies of the British Crown at the time of the seizure, and that the claimants had, therefore, no *persona standi* in the Court. The grounds of the decision are thus stated in the report of the judgment printed at the end of the respondent's case. After referring to two documents brought in by the claimant upon further proof, the learned judge expresses himself in these terms: "It appears, therefore, that the claimants (the owners of the cargo) were merchants, resident at Galatz at the time of shipment, and that, being so, the next question is, what national character the law impresses upon them? Galatz is in Moldavia; Moldavia was in possession of the Russians; and, so long as any territory is in possession of the enemy, I apprehend that the law declares that all the inhabitants thereof, and all the persons resident therein and carrying on trade, are to be considered as enemies with respect to that trade. The owners of the cargo are erroneously described as Ionian subjects, they being resident at Galatz, and undoubtedly they are not entitled to that character for the purposes of trade. Had the truth been stated in the first instance, I should have disposed of the case at once."

Upon this ground the learned judge felt himself under the necessity of condemning the cargo, but he added, "that he should have experienced very great difficulty in coming to the conclusion that the claimants had proved their property in the cargo claimed, even if they were entitled to any *persona standi* in the Court."

Upon the present appeal the first question is, whether the owners of the cargo, in regard to this claim, are to be considered as alien enemies? and for this purpose it will be necessary to examine carefully both the principles of law which are to govern the case, and the nature of the possession which the Russians held of Moldavia at the time of this shipment.

Upon the general principles of law applicable to this subject there can be no dispute. The national character of a trader is to be decided, for the purposes of the trade, by the national character of the place in which it is carried on. If a war breaks out, a

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foreign merchant carrying on trade in a belligerent country has a reasonable time allowed him for transferring himself and his property to another country. If he does not avail himself of the opportunity, he is to be treated, for the purposes of the trade, as a subject of the Power under whose dominion he carries it on, and, of course, as an enemy of those with whom that Power is at war. Nothing can be more just than this principle; but the whole foundation of it is, that the country in which the merchant trades is enemy's country.

Now the question is, what are the circumstances necessary to convert friendly or neutral territory into enemy's territory? For this purpose, is it sufficient that the territory in question should be occupied by a hostile force, and subjected, during its occupation, to the control of the hostile Power, so far as such Power may think fit to exercise control; or is it necessary that, either by cession or conquest, or some other means, it should, either permanently or temporarily, be incorporated with, and form part of, the dominions of the invader at the time when the question of national character arises? It appears to their Lordships that the first proposition cannot be maintained. It is impossible for any judge, however able and learned, to have always present to his mind all the nice distinctions by which general rules are restricted; and their Lordships are inclined to think that, if the authorities which were cited and so ably commented upon at this Bar had been laid before the judge of the Court below, he would perhaps have qualified in some degree the doctrine attributed to him in his judgment.

With respect to the meaning of the term "dominions of the enemy," and what is necessary to constitute dominion, Lord Stowell has in several cases expressed his opinion. In the *Fama* (*k*), he lays it down that in order to complete the right of property there must be both right to the thing and possession of it; both *jus ad rem* and *jus in re* (*l*). "This," he observes, "is the general law of property, and applies, I conceive,

(*k*) [Not republished.] The principles of the judgment are set out in this judgment. Sir W. Scott held on the facts that the act of cession had not taken place, and that Louisiana was in May, 1803, still a Spanish colony, and not actually ceded to France under the treaty of Idelfonso, 1796. [5 C. Rob. 115.]

(*l*) "All writers concur in holding it to be a necessary principle of jurisprudence that to complete the right of property the right to the thing and the possession of the thing itself should be united."

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no less to the right of territory than to other rights. Even in newly-discovered countries, when a title is meant to be established for the first time, some act of possession is usually done and proclaimed as a notification of the fact. In transfer, surely, when the former rights of others are to be superseded and extinguished, it cannot be less necessary that such a change should be indicated by some public acts, that all who are deeply interested in the event, as the inhabitants of such settlements, may be informed under whose dominion and under what laws they are to live."

The importance of this doctrine will appear when the facts with respect to the occupation of the principalities come to be examined.

That the national character of a place is not changed by the mere circumstance that it is in the possession and under the control of a hostile force is a principle held to be of such importance that it was acted upon by the Lords of Appeal in 1808, in the St. Domingo cases of the *Dart* and *Happy Couple*, when the rule operated with extreme hardship.

In the case of the *Manilla* (*m*), Lord Stowell gives the following account of those decisions:—"Several parts of it (the island of St. Domingo) had been in the actual possession of insurgent negroes, who had detached them, as far as actual occupancy could do, from the mother country of France and its authority, and maintained, within those parts at least, an independent government of their own; and although this new power had not been directly and formally recognised by any express treaty, the British Government had shown a favourable disposition towards it on the ground of its common opposition to France, and seemed to tolerate an intercourse that carried with it a pacific and even friendly complexion. It was contended, therefore, that St. Domingo could not be considered as a colony of the enemy. The Court of Appeal, however, decided, though after long deliberation and with much expressed reluctance, 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

[1 Edw. 3.]

(*m*) [Not republished.] The only point for decision was whether, the Court of Appeal having decided that St. Domingo was a French colony, the words of the Order in Council of 11th November, 1807, excepted certain places from being, for the purpose of the Prize Court, excepted from this general character.

had established itself within it, to that degree of force and with that kind of allowance from some other States), as being other than still a colony, or parts of a colony of the enemy. There can be no doubt that the strict principle of that decision was correct."

On the other hand, when places in a friendly country have been seized by and are in possession of the enemy, the same doctrine has been held.

While Spain was in the occupation of France, and at war with Great Britain, the Spanish insurrection broke out, and the British Government issued a proclamation that all hostilities against Spain should immediately cease. Great part of Spain, however, was still occupied by the French troops, and amongst others, the port of St. Andero. A ship called the *Santa Anna* (*n*) was captured on a voyage, as it was alleged, to St. Andero, and Lord Stowell observed:—"Under these public declarations of the State (*o*), establishing this general peace and amity, I do not know that it would be in the power of the Court to condemn Spanish property, though belonging to persons resident in those parts of Spain which are at the present moment under French control, except under such circumstances as would justify the confiscation of neutral property."

The same principle has been acted upon in the Courts of Common Law. In *Donaldson* v. *Thompson* (*p*), the Russian troops were in possession of Corfu and the other Ionian Islands, though the form of a republic was preserved, and it was contended that the islands must be considered as substantially part of the territory of the Russian Empire, if the Russian power was there dominant, and the supreme authority was in the Russian commander; or, if not, that the Republic must be considered as a co-belligerent with Russia against the Porte, since the Emperor of Russia derived the same advantages, in a military point of view, from this occupation of the islands as if he had seized it hostilely, or the Ionian Republic had been his ally in the war he was carrying on. Both these propositions, however, were repudiated by Lord Ellenborough;

(*n*) The *Santa Anna*. The Court held on the evidence that the destination of the vessel was Cadiz, then in the British occupation.

(*o*) Order in Council, 4th July, 1808: "All hostilities against Spain on the part of his Majesty shall immediately cease."

(*p*) 1 Campb. 429.

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and afterwards on a motion to set aside the verdict by the Court of King's Bench, Lord Ellenborough observed:—"Will any one contend that a government which is obliged to yield in any quarter to a superior force becomes a co-belligerent with the power to which it yields? It may as well be contended that neutral and belligerent mean the same thing." The same doctrine was afterwards laid down by the Court of King's Bench in *Hagedorn* v. *Bell* (*q*), in the case of a trade carried on with Hamburg, which had been for several years, and at the time was in the military occupation of the French.

The distinction between hostile occupation and possession clothed with a legal right by cession or conquest, or confirmed by length of time, is recognized by Lord Stowell in the case of the *Bolletta* (*r*). A question there arose whether certain property belonging to merchants at Zante, which had been captured by a British privateer, was to be considered as French or as Russian property; that question depending upon the national character of Zante at the time of the capture. Lord Stowell observes:—"On the part of the Crown it has been contended that the possession taken by the French was of a forcible and temporary nature, and that such a possession does not change the national character of the country until it is confirmed by a formal cession, or by long lapse of time. That may be true when possession has been taken by force of arms and by violence; but this is not an occupation of that nature. France and Russia had settled their differences by the Treaty of Tilsit, and the two countries being at peace with each other, it must be understood to have been a voluntary surrender of the territory on the part of Russia." On this ground he held the territory to have become French territory, remarking in a subsequent passage of his judgment that this "was a voluntary surrender on the part of Russia in consequence of a previous cession, and that it was not an hostile occupation by force of arms, liable to be lost again the next day."

These authorities, with the other cases cited at the Bar, seem to establish the proposition, that the mere possession of a territory by an enemy's force does not of itself necessarily convert the territory so occupied into hostile territory, or its inhabitants into enemies.

(*q*) 1 Man. & Sel. 450.

(*r*) Edwards, 171. [Not published.] The ground of the judgment is set out in the above passages.

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It is necessary now to inquire what was the nature of the possession of Moldavia by the Russians, at the time when the shipment in question was made.

The political position of the provinces of Moldavia and Wallachia is very anomalous. They are classed by Wheaton, in his Elements of International Law, p. 48 (6th ed.), amongst semi-sovereign states. By the Convention of Ackermann, in 1826, between Russia and Turkey, it was provided that the government of those provinces should be administered by Hospodars chosen from amongst the native Boyars, and they were to enjoy their authority for the term of seven years. By the Treaty of Adrianople, between the same Powers, in 1829, and by a separate Act annexed to that Treaty with respect to the provinces of Moldavia and Wallachia, it was provided that the Hospodars, instead of being elected for a term of seven years only, should in future hold their dignities for life, and that they should freely administer the internal affairs of those provinces in concert with their respective divans. It was further provided that they should pay a fixed tribute to the Porte in lieu of certain charges to which they were previously subject, and be free from all other exactions. The inhabitants were to enjoy full liberty of commerce for the productions of their soil and their industry, without any restriction, except such as the Hospodars, in concert with their respective divans, should establish. They were to be at liberty freely to navigate the Danube with their own vessels, furnished with passports by their government; and it was provided that the Pruth, which bounds one side of Moldavia, should continue to be the limit of the two empires of Russia and Turkey.

This independent administration was enjoyed by the two provinces at the time when the differences arose between Russia and Turkey in the year 1853. Their government was administered by the Hospodar of each province, with the assistance of a council; they had a national flag, and a *Chargé d'Affaires* resident at Constantinople.

The Sultan having refused compliance with demands made upon him by Russia, the Emperor gave orders that his troops should enter the Danubian principalities, and on the 26th of June, 1853, he issued a manifesto, declaring, in the following terms, the

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grounds upon which, and the purposes for which, this step was taken:—"Having exhausted all the means of persuasion, and all the means of obtaining in a friendly manner the satisfaction due to our just reclamations, we have deemed it indispensable to order our troops to enter the Danubian principalities, to show the Porte how far its obstinacy may lead it. Nevertheless, even now it is not our intention to commence war. By the occupation of the principalities we wish to have in our hands a pledge which will guarantee to us in every respect the re-establishment of our rights. We do not seek conquests. Russia does not need them. We demand satisfaction for a legitimate right openly infringed."

On the 2nd and 3rd days of July, 1853, the Russian troops, under Prince Gortchakoff, crossed the Pruth and entered Moldavia; and upon that occasion the Prince issued a proclamation to the inhabitants of Moldavia and Wallachia, in which he declared:—"We come amongst you neither with projects of conquest, nor with the intention of modifying the institutions under which you live, or the political position which solemn treaties have guaranteed to you."

The proclamation then stated that the occupation was only provisional, and that on the day on which the Emperor should obtain the reparation due to him, and guarantees for the future, the Russian troops should return within the frontiers of Russia; and it concluded with exhorting the inhabitants to engage with security in their agricultural labours and commercial speculations, and to be obedient to the laws under which they lived, and to the established authorities.

The Russian Government informed the Hospodars that their relations with the Porte must be broken off, and that all action on the part of the Sovereign power must for a time cease; that the fixed tribute which they were accustomed to pay to the Porte must be stopped. But the Hospodars were not removed from office; they continued, with the assistance of the Administrative Council, to conduct the affairs of the government, and the Wallachian flag continued to be used. When war afterwards was declared between Russia and Turkey, the two Hospodars were recalled by the Porte, and directed to leave the government in the hands of a provisional council of Boyars. A Russian commissary was appointed to con-

duct the government in their stead, but nothing was said or done by the Russian Government to change the nature of the occupation, or to indicate any intention of converting into a conquest what had been originally announced as a provisional and temporary measure. On the contrary, when General Budberg was appointed Commissary, the Russian Government avoided giving him the title of governor, as being one which was calculated to give rise to misapprehension as to the Emperor's intentions, which remained those of not incorporating the provinces.—(Sir George Hamilton Seymour's despatch to Lord Clarendon, dated November 5th, 1853.)

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The occupation, however, such as it was, led to a declaration of war by the Porte in October, 1853, and in that war England and France engaged as allies of the Sultan in the following spring. Austria and Prussia, though not actively engaged as belligerents, were not less opposed to the occupation of the principalities, and negotiations were entered into by both those Powers with Russia for the purpose of securing the immediate evacuation of the provinces by the Russian troops.

The Russian Minister, in his answer to the demands of Austria on the 17th to 29th of June, 1854, stated that, from the moment when the Porte declared war against Russia, the occupation of the principalities, whatever might have been its original character, had been for Russia only a military position, the maintenance or abandonment of which was entirely a matter connected with strategical considerations. The answer then contained the following passage:—"Our august master still wishes, as he has always wished, peace. He has no desire—we have repeated it, and we repeat it once more—either to prolong indefinitely the occupation of the principalities, or to establish himself there in a permanent manner, or to incorporate them with his dominions, still less to overthrow the Ottoman Government."

On the 8th of August, 1854, Prince Gortchakoff announced that the Emperor of Russia had ordered the complete evacuation of the two principalities, and soon afterwards the Russian troops retired across the Pruth.

It seems impossible to hold that by means of an occupation so taken, so continued, and so terminated, Moldavia ever became part of the dominions of Russia, and its inhabitants subjects of Russia,

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and, therefore, enemies of those with whom Russia was at war. The utmost to which the occupation could be held to amount was a temporary suspension of the *suzeraineté* of the Porte, and a temporary assumption of that *suzeraineté* by Russia; but the national character of the country remained unaltered, and any intention to alter it was disclaimed by Russia. At what period, then, could foreigners dwelling there be said to have that notice of a change in the dominion and in the laws under which they were to live, to which Lord Stowell refers, in the case of the *Fama*? At what period were they under the obligation of changing their domicile in it, under the penalty, if they omitted to do so, of being treated as enemies of Great Britain?

Moldavia and Wallachia were not treated by the Porte as enemies, and it would be singular if these countries, though not held to be enemies by Turkey, should be held to be enemies of the allies of Turkey. That the Wallachian flag was recognized both by the Russian and Turkish authorities, sufficiently appears from the documents before the Court; and their Lordships have ascertained, by communication with the Foreign Office, the other facts above stated; and further, that no act was ever done by the British Government to change the national character of the provinces in relation to Great Britain; and without some such act, the occupation by the Russians, under the circumstances stated, could not produce such an effect.

Being of opinion, therefore, that the claimants have a *persona standi* in the Court, we have now to consider the effect of the evidence upon further proof.

The only evidence offered on further proof, by the claimants (if, indeed, it is to be treated as evidence), consisted of the production of two documents: a bill of lading, and an account, to both of which the learned judge of the Court below refers in his judgment, as showing that the claimants of the property are to be considered as Moldavians, for the purposes of this case. The bill of lading is not verified by any affidavit; it purports to bear date at Galatz, on the 30th of June, 1854, and to be signed by Caralambo S. Pana, the master of the Wallachian brig *Gerasimo*, and to acknowledge the shipment at Galatz, by Messrs. Epaminonda Pana & Co., for account and risk of whomsoever it may concern, of 838 chilos

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of maize of Moldavia, of good quality, dry, sifted, and in good condition, consigned, at Trieste or Venice, to the order of Signor Antonio de Ralli. The account is what is termed a *pro formâ* account, and purports to be signed by Ralli, at Trieste. His signature is attested by two witnesses, and the signature both of Ralli and the witnesses is attested by a notary public, whose official character of a notary, and whose signature, are attested by the British Vice-Consul at Trieste. This document is headed :— "Messrs. Pana & Co., Galatz. *Pro formâ* account of cargo of Indian corn, on board the Wallachian brig *Gerasimo*, Pana." It purports to state, in the first place, what would have been the gross proceeds of the cargo at Trieste on the 20th of November, 1854; and it then contains an account of the charges which would have attended the sale, including commission. It seems, therefore, that this account was made out as between Pana & Co. as the shippers, and Ralli as consignee and agent for the sale.

Though these documents were produced only on the further proof, the account of Ralli had been made out long before, with a view, probably, to the proceedings then in contemplation; for it appears to have been made on the 17th of April, 1855, and signed and witnessed before the notary on the 19th of that month. This was before any question of property had been raised, and it therefore does not, except incidentally, show the right of property.

On the part of the captors, evidence was produced as to the other two points, namely, the omission to examine witnesses in preparatory and the sale.

The material evidence upon both these points is given in the affidavit of La Fontaine, made at Constantinople on the 16th of February, 1856, in which he says, that since the 20th of August he has acted as prize agent for the British squadron in the Black Sea; that the *Gerasimo* was brought to Constantinople on the day of August (not naming the day); that at such time the exigencies of the service totally precluded the possibility of sending the ship down to Malta for adjudication; that later in the year, when it was proposed to send her down to Malta for adjudication, she, owing to the unseaworthy state of the said ship, and the difficulty at that time of sending a sufficient prize crew to navigate her to Malta, was detained at Constantinople by the

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Admiral Superintendent there. He then proceeds to state matters relating to the sale, and concludes thus: "And the deponent further made oath, that as there was no Vice-Admiralty Court and no standing commissioner at Constantinople, it was impossible to get any of the said crew examined there; and that after they had been detained for a considerable time on board her, they were allowed to leave her without being examined; and the vessel was delivered up and her cargo sold in pursuance of the above-mentioned arrangements." This is the only evidence by which it is attempted to justify the non-examination of witnesses in preparatory.

With respect to the sale of the cargo, he says, that as both the ship and her cargo were deteriorating in value, deponent, in his quality of agent and representative of the British squadron, by virtue of the authority given him as aforesaid, entered into an arrangement with Captain C. Pana for himself, and as lawful representative of the vessel and her cargo, respecting them. That the conditions of the arrangement so entered into were reduced into writing, and duly executed by the deponent and by C. Pana; and he then states that certain documents, which he numbers, are the papers so executed, and are all the documents relating to the said arrangement.

Now, their Lordships regret to observe that, on reference to these documents, it appears that the account given of the transaction by La Fontaine's affidavit is entirely inaccurate in the most important particulars.

This gentleman swears that the arrangement which he made with C. Pana was made with him as lawful representative of the cargo, as well as of the ship; and that under that arrangement the cargo, as well as the ship, was sold. If that statement had been true, it would have been of the utmost importance; for not only would it have materially affected the evidence of the claimants' right of property, but it would have amounted to a waiver of their demand for costs and damages. But, on reference to the agreement itself, it appears that it has no reference whatever to the cargo. It is made by C. Pana, not as representing the cargo, nor as having any right whatever over it, but solely as the lawful attorney of the owner of the ship. The agreement is confined to the ship

and freight. At the time when it was made, namely, on the 31st of March, 1855, the cargo had been actually sold by La Fontaine himself under the circumstances to be now stated.

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There is great confusion in the dates assigned to the documents, partly, perhaps, from misprints, and partly from the difference between the new style and the old not always being observed; as far as we have been able to collect the order of proceedings, it was as follows. With respect to the material facts there is no doubt.

Signor Paspali was the owner of the vessel. Spiridione Pana was the agent of E. Pana & Co., the shippers of the cargo. Hanson, a banker at Constantinople, at first acted as agent for the captors, and soon afterwards La Fontaine succeeded to that office. At one period both seem to have been acting.

Paspali and the captors claimed freight for the cargo, and called upon Pana & Co., or Spiridione Pana, as the agent, to pay it. This he refused to do, or to consent to terms which Hanson, on behalf of the captors, desired to impose as the conditions of an arrangement. Under these circumstances, Paspali and the captors' agent were desirous that the cargo should be sold, being first valued, and in the month of September, 1854, Paspali presented a petition to the *Chargé d'Affaires* of the Wallachian Principality at Constantinople, praying that, in accord with the Britannic Chancery, surveyors might be appointed to verify the condition of the cargo. The petition states that La Fontaine assents to this application. This petition was communicated by the directors of the Wallachian Chancery to what is termed the Royal Britannic Chancery, which seems to mean the Consulate-General of her Majesty, with a request that it would be pleased to name a surveyor for the purpose of deciding, amongst other things, whether the Indian corn on board the *Gerasimo* ought to be discharged. Hereupon, Spiridione Pana, on the 6th of October, 1854, addressed to the British Consul-General a statement in which, after alluding to an earlier petition of Paspali, and an answer which he had put in to it, he observes that Paspali had presented a second petition in which he continued to hold him (Spiridione Pana), in the capacity in which he acts, responsible for the payment of the freight claimed, because he had not consented to take out the cargo existing on board under the conditions imposed on him by Hanson. The statement concludes

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in these words:—"In reply to the above adverse petition it is sufficient for the undersigned to refer Signor D. Paspali to the reply given to him by the Act of the 15th of September last. And, in order that Signor D. Paspali may no longer have reason to consider the undersigned as being an impediment to the delivery and sale of the cargo, he declares that he is not opposed to the appointment of the survey demanded, nor to the sale of the cargo; but he does not take any trouble in the matter, nor does he assume any responsibility towards any person whomsoever, still less towards Signor D. Paspali, for the freight claimed; and provided from the survey it should appear that the cargo ought to be sold, the undersigned will not refuse to be present at the sale in the same manner as the other consignees will be present who are in the same position as the undersigned; his preceding protestations, however, remaining still, in all and singular their items, in full vigour, and without any prejudice to the rights and actions of the shippers against whomsoever it may concern, or any responsibility of the undersigned in the capacity in which he acts towards Signor Paspali for the freight claimed in the event that the proceeds of the cargo should not be sufficient to cover it;" and he prays that a copy of this paper may be communicated to Paspali and to Hanson, in the capacity in which he acts.

Neither the first petition of Paspali, nor the answer to it by Spiridione Pana, are amongst the papers in the appeal.

In consequence of these proceedings, the Wallachian and British authorities appointed surveyors, who, on the 17th of October, 1854, made a report, in which they stated that they had betaken themselves to the vessel in the company of La Fontaine, assisted by the public broker, Lazzaro de Nicolini, and there, in the presence of the captain, had examined the cargo, which they found in a state of serious heat; that the odour it sent forth, and the commencement of rot, induced them unanimously to advise the sale of the cargo, for account of whom it may concern, in order to prevent the total deterioration thereof. On the same day the cargo was sold by La Fontaine, as the Royal British Navy Agent, to Messrs. Charnaud, exactly as it may be found on board the *Gerasimo*, that is to say, rotten, wetted, damaged, or with any other defect, at the price of $15\frac{3}{4}$ piastres for every chilo.

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This sale seems to have been made without the knowledge of E. Pana & Co., or S. Pana, their agent, for, on the 6th of November, 1854, he presented a petition to the British Consulate, stating that he was authorized by E. Pana & Co., the proprietors of the cargo, to sell it, and receive the proceeds, and praying that he might be at liberty to do so, depositing the proceeds in the hands of the Royal Britannic Chancery until it should be definitely settled as to the fate of the cargo, he being ready to tender valid security for the due deposit of the price obtained.

Nothing further appears upon the evidence or documents; but it is obvious that some further arrangement was made, for it was agreed between the counsel at the Bar that the proceeds of the cargo had been paid over to Pana & Co., or their agent, on security being given to answer the amount in case of condemnation.

The question for their Lordships to decide is, what is the effect of this evidence with reference to the three points: the property, the sale, and the omission to examine witnesses? and upon none of these points are they able to find any serious doubt.

At Constantinople, where the facts were probably known, and, at all events, were capable of easy proof, no doubt was ever suggested as to the fact of Pana & Co. being owners of the cargo through the whole of the long proceedings which led to the sale. They were dealt with, both by the captors and the shipowner, as the proprietors; they were called upon in that character to pay the freight; they were called upon in that character to consent to the sale; they were called upon in that character to be responsible for the amount in case of condemnation; and can it be argued that they are only to be treated as owners in case of condemnation, and not in case of restitution? At the hearing of the claim, none of these facts appeared. At the hearing on further proof, the view taken of the case by the learned judge made it unnecessary to investigate them. The affidavit of La Fontaine was calculated to mislead anybody who had not carefully examined the documents to which it refers; the inaccuracies in it were not pointed out at this Bar, and were probably, therefore, not brought to the notice of the learned judge of the Court below. When the documents are examined, it appears to their Lordships that no fair doubt as to the property can be raised by the captors. Indeed, the respondent's

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own case on their Lordships' table states that the cargo was sold with the consent of Spiridione Pana, the agent of the proprietor of the cargo. Can a doubt be suggested whether the principals for whom Spiridione Pana was agent were Epaminonda Pana & Co., of Galatz? As to the sale, the evidence clearly shows that it took place under circumstances which cannot in the least prejudice the right of the owners to relief.

Then as to the excuse for the non-examination of the witnesses. There is literally none whatever. What is the value of a statement by La Fontaine of what the exigencies of the public service would or would not permit? What knowledge has he upon the subject? even if what appears in this case was calculated to induce the Court to place entire confidence on his accuracy. But, if the exigencies of the public service did not permit the sending these vessels either to England or to Malta, are the claimants to suffer? Is it their fault that there was no commissioner for the examination of witnesses at Constantinople; or that crews could not be spared to send the vessel to Malta? Is it consistent with justice that the crews should be kept prisoners, and the ship and cargo detained, without the least authority, at Constantinople; that the captors should take no steps whatever for more than twelve months to proceed to adjudication; that the claimants should lose all the advantage of having the examination of their own witnesses; and that for all these wrongs they should be entitled to no remedy?

It was strongly insisted by the appellant that the penalty on the captors for omitting to comply with the rules of the Prize Court, if unaccounted for, or not sufficiently explained, was a forfeiture of all their rights, and restitution to the claimants, with costs and damages; and authorities were cited which were supposed to warrant that proposition.

It is not, in their Lordships' view, necessary to adopt in this case so severe a rule, and they think it will be more satisfactory to examine the grounds on which it is attempted to justify the seizure and on which condemnation is required.

The ground now suggested is, that the *Gerasimo* was guilty of a breach of blockade in coming out of the Danube when the mouths of that river were in a state of notified blockade. It is singular that if this were the ground of capture, no notice whatever of the

blockade should have been contained in the affidavit originally prepared for Captain Powell to swear when the seizure was made, and the facts recent; that notice of it should be introduced for the first time in the affidavit made by him on the 30th of August, 1855; and that even in that late affidavit it is not stated that breach of blockade was the cause of seizure.

There is no doubt, however, that breach of blockade, whether it was the cause of seizure or not, may be used as ground of condemnation if the circumstances of the case bring it within the law.

What then were the circumstances? In the summer of 1854 the Russian forces in the Turkish territories were straitened for provisions. The allied fleets desired to prevent the importation of provisions up the Danube, and with that view the two admirals in command of the English and French fleets issued a proclamation, dated the 2nd of June, 1854, in which they declared, to all whom it might concern, that they had established an effective blockade of the Danube, in order to stop all transport of provisions to the Russian armies; they declared that this blockade included all those mouths of the Danube which communicate with the Black Sea, and they apprised all vessels of every nation that they will not be able to enter the river till further orders—"*qu'ils ne pourront entrer dans ce fleuve jusqu'à nouvel ordre.*"

On the 26th of June the Russians forbade all export of cereals after the 2nd of July. Any exportation of cereals, therefore, was in furtherance of the objects of the allies, and to the prejudice of the Russians. Could a Moldavian merchant imagine, if he had heard of this blockade, that he was to be liable to capture by the allies for exporting provisions when the whole purpose of the blockade was declared to be to prevent their import?

But, by the rules of law, a ship which has entered a blockaded port before the blockade is entitled to come out again; and if she has a cargo taken on board before notice of the blockade, she is entitled to bring it out. The blockade of a port is *primâ facie* notice of the existence of the blockade to all who are within it, because the inhabitants who see the blockading ships off their coast cannot be well ignorant of the blockade. But this was no blockade of the port of Galatz, but a blockade of the mouths of

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the Danube; Galatz lying on its banks up the river at a distance of 150 miles from its mouth.

In this case the ship had entered the river before the blockade; the cargo was taken on board on the 30th of June, and the ship must have sailed on or before the 2nd of July, otherwise she would have been detained by the Russians. If she had no notice of the blockade, she was, on that general ground, entitled to bring out her cargo; if she had notice, she never could suppose that, according to the notification, she could be liable to capture; but if the case had been open to any suspicion, though, in fact, there is none, no weight could be given to such suspicion when the claimant has been deprived, by the wrongful act of the captors, of the opportunity of affording the explanations which the rules of law were intended to secure him.

Of the law applicable to the case, as it appears to their Lordships, they cannot express their opinion better than in the language used by the learned judge of the Court below, in the beginning of his judgment on the hearing before him. He says:—"On the part of the claimants a very long argument was addressed to the Court impugning the conduct of the captors, and charging them with having improperly brought the vessel to Constantinople. It has been further stated that there being no means of examining witnesses at Constantinople, great unnecessary delay had occurred, and that the captors were responsible for such delay and all the consequences. The Court is not disposed to deny the truth and justice of the principle contended for; on the contrary, I am clearly of opinion that if a delay in bringing to adjudication, and the non-examination of witnesses arose, though it may be almost impossible for the government of the belligerent nation to prevent such occurrence, still that neutrals ought to be indemnified if injustice has been done them. The captors in the first instance, though they may be perfectly blameless, are responsible to the neutrals, and they must look to their own government for redress, if they have been compelled to make good any injury sustained by neutrals in consequence of their fulfilling the commands which they dare not disobey. In many cases the captains of some of her Majesty's cruisers may have a discretion to release at once; but this may not be so in case of a

blockade, when special orders may have been given to capture and detain."

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In this statement of the principles of law their Lordships cordially concur. What claim the captor, Captain Powell, may have upon her Majesty's Government it is not their duty to judge, nor have they any means of forming an opinion. But, as regards the claimants, his conduct appears to be without any excuse, and their Lordships have no hesitation in advising restitution of the cargo with costs and damages against the captors.

THE ASPASIA.

[11 Moore, P. C. 79.]

His Lordship then delivered judgment:—

As regards the claimant, this case differs in no material particular from that which has just been decided, and the same decree must be pronounced. As between the captors and the Crown there may be a very material distinction, as the death of Captain Parker, in the service of his country, within a few days after the capture, relieves him from personal blame in respect of the gross irregularities which have since taken place.

THE ACHILLES.

[11 Moore, P. C. 86.]

His Lordship also delivered the following judgment:—

This case differs from the two which have just been disposed of, in this circumstance: that the claimants' right of property is not sufficiently established. The claim is made on behalf of Paolo Focca, as the sole owner; the ship's papers, however, do not establish the title, but, on the contrary, throw some doubt upon it, and the agreement made with the captain on behalf of the owner does not show who the owner was.

Considering, however, the hardships imposed on the claimant by the course pursued by the captors, their Lordships will admit the claimant to further proof as to the property. The other facts are sufficiently clear, and they will not order further proof as to them.

[11 Moore, P. C. 119.]

THE ARIEL.

Ship—Transfer to Neutral—War Imminent or in Existence—Part Payment of Purchase-money—Lien—Restitution.

The sale of a ship absolutely and *bonâ fide* by an enemy to a neutral, *imminente bello*, or even *flagrante bello*, is not illegal.

A Russian subject immediately before the war between Russia and England sold, absolutely and *bonâ fide*, a ship to a subject of a neutral State. Part only of the purchase-money was paid at the time of the purchase, the remainder being agreed to be paid out of the earnings of the ship. Before all the stipulated price was paid, the ship was seized in a British port as prize, and condemned by the High Court of Admiralty of England, on the ground that the enemy's interest in the ship was not divested, as the residue of the purchase-money was to be paid out of the earnings. Such condemnation reversed upon appeal, as the non-payment of part of the purchase-money did not create a lien on the freight and ship in favour of the seller, so as to render the ship in possession of a neutral owner liable to seizure by a belligerent.

Liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize.

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This vessel, under Danish colours, was seized by the Custom House officers at Belfast shortly after her arrival at that port from Miramichi, in New Brunswick, laden with a cargo of deals and firewood consigned to that port. The vessel was proceeded against in the High Court of Admiralty of England, and, by an interlocutory decree, was condemned as prize and *droits* of her Majesty in her office of Admiralty.

Proceedings having been commenced by the seizors in the High Court of Admiralty, a claim was given in for the ship and the freight due for the transportation of the cargo on the part of the appellant. Upon the case coming on for hearing upon the depositions and ship's papers, the Court, at the instance of the appellant, allowed further proof.

It appeared that the *Ariel* was built at Libau, in Courland, in the year 1852, and had been owned by one Hagedorn, a merchant and shipowner, resident at Libau, and also the Netherlands consul at that port. At the commencement of the year 1854, the political differences between Russia and the Western Powers began to

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assume so threatening an aspect, that several of the shipowners resident at Libau determined to dispose of their shipping property. Accordingly, on the 2nd of February, 1854, Eckhoff, as the administrator of the estate of Hagedorn, then deceased, signed a power of attorney authorizing Heinrich Sorensen, the Danish consul at Libau, to sell the *Ariel* to his son, Hermann Alexander Sorensen, the appellant, for a sum not less than 10,000 roubles; and on condition that in case the full payment could not be effected at once, one-third of the purchase-money should be paid at the time of transfer, another one-third after six months, and the remaining third within nine months. In the latter part of February, Sorensen, senior, left Libau for Hamburg, where he met his son, and in virtue of the power so executed by Eckhoff, agreed with his son that he should purchase the *Ariel* upon the conditions expressed in such power. Accordingly, on the 6th of March, 1854, old style, corresponding with the 18th of March, new style, a bill of sale and transfer of the *Ariel* to Sorensen, junior, was executed by Eckhoff, whereupon 3,333 silver roubles, 33 copecks, being one-third of the purchase-money, was paid over to him by Sorensen, senior, on behalf of his son. On the 5th of May, 1854, Sorensen, senior, died, and as Eckhoff had no personal knowledge of Sorensen, junior, he became desirous of effecting some arrangement with him in respect of the balance of the purchase-money of the *Ariel*, so as to secure the estate of Hagedorn from loss. In the month of June following, one Stelling, as the agent, and on behalf of Eckhoff, called upon Sorensen; who thereupon handed over to him two acceptances, one, at six months' date, for 3,333 silver roubles, 33 copecks, and the other, at nine months' date, for a like sum, being the balance of the purchase-money. At the time of the sale and transfer of the *Ariel*, on the 18th of March, 1854, she was lying in the port of Libau, and on the 15th of April following she left that port for Memel, where she arrived on the following day. Having taken in a cargo of timber, she left Memel on the 18th of May and arrived in Dublin on the 12th of June following, where she discharged her cargo. She left that port in ballast on the 25th of June, and arrived at Liverpool on the 27th, where she discharged her ballast, and, having taken in a cargo of salt, left that port on the 11th of July

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following. On the 22nd August she arrived in Halifax, where she discharged her cargo, and on the 12th of September left that place in ballast. On the 24th of September she arrived in the Bay of Miramichi, where she took in a cargo of deals and firewood, and having left on the 18th of October following, arrived in Belfast on the 20th of November, where she discharged her cargo, and on the 2nd of December she was seized by the officers of her Majesty's Customs.

The national character of the claimant appeared from the evidence on further proof to be this: Sorensen, the father of the claimant, was by birth a Dane, having been born at Flensburg, in the Grand Duchy of Sleswig. In the year 1826 he went to reside at Libau, in the Gulf of Courland, having been appointed Danish consul at that place, which office he held up to the time of his death, which took place on the 5th of May, 1854. He engaged in business there as a merchant and shipowner, but always considered himself a Dane, and so called himself, and often mentioned his intention of returning to Copenhagen and there end his days. The claimant was one of the children of Sorensen, senior, and was born at Libau, where he remained until about the age of four years, when he went to Copenhagen on a visit to his uncle, who was a merchant there. He remained at Copenhagen for some time, and then returned to his father at Libau; but at the age of eight years he again returned to Copenhagen to visit his relatives and learn the Danish language. After having remained at Copenhagen for some considerable time, he returned to Libau, where he remained until the year 1851, when he again left that place and returned to Copenhagen, and in the same year went to Leith, in Scotland, where he remained for twelve months, and thence to London, where he resided two years, and had established himself as agent for several Russian and Danish mercantile firms. On the 22nd of February, 1854, the claimant left London for Hamburg, in pursuance of a telegraphic message from his father to that effect, and upon his arrival there, his father advised him to give up his London business of agent, in consequence of the threatening aspect of affairs to Baltic commerce, and to establish himself as a Danish merchant and shipowner at Altona. Acting upon this advice, the claimant established himself

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at Altona, when, pursuant to the resolution of the Town College of that city, of the 8th of March, 1854, he was duly admitted a citizen and burgher, having previously sworn allegiance to the King of Denmark, being the only sovereign to whom he has ever taken the oath of allegiance. He had a counting-house at Altona, and a lodging at Hamburg. All the relatives of the claimant, on his father's side, were Danes by birth, and all those on his mother's side, except one, had become Danish citizens.

On the 6th of August, 1856, the judge of the Admiralty Court (the Right Hon. Dr. Lushington), by an interlocutory decree (*o*), held that the national character of the claimant was Danish, but as the seller retained an interest in the ship, pronounced the ship and freight to have belonged, at the time of the seizure, to an enemy of Great Britain, and condemned the same as prize, and as *droits* and perquisites of her Majesty in her office of Admiralty.

The present appeal was from this decree. The appellant insisted that the same was erroneous, by reasons, first, because the purchase of the *Ariel*, and her transfer to him, was *bonâ fide* and complete, and the enemy at the time of seizure had no lien, direct or indirect, upon her; and further, that at the time of the purchase and transfer of the *Ariel*, and of the claim, the nationality of the appellant was Danish.

The argument, on both sides, is fully stated in the judgment of their Lordships.

The appeal was argued by

Dr. Addams and *Dr. Twiss*, for the appellant; and

The *Queen's Advocate* (Sir John Harding), the *Admiralty Advocate* (Dr. Phillimore), and *Mr. Atherton, Q.C.*, for the Crown.

The authorities referred to were—

As to the national character of the claimant: the *Conferenzrath* (*p*),

(*o*) The judgment was reported, *sub nom.* the *Baltica*, 1 Spinks' Prize Cases, pp. 264, 274; but as it was reversed, it has not been reprinted.

(*p*) Vol. I. p. 571.

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the *President* (*q*), the *Benedict* (*r*), the *Johann Christoph* (*s*), the *Ernst Merck* (*t*).

That the sale and transfer of the ship to the claimant was collusive and fraudulent, and that the sale by an enemy to a neutral could not change its character: the *Hoffnung* (*u*), the *Jan Frederick* (*x*), the *Danckebaar Africaan* (*y*), the *Clio* (*z*), the *Abby* (*a*), the *Vrow Margaretha* (*b*), the *Rendsborg* (*c*), the *Rapid* (*d*), *De Lovio* v. *Boit* (*e*); Story on Prize Courts (Pratt's edit.), p. 63.

Upon the necessity of the sale of the ship being absolute, without leaving any interest in the seller: the *Tobago* (*f*), the *Sechs Geschwistern* (*g*), the *San Jose Indiano* (*h*), the *Frances* (*i*).

And, that there was no lien on freight to found a claim in a Prize Court: the *Marianna* (*k*), the *Christine* (*l*).

Judgment was delivered by

The Right Hon. SIR JOHN PATTESON.—The first question in this case relates to the national character of the claimant, Sorensen, junior. It was strongly contended on the part of the captors that he could not be properly considered to be a Dane. The circumstances under which he took a counting-house at Altona, with a lodging at Hamburg, are undoubtedly peculiar; and the precise time he went thither, and of consequence the exact length of time that he had continued there when the war between this country and Russia broke out, are not fully ascertained. Their Lordships, however, looking at the general law on this subject, and particularly adverting to the case of the *Conferenzrath* (*m*), entirely agree with

(*q*) Vol. I. p. 475.
(*r*) *Ante*, p. 527.
(*s*) *Ante*, p. 302.
(*t*) *Ante*, p. 338.
(*u*) Vol. I. p. 583.
(*x*) *Ante*, p. 435.
(*y*) Vol. I. p. 74.
(*z*) *Ante*, p. 529.
(*a*) *Ante*, p. 464.
(*b*) *Ante*, p. 149.
(*c*) *Post*, p. 614, note.
(*d*) *Ante*, p. 317.
(*e*) 2 Gallison's Amer. Rep. 448.
(*f*) Vol. I. p. 456.
(*g*) Vol. I. p. 363.
(*h*) 2 Gallison's Amer. Rep. 267. 283.
(*i*) 8 Cranch's Amer. Rep. 335.
(*k*) Vol. I. p. 518.
(*l*) *Ante*, p. 320.
(*m*) Vol. I. p. 571.

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the learned judge of the Admiralty, that Sorensen, junior, has succeeded in establishing his claim to a Danish national character.

The next and important question is, whether Sorensen, junior, was the owner, and sole owner, of the *Ariel* at the time of the capture. Now this question turns upon two points—

First, was there a real *bonâ fide* sale, absolutely to Sorensen, junior, of the *Ariel*, without collusion or fraud?

Secondly, did any interest in the ship remain in the seller at the time of the capture?

The ship *Ariel* is one of several vessels alleged to belong to the claimant, which were seized in British ports some time after the breaking out of the war, the *Ariel* being seized at Belfast on her return from America with a cargo, on the 2nd of December, 1854. This case is distinguishable from the others, as to which there is not any appeal at present before their Lordships, but which have been so alluded to in the argument that it is impossible wholly to exclude the mention of them. The distinction between them is in regard to the precise terms of the original sale to Sorensen, junior, and is such that their Lordships might perhaps determine this case on that distinction, without coming to any positive decision as to the general question which applies to them all. But, upon consideration, their Lordships have thought it right to state their opinion upon that general question.

The facts appear to be, that the *Ariel* was a Russian ship, and before the breaking out of the war belonged to a Russian subject, Eckhoff, as administrator of one Hagedorn, who had been for some time consul for the Netherlands at Libau, and also a merchant and shipowner there, who died in April, 1853. Some stress was laid on this in the argument, it being contended that Eckhoff was bound to sell the *Ariel* for the benefit of the estate of Hagedorn, who was not a native of Russia, but had only a mercantile domicile in Russia during his life and residence there, and having died before any contemplation of war, never was, or could be by any possible construction, an enemy of this country, nor could his property, after his death, be considered as Russian property. The doctrine of *utile tempus* for a foreigner residing in a country between which country and another a war breaks out, to remove himself and his property from that country to his own, was sup-

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posed to apply. But that doctrine applies only to cases where there is a *bonâ fide* intention to remove. There is no evidence whatever of any intention on the part of Eckhoff, the administrator, to remove Hagedorn's property to the Netherlands, and the doctrine of *utile tempus* appears to be wholly inapplicable. The most that can be made of the representative character of Eckhoff, is to place him in the same position as Hagedorn himself would have been had he been still alive. Now, Hagedorn had unquestionably a mercantile domicile at Libau, in Russia, and had he been living, and become the seller of the *Ariel*, instead of Eckhoff, he and his ship must, according to all authorities, have been considered Russian. Another of the ships seized, namely, the *John*, belonged to another Russian subject named Gamper; and another, the *Industrie*, to one Rode; and the rest of the ships belonged to Sorensen, senior (the father of the claimant), who had for many years been the Danish consul at Libau, and was also a merchant and shipowner there, and, therefore, clearly a Russian subject so far as relates to these ships.

The Russian ambassador left England on the 8th of February, 1854.

At that time the claimant was carrying, and had for about two years carried on the business of an agent in England. On the 22nd of February, 1854, he was summoned to Hamburg by his father by a telegraphic message. They met at Hamburg, and it was then arranged that the claimant should leave England and establish himself at Altona, and become a Danish subject, with a view to purchase his father's ships, and some others, and trade with them on his own account. He had not sufficient means of his own to pay for such ships; but he was told that the speculation would, probably, be very advantageous, even to the extent of 100 per cent., and arrangements were made between him and his father to enable him to carry it out, and he accordingly returned to England and disposed of his concerns there, and came to Altona to become a Danish subject. He purchased his father's vessels, and also the *John*, and the *Industrie*, and the *Ariel* (the ship in question). The *Ariel* was sold to him by his father under a power of attorney given by Eckhoff to the father for that purpose, he (Eckhoff) being personally unacquainted with the claimant, on the 18th of March, 1854.

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The British declaration of war issued on the 29th of March.

These dates seem of themselves to show that the sale was made in contemplation of war, and *imminente bello*, in a popular sense; but the evidence in the case goes further, and shows conclusively that the Russian shipowners at Libau, feeling that war was at hand, and that they could not employ their ships under the Russian flag, determined, on consultation, to sell their vessels, even at considerably reduced prices, to neutrals, rather than keep them unemployed in Russian ports. It is argued that war cannot be said to be imminent unless there be an embargo, or some similar act of the country about to be belligerent, and cases are cited in which such circumstances have occurred, but none of those cases go the length of laying down any positive rule as to the necessity of such circumstances. Their Lordships are of opinion that there is abundant proof that the sale was made *imminente bello*, and in contemplation of it. Still, if the sale was absolute and *bonâ fide*, there is no rule of international law, as laid down by the Courts of this country, which makes it illegal. Such a *bonâ fide* sale made even *flagrante bello* would be legal, much more *imminente bello*. The *Ariel* was in port at the time of the sale, therefore the cases as to the illegality of sales *in transitu* do not apply.

Was, then, the sale of this ship absolute and *bonâ fide*? Assuredly the time of the sale, the circumstance of the claimant making himself a neutral for the express purpose of buying this and the other ships, and his inability to pay the whole price, all tend to throw suspicion upon the sale, and to make it incumbent on the Court to look closely into the history of the transaction, it being obviously the intention of all parties to place the ship, by such sale, out of the reach of capture by the belligerent. If there had been facts leading to a well-founded conclusion that a secret understanding existed between the seller and the claimant, that the ship should be restored to the seller in the event of no war breaking out, or in the event of a speedy peace, or that the ship should be employed by the claimant under the direction and for the benefit of the seller, the Court would be bound to hold the sale to be collusive and void, and to condemn the ship as Russian property. But no such facts are even surmised in this case.

It appears by the evidence of Eckhoff himself, that Sorensen

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(the father) informed him that he should advise his son to purchase the *Ariel* if Eckhoff did not require all the purchase-money at the time of the sale and transfer, inasmuch as his son would not have sufficient money to pay for all the vessels he intended offering him for sale, and that he, therefore, intended to sell his ships to his son; to accept a portion of the purchase-money at the time of sale, and to allow his son to pay him the remainder of the purchase-money out of the earnings of the vessels. Eckhoff goes on to say, that by reason of what Sorensen (the father) had so communicated to him, he agreed to sell the *Ariel* to the claimant under the following stipulation or condition, namely, that the amount of the purchase-money should be 10,000 silver roubles, that 3,333 silver roubles and 33 copecks, or say one-third of the purchase-money should be paid in cash at the time of effecting the sale and transfer of the *Ariel;* that a similar sum or instalment of one-third of the purchase-money should be paid in six months after the sale and transfer, and the remaining one-third in nine months. He adds, that had it not been for the very high character and well-known honour and integrity of Sorensen (the father), he would not have agreed to sell the *Ariel* to the son, except for ready cash, inasmuch as he was then, and still was, personally unknown to the son.

It is argued that Eckhoff does not in terms deny that he agreed to be paid the remaining two-thirds of the purchase-money out of the earnings of the *Ariel*, and, therefore, it must be inferred that he did so agree, and accepted the same terms as the father did on the sale of his vessels. Their Lordships are of opinion that the drawing of such an inference would be putting an unfair construction on Eckhoff's affidavit, especially as it is plain that he looked to Sorensen (the father) to carry him through the transaction, and, being personally unknown to the son (the claimant), would be very unlikely to enter into any engagement with him as to the earnings of the ship. Afterwards, indeed, when upon the death of Sorensen (the father), in May, 1854, Eckhoff became somewhat anxious about the price of the ship, he did by his agent procure the claimant's acceptances falling due at six and nine months from the sale and transfer of the *Ariel*, and a promise from the claimant that the earnings of the *Ariel* should be applied to the liquidation of those acceptances, being the best security he could get. It

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appears that they were so applied, and that a small sum, only about 90*l.*, remained due when the *Ariel* was seized in December, 1854. This subsequent arrangement is the circumstance above alluded to, in which this case is perhaps distinguishable from the cases of the other ships, as to which the appropriation of the earnings formed part of the original contract.

It was urged further, that the bill of sale of the *Ariel* is untrue, because it states the whole purchase-money to be paid. Their Lordships are of opinion that there is no weight in this objection. In all conveyances of freehold or leasehold estates, the purchase-money is always mentioned to have been fully paid, and yet there may be a collateral instrument, showing that nothing has been paid, or the whole or part of the money left upon mortgage of the estate. A bill of sale of a ship is a conveyance of a similar nature, and open to the same considerations; the object being to enable the purchaser to become the absolute owner.

After the sale and transfer of the *Ariel*, it appears to have been employed under the sole control of the claimant, without any interference on the part of the seller (Eckhoff), in voyages to England and Ireland and America, with a crew composed indeed of Russians, except the master and mate, who were Danes, but not with Russian cargoes. Under these circumstances, the learned judge in the Court below says: "I am inclined to hold the present sale" (speaking of that of the *Baltica*, one of the father's ships) "was *bonâ fide*." By which their Lordships understand him to mean that the sale was real, intended to pass the property in the ship to the claimant, without any engagement to restore it under any circumstances, and without fraud or collusion. In this opinion their Lordships fully concur.

But then the second point above stated remains. Did any interest in the ship remain in the seller at the time of capture? And this is a point more difficult of solution. The decision of the learned judge that some interest did remain in the seller rests almost entirely on the language used by Lord Stowell in the case of the *Sechs Geschwistern* (*q*), for with the exception of that case all the other cases proceed on the ground of *mala fides* and collusion.

(*q*) Vol. I. p. 363.

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Lord Stowell there says: "The rule which this country has been content to apply is, that property so transferred" (that is, by purchase from an enemy) "must be *bonâ fide* and absolutely transferred; that there must be a sale divesting the enemy of all further interest in it; and that anything tending to continue his interest vitiates a contract of this description altogether."

Applying that rule to the case then before him, Lord Stowell condemned the ship, and rightly so; because there were covenants in that case which preserved and retained the interest of the enemy seller, and for restitution at the end of the war. It was a conditional, not an absolute sale. Lord Stowell concludes his judgment in these words: "Is there in this any sign of a *bonâ fide* transfer? Is not the hand of the French vendor still on the vessel? Looking to the control which the French Government and the vendor still retain over this property, it is impossible for me to hold that all the interest of the enemy is completely divested." In the present case there is a total absence of any such covenant or condition. The utmost that can be said is, that there is an engagement on the part of the buyer to apply the earnings of the ship to the payment of part of the price.

The mere non-payment of a part of the price cannot of itself be sufficient to leave an interest in the ship in the seller. That is distinctly stated by Lord Stowell in the *Marianna* (*r*). He says: "That objection can have little weight, since it is a matter solely for the consideration of the person who sells, to judge what mode of payment he will accept. He may consent to take a bill of exchange, or he may rely on the promissory note of the purchaser, which may not come in payment for a considerable time, or may never be paid. The Court will not look to such contingencies. It will be sufficient that a legal transfer has been made, and that the mode of payment, whatever it is, has been accepted."

Here, however, there is more than mere non-payment of part of the price; there is an engagement to pay it out of the earnings, and that is contended to create an interest in and lien on the freight, and, through the freight, on the ship.

We must observe here, that even supposing that the facts of this

(*r*) Vol. I. p. 518.

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case were sufficient to show that the vendor had a lien on the freight for the purchase-money unpaid, it by no means follows that he had a lien on the ship. The ship and the freight are quite distinct—the ship may belong to one person and the freight to another; and that not only for a single voyage, but, as a security for a debt, for future voyages, provided that the contract and assignment be not such as to separate the freight and earnings of the ship for ever from the ship itself, so that they could not be re-united, but only to separate them for the temporary purpose of securing a debt, and operating only upon that separation of title till that debt should be paid. The law on this subject was distinctly laid down, as stated above, by Lord Eldon, in the case of the ship *Warre*, which is to be found in the note to 8 Price's Rep. 269. The same doctrine was held in *Stephenson* v. *Dowson* (*s*); in *Langton* v. *Horton* (*t*); in *Leslie* v. *Guthrie* (*u*); and in other cases.

There are no means by which, according to the contract with respect to the earnings stated in this case, the ship could in any manner be affected, either in the Admiralty, the Courts of Common Law, or the Court of Chancery. It may be doubtful, considering the loose terms of the contract, and as it was made between foreigners, whether the Court of Chancery would interfere by appointing a receiver of the freight if the ship arrived in England and the owner had not applied the earnings towards payment of the purchase-money. But, as between English subjects, if the Court interfered, it would not be in pursuance of the contract, but by reason of breach of contract. It was said in argument that, by the law, either of Russia or Denmark, some lien might be created on the ship; but that is a matter of foreign law, and therefore a fact to be proved by those who rely upon it, and no proof was offered. The difficulty, or rather the impossibility, of obtaining a satisfactory result by such inquiries, appears to have been one of the reasons why Lord Stowell, in the case of the *Tobago*, to which we are about to allude more at length, refused to enter into them at all.

Supposing, however, that a lien on the freight or even on the ship in favour of the vendor, who is to be considered as an enemy,

(*s*) 3 Beav. 342. (*t*) 1 Hare, 549. (*u*) 1 Bing. N. C. 697.

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did exist, would that lien render the ship in the possession of the neutral owner liable to be captured? That such a lien on an enemy's ship would not be sufficient to found a claim by a neutral in a Court of Prize is clear. It was so held by Lord Stowell in the case of the *Tobago* (*x*), which was the case of a British subject claiming in respect of a bottomry bond on a French enemy's ship which had been captured, and again in the case of the *Marianna* (*y*). That was the case of a lien on the freight and cargo of a ship; which ship was sold by an American neutral to a Spanish enemy, and the lien was in respect of part of the purchase-money remaining unpaid. It is true that in the *Christine* (*z*) the Court said that the doctrine in the *Marianna* did not apply to cases when the *bona fides* of the sale was disputed, in which proof of actual payment is always essential; and no doubt that upon a question of *bona fides* such proof would be most important and even essential. But the question of *bona fides* in this case has been already disposed of. Their Lordships are now considering the only point as to an interest remaining in the *bonâ fide* seller. The same doctrine as determined in the *Tobago* and the *Marianna* is laid down by the Supreme Court of the United States of America, in the *Frances* (Irvin's claim) (*a*), and in the *San Jose Indiano* (*b*), and other cases.

Indeed, it was not disputed at the Bar that such is the law of prize as regards a claimant in respect of a lien. But the converse of the proposition was contended not to be true, and that, although the lien of a neutral on an enemy's ship or its freight is not sufficient to found a claim, yet the lien of an enemy on a neutral ship or its freight is sufficient to show an interest in the enemy, of which the belligerent captor is entitled to avail himself, and to defeat the neutral's claim; that a lien on an enemy's ship which would not be recognized in favour of a neutral, would be recognized against a neutral for the purpose of condemnation if the lien be in favour of an enemy. Their Lordships asked, and asked in vain, for some authority which went to establish that distinction. No such authority was produced, but their Lordships were referred

(*x*) Vol. I. p. 456.
(*y*) Vol. I. p. 518.
(*z*) *Ante*, p. 320.
(*a*) 8 Cranch's Rep. 418.
(*b*) 2 Gallison's Rep. 283.

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again to the language of Lord Stowell in the case of the *Sechs Geschwistern*, which, as has been already observed, was a question as to the right of property not of lien. Their Lordships have been unable to find any authority for the alleged distinction, and, on the contrary, they are of opinion that the cases of the *Tobago* and of the *Frances* (Irvin's claim), already cited, are plainly against the distinction. In the *Tobago*, the counsel for the captors argued: "Suppose a bond of this nature given upon a neutral ship, and to a person now become an enemy, could a proceeding of prize be instituted against the neutral ship, or any part of it, as the property of the enemy? Certainly not." The counsel for the claimant argued: "With regard to the case put, of an enemy's interest of this description on a neutral ship, the distinction is obvious, that this interest is a thing accessorial only to the ship; and that it might well consist with the principles of justice that the accessory might be restored though the ship was condemned; at the same time, that it would not be reasonable or just to seize the ship itself on account of such an accessorial interest which an enemy might possess in it." Lord Stowell, in giving judgment, says: "Can the Court recognize bonds of this kind as titles of property, so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize? The total silence of those who had argued for the claimant as to any precedents for this demand, strongly shows that it has not been the practice of the Court to consider such bonds as property entitled to its protection; and I think I may venture to say that there has been no such instance. The person advancing money on bonds of this nature, acquires by that act no property in the vessel; he acquires the *jus ad rem*, but not the *jus in re* until it has been converted and appropriated by the final process of a Court of justice. The property of the vessel continues in the former proprietor, who has given a right of action against it, but nothing more. If there is no change of property, there can be no change of national character." And further, he says: "The captor has no access whatever to the original private understanding of the parties in forming such contracts; and it is therefore unfit that he should be affected by them. His rights of capture act upon the property without regard to secret liens possessed by third parties. In like manner his rights operate on no such liens where

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the property itself is protected from capture. Indeed, it would be almost impossible for the captor to discover such liens in the possession of the enemy upon property belonging to a neutral: the consequence, therefore, of allowing generally the privilege here claimed would be, that the captor would be subject to the disadvantage of having neutral liens set up to defeat his claims upon hostile property, whilst he could never entitle himself to any advantage from hostile liens upon neutral property." It is difficult to conceive stronger language than this to show that the distinction now attempted to be set up is wholly without foundation. The observations of the same learned judge in the *Marianna* are substantially to the same effect. Both these cases, it is to be observed, were decided subsequently to that of the *Sechs Geschwistern*. The language of the Court in the *Frances* (*c*) (Irvin's claim) is equally strong: "In cases of liens created by the mere private contract of individuals, depending upon the different laws of different countries, the difficulties which an examination of such claims would impose upon the captors, and even upon the Prize Courts, in deciding upon them, and the door which such a doctrine would open to collusion between the enemy owners of the property, and neutral claimants, have excluded such cases from the consideration of those Courts." Then, after referring to the cases of the *Tobago* and the *Marianna*, it is added: "From this it appears that the doctrine of the Prize Courts upon this subject works against, as well as in favour of captors." Their Lordships have come to the conclusion that the supposed distinction does not exist, and that liens, whether in favour of a neutral on an enemy's ship, or in favour of an enemy on a neutral ship, are equally to be disregarded in a Court of Prize.

One other argument was pressed arising from the number of vessels bought by the claimant, and the magnitude of the transaction was insisted on; and the case of the *Rendsborg* (*d*) was

(*c*) 8 Cranch's Rep. 419.

[4 Rob. 121; affd. August 11th, 1803.]

(*d*) [The *Rendsborg* (August 13th, 1802). A question as to whether on the facts the cargoes of several vessels taken on a voyage from Batavia to Copenhagen, and claimed for the neutral house of De Coninck & Co., of Copenhagen, ceased to be neutral property owing to the magnitude of the transaction, such cargoes having been purchased from the Dutch East India Company. "This is not the case of an individual merchant, nor of a company going to trade on the general permission in an ordinary character or on a common

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particularly adverted to. That case was such, that Lord Stowell held it to amount to an adhering to and assisting the enemy, and it was of a very peculiar character. Their Lordships are unable to see why, if the transfer of one ship was legal under the circumstances which have here occurred, if it had stood alone, such transfer should be rendered illegal because six other ships were purchased, under similar circumstances, at the same time; unless, indeed, as affording ground to believe that all the purchases were fraudulent and collusive.

In effect, the whole case resolves itself into a question of *bona fides;* and that being once established, their Lordships feel obliged to come to the conclusion that the *Ariel* was the *bonâ fide* property of the claimant alone, and that no interest remained in the seller (Eckhoff). They must therefore humbly advise her Majesty that the decision of the Court below ought to be reversed, and the proceeds of the ship restored to the claimant; however, without costs and damages, not only because further proof was ordered and gone into, but also on account of the particular circumstances of the case (*e*).

footing. It is a trade carried on to an enormous extent, invested with particular privileges, secured by peculiar contracts, and transferred from a public company to which it exclusively belongs to these individuals, upon an express acknowledgment, understood and acted upon on both sides, that it was so transferred in order to relieve the goods which were captured there by the pressure of war, and could not be delivered by any other practicable mode. The question is whether such a commerce formed with such views and so conducted can be entitled to a neutral character. . . . It is a possible theory that the commerce may not be neutral although the property is, and if that is the case the mere neutral ownership will not be a sufficient title to restitution." The Court then examined the evidence at length, and held that the contracts were, under the principle stated above, "unlawful contracts," and condemned the property.]

(*e*) There were six other vessels seized, all of them belonging to Sorensen, junior, and purchased by him, *imminente bello*, namely, the *Baltica*, *Æolus*, *Amelie*, *John*, *Ceres*, and *Industrie*, and it was arranged between the parties, to save expense, that as the cases were *in eadem conditione*, and so treated by the Court below, no proceedings by way of appeal should be taken in those cases till the *Ariel* was disposed of. After the delivery of the above judgment, the Crown officers restored all these vessels, with the exception of the *Baltica*, which they declined to restore, as they contended that the facts were distinguishable, the sale of that ship having taken place while she was *in transitu*. See the *Baltica*, *post*, p. 628.

[11 Moore, P. C. 271.]

THE MARIA (No. 2).

Ship—National Character—Proof of Ownership.

If any doubt exists as to the character of a ship claimed to be the property of a neutral being still enemy's property, the rule of the Prize Court is, that the claimant shall be put to strict proof of ownership, and any circumstance of fraud or contrivance, or attempt at imposition on the Court, in making out his title, is fatal to the claimant. Condemnation of the ship as enemy's property necessarily follows.

A vessel (formerly Russian) was seized as prize, as being enemy's property, after she had become the property of neutrals. Restitution was claimed by the parties to whom the property in the ship had been formally transferred before the declaration of war. *Held*, that as the claimants were shown to be invested with the character of owners, and there being no other party who could set up a title against them, they were entitled to restitution, but under the circumstances, respecting the ownership, without costs and damages.

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THIS was the case of a Belgian ship which left Rio Grande, in the Brazils, on the 27th of July, 1855, laden with a cargo of hides and horns, bound to Cork or Falmouth for orders, and arrived off Cork on the 27th of October following, where she was seized as prize by Patrick O'Malley, Esq., the Commander of her Majesty's Revenue Cutter, *Eliza*, on suspicion of being Russian property.

From the evidence, it appeared that just previous to the breaking out of the late Russian war, the Russian schooner *Maria* was consigned by her Russian owners to Messrs. Sasse and Huger, shipbrokers, at Antwerp, in Belgium, and that subsequently that firm received a power for sale from her owners. In accordance with this power, Messrs. Sasse and Huger, on the 9th of May, 1854, sold and executed a bill of sale of the *Maria*, to the firm of Messrs. Huger & Co., merchants and shipowners at Antwerp; their father, Maurice Huger, a cashier and book-keeper in the firm of Messrs. Sasse and Huger, the shipbrokers, signing the acceptation of the bill of sale by procuration for them. The money was remitted to the agent of the Russian owners, and the regular forms to make her a Belgian vessel were gone through, and on the 26th of May,

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1854, by a Royal decree the vessel was nationalized as a Belgian ship, and as owned by, or being the property of, Messrs. Huger & Co. Some time after this purchase she was despatched by her owners on a voyage to England, and whilst at Goole, in Yorkshire, in the month of September, 1854, she was seized by officers of her Majesty's Customs as being the property of Russian subjects. Her owners, however, upon being informed of such seizure, transmitted copies of her bill of sale, sea-pass, certificate of nationalization, and other documents, to the Belgian minister at London, by whom they were produced to the British Government; and after a short detention the *Maria* was released, and in the same month sailed with a return cargo to Antwerp. In the month of April, 1855, after several intermediate voyages, the *Maria* sailed from Antwerp with an assorted cargo for Rio Grande, in the Brazils, and thence, in the month of July following, again sailed, bound to Cork, with a cargo of hides and horns. She arrived off Cork on the 27th of October, and was again seized, and proceeded against in the Admiralty Court. This second seizure of the *Maria* was occasioned by, and solely owing to, a letter written to the government by a witness named Smithies, undertaking, in the event of a second seizure, to furnish such information as would enure to condemn the schooner as prize.

A claim was put in by the appellant as the agent of Huger & Co., Belgian subjects, and sole owners of the ship and freight. In the Court of Admiralty, the cause was heard, in the first instance, upon the evidence of the captured crew and the ship's papers alone; and upon that evidence, it appeared, from the evidence of the master and mate in preparatory, on the standing interrogatories, that the owners of the schooner were not Messrs. Huger & Co., of Antwerp, shipowners, on whose behalf it had been claimed, but the other Antwerp firm, that of Messrs. Sasse and Huger, shipbrokers. It also appeared that the master had been appointed by Messrs. Sasse and Huger, acting as brokers of the *Maria*, and that he was not acquainted with the circumstances attending the sale and purchase, and consequently with the real ownership, of the schooner, there being no bill of sale on board. Upon this discrepancy between the claim and the evidence of the master, as to the ownership of the *Maria*, the judge of the Admiralty Court (the

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Right Hon. Dr. Lushington) ordered further proof (*f*) as to the ownership of the schooner; the claimants thereupon elected to proceed by plea and proof, and thereby opened the case to further proof on the part of the Crown. An allegation on the part of the claimants and responsive allegation by the respondents were then given in.

In the allegation on the part of the claimants, the sale and purchase of the *Maria*, by the firm of Huger & Co., and the circumstances attending and connected with that sale and purchase, and the history and employment of the schooner herself, were pleaded; and in support of that allegation witnesses were examined. On the part of the respondents, the responsive allegation set up that Messrs. Sasse and Huger, of Antwerp, and Messrs. Samuel Jackson & Co., of Manchester, salt merchants, or James Jackson, or George Henry Lord, partner in that firm, or one of them, were the true owners, in moieties, of the *Maria*, and that she was liable to condemnation, from the existence of English interests in the schooner. One witness only, Smithies, was examined in support of this allegation, who was the party upon whose information the *Maria* had been a second time seized. His evidence was to the effect that Messrs. Jackson & Co., or James Jackson and George Henry Lord, or one of them, were co-owners, in moieties, of the *Maria*. On the hearing of the further proofs, it was contended, on behalf of the claimants, that the allegation on their behalf setting up the ownership of Huger & Co., in opposition to that of Sasse and Huger, was sufficiently proved; and that the responsive allegation on behalf of the Crown, setting up that Messrs. Jackson & Co., or James Jackson, or George Henry Lord, or one of them, partners in that firm, were co-owners, either with Messrs. Huger & Co., or with Messrs. Sasse and Huger, supported only by the evidence of Smithies, was wholly deficient in proof, and restitution was prayed on that account. On the part of the Crown, it was insisted that the allegation given in on its behalf was fully proved by the evidence, and condemnation of the schooner was prayed on the part of the Crown.

(*f*) See case reported upon this point, *ante*, p. 536.

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The judge of the Court of Admiralty (the Right Hon. Dr. Lushington) delivered judgment on the 27th of February, 1857, whereby he condemned the vessel as prize, and as *droits* and perquisites of her Majesty in her office of the Admiralty. In this judgment he expressed his opinion that the evidence to establish the claim wholly and totally failed, and that alone was the question he was called upon to decide; that he was not called on to say whether Sasse and Huger did not really purchase the vessel, in the names of Huger & Co., to evade the Belgian law; and that it was unnecessary to inquire whether Jackson & Co. had any interest in the vessel, the law of prize being, as enunciated by Lord Stowell, and confirmed by undeviating practice, that whoever claimed a ship during war must prove his title to restitution, by establishing that the ship was the property of the person claiming it. He therefore condemned the vessel, observing that there had been a determined attempt on the part of the claimants to impose on the Court that Huger & Co. were the real owners; that the real fact might be that Sasse and Huger purchased the vessel on their own account; and that as they could not hold the property by the Belgian law, they had assumed the names of Huger & Co. to evade it. That Huger & Co. having made their claim, they had supported it by fraud and falsehood.

From this sentence of condemnation the claimants appealed.

Dr. Addams and *Dr. Twiss*, for the appellant; and

The *Queen's Advocate* (Sir John Harding), the *Admiralty Advocate* (Dr. Phillimore), and *Mr. Atherton, Q.C.*, for the respondents.

Three questions were raised and discussed at the hearing of the appeal:—

First. It was submitted by the appellant, that the title of Messrs. Huger & Co., as the sole owners of the ship and freight, was made out, and that they were entitled to restitution, with costs and damages. That Messrs. Sasse and Huger, being brokers, were forbidden by the law of Belgium, of which kingdom they were domiciled residents, from being shipowners.

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Second. The respondents supported the sentence on the ground that the judgment by the Court below was correct, and in accordance with the prize law and the practice of Prize Courts, according to which practice two parties only could be recognized: first, claimants; and secondly, enemies; and that as the claimants had not established their title as right owners by the ship's papers, and evidence in preparatory, in the absence of a claimant entitled to restitution, condemnation of the vessel seized as enemy's property necessarily followed. Upon this point they cited the *Magnus* (*g*), the *Elsebe* (*h*), the *Ida* (*i*); Story on Prize Courts, p. 26 (Pratt's edit.).

Thirdly. That the alleged transfer of the ship to the claimants was fraudulent and fictitious, and that they were not the real transferees. That Messrs. Jackson & Co., an English firm, were part owners of the ship, and that such purchase by them of an enemy's ship was void and inoperative, so as to divest the enemy of his property therein, even if it should appear that part of the ship was the property of neutrals: the *Rosalie and Betty* (*k*), the *Fortuna* (*l*), the *Vrow Elizabeth* (*m*), the *Recovery* (*n*), the *Eliza and Katy* (*o*), the *Benedict* (*p*), the *Rapida* (*q*), the *Tobago* (*r*).

The following American authorities were also cited in the course of the argument: the *Sally and Cargo* (*s*), the *San Jose Indiano* (*t*), the *Merrimack* (*u*), the *Mary* (*x*).

Judgment was delivered by

The Lord Chief Justice COCKBURN.—In this case, the ship *Maria* having, in the month of September, 1854, been seized, while under

(*g*) *Ante*, p. 267, note.
(*h*) Vol. I. p. 441.
(*i*) *Ante*, p. 268.
(*k*) Vol. I. p. 246.
(*l*) Vol. I. p. 193, note. A decision on the Navigation Laws.
(*m*) Vol. I. p. 409.
(*n*) 6 Rob. 341. Not republished.
(*o*) 6 C. Rob. 185. Not republished; a question of fact.
(*p*) *Ante*, p. 527.
(*q*) See note, *ante*, p. 238.
(*r*) Vol. I. p. 456.
(*s*) 1 Gallison's Amr. Rep. 409.
(*t*) 2 Gallison's Amr. Rep. 269.
(*u*) 8 Cranch's Amr. Rep. 333.
(*x*) 9 Cranch's Amr. Rep. 147.

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Belgian colours, at Goole, in Yorkshire, by officers of her Majesty's Customs, as being the property of Russian subjects, was afterwards, on the production of certain documents brought forward as evidence of her being Belgian property, released; but was again, in the month of October, 1855, while sailing under Belgian colours, seized off Cork, under the direction of the Lords of the Admiralty, by the commander of one of her Majesty's revenue cutters, such second seizure having been directed by the government in consequence of intelligence privately communicated by a person of the name of Smithies, who undertook, in the event of a second seizure, to furnish such information as would lead to the condemnation of the schooner. The vessel having been seized, was proceeded against in the Court of Admiralty. She was claimed by the appellants, but condemned, and from this sentence of condemnation the present appeal was brought.

The vessel in question, the *Maria*, was originally the property of Russian subjects. In the month of January, 1854, she arrived at Antwerp, with cargo, consigned to the firm of Charles Isaac Sasse and Francis Huger, shipbrokers of that city. On the 17th of the ensuing month of February, a letter, dated the 31st of January, was received there by Charles Isaac Sasse, of that firm, from the managing owner of the vessel, stating that in consequence of the aspect of affairs having become more gloomy for the Russian flag, the owners of the *Maria* were willing to sell her for 25,000 marks banco, if that price could be obtained. Sasse and Huger having offered the vessel for sale, by letter of the 3rd of March informed the owners that the highest price which had been offered was 18,500 francs; and, in reply, received from the managing owner a letter of the 23rd of March, authorizing the sale of the vessel for 18,500 francs, if no higher price could be got for her, and directing that the money should be remitted to one Wedel, an agent of the owners at Lubeck, by whom a power from the owner to sell the vessel was to be transmitted to Sasse and Huger. The power to sell having been transmitted in due course to Charles Isaac Sasse, the latter, on the 9th of May, 1854, executed a bill of sale of the vessel to Huger & Co., of Antwerp; after which, the ownership of the vessel, as belonging to Huger & Co., was duly registered before the proper tribunal at Antwerp, Maurice Huger, as representing

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the firm of Huger & Co., having first made oath that the vessel "had been purchased by the house of Huger & Co.; that the purchase had been made unconditionally, without reserving any part or interest to others, or any promise made, or that it should subsequently be reckoned to the benefit of whoever it might be, still less to the benefit of any foreigner;" and, "finally, that no funds had been furnished by any foreigner upon the ship." After this the *Maria* was in due form nationalized by royal decree, as a Belgian ship, on the petition of Huger & Co. It appears from the evidence of Charles Isaac Sasse, that the amount of the purchase-money was remitted to Wedel, the agent of the Russian owners; and on the 28th of May, Wedel wrote to Sasse and Huger, acknowledging, on behalf of the Russian owners, the receipt of remittances amounting to the sum of 18,500 francs.

Upon this state of facts, the learned judge of the Admiralty Court indicated an opinion that the transfer of the property in the vessel from the Russian owners, prior to the seizure, had been sufficiently established, and that the vessel was not liable to seizure as enemy's property. He abstained, therefore, from condemning her on that ground. In this view we entirely concur. We think that the correspondence between the Russian owners and Sasse and Huger, together with the personal testimony of the witnesses, clearly establishes that the Russian owners, under a sense of the danger to which the ship was exposed from the peril of war, authorized the sale, and that the price which, upon the representation of Sasse and Huger that no better terms could be obtained, they consented to take, was in fact transmitted to them. As between the vendors and the purchasers, whoever the latter may have been, the transaction was, beyond a doubt, a *bonâ fide* one: the vessel ceased to be the property of a belligerent enemy, and was therefore no longer liable to seizure.

The opinion of the learned judge having been thus in favour of the vessel, so far as her nationality was concerned, her condemnation was based upon a different ground, which we will now proceed to consider.

On the part of the seizors, it was alleged, in answer to the claim, that whatever might be the nationality of the vessel, the claimants, Huger & Co., were not, as they had represented themselves, the

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sole owners, but that an English firm, Jackson & Co., of Manchester, were part owners of the vessel: that Huger & Co. were not, therefore, entitled to restitution; and that in the absence of any party entitled to restitution, conformably to the practice of Prize Courts, condemnation must necessarily follow. In addition to which, it was contended that the purchase by British subjects of an enemy's ship was illegal and void, and inoperative to divest the enemy of his property in the ship.

The learned judge adopted the view maintained by the seizors to the extent that, in the absence of any claimant entitled to restitution, condemnation of a vessel seized as enemy's property must follow, although it should be made to appear that such vessel was in fact neutral property; and he proceeded to condemn the *Maria*, not, however, on the ground that Jackson & Co. had been shown to be part owners (on which point he abstained from pronouncing any opinion), but on the ground that Huger & Co. had not in fact been the real purchasers of the vessel from the Russian owners.

An alleged interest both in Jackson & Co., and in Sasse and Huger, as also in Maurice Huger, the father of the partners in the house of Huger & Co., was insisted on, in the argument before us, as sufficient, on the legal grounds above mentioned, to support the sentence of condemnation. We think it right, therefore, to advert to these questions, although the judgment of the learned judge is founded on the supposed defect of ownership of Huger & Co. We are of opinion, however, that no sufficient case is made out of property, either in Jackson & Co., or in Sasse and Huger, or Maurice Huger, to override the formal and authentic proofs of title adduced on behalf of Huger & Co., the claimants.

With regard to the alleged interest of Jackson & Co., it certainly appears that as early as the month of April, 1851, Sasse and Huger, having then authority to sell the *Maria*, proposed to Jackson & Co. to take a share in the vessel, and that the latter agreed to contribute 500*l.* towards the purchase, and to become half owners in the vessel; whereupon it was arranged that this amount should be allowed by Jackson & Co. in account with Huger & Co., this firm being at that time indebted to Jackson & Co. in respect of cargoes of salt consigned to them by the latter. Before, however, anything had been done towards actually making

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over to Jackson & Co. any property in the vessel, doubts were raised in their minds by Smithies, their agent at Antwerp, as to the legality of the transaction; whereupon they desisted from requiring that any property in the vessel should be transferred to them, preferring, as it would seem, that the 500*l.* should be left as a matter of claim against Huger & Co., rather than to embark that amount in the ownership of a vessel which they were led to believe might be liable to seizure.

Under these circumstances we are of opinion that no property in the vessel ever passed to Jackson & Co., so as to prevent the claimants, if otherwise entitled, from being considered as the owners. It becomes, therefore, unnecessary to determine whether (as was contended before us, on behalf of the appellants) the purchase of an enemy's ship by British subjects, although previously illegal, was not legalised by the Order in Council on the 15th of April, 1854, by which a certain permission to trade with the enemy was conceded to her Majesty's subjects.

We proceed now to consider whether Sasse and Huger, or Maurice Huger, the father of the two claimants, G. F. E. Huger and J. J. H. Huger, who constitute the firm of Huger & Co., are shown to be the owners, so as to oust the claimants of the right to restitution which the possession of the ordinary and formal muniments of title would otherwise give them. For it is to be observed that the bill of sale, whereby the property in the vessel was transferred by the Russian owners, being made out in favour of the claimants, and the transfer having been duly registered before the proper Belgian tribunals, with all the necessary formalities, as a transfer to the claimants, these facts (the transfer by the Russian owners having been established to be a *bonâ fide* one) entitle the claimants to be considered, *primâ facie*, as the owners of the vessel.

It is said, however, to be established by the evidence that the transfer to Huger & Co., the claimants, was fraudulent and fictitious, and that they were not the real transferees. There is, no doubt, a good deal of evidence which tends to this conclusion. Not only had Sasse and Huger been throughout the parties conducting the transaction, but they, although in the name of Huger & Co., engaged a master and crew for the vessel, and corresponded with the master when the vessel was afloat; nay, the master and

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mate, on the seizure of the vessel, stated that Sasse and Huger, whom alone they had known and communicated with, and whom they looked upon as Huger & Co., were the owners of the vessel. Doubts, too, were cast on the reality of the existence of such a firm as Huger & Co. It appeared that G. F. E. Huger and J. J. H. Huger, who were said to constitute the firm, were themselves clerks in other mercantile establishments, and it was admitted on their behalf that the affairs of this firm were carried on entirely by Maurice Huger, their father, they themselves taking no part in the management. It was suggested that Sasse and Huger, the latter member of which firm was a brother of the two claimants, had fraudulently put forward this fictitious firm to cover a transaction in which they could not safely avow themselves to be the principals, inasmuch as, being shipbrokers, they were by the law of Belgium prohibited under penalties from becoming shipowners; or, if Sasse and Huger were not to be deemed the real purchasers of the vessel, then Maurice Huger, it was contended, must be taken to be the only person interested as Huger & Co., it being suggested that Maurice Huger, having been insolvent, was carrying on business in the name of his sons with a view to avoid any claim by his creditors on the capital embarked in the house.

The circumstances to which we have adverted are, no doubt, such as to throw suspicion on the reality of the ownership of Huger & Co. On the other hand, the presumption arising from the formal transfer to the claimants is confirmed by the evidence of the parties whose title is thus set up against that of the claimants, and by the positive oath of Sasse, and of Huger his partner, not only that the purchase was on behalf of Huger & Co., but that the purchase-money, having been transmitted by Sasse and Huger to the sellers, was afterwards repaid by Huger & Co.: and it is possible that the belief of the master and mate as to Sasse and Huger being Huger & Co., and therefore their owners, may have arisen from the firm of Huger & Co. being an obscure and unknown firm, while Sasse and Huger were well known as shipbrokers, and from the correspondence having been conducted by Sasse and Huger, one of whom bore the name of Huger. These circumstances may very well have led the master to confound Sasse and Huger with Huger & Co.

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Admitting that the matter remains in some degree of doubt, we think that the credit due to the bill of sale and the formal proceedings before the Belgian authorities must prevail, and that the claimants, Huger & Co., must be taken to be the owners.

We have the satisfaction of knowing that by our thus holding no injustice can be done. Setting aside the alleged interest of Jackson & Co., of which we have already disposed, it is not pretended that, if Huger & Co. are not the real owners, anyone except Sasse and Huger or Maurice Huger is so. But if Sasse and Huger, or Maurice Huger, be in fact the real owners, no injustice will be done to them, as they themselves concur in representing Huger & Co. as the owners, and may be said to be assenting parties to the judgment we are now pronouncing in favour of the claimants. If they have any claim, as against Huger & Co., to have the benefit of the restitution decreed to the latter, we may safely leave them to such remedy or means of enforcing their rights as the Belgian law may afford them. On the other hand, if they have been guilty of any violation of the local municipal law, or of any fraud to evade the latter, these are matters with which we have no concern. We cannot modify our judgment with a view indirectly to punish Sasse and Huger for any infraction of, or fraud upon, the Belgian law. We have before us the case of a vessel seized after she had become neutral property, and when she was therefore no longer liable to seizure, and of restitution claimed by parties to whom the property in the ship has been formally transferred, and who are therefore invested with the character of owners; while there is no other party who can now set up a title against them.

The view which we have taken of the facts of this case renders it unnecessary to pronounce any opinion upon the important principle of law involved in the judgment of the Court below, as to the effect of a claimant failing to make out his ownership where the neutrality of the vessel plainly appears. We are only desirous of guarding ourselves, in disposing of this case on the facts, against being taken to assent to this principle as one of universal application. Although this doctrine has no doubt been propounded by very high authority, and has been asserted to have been uniformly adopted in the practice of Prize Courts, the instances in which it

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has been applied appear to have been cases in which the question has been whether the ship was not still enemy's property. When any doubt remains on this score, the rule that the claimant shall be held to strict proof of ownership, and that any circumstances of fraud or contrivance, or attempt at imposition on the Court, in striving to make out his title, shall be taken as fatal to his claim, is a very sound and wholesome one. In such a case, the question being between the enemy's property and the claimants, if the latter fails, the condemnation of the vessel as enemy's property necessarily follows.

It is obviously a very different thing to apply the same principle to a case where the Court, in pronouncing sentence, is obliged to start with the fact that the vessel is neutral property, and was, therefore, not liable to seizure. To say, in such a case, that, because the party whose claim is put forward may only have the legal title, while another has the beneficial interest, the vessel, though neutral property, must necessarily be condemned, is a proposition to which we must not be taken as giving our assent, though the facts of the present case do not render it necessary for us to pronounce judgment upon it. We proceed in this case upon the ground that the property is clearly established to be neutral, and that we have before us all the parties who are or can be interested in it, all of whom agree in affirming the title of the claimants.

Their Lordships will therefore humbly report to her Majesty that the sentence of condemnation pronounced in the Court below should be reversed, and that restitution of the proceeds to the appellants should be decreed. But we think there should be no damages for the detention of the vessel, or costs. The claimants must be considered as themselves in some degree to blame, if not for the seizure, at all events for the detention of the vessel. No documents were found on board evidencing the transfer of the ship, and the statement of the master and the mate as to who were their owners turned out to be incorrect. There were also circumstances of grave suspicion as to the participation of British subjects in the transfer of the ship from the enemy, which the claimants have not shown all the alacrity to remove that might have been expected from them. We shall therefore recommend that her Majesty's order be limited to simple restitution.

[11 Moore, P. C. 141.]

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Neutral—Residence in Enemy Country—Ship—Sale to Neutral—Imminence of War—Validity.

A neutral residing in an enemy's country, as consul of a neutral State, and who also traded there as a merchant, is to be regarded as an enemy.

A Russian vessel was sold, *bonâ fide* and absolutely, by an enemy to a neutral when the war between Russia and Great Britain was imminent. The vessel was at the time of the sale in the prosecution of a voyage from Libau, an enemy's port, to Copenhagen, a neutral port, where she arrived and was taken possession of by the purchaser. *Held* (reversing the sentence of the Admiralty Court of England), that the sale, though *in transitu*, was valid, as the *transitus* had ceased when the vessel had come into possession of the purchaser, which took place before the seizure.

A neutral while a war is imminent, or even after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid whether the subject of it be lying in a neutral or an enemy's port.

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This ship, under Danish colours, was seized by the Custom House officers, at the port of Leith, on suspicion of being a Russian ship.

The vessel, under the Russian flag, formerly belonged to Sorensen, senior, and was sold by him on the 17th of March, 1854, immediately antecedent to the declaration of war between Great Britain and Russia, to the appellant, his son, a Danish subject, resident at Altona, and transferred by a regular bill of sale. Part only of the purchase-money was paid, the remainder being agreed to be paid by the earnings of the vessel. Sorensen, senior, was a Dane by birth, but had long resided at Libau, as Danish consul, where he traded as a merchant. The only distinguishing feature in this case from the *Ariel* (*b*) was, that at the time of the purchase the *Baltica* was prosecuting a voyage from Libau to Copenhagen. It appeared that on her arrival in the port of Copenhagen, in the middle of March, she was delivered over to the agent of the appellant, and was admeasured by the Danish Custom House

(*b*) *Ante*, p. 600.

officers there, and branded as Danish property. Her flag was also there changed for the Danish flag, and a Danish master and crew engaged to navigate her. She sailed from Copenhagen with a cargo of linseed on the 21st of May, 1854, and arrived at Leith, in Scotland, her port of destination, on the 29th of that month, and was seized on the 31st, by the Custom House authorities, as prize.

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Proceedings consequent upon her seizure were commenced against the vessel in the High Court of Admiralty of England, when the appellant put in a claim as owner of the ship and freight.

The judge of the Court of Admiralty (the Right Hon. Dr. Lushington), by his interlocutory decree, dated the 6th of August, 1855 (*c*), condemned the ship, upon the ground that, from the fact of the seller being consul of a neutral State and also a merchant trading in the enemy's country, he was to be regarded as an enemy; moreover, that the transfer was fraudulent and collusive, and intended to defeat the just belligerent rights of Great Britain, and also that the vendor had retained an interest in the ship, part of the purchase-money having been agreed to be paid by the earnings of the vessel. The appeal was from this decree.

The appellant insisted upon the *bona fides* of the purchase and the national character of the purchaser, which had already been established in the *Ariel*, and submitted that that case was not distinguishable in principle from the present appeal.

On behalf of the Crown, it was submitted that the sale was invalid, having been made when the vessel was *in transitu*.

Their Lordships called upon the Crown to distinguish this case from the *Ariel*.

The *Queen's Advocate* (Sir John Harding), the *Admiralty Advocate* (Dr. Phillimore), and *Mr. Atherton*, *Q.C.*, for the Crown, cited the *Danckebaar Africaan* (*d*), the *Vrow Margaretha* (*e*), the *Jan Frederick* (*f*).

(*c*) The case was reported *sub nom.* the *Baltica*, 1 Spinks' Prize Cases, p. 264. [As the decision was reversed, the case is not republished.]

(*d*) Vol. I. p. 74.

(*e*) Vol. I. p. 149.

(*f*) Vol. I. p. 135.

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Dr. Addams and *Dr. Twiss*, for the appellant.

Their Lordships afterwards directed the case to be re-argued.

The *Admiralty Advocate* argued the case for the Crown, and

Dr. Addams for the appellant.

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The arguments are fully noticed in the judgment, which was delivered by

The Right Hon. T. PEMBERTON LEIGH.—The *Baltica* was one of several Russian ships which, in the month of March, 1854, shortly before the breaking out of the war between Russia and Great Britain, were sold by Sorensen, senior, a merchant domiciled in Russia, to his son, Sorensen, junior, a merchant domiciled in Denmark. These vessels having been condemned in the Court of Admiralty in England, appeals were brought against those sentences; and in the case of the *Ariel* (*g*), which was selected for the purpose of deciding the general question, it was held by their Lordships that the sale was *bonâ fide;* that the property was entirely divested from the vendor and vested in the vendee before the seizure; that the transfer was complete, and was not a fraud upon any just right of the belligerents, and they therefore ordered restitution of the vessel.

In conformity with this decision, the Crown officers very properly restored such of the vessels as appeared to them to stand in the same situation with the *Ariel;* but they declined to restore the *Baltica*, considering the case of that vessel to be distinguishable from the rest, on the ground that the sale of the ship had taken place while she was engaged in the prosecution of a voyage, or, as it is technically termed, while she was *in transitu*.

In order to determine the validity of this distinction in the circumstances of this case, the present appeal has been brought.

The general rule is open to no doubt. A neutral, while a war is imminent, or after it has commenced, is at liberty to purchase either goods or ships (not being ships of war) from either belligerent, and the purchase is valid, whether the subject of it be lying in a

(*g*) *Ante*, p. 600.

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neutral port or in an enemy's port. During a time of peace, without prospect of war, any transfer which is sufficient to transfer the property between the vendor and vendee, is good also against a captor, if war afterwards unexpectedly break out. But, in case of war, either actual or imminent, this rule is subject to qualification, and it is settled that in such case a mere transfer by documents which would be sufficient to bind the parties, is not sufficient to change the property as against captors, as long as the ship or goods remain *in transitu*.

With respect to these principles, their Lordships are not aware that it is possible to raise any controversy; they are the familiar rules of the English Prize Courts, established by all the authorities, and are collected and stated, principally from the decisions of Lord Stowell, by Mr. Justice Story, in his Notes on the Principles and Practice of Prize Courts, a work which has been selected by the British Government for the use of its naval officers, as the best code of instruction in the prize law. The passages referred to are to be found in pp. 63, 64 of that work.

The only question of law which can be raised in this case, is not whether a transfer of a ship or goods *in transitu* is ineffectual to change the property, as long as the state of *transitus* lasts; but how long that state continues, and when, and by what means, it is terminated.

In order to determine the question, it is necessary to consider upon what principle the rule rests, and why it is that a sale which would be perfectly good if made while the property was in a neutral port, or while it was in an enemy's port, is ineffectual if made while the ship is on her voyage from one port to the other. There seem to be but two possible grounds of distinction. The one is, that while the ship is on the seas, the title of the vendee cannot be completed by actual delivery of the vessel or goods; the other is, that the ship and goods having incurred the risk of capture by putting to sea, shall not be permitted to defeat the inchoate right of capture by the belligerent Powers, until the voyage is at an end.

The former, however, appears to be the true ground on which the rule rests. Such transactions during war, or in contemplation of war, are so likely to be merely colourable, to be set up for the

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purpose of misleading, or defrauding captors, the difficulty of detecting such frauds, if mere paper transfers are held sufficient, is so great, that the Courts have laid down as a general rule, that such transfers, without actual delivery, shall be insufficient; that in order to defeat the captors, the possession, as well as the property, must be changed before the seizure. It is true that, in one sense, the ship and goods may be said to be *in transitu* till they have reached their original port of destination; but their Lordships have found no case where the transfer was held to be inoperative after the actual delivery of the property to the owner. That the *transitus* ceases when the property has come into the actual possession of the transferee is a doctrine perfectly consistent with the decisions in the *Danckebaar Africaan* (*h*), and in the *Negotie en Zeevaart* (*i*), on the authority of which the former case was decided.

The *Danckebaar Africaan* had sailed on a voyage from Batavia to Holland, which country, when the voyage commenced, was at war with Great Britain, and continued so till after the capture and adjudication. The ship and goods were seized on their voyage by British cruisers, and brought to the Cape of Good Hope. They were there claimed by merchants resident at the Cape, who represented themselves to be the owners, and who insisted, as the fact was, that before the capture, the Cape (previously a Dutch possession) had capitulated to the British forces under a treaty which secured to the capitulants their rights of property. It was contended, therefore, that they were entitled to restitution, on the ground that, at the time of the capture, their character of enemies had ceased, and been changed into that of friends.

Lord Stowell held, that he was bound, by the authority of the *Negotie en Zeevaart*, to condemn the ship and goods which had been seized before they had reached the hands of the owners, relying on a dictum of Lord Camden, "that the ship, as Dutch, could not change her character *in transitu*"; but he intimated that his opinion might have been different if the ship had come, before capture, into the actual possession of the owners. His language is: "If the vessel had arrived at the Cape, I will not say that, coming actually

(*h*) Vol. I. p. 74.

(*i*) Not reported; facts stated by Lord Stowell, from his recollection in the *Danckebaar Africaan*. See Vol. I. p. 74.

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into the hands of the capitulants, she might not have been protected as property in possession, but being taken possession of before she arrived there as Dutch property, I am bound by the decisions of the Lords, and I think myself obliged to say that her character could not be changed *in transitu*, and that she must be condemned as Dutch property."

It will be observed that in this case, if the ship had reached the Cape before capture, and come into the possession of the owners, such possession would have been taken before the termination of her regular voyage; for her destination was to Holland; and this circumstance is adverted to by Lord Stowell, who in answer to the argument that the ship was coming to the Cape, and into the possession of the true owners, observes, "There is no decided proof that this ship was coming to the Cape, and if so she is still to be considered as taken merely *in transitu* towards Holland, where the voyage was clearly to have ended; and in what character? As a Dutch ship in a Dutch port."

Yet, even under these circumstances, he was not prepared to condemn the ship if she had actually come into the hands of the owners.

In the case of the *Vrow Margaretha* (*k*), it is distinctly stated by Lord Stowell that the *transitus* ceases by the actual delivery of the property. After stating that, by the usage of merchants, a transfer of property *in transitu* may be made by the execution of proper documents, he proceeds:—"When war intervenes, another rule is set up by Courts of Admiralty, which interferes with the ordinary practice. In a state of war, existing or imminent, it is held that the property shall be deemed to continue as it was at the time of shipment till the actual delivery; this arises out of the state of war, which gives a belligerent a right to stop the goods of his enemy." He then assigns the reason for the rule, namely, that if it were otherwise, "all goods shipped in an enemy's country would be protected by transfers which it would be impossible to detect;" and adds: "It is on that principle held, I believe, as a general rule, that property cannot be converted *in transitu*, and in that sense I recognize it as the rule of this Court."

(*k*) Vol. I. p. 149.

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In the manual already referred to, Mr. Justice Story, at p. 64, lays down the rule to the same effect in these words: "The same distinction is applied to purchases made by neutrals of property *in transitu*; if purchased during a state of war, existing or imminent, and impending danger of war, the contract is held invalid, and the property is deemed to continue as it was at the time of shipment until the actual delivery."

Applying these rules to the facts of this case, their Lordships can have no doubt as to the result.

The *Baltica* sailed from Libau on some day before the 17th of March, 1854 (N.S.), with a cargo of linseed, bound for Leith. On the 17th of March she was transferred by bill of sale (as far as, under the circumstances, such transfer could be effectual) to Sorensen, junior. She was described as then on a voyage from Libau to Copenhagen. Probably she was intended to call at Copenhagen in the prosecution of her voyage to Leith. There does not seem to have been any motive for misrepresenting her voyage, for her ultimate destination was an English port. She arrived at Copenhagen before the end of March, and possession of her was then taken by Sorensen, junior, the purchaser. He had her registered as a Danish ship, and she was marked as such by the proper Danish authorities. He detained the ship at Copenhagen till the middle of May. He changed the captain and the crew and the flag, and transferred the command to a Danish master; and under a Danish commander and with a Danish crew, and under the Danish flag, the vessel sailed from Copenhagen for Leith on the 21st of May.

There can be no manner of doubt, therefore, that at this time the ship had come fully into the possession of the purchaser, and thereupon, according to the principles already referred to, the *transitus*, in the sense in which for this purpose the word is used, had ceased.

But if it could be held that the *transitus* continued till the arrival of the ship at Leith, the result in this case would be the same, for the ship actually arrived in Leith Roads on the 29th of May. On the 31st of May she was towed into Morison's Haven in that port, where her cargo was discharged, which, it seems,

has since been given up to the consignee with the consent of the Custom House officers.

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A seizure, however, was made of the ship, on what particular day does not very distinctly appear, but clearly after she had arrived at her port of destination.

No distinction, therefore, can be made between the *Baltica* and the other ships which have already been restored. Their Lordships will report to her Majesty their opinion that the same order should be made in this case as was made in the *Ariel;* an order for restitution, but without damages or costs either in the Court below or in the Court of Appeal.

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[12 Moore, P. C. 168.]

Blockade—Condemnation of Ship—Liability of Owner of Cargo—Master of Ship Agent for Cargo Owner.

The general, but not universal, rule is, that where a ship is condemned for breach of blockade, the cargo follows the same fate.

The presumption is against a vessel captured in entering a blockaded port, and an imperative and overwhelming necessity for so doing must be established by the owner to exempt from condemnation.

It is not competent to owners of a cargo on board a vessel condemned for breach of blockade to save the cargo from condemnation by showing their innocence in the transaction, as the owners of the cargo are concluded by the illegal act of the master, although (1) it was done without the privity of the owners of the cargo, and (2) even if it was done contrary to their wishes.

When a blockade is known, or might have been known, to the owners of the cargo, at the time when the shipment was made, and they might, therefore, by possibility, be privy to an intention of violating the blockade, such privity will be assumed as an irresistible inference of law, and it is not competent to rebut it by evidence.

In cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master is to be treated as the agent for the cargo as well as for the ship.

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In this case, the *Panaghia Rhomba* was captured on the 27th of November, 1855, by her Majesty's ship *Dauntless*, Alfred Phillipp Ryder, Esq., commander, within two miles of Odessa, which was then blockaded, and had been so since the 1st of February, 1855.

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She was sailing under Greek colours, and had on board Wallachian and Servian colours. According to the master's statement, she had sailed from Galatz on the 22nd of September, 1855, with a cargo of wheat bound to Syra or the Pyræus of Athens, with orders to call at Constantinople, and at the time of her capture she was steering to Odessa as a port of refuge for the preservation of the ship and cargo, and the lives of those on board. The ship was sent to Constantinople, where her cargo was sold.

The case was twice argued before the Court below: first, on the ship's papers and depositions, when the Court decreed further proof, and subsequently on further proof.

Upon the first occasion, a claim was made for restitution of the ship by Cosmas Tandarius, described as of Tully Acarnania, in Greece, but then residing at Wellclose Square, in the county of Middlesex, on behalf of Constantine Fachary, of Syra, then residing at Galatz, as sole owner. A separate claim for the cargo was also made by the appellant on behalf of Gregoria John Cuppa, an Ionian subject, resident at Constantinople, for one moiety, and on behalf of himself, and his two other partners of the same name, merchants in London, for the other moiety. The evidence of a witness who was examined at Malta was produced before the Court, the master and the rest of the crew of the captured vessel having, it appeared, been left on account of sickness at Constantinople. From the evidence of this witness it appeared that the real owner of the ship was not Constantine Fachary, the then claimant, but Tandarius himself. It appeared also, from the papers on board, that a fictitious sale had been entered into between Fachary and Tandarius at Galatz. It appeared also that the master of the ship had entered into an engagement not to deliver the cargo to a Power at war with Russia. The cargo papers were all in blank. There was no log, but one mutilated sheet of paper was produced, apparently torn from a log-book. At the hearing it was admitted that Tandarius was the true owner. Upon this state of facts the captors prayed for condemnation of the ship and cargo. The claimants prayed that the claim of Cosmas Tandarius for the ship and freight, and for costs and damages, and of the appellant for the cargo laden on board, with costs and damages, might be admitted.

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The judge (the Right Hon. Dr. Lushington), after argument, granted further proof to both parties; to Cosmas Tandarius (the claimant for the ship), to show that the attempt to enter Odessa was the result of imperative and overruling compulsion. This he considered as great concession, but held he was justified by reason of a latitude having always been extended to merchants in that part of the world, who were not presumed to be as cognizant of the law of nations as merchants of other States, who were known to be familiar with the practice of the law. It was also allowed to the appellant, the claimant for the cargo, to give further proof as to the property, and also to the captors to produce further proof that the state of the vessel was not such, from a leak or otherwise, as to render the entrance of a blockaded port a matter of imperative necessity.

The cause came on for hearing a second time, upon such further proof, on the 30th of July, 1857. The further proof, on the part of the claimants, consisted of, first, an amended claim of Tandarius, with two affidavits on behalf of the ship; second, of an affidavit from the appellant on behalf of the cargo. The affidavit of Tandarius stated that he encountered adverse winds, that the vessel had grounded upon the Sulina bar, and that the water which she had made from the beginning had increased upon her, and that it was necessary, for saving the lives of those on board, either to run her on shore or let her drive before the wind to Odessa. On behalf of the captor, a joint affidavit of Paul, a midshipman, and of two seamen of her Majesty's ship *Dauntless*, and a translation from the Greek papers of the engagement of the captain of the *Panaghia Rhomba* were brought in. The affidavit of Paul and others stated that the leak was above water-line, and that the vessel had only about fourteen inches of water in the hold, and made about two inches per hour. They deposed that there was no necessity of her going into any port whatever; that, supposing the leak had been sprung in crossing the Sulina bar, she might have been safely conducted to Constantinople, or some other Turkish port.

After a full argument, the judge (the Right Hon. Dr. Lushington), on the 30th of July, 1857, condemned the ship and cargo as lawful prize. The material part of his judgment, so far as related

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to the cargo, was as follows:—"The question for the Court then to determine is, whether the excuse set up by the claimants for entering a blockaded port is proved by clear and decisive evidence. The *onus probandi* is upon the claimants, and they are bound to make out the affirmative to the satisfaction of the Court; for if there be any principle of maritime law more important or more firmly established than another, it is that the presumption is against a vessel captured in entering a blockaded port, and that an imperative and overruling necessity for so doing must be established. I will not cite cases to prove a position so universally acknowledged. It has been urged that it is improbable that the master would voluntarily go to Odessa, having a cargo of wheat on board, that port being a well-known port of exportation of cargoes of that description. I am of opinion that that argument is not without weight so far as relates to the motives by which the master might be governed, but it has little bearing upon the true question in this case. The question is not what was the opinion of the master as to there being a necessity for going into a blockaded port, nor whether his conduct was *bonâ fide* or not; it is impossible for the Court to try a question of that description; the Court cannot try motives and convictions depending on the peculiar character and temperament of the master. The true and only question for consideration is, whether the necessity is proved by the evidence to have existed; and the necessity being proved, it excuses an attempt to enter a blockaded port; the apprehension of necessity not proved, works no such effect. I am of opinion that the evidence produced in this cause does not prove such necessity; that it is not shown that either the leak or the state of the wind compelled the master, for the safety of the ship and the lives on board, to go to Odessa; and that it is not proved that he could not have gone to another port not blockaded. I therefore condemn the ship. I believe such decision to be in strict conformity with the course of practice pursued and sanctioned by Lord Stowell and those who then sat in the Privy Council. It is vain, indeed I may say it is worse than useless, to assert in law the maintenance of the right of Great Britain to blockade in time of war, and yet, when cases arise which call for the enforcement of that right, so to diminish the stringency of the rule to be applied as to render the right itself as

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to operation and effect wholly nugatory. The last question for consideration is whether the conduct of the ship, to use Lord Stowell's words, will affect the cargo? The general, but not the universal, rule is that when the ship is condemned for breach of blockade the cargo must follow the same fate. I say not the universal rule, for in some cases, which I must presently advert to, the cargo has been restored, though the ship has been condemned. I now purport to examine the cases, and to extract if I can the principles acted upon by Lord Stowell, for those principles which have formerly been acted upon will be my guide. The first case is that of the *Mercurius* (*l*), and the important passages are: 'On the third point' (Lord Stowell says) 'to maintain that the conduct of the ship will affect the cargo, it will be necessary either to prove that the owners were, or might have been, cognizant of the blockade before they sent their cargoes, or to show that the act of the master of the ship personally binds them. In America there could not have been any knowledge of the blockade. The cargo is innocent in its nature, and sets out innocently. The master certainly is the agent of the owner of the vessel, and can bind him by his contract or his misconduct; but he is not the agent of the owners of the cargo, unless expressly so constituted by them. In cases of insurance, and in revenue cases, where, it is said, the act of the master will affect the cargo, it is to be observed that the ground on which they stand is wholly different. In the former it is in virtue of an express contract which governs the whole case; and in revenue cases it proceeds from positive laws and the necessary strictness of all fiscal regulations.' Then he goes on to observe upon the argument of an attempt at fraud by throwing the blame on the carrier-master, and proceeds: 'If such an artifice could be proved it would establish that *mens rea* in the neutral merchant, which would expose his property to confiscation.' Lord Stowell in that case restored this cargo *ex necessitate*, on the ground that the claimants of the cargo could not have known of the blockade. That is a case of restitution of the cargo. It is to be observed that in that case the innocence of the owner was beyond all question, and he was held not bound by the act of the master; that his

(*l*) Vol. I. p. 54.

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innocence being patent on the face of the proceedings, did not require any evidence whatever to establish it. Now, the present case clearly cannot be governed by the case I have cited, because that was a case of invincible ignorance, which this case is not, for the blockade of Odessa dates from February, 1855, and consequently was known, or might have been known, to the claimants. The true question I have to consider is this, whether—the Court having determined that the master has been guilty of a breach of blockade, and the ship therefore subject to condemnation—the claimants of the cargo are at liberty to prove that they were innocent of any intention to violate the blockade. That is the true question in this case. It is a question of very great importance; for, on the one hand, to condemn the property of an innocent claimant through the misconduct of the master, not his appointed agent, is undoubtedly a measure of severity; and on the other hand, to receive proof of the entire innocence of the claimant may introduce a laxity into the law of blockade, which might defeat that most important right of Great Britain during war. I will assume that the claimant in this case, and I think I may fairly assume it looking at all the circumstances, was innocent of all intention to break the blockade. I do not think it necessary to go into the facts, because I assume, looking at all the correspondence, that there is not the slightest ground for supposing that Baltazzi, the owner of the cargo, intended to commit any breach of blockade whatever. I give him the benefit of that presumption; and, I might say, if it were necessary, that it is the conclusion I draw from all the evidence in the case. Then comes the question of law: and am I at liberty, except in the case of invincible ignorance, to enter upon that inquiry? The first case I wish to notice is that of the *Alexander* (*m*). In that case the ship had been condemned for breach of blockade. It was argued, on the part of the claimants of the cargo, that they were not bound by the act of the master deviating into a blockaded port, and it was prayed that they might be permitted to give further proof to establish the innocence of the owners. This is a very important judgment, though not so important as some to which I am about hereafter to refer.

(*m*) Vol. I. p. 358.

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'I think this case is in effect decided by the decree which has pronounced the ship subject to condemnation for fraudulently attempting to go into a blockaded port.' Now, I pause here for a moment. Lord Stowell on that occasion had come to the conclusion that the master had fraudulently gone into a blockaded port under pretence of being in want of provisions. Now, I hold that I cannot look into the question of whether the master went into the blockaded port fraudulently or not fraudulently; what I have to look to, is to see whether he went there with the pressure of necessity or without the pressure of necessity; for, as I have said in a previous part of this judgment, it is utterly impossible for me to dive into the motives and reasons in a man's mind. Lord Stowell proceeds to say: 'For when the Court decided that, it did, in effect, decide that the vessel was so going to dispose of this cargo, the inference in all cases being, that a ship going into a blockaded port is going with an intention of disposing of the cargo. The Court has already decided that the ship was going in, and that the excuse assigned was a frivolous pretence. The master makes no distinction.' Then he goes on to other matters and says: 'It is true that the owners of the cargo are not, in general cases, held to be affected by the act of the master, unless he is specially appointed their agent. But, it would be impossible to maintain a blockade in cases of this nature, which is directed more against the cargo than against ships, if the Court did not draw the inference that a ship, going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner. If any inconvenience arises to the claimants of the cargo from this necessary conclusion, the owners of the vessel or the master are the persons to whom they must look for indemnification.' Now, the next case is that of the *Adonis* (*n*). The ship had been condemned before, and it was contended, in the same way as it was in the previous cases, that the condemnation of the ship would not inure to the condemnation of the cargo, and that the master was not the agent of the owner. 'This is a case,' said Lord Stowell, 'in which I have taken some short time to deliberate, being unwilling to press, with any unneces-

(*n*) Vol. I. p. 467.

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sary degree of severity, the effect of presumption against this class of cases, more especially because it is one in which the principle of law, though unquestionably built upon the just rights of war, must be allowed to operate with some hardship upon neutral commerce; and because it is a class of cases on which the Court has little authority to resort to, but has to collect the law of nations from such sources as reason, supported in some slight degree by the practice of nations, may appear to point out. In the present case, it is now to be assumed that the ship was taken in a course to Havre. I collect that from the strange and incredible account of the master, which I have already said, in my opinion, cannot be true. It is to be inferred also, I think, that the master was induced to make this deviation from some sinister intention, and I may be warranted to presume that all this would not have been resorted to but in the service of the cargo.' Now, it must be observed that in this judgment, Lord Stowell builds up presumption upon presumption; and he says these are presumptions which must necessarily arise and by which he must be governed. He then goes on: 'It has happened in other blockade cases, that excuses have been set up from want of water and provisions, or from other occasions; but when the Court pronounces these excuses to be not real, a presumption necessarily arises that it was for the delivery of the cargo that such a fraud had been attempted, since there is scarcely any other adequate motive which can be supposed to induce a master to hazard the interests of his vessel.' Then he goes on to say: 'There is a presumption also in such cases, that this is done with the knowledge, and at the instigation, of the owner of the cargo; because, although it is not an impossible thing that masters may be guilty of barratry, it is not a natural conduct, nor what is gratuitously to be supposed. These are, I think, just inferences; and the only question can be as to the effect of the presumption arising from them, whether it shall exclude all contrary averment, or whether it shall operate only as matter of evidence, in concurrence with other proof, as to the guilt of the intention. It must undoubtedly bind the owner; but the question is, whether it shall do so presumptively, or conclusively, and whether the party shall be let in to prove a contrary intention? I am of opinion that he cannot.' Then Lord Stowell

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states his reasons. He says: 'I will not say that the fact may not exist, that a master should commit a barratry in a case of this kind; but I think myself justified in holding that the owner cannot be admitted to go into proof on this point, on account of the fraudulent abuse to which such a liberty must inevitably lead, since it would be perfectly easy at any time to set up the pretence, and equally impossible on the other side to detect it. For what would be the ordinary test? Letters sent to correspondents elsewhere, and insurances—measures wholly in the power of the parties, and capable of being made, at their pleasure, a complete recipe for a safe traffic with a blockaded place. When this consequence is duly weighed on one side, and when it is considered on the other, what few inducements a master can have to go to any other port.' Then he says it is impossible to say the owner of the cargo cannot be bound, and he enters further into the question; but all his argument tends exactly to the same point. There is one more case which I must refer to, and then I shall have finished the examination of these cases; that is, the case of the *James Cook* (*o*). Lord Stowell says: 'With respect to the cargo, I do not see how it is to be exempt from the fate of the ship; the master, who is also the owner of the ship, can hardly be supposed to have risked his vessel without the privity of the owner of the cargo, and in its service; but the fact is not very material, as the owners of cargoes must at all events answer to the country imposing the blockade for the acts of the persons employed by them, where, as in this case, the blockade is known at the port of shipment; otherwise, by sacrificing the ship, there would be a ready escape for the cargo for the benefit of which the fraud was intended.' Now, I can say with truth that I have exercised all my ingenuity to avoid, if possible, applying the principles laid down in the cases which I have cited, to that now under consideration; and I have done so because, looking at the whole case, I have no reason to believe that the claimants of the cargo had any intention of breaking the blockade. It is my duty, however, to declare that, according to past decisions, that consideration is not

(*o*) *Ante*, p. 53.

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open to me, that I am forbidden to make an exception which, if once admitted, would in all cases of blockade call on the Court to consider the guilt or innocence of the owners of the cargo, a proposition which Lord Stowell declared to be fraught with danger; indeed, I believe it to be utterly impossible to enforce the belligerent rights of this country except upon general principles, and that all attempts to go upon purely equitable principles, particular decisions and particular cases, without regard to the great principles, can only have the effect of destroying the right, and rendering it no longer worth the exertion which Great Britain used in times past for the purpose of protecting it. I have now carefully investigated the decisions of Lord Stowell, and I have asked myself how Lord Stowell would have determined this case; and the conclusion I have arrived at is this: that the cargo must follow the fate of the ship. If, in pronouncing this judgment, therefore, I have erred, I have either misunderstood the judgments of Lord Stowell, or they no longer have the force of law. In all cases which it has fallen to my lot to decide during this war, those judgments have been my guide, and in this, probably the last decision I may have to pronounce upon a question of prize law, they will be my guide also. I have endeavoured not only to uphold and maintain the principles enunciated by that great judge, but also, what is little less important, to carry out the practical application of them. I must condemn the cargo."

From this sentence the present appeal was prosecuted on behalf of the claimant of the cargo.

Dr. Addams and *Dr. Twiss*, for the appellant.

This is a case *primæ impressionis*. There is no decision of Lord Stowell's directly in point. The decision the Court below has arrived at was founded upon the supposed authority of Lord Stowell in the cases of the *Alexander* (*p*), the *Adonis* (*q*), and the *James Cook* (*r*). It must be borne in mind that these cases were decided without further proof. The principle to be gathered from

(*p*) Vol. I. p. 358. (*q*) Vol. I. p. 467. (*r*) *Ante*, p. 53.

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the judgment of the Court below is, first, that whenever a ship is captured going into a hostile port, it is to be presumed to be so going in for the benefit of the owners of the cargo; and secondly, therefore, with their knowledge, which is to be assumed a guilty knowledge. This is a gratuitous assumption, as Lord Stowell in his judgments never laid down so universal a proposition. On the contrary, in the *Neptunus* (*s*), he held that there might be circumstances to exempt the cargo, although the ship be condemned. So, in the *Mercurius* (*t*), the same learned judge determined that a violation of blockade by the master affected the ship, but not the cargo, unless the owner of the cargo was cognizant of the intended violation. Proof of innocence of the owners of the cargo was received by the Court in the *Shepherdess* (*u*). This case clearly shows that the rule of Prize Courts is to allow further proof to except the owners of the cargo from condemnation, if they establish their innocence. But the most rigorous application of the principles of prize law by which the cargo is to be affected by the conduct of the ship cannot apply to the facts of the present case. We admit that the ship was captured going into Odessa, at a time when that port was in a notoriously subsisting state of blockade, but the running into that port was a matter of imperative necessity, arising from the ship having sprung a leak. Though the ship may have been justly condemned, yet as the owners of the cargo are free from blame, the Court ought to have decreed restitution of the cargo. The master cannot be deemed the agent of the owners of the cargo.

[*Sir John Coleridge.*—Suppose the master of a ship, not being the agent of the owner of the cargo, goes into a hostile port, how would that affect the cargo?]

From what Lord Stowell says in the *Atalanta* (*x*), if there was no direct guilty participation of the owners of the cargo, restitution would follow as of course. There may be fraud on the face of proceedings so as to induce the Court to arrive at a different conclusion and condemn the cargo. So, in the case of egress, a vessel

(*s*) Vol. I. p. 292.
(*t*) Vol. I. p. 54.
(*u*) Vol. I. p. 470.
(*x*) Vol. I. p. 607.

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coming out of a blockaded port, if the owner of the cargo give satisfactory proof of his innocence, he would be entitled to restitution: the *Frederick Molke* (*y*), the *Juffrow Maria Schroeder* (*z*).

The *Queen's Advocate* (Sir John Harding) and the *Admiralty Advocate* (Dr. Phillimore), for the respondents.

No case or reference to text writers on prize law has been cited to support the appellants' argument, which impugns the opinion of Lord Stowell, referred to by Dr. Lushington in his judgment in this case. Now, we challenge the appellants to produce any authority by which the cargo in such a case as this can be excepted from condemnation with the ship. The rule of Prize Courts is, that where deviation into a blockaded port takes place, it is to be presumed to be in the service of the cargo, and that, therefore, the owner of the cargo is bound by the acts of the master of the ship. (Story on Prize Courts, p. 72 (Pratt's edit.).) The presumption of law is, that it was done with the privity of the owner of the cargo. The *Alexander* (*a*), the *James Cook* (*b*), the *Adonis* (*c*), the *Exchange* (*d*). The case of the *Mercurius* (*e*), relied upon by the appellants, is distinguishable. There the innocence of the owner of the cargo was beyond all question; the owner at the time of shipment not being cognizant of the blockade. All the facts in this case prove the guilty knowledge of the owner of the cargo. Odessa was blockaded on the 1st of February, 1855; the *Panaghia Rhomba* shipped her cargo of wheat in September of that year at Galatz. The owners of the cargo must have known six months before shipment the fact of the port of Odessa being blockaded. There is no evidence to justify the case put by the owners of the cargo that the state of the vessel from leakage was such as to render the entrance of a blockaded port a matter of imperative necessity. The vessel in fact, after seizure, got in safely to the port of Constantinople. Again, Odessa was a port for sale of wheat, and that

(*y*) Vol. I. p. 58.
(*z*) Note to the *Potsdam*, Vol. I. p. 355.
(*a*) Vol. I. p. 538.
(*b*) *Ante*, p. 53.
(*c*) Vol. I. p. 467.
(*d*) *Ante*, p. 13.
(*e*) Vol. I. p. 54.

fact renders the case more suspicious as showing the original destination of the ship.

Dr. Twiss, in reply.

The consideration of their Lordships' judgment was reserved, and now delivered by

The Right Hon. T. PEMBERTON LEIGH.—This case involves a general principle of so much importance that their Lordships thought it desirable to take time for its consideration, although they had a strong impression at the hearing as to the decision at which they must arrive.

The *Panaghia Rhomba* took in a cargo of wheat at Galatz, in the month of September, 1855, to be conveyed to the Piræus or Syra, on the joint account of Signor Cuppa, an Ionian merchant, resident in Constantinople, and of Messrs. Baltazzi, British merchants, resident in London.

In the month of November following, the vessel was captured by her Majesty's ship *Dauntless*, for an attempt to violate the blockade of the port of Odessa, which had subsisted from the month of February, 1855, and was then continuing.

The ship has been condemned by the Court below upon evidence which quite satisfies their Lordships of the propriety of the sentence; and the question now raised is whether it is competent to the claimants of the cargo to protect their property from condemnation by showing their innocence in the transaction, or whether, under the circumstances of this case, the owners of the cargo are concluded by the illegal act of the master, though it may have been done without their privity, and even contrary to their wishes.

It has been held by the Court below that the owners are so concluded, and that the rule upon the subject is established by authority not now to be questioned.

The first case to which we have been referred is the *Mercurius* (*f*), which came before Lord Stowell in 1798. There a cargo had been put on board the *Mercurius*, in America, at a time when it could not have been known in that country that a blockade of the

(*f*) Vol. I. p. 54.

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Texel had been established. The master, after warning, attempted to enter the Texel, and the ship was condemned, because the owner was bound by the act of the master; but the cargo was restored, because, as Lord Stowell observes, the shippers at the time of shipment could not have known of the blockade, and the master, though he was the agent of the owner of the vessel, and could bind him by his contract or his misconduct, was not the agent of the owners of the cargo unless expressly so constituted by them. Lord Stowell, in that case, addressed himself to the argument of the captors, that to exempt the cargo from condemnation would open a door to fraud, if neutrals were allowed to trade with blockaded ports with impunity, by throwing the blame upon the carrier-master; and, in answer to that objection, he observed that "if such an artifice could be proved, it would establish that *mens rea* in the neutral merchant which would expose his property to confiscation, and it would be at the same time sufficient to cause the master to be considered in the character of agent, as well for the cargo as for the ship."

In that case Lord Stowell seems to have thought that the owners of the cargo were not bound by the act of the master without their authority, and the judgment seems rather to warrant the marginal note which the very learned reporter has stated as the effect of it, namely: "Violation of blockade by the master affects the ship, but not the cargo, unless the property of the same owner, or unless the owner is cognizant of the intended violation."

Now, in the present case, Dr. Lushington has stated his conviction that the owners of the cargo were innocent of all knowledge of the intended violation; and if, therefore, the law remained as it is to be collected from the case of the *Mercurius* (*g*), their Lordships would have great difficulty in assenting to the decision now under review.

But the subsequent cases appear to have carried the rule much further, and to have established that when the blockade was known, or might have been known, to the owners of the cargo at the time when the shipment was made, and they might, therefore, by possibility be privy to an intention of violating the blockade, such privity shall be assumed as an irresistible inference of law, and it

(*g*) Vol. I. p. 54.

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shall not be competent to them to rebut it by evidence; that in cases of blockade, for the purpose of affecting the cargo with the rights of the belligerent, the master shall be treated as the agent for the cargo as well as for the ship. This is the result of the cases cited by Dr. Lushington in his judgment, and the additional authorities mentioned at the Bar.

In the case of the *Alexander* (*h*), which occurred in 1801, Lord Stowell held that, in cases of breach of blockade, the Court must infer "that a ship going in fraudulently, is going in the service of the cargo, with the knowledge and by the direction of the owner."

In the case of the *Adonis* (*i*), which occurred in 1804, he went a step further, and held not only that such inference must be made, but that (with the exception to which we have already referred) the owners could not be let in to prove a contrary intention. This case was affirmed upon appeal, and it possesses, therefore, all the authority which the decisions of the tribunal of a single country can give in a law in which all civilized countries are concerned.

The same doctrine is laid down by the same great judge in the case of the *Exchange* (*k*), in 1808, and in the *James Cook* (*l*), in 1810.

We find, therefore, a series of authorities establishing a general rule which, like all general rules, may in its application to particular cases be occasionally attended with hardship, but which, nevertheless, may be necessary to prevent fraud, and may, on the whole, promote the purposes of justice. It is a rule not applicable exclusively to neutrals, but applies with equal force to all persons attempting to violate a blockade, though they may be the subjects or the allies of the country which has established it. In the present case, indeed, Messrs. Baltazzi, the claimants, are British subjects.

The propriety, or rather the necessity, of acting upon these rules is rested by Lord Stowell on the notoriety of the fact that in almost all cases of breach of blockade the attempt is made for the benefit and with the privity of the owners of the cargo; that if they were at liberty to allege their innocence of the act of the master, it would always be easy to manufacture evidence for the

(*h*) Vol. I. p. 538.
(*i*) Vol. I. p. 467.
(*k*) *Ante*, p. 13.
(*l*) *Ante*, p. 53.

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purpose, which the captors would have no means of disproving; and that, in order to make a blockade effectual, it is essential to hold the cargo responsible to the blockading power for the act of the master, to whom the control over it has been entrusted, leaving the owners to seek their remedy against the master or the owners of the ship, if, in reality, the penalty was incurred without any privity on their part.

It is impossible not to feel the force of this reasoning; it rests on the same grounds with another rule of the Prize Courts, which treats as invalid the sale of a ship *in transitu*, a point upon which we have had very recently to examine the law (*m*).

Against a rule acted upon and promulgated to the world for so many years, the counsel for the appellants, though challenged to do so by the respondents, have not produced a single decision or dictum by any one judge or jurist in any part of the world. Under these circumstances their Lordships must consider it as a settled principle of prize law by which they are bound.

Holding themselves to be precluded by the rule of law from looking into the evidence in this case, in order to judge of the guilt or innocence of the claimants, they can express no opinion upon this subject. But they think that, as the learned judge in the Court below has declared his conviction of their entire innocence, and his reluctance to pronounce the sentence complained of, the claimants may fairly be considered to have been invited to bring this appeal, and that in affirming the sentence her Majesty should be advised to make the order without awarding costs against the appellants.

(*m*) In the *Baltica*, *ante*, p. 628.

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